

MINUTES OF COMMISSION MEETING

October 19, 2023

Present at the meeting of the New Jersey Law Revision Commission, held remotely, were: Chairman Vito A. Gagliardi, Jr.; Vice-Chairman Andrew O. Bunn; Commissioner Virginia Long; and Professor Bernard W. Bell and Grace Bertone, Esq., attending on behalf of Dean Johanna Bond.

Minutes

Vice-Chairman Bunn raised an issue pertaining to the Minutes from the Commission meeting on September 21, 2023. He pointed out a reference on page three to the “New Jersey Social Justice Institute” and requested that this reference be corrected to reflect the organization’s correct name of “New Jersey Civil Justice Institute.”

With the modification proposed by Vice-Chairman Bunn and on his motion, seconded by Commissioner Long, the Minutes of the September 21, 2023, were unanimously approved by the Commission.

Workers’ Compensation Act – Scope of “Intentional Wrong”

Whitney Schlimbach discussed with the Commission a Revised Draft Final Report that addressed the scope of the “intentional wrong” exception in N.J.S. 34:15-8 of the New Jersey Workers’ Compensation Act (WCA). Ms. Schlimbach explained that the statute lacks a definition of the term “intentional wrong” and does not specify its parameters. The exception was incorporated into the statute in 1961 and, until 1985, courts interpreted it to mean a “deliberate intent to injure.” In 1985, the Supreme Court expanded the exception to encompass a “substantial certainty” of injury in the case of *Millison*. The Court also introduced a two-prong analysis, and subsequently reaffirmed the substantial certainty standard in its *Laidlow* and *Van Dunk* decisions.

Outreach was conducted to knowledgeable individuals and organizations, seeking their input on the proposed revisions contained in the October 2022 Tentative Report. The Insurance Council of New Jersey (ICNJ) and the New Jersey Civil Justice Institute (NJCJI) jointly submitted a comment opposing the suggested modifications. The New Jersey Business and Industry Association (NJBIA) expressed its opposition in a separate statement. These organizations generally raised objections to codifying a fact-sensitive analysis and expressed particular concern regarding the proposed phrase “known and accepted risk in the industry.”

The Workers Compensation and Civil Trial Bar Sections of the New Jersey State Bar Association (NJSBA) also provided preliminary, informal comments on the Tentative Report. The Workers’ Compensation Section opposed the proposed modifications, echoing the concerns raised by the ICNJ, NJCJI, and NJBIA. Additionally, the Section emphasized that due to the longstanding and consistent nature of the common law on this matter, modifications are not only unnecessary, but could potentially introduce uncertainty and confusion, leading to increased litigation on the issue. The Civil Trial Bar Section expressed that a portion of its members took a position aligned with that of the Workers’ Compensation Section, while other members did not oppose modifications entirely, but disagreed with the Commission’s proposed changes. The Honorable

Roberto Rivera-Soto echoed the concerns of ICNJ, NJCJI and NJBIA, and also provided alternative language.

Following the release of the September 2023 Draft Final Report containing revised modifications, additional feedback was received from both the ICNJ and the NJCJI. These organizations again issued a joint statement reiterating previous concerns and presenting alternate language in the event the Commission decided to proceed with modifications to the statute.

The Workers' Compensation and Civil Trial Bar Sections of the NJSBA were provided with the September 2023 Draft Final Report for review shortly before the September meeting. During that meeting, the Commission postponed consideration of the Report until both sections had the opportunity to complete their review. In early October, Staff received an e-mail confirming that the Workers' Compensation and Civil Trial Bar Sections maintained their initial positions following a review of the revised modifications.

Ms. Schlimbach clarified that the Revised Draft Final Report does not recommend any changes to N.J.S. 34:15-8 but the Appendix includes the previously proposed modifications from the September 2023 Draft Final Report for the sake of completeness. Commissioner Bell submitted comments to Staff via e-mail before the meeting, and he suggested that the prior proposed revisions should be removed from the Final Report since these modifications did not fully reflect the intricacies of the judicial doctrine. He noted that the draft report, along with all prior versions, is accessible on the Commission's website.

Considering the well-established and consistently upheld common law principles pertaining to the intentional wrong exception, coupled with the nearly unanimous opposition from the commenters concerning the proposed amendments in both the September 2022 Tentative Report and the September 2023 Draft Final Report, Ms. Schlimbach recommended the release of the revised report that does not recommend changes to N.J.S. 34:15-8, as the Final Report.

Vice Chairman Bunn concurred with the recommendation that work on the project cease and that the Report should be released without the Appendix or the language in the body of the Report referring to the Appendix.

On the motion of Commissioner Bertone, seconded by Commissioner Bell, the Commission unanimously agreed to release the report as a Final Report that does not recommend modifications to N.J.S. 34:15-8.

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

Ms. Schlimbach discussed with the Commission a Revised Draft Tentative Report concerning the election law statutes related to contesting an election (N.J.S. 19:29-1) and voting by mail (N.J.S. 19:63-26). In New Jersey, elections may be contested by citing one of the grounds in N.J.S. 19:29-1, including that the rejection of a sufficient number of legal votes to alter the election's outcome. In addition, the Vote By Mail Law directs that an election "shall not" be declared invalid due to irregularities or failures in the preparation or forwarding of mail-in ballots as set forth in N.J.S. 19:63-26.

The Appellate Division addressed whether the prohibition outlined in N.J.S. 19:63-26 prevents an election from being contested pursuant to N.J.S. 19:29-1 due to defective mail-in ballots in the case of *In re Election for Atlantic County Freeholder District 3 2020 General Election*. In that case, the election was contested because a significant number of voters received mail-in ballots that omitted the Third District Commissioner election. The Appellate Division held that N.J.S. 19:63-26 establishes a presumption of validity when there is an irregularity or failure in the preparation or forwarding of mail-in ballots. This presumption, however, can be overcome by asserting one of the grounds in N.J.S. 19:29-1 as a basis for invalidating the election.

Outreach was conducted regarding the proposed modifications in the October 2022 Tentative Report and a response was received from Scott Salmon, Esq., who represented the successful candidate in the *Atlantic County Election* case. Mr. Salmon offered alternative language and raised additional statutory issues related to N.J.S. 19:29-1.

During the April 2023 Commission meeting, the Commission authorized research and outreach concerning the issues raised by Mr. Salmon, which dealt with the jurisdiction of the Election Law Enforcement Commission (ELEC) as provided in the Campaign Contributions and Expenditures Reporting Act (Reporting Act). As directed by the Commission, Staff reviewed recently enacted legislation, including the 2023 Election Transparency Act, and found that the newly enacted legislation does not impact the issue raised in *Atlantic County Election* or the scope of ELEC's jurisdiction. Two decisions have addressed the scope of ELEC's jurisdiction in the context of election contest claims based on violations of the Reporting Act: *In re Contest of Democratic Primary Election of June 3, 2003 for Office of Assembly of Thirty-First Legislative District* and *Nordstrom v. Lyon*.

The *In re Democratic Primary Election* decision addressed whether an election contest based on campaign contribution violations of the Reporting Act could be brought pursuant to N.J.S. 19:29-1. The Court determined that ELEC has primary jurisdiction over all Reporting Act complaints not brought under N.J.S. 19:44A-21, which allows for criminal complaints, or N.J.S. 19:44A-22.1, which allows for summary actions for an injunction by the court prior to an election.

In *Nordstrom v. Lyon*, the Appellate Division addressed an election contest claim based on violations of reporting obligations and contribution limits in the Reporting Act. The Court held that ELEC has primary jurisdiction over excess contribution claims but exclusive jurisdiction over reporting violations. A subsequent decision, *South Hunterdon Regional School District Public Question v. Hunterdon County Board of Elections*, re-affirmed the holding in *Nordstrom* regarding ELEC's primary and exclusive jurisdiction over different types of Reporting Act violations.

Ms. Schlimbach explained the proposed modifications in the Appendix. She noted that the modifications to N.J.S. 19:63-26 have not changed since the release of the October 2022 Tentative Report.

In N.J.S. 19:29-1(a), the modified language “any eligible voters of this State” was returned to its original language - “the voters of this State” - because N.J.S. 19:29-2 requires a certain number of voter signatures to commence an election contest petition. In an e-mail to Staff prior to the Commission meeting, Commissioner Bell suggested that this language should read “the requisite number of voters of this State as specified in N.J.S. 19:29-2.” In addition, the modifications added the language “any defeated candidate for such nomination, party position or public office” to clarify that a defeated candidate may commence an election contest.

In subsection (a)(1), the modifications set forth in the October 2022 Tentative Report were unchanged, except to replace the words “the nomination or election” with the statute’s original language (“the result”) to account for challenges to public propositions.

In subsection (a)(2), Commissioner Bell pointed out in his e-mail that the language should read “[w]hen the incumbent was not eligible *for* the office at the time of the election,” rather than “*to* the office.” He also questioned whether the statute was intended to reach individuals who would not be eligible to hold office at the time of their candidacy due to age but would be eligible at the time of the election or of taking office. Ms. Schlimbach informed the Commission that pursuant to an Attorney General Formal Opinion from 1980, a candidate for the Senate or General Assembly must satisfy the minimum age requirement at the time that they are sworn into office.

Regarding subsection (a)(7), new modifications clarify that this subsection is applicable to the outcome of an election *or* the result of a public proposition. Ms. Schlimbach requested Commission guidance regarding whether this modification is appropriate given the limited case law on the issue.

In subsection (a)(8), the modifications add a cross-reference to potential new language in the Reporting Act that clarifies the scope of ELEC’s jurisdiction. In his e-mail, Commissioner Bell asked whether the phrase “by this title” in that section was intended to mean the entirety of Title 19 or only the Reporting Act. Ms. Schlimbach indicated that the language is original to the statute, and because N.J.S. 19:29-1 pre-dates the Reporting Act, the language was likely intended to encompass all of Title 19. She noted that the remaining modifications to N.J.S. 19:29-1 are unchanged from the October 2022 Tentative Report.

Ms. Schlimbach asked for Commission guidance regarding the proposed modifications to the Reporting Act. She noted that the scope of ELEC’s jurisdiction has been crafted by the common law because the Reporting Act does not clearly set forth its jurisdictional bounds. She requested the Commission’s input regarding whether to make a modification clarifying the scope of ELEC’s jurisdiction in this context. In addition, she asked for guidance regarding the most appropriate location of the proposed modifications among the three options contained in the Appendix and Commissioner Bell’s suggestion that the modifications appear in N.J.S. 19:44A-5, which sets forth the composition of ELEC and the process for appointing its Commissioners.

The Appendix contains draft language incorporating the proposed modification as an entirely new section in the Reporting Act or included in either N.J.S. 19:44A-6 or N.J.S. 19:44A-22. N.J.S. 19:44A-6 sets forth the duties and powers of ELEC, and N.J.S. 19:44A-22 articulates ELEC’s power “to hold, or to cause to be held . . . hearings” when it “receiv[es] evidence of any violation of this section.”

The proposed language clarifies that ELEC has exclusive jurisdiction over “violations of the reporting requirements” and primary jurisdiction over violations of “all other” requirements. This language is consistent with the *In re Democratic Primary* holding, which found that a primary jurisdiction analysis was appropriate if the complaint was not brought under N.J.S. 19:44A-21 or -22. Ms. Schlimbach added that although the *Nordstrom* Court held that excess contribution claims were subject to a primary jurisdiction analysis, the *South Hunterdon* Court employed a primary jurisdiction analysis with respect to an illegal expenditure claim. In addition, outside the context of an election contest claim, the Appellate Division has also conducted a primary jurisdiction analysis on a misuse of campaign funds claim.

Chairman Gagliardi asked if any Commissioners had any comments regarding the modifications to subsection (a)(7) clarifying that this subsection applies to elections and public proposition. Commissioners had no comments, and all agreed with the modifications.

Chairman Gagliardi asked if any of the Commissioners had comments concerning whether to actively seek public input regarding the suggested modifications to the Reporting Act, and if such outreach was necessary, the appropriate location for the language. Commissioner Bunn noted that the proposed language in subsection (a)(8) lacks clarity because it is attempting to address two very distinct concepts – contest and venue. He recommended treating jurisdiction separately and having one section for the grounds for action to bring a contest and another section that references jurisdiction. Commissioner Bell agreed with Commissioner Bunn and noted that Scott Salmon mentioned that N.J.S. 19:29-2 generally deals with jurisdiction of election contests and that might help with how to structure the language.

Ms. Schlimbach inquired whether the Commission thought it is appropriate to make modifications to the Reporting Act that articulates ELEC’s jurisdiction. Commissioner Bunn indicated that he prefers Option One on page sixteen but suggested that there be a cross-reference to the statutes governing election contests. Commissioners Bell and Long, along with Chairman Gagliardi, expressed support for Option One.

Commissioner Long pointed out that the rebuttable presumption in N.J.S. 19:63-26 is not truly a rebuttable presumption. She clarified that despite the interpretation given in the *Atlantic County Election* case, the statute's intent is that mail-in irregularities alone will not invalidate an election, but if another independent standard is met, then it may lead to the election's invalidation. She emphasized that the belief that it is a rebuttable presumption is incorrect, as these are two distinct concepts. She recommended removing subsection (b). Ms. Schlimbach proposed that the last sentence of section (b) should be added to section (a), so it reads “unless one or more of the

grounds set forth in N.J.S. 19:29-1 is established.” She also asked whether to remove subsection (c) in 19:29-1 because it references the presumption. Commissioner Long agreed with Ms. Schlimbach’s suggestion. Chairman Gagliardi pointed out that when making the revisions any reference to the presumption should be omitted.

Commissioner Bell requested the Commission’s position on his proposed modifications. In N.J.S. 19:29-1(a), the Commission agreed to modify the language to read “the requisite number of voters of this State as specified by N.J. Stat. Ann. 19:29-2.” In N.J.S. 19:29-1(a)(2), the Commission replaced the word “to” with “for”. Finally, Commissioner Bell recommended adding a footnote reference to the Attorney General’s opinion related to eligibility for office.

The Commission directed Staff to incorporate the proposed revisions into a Revised Draft Tentative Report to be discussed at a future meeting.

Non-Admitted Insurers Act – Jurisdiction Over Violations as set forth in N.J.S. 17:32-20

Samuel Silver discussed with the Commission a Draft Tentative Report recommending a statutory amendment to clarify the authority of the Commissioner of the Department of Banking and Insurance (DOBI) to choose between an administrative action and requesting that the Attorney General institute a civil action in the Superior Court.

Mr. Silver stated that the Non-Admitted Insurers Act was enacted in 1968 to protect the health and welfare of New Jersey residents by subjecting non-admitted insurers to the laws that govern all foreign insurers doing business in the State. The DOBI is authorized to regulate the activities of non-admitted foreign insurance companies. Pursuant to N.J.S. 17:32-20, when it appears that an insurer has violated the provisions of the Act, the Attorney General “shall” institute a civil action in the Superior Court upon the request of the Commissioner.

The authority of the Commissioner is found in N.J.S. 17:1-15. The Commissioner is authorized to institute or cause to be instituted the legal proceedings or processes necessary to enforce and give effect to any of the Commissioner’s powers or duties; order any person violating any provision of Title 17 to cease and desist from engaging in such conduct; and perform such other functions as may be prescribed by law.

Mr. Silver stated that in the case of *In re Midland Ins. Co.*, 167 N.J. Super. 237 (App. Div. 1979), the Appellate Division determined that N.J.S. 17:32-20 authorized the Commissioner to seek injunctive relief. The Court also determined that injunctive relief was not the exclusive remedy available to the Commissioner when a foreign insurer failed to comply with the insurance statutes. The Commissioner, according to the court, was permitted to imposition a monetary penalty against the recalcitrant insurer.

In *Applied Underwriters Captive Risk Assurance Co., Inc. v. NJ Dep’t of Banking & Ins.*, 472 N.J. Super. 26 (App. Div. 2022) the DOBI began to receive complaints from New Jersey policyholders regarding elevated and fluctuating premiums on a unique type of workers’

compensation insurance. After investigating, DOBI demanded that Applied “make whole” all New Jersey businesses that had been harmed by its programs and warned that failure to do so would result in formal action.

In response to the DOBI’s demand, Applied filed a petition with DOBI to transfer the dispute to the Office of Administrative Law. The Commissioner denied that request. Applied then filed a complaint in the Law Division complaint in which it sought declaratory and injunctive relief and maintained that the issue must be resolved in a judicial forum. The DOBI moved to dismiss and contended that jurisdiction was properly before the Commissioner as an administrative case. The Law Division transferred the matter to the Appellate Division.

Upon examining the legislative history of N.J.S. 17:32-20 (Section 20), the Appellate Division determined that the DOBI had primary jurisdiction over insurance matters. The Court reasoned that the Commissioner holds a level of expertise in insurance that the courts do not and should have jurisdiction over insurance matters.

Mr. Silver advised that on October 16, 2023, Staff received an email from Commissioner Bell inquiring about a situation in which the Attorney General receives a request from the Commissioner for legal action, but the Attorney General does not believe there is a sound basis in law for such an action. In response, Mr. Silver examined the common law involving Section 20.

Since the enactment of Section 20, it has been litigated only three times. A survey of the common law confirmed that the situation posited by Commissioner Bell is rare. In *Sheeran v. Nationwide Mut. Ins. Co.*, 80 N.J. 548 (1979), the Commissioner attempted to settle a dispute with defendants amicably and then instituted a suit in the Chancery Division seeking a mandatory injunction ordering defendants to comply with the statute regarding the disposition of unearned premiums. The case is an example of cooperation between the Attorney General and the client agency.

In the *In re Midland Ins. Co.*, 167 N.J. Super. 237 (App. Div. 1979) decision, the Court addressed the breadth of the statute in a case involving unpaid bail bond forfeitures and determining that N.J.S. 17:32-20 authorized injunctive relief and the imposition of a monetary penalty. This is an additional example of cooperation between the Attorney General and the DOBI.

In addition to reviewing the common law, Mr. Silver contacted the Office of the Attorney General. Mr. Silver advised the Commission that the individual with whom he discussed Commissioner Bell’s question indicated that they were unaware of any instances of such discord between the Office of the Attorney General and the client agency. Although they understand the possibility of such a conflict, they stated that such a conflict would be a rarity.

Mr. Silver also examined the Rules of Professional Conduct (R.P.C.) to see if they provide guidance on the issues of whether a statute can require an attorney to institute an action that they believed to be frivolous and whether the word “shall” belongs in the statute. Pursuant to R.P.C. 3.1, a lawyer is not permitted to bring a frivolous action when the lawyer knows or reasonably

believes that there is no basis in law and fact for doing so. Mr. Silver also noted that the common law provides that the Attorney General has discretion to choose when and where to provide representation. This decision will not be disturbed absent a showing that it was arbitrary, capricious, or unreasonable, as set forth in *Application of North Jersey Dist. Water Supply Commission*, 175 N.J. Super. 167 (App. Div. 1980).

In his written correspondence, Commissioner Bell also suggested the possibility that language be added to end of the statute to provide that such actions are undertaken where the Attorney General has concluded that there is a sound basis for the action. Mr. Silver said that such language may set up a conflict between two executive branch entities. Pursuant to *Applied Underwriters*, the Commissioner holds a level of expertise in insurance that the court does not and should have jurisdiction over insurance matters.

Finally, during his conversation with the Attorney General's Office, Mr. Silver confirmed that the litigation in *Applied Underwriters* was remanded to the DOBI, is now pending before the Office of Administrative Law, and is scheduled to go before an Administrative Law Judge some time in 2024. Afterward, it will go back to the Commissioner for consideration. If either of the parties object to the determination, they may appeal to the Appellate Division and possibly the New Jersey Supreme Court.

Regarding the proposed modifications set forth in the Appendix to the Report, Mr. Silver stated that these modifications are consistent with the Appellate Divisions discussion of discretionary powers of the Commissioner as set forth in *Applied Underwriters*. Additional modifications to the structure were made to promote accessibility. Mr. Silver also asked the Commission for its guidance regarding the use of the word "shall" as it appears in the statute.

Chairman Gagliardi considered whether the Commission should suspend work on the project until the Office of Administrative Law issues its decision and any subsequent appellate decisions have been issued by the respective courts. He noted that a final decision is likely months or years away. Vice-Chairman Bunn stated that because the proceeding before the Administrative Law Judge involves the jurisdictional issue addressed by the project, additional work on the project should be suspended. He added that he believes the statute is flawed and needs revision and should be monitored for future work.

Chairman Gagliardi suggested that work on the project is suspended until there is a final decision or resolution. Commissioner Bell agreed that if the issue addressed by the project is still being litigated, the Commission should not proceed.

On the motion of Commissioner Long, seconded by Vice-Chairman Bunn work on this project was suspended pending further developments in the underlying case.

Applicability of DWI Statute, N.J.S. 39:4-50, to Bicyclists

Samuel Silver discussed with the Commission an update on Staff's work involving the

applicability of New Jersey's driving while intoxicated (DWI) statute, N.J.S. 39:4-50, to bicyclists. He reminded the Commission that this project was brought to the Commission's attention by a member of the public that noted the conflicting Law Division decisions on this subject.

In *State v. Tehan*, 190 N.J. Super. 348 (Law Div. 1982), the Court considered the application of the State's DWI statute to bicyclists. The *Tehan* Court determined that N.J.S. 39:4-50 imposes a duty upon persons to refrain from operating on the roadways while intoxicated, reasoning that since all bicyclists are afforded the rights and duties applicable to drivers of a vehicle on the roadways, the DWI statute applies to cyclists, as well.

Three years later, in *State v. Johnson*, 203 N.J. Super. 436 (Law Div. 1985), the Superior Court in Cumberland County addressed this issue. The Court disapproved of the holding in *Tehan*. The *Johnson* Court opined that it is not the role of the judiciary to extend the language of a statute. The Court reasoned that N.J.S. 39:4-50 has been amended several times since its enactment and none of these modifications prohibit the use of a bicycle while intoxicated. The Court indicated that if the Legislature intended to include cyclists in the statute, then it is the responsibility of the Legislature to make that clear.

In *State v. Machuzak*, 227 N.J. Super. 279 (Law Div. 1988), the Court addressed the applicability of the statute once again. The *Machuzak* Court determined that the statute specifically and unambiguously applies to motorized vehicles only. The Court reasoned that it is clear that the pertinent definitions found within N.J.S.A. 39:1-1, and used in the DWI statute, were not intended to apply to non-motorized pedal-type bicycles.

Mr. Silver stated that the New Jersey State Bar Association (NJSBA) advised Staff that the issue of driving while intoxicated as it relates to bicyclists is unambiguous and there is no need to amend NJS 39:4-50. The members of the NJSBA who specialize in this area of law concluded that the statute, as intended by the Legislature, unequivocally excludes conveyances powered by humans. The NJSBA respectfully asked that the Commission reconsider this project.

Vice-Chairman Bunn stated that since the statute is not ambiguous and there is no confusion with its implementation, the Commission should take no further action. Commissioner Bell concurred with the Vice-Chairman's recommendation. Chairman Gagliardi stated that since there is no dispute and no ambiguity, the Commission can end work on this project or issue a Final Report alerting the Legislature to the conflict in the common law.

The Commission authorized Staff to prepare a Final Report without a recommendation and alerting the Legislature to the conflict in the common law on this issue.

Community Supervision for Life Violations and the Ex Post Facto Clause

Whitney Schlimbach discussed a Memorandum proposing a project to address whether N.J.S. 2C:43-6.4, which governs violations of community and parole supervision for life for

qualifying sex offenders, should be modified to reflect the holding in *State v. Hester*, 233 N.J. 381 (2018), that the 2014 amendment to the statute is an unconstitutional ex post facto law.

Ms. Schlimbach explained that in New Jersey, individuals convicted of certain sex offenses may be sentenced to parole supervision for life (PSL) pursuant to N.J.S. 2C:43-6.4 in the Violent Predator Incapacitation Act. However, prior to a 2003 amendment to the statute, offenders were sentenced to *community* supervision for life (CSL). In addition, a 2014 amendment to the statute provided that violations of either PSL or CSL are third-degree, rather than fourth-degree crimes, and also added that a violation of CSL converts it to PSL.

Ms. Schlimbach advised that this issue came to the attention of Staff through discussions with Fletcher Duddy of the New Jersey Public Defenders Office, while working on another project related to New Jersey's sex offender statutes.

In the case of *State v. Hester*, four defendants received CSL sentences for qualifying offenses. After the 2014 amendment, these defendants violated their CSL, were subsequently convicted of third-degree crimes, and their CSL sentences were converted to PSL in accordance with N.J.S. 2C:43-6. The trial courts and the Appellate Division concurred that the application of the 2014 amendment to these defendants violated the Ex Post Facto clause because it effectively increased the punishment for a CSL violation for those sentenced to CSL prior to 2014.

The Supreme Court conducted a thorough examination of the constitutionality of the 2014 amendment and concluded that it resulted not in a simple procedural alteration but rather a change that directly contravened the fundamental principles underpinning the Ex Post Facto Clauses of both the New Jersey and Federal Constitutions. The Court examined the legislative history of the statute and conducted an ex post facto analysis, which assesses whether the law is: (1) applicable to events that occurred prior to its enactment and (2) places the affected offender at a disadvantage. The *Hester* Court concluded that the “completed crime” was the predicate sexual offense, not the CSL violation. With respect to the second element of the analysis, the Court compared the circumstances in *Hester* to those in the prior Supreme Court case of *State v. Perez*.

In *Perez*, the defendant was sentenced to CSL in 1998 and convicted of a violation in 2011. Because the 2003 amendment to the statute replaced CSL with PSL, the defendant was sentenced to a mandatory extended term without parole eligibility upon his CSL violation and spent many additional years in prison as a result of the change. The *Perez* Court found that the 2003 amendment rendered more than a “simple change in nomenclature” or “simple clarification” of legislative intent and instead violated the Ex Post Facto clause. The *Hester* Court held that retroactive application of the 2014 amendment to N.J.S. 2C:43–6.4 violates the Ex Post Facto Clause of the New Jersey and Federal Constitutions.

Vice-Chairman Bunn suggested that the statute can be amended to capture the holdings of *Hester* and *Perez*. Commissioner Long noted that *Hester* and *Perez* are analogous, but that she does not object to hearing from the interested parties who practice in this area.

It was the consensus of the Commission to proceed with this project.

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

Samuel Silver discussed with the Commission a Memorandum proposing a project to remove the anachronistic terms “State Home for Boys” and “State Home for Girls” from the applicable statutes.

Mr. Silver stated that New Jersey’s commitment to juvenile justice dates back to 1864. At that time, Governor Parker advised the Legislature that there should be some place other than the State Prison for the incarceration of youthful offenders. During the post-Civil War era, the New Jersey Legislature established the State Reform School for Juvenile Offenders. Subsequently, the Legislature established the State Industrial School for Girls. In 1900, the State Reform School for Juvenile Offenders became the State Home for Boys, and the State Industrial School for Girls became the State Home for Girls.

In 1970, the State Home for Boys became the Training School for Boys. When the Training School for Girls closed, the Training School for Boys became co-educational. In 1976, the Department of Corrections took control of New Jersey’s eight correctional facilities, including those in which juvenile offenders were housed.

In 1995, the Juvenile Justice Commission (JJC) was created by the Legislature. The custody of all juveniles adjudicated delinquent and committed to Department of Corrections were transferred to the JJC. To this time, the JJC operates three secured facilities: the Juvenile Medium Security Facility; the Female Secure Care & Intake Facility; and the New Jersey Training School – Jamesburg.

Mr. Silver stated that he spoke with Christina Broderick, Chief of Legal & Regulatory Affairs. Ms. Broderick confirmed that references to the State Home for Boys and State Home for Girls are not appropriate because these terms are no longer used by the JJC.

Finally, Mr. Silver advised the Commission that there are no bills pending to amend the language of N.J.S. 30:4-85; N.J.S. 48:12-109; N.J.S. 30:3-5(2); or N.J.S. 30:3-6(1) that propose removing references to the New Jersey State Home for Boys and the New Jersey State Home for Girls.

Chairman Gagliardi stated that this project is a classic Law Revision project. It was the consensus of the Commission to proceed with work on this project.

Miscellaneous

Laura Tharney advised the Commission that the Seton Hall Journal of Legislation and Public Policy published Staff’s article entitled “Addressing Ambiguities in One of Life’s Two Certainties: The New Jersey Law Revision Commission’s Examination of Selected Tax Statutes,” in Volume 47, Issue 1 (2023).

She also mentioned that Staff presented a continuing legal education program entitled “New Jersey Law Revision Commission: Recent Recommendations Rundown” at the Office of Legislative Services. Ms. Tharney advised the Commission that the program was well received, and that Staff has been asked back to present a future program.

On October 24, 2023, Ms. Tharney will meet with Johanna Bond, the Dean of the Rutgers University Law School. Ms. Tharney will discuss with Dean Bond the work of the Commission and our engagement with the law school community.

On November 1 and November 8, 2023, Ms. Tharney will be representing the Commission at Practice Area Fairs on the Rutgers Law School Camden and Newark campuses. On November 6, 2023, Whitney Schlimbach and Samuel Silver will be attending the Seton Hall University careers in public service fair on behalf of the Commission.

Adjournment

On the motion of Commissioner Long, seconded by Commissioner Bunn, the meeting was unanimously adjourned.

The next meeting of the Commission is scheduled for November 16, 2023, at 10:00 a.m., and will be conducted remotely, using Zoom.