

To: New Jersey Law Revision Commission
From: Timothy J. Prol
Re: Public Health and Safety (N.J.S. 2C:40-18)
Date: September 11, 2017

MEMORANDUM

Executive Summary

In July, 2015, Staff sought approval from the Commission to undertake a project addressing the issue of notice with regard to the interplay between N.J.S. 39:3-76.2f (“Seat Belt Law”) and N.J.S. 2C:40-18 (“Public Health and Safety Statute”) in response to the New Jersey Supreme Court decision in *State v. Lenihan*.¹

The Commission directed Staff to research the legislative history of N.J.S. 2C:40-18 and to conduct additional research regarding the potential for the scope of N.J.S. 2C:40-18 to be broadened beyond the original legislative intent as a result of the Court’s decision in *Lenihan*.

Preliminary examination of the legislative history and contemporaneous news articles indicates that the intent of the legislation which created N.J.S. 2C:40-18 was likely to focus on violations of New Jersey building codes by night clubs and similar establishments. There is a strong likelihood that expansion of the scope of N.J.S. 2C:40-18 to include statutes such as N.J.S. 39:3-76.2f as predicate offenses is beyond the scope of the statute as originally contemplated by the Legislature.

Background

I. Legislative History

In 1997, the New Jersey State Legislature passed S187, which created a new criminal offense codified in statute as N.J.S. 2C:40-18 as follows:

- a. A person is guilty of a crime of the second degree if the person knowingly violates a law intended to protect the public health and safety or knowingly fails to perform a duty imposed by a law intended to protect the public health and safety and recklessly causes death.
- b. A person is guilty of a crime of the third degree if the person knowingly violates a law intended to protect the public health and safety or knowingly fails to perform a duty imposed by a law intended to protect the public health and safety and recklessly causes serious bodily injury.
- c. A person is guilty of a crime of the fourth degree if the person knowingly violates a law intended to protect the public health and safety or knowingly fails to perform

¹ Nicole Grasso, *Seat Belt Usage (N.J.S. 39:3-76.2f) and Public Health and Safety (N.J.S. 2C:40-18)* (July 6, 2015).

a duty imposed by a law intended to protect the public health and safety and recklessly causes significant bodily injury.

The standard sources of legislative history provided only very limited information about the history of the statute in question, so Staff looked to contemporaneous news articles in an effort to obtain additional information. The impetus for N.J.S. 2C:40-18 stemmed from a nightclub stampede which resulted in the deaths of four teenaged patrons.² The club was overcrowded and, when a fight broke out, patrons attempting to flee mobbed all available exits and trampled the four individuals to death.³ The problems with egress were exacerbated by apparent violations of the Uniform Fire Safety Act and the Uniform Construction Code Act, namely, that some exits were locked or blocked and there were an inadequate number of emergency exits.⁴

Examining the titles of newspaper articles published at and around the time of the bill's introduction sheds light upon the result the Legislature was seeking to achieve: "*Legislation Targets Dance Hall Building Code Violations, Lack of Insurance: Measures spurred by trampling deaths in Elizabeth*," "*Bill Targets Unsafe Clubs*," "*Panel advances bill on safety-code violations*," "*Bill would impose jail if club patrons are hurt*," "*Safer clubs law enacted*," "*Manslaughter bill aims at dance club owners*."⁵ Additionally, there is an editorial in the Asbury Park Press from the bill's primary sponsor, Senator Raymond J. Lesniak, which addresses the incident as the inspiration for this legislation.⁶ In the article, Senator Lesniak discusses the tragedy in the night club and outlines a package of bills he introduced designed to prevent these types of night-club-related disasters from happening in the future. The bill package included the piece of legislation which ultimately became N.J.S. 2C:40-18. Senator Lesniak wrote, "...[I]t is so important that the buildings that house these popular clubs adhere to the letter of the fire and safety codes – not now and then, but always."⁷

The Titles of the bills introduced as part of the package read as follows:

Provides for license revocation and monetary penalties for occupancy and fire code violations by certain alcoholic beverage licensees.⁸

Requires certain alcoholic beverage licensees to carry \$1 million liability insurance.⁹

² Maryann Spoto, *Legislation Targets Dance Hall Building Code Violations, Lack of Insurance: Measures spurred by trampling deaths in Elizabeth*, The Star-Ledger, Jan 18, 1995.

³ Robert E. Misseck, *Elizabeth club owner cited for manslaughter in trample-deaths*, The Star-Ledger Mar. 3, 1995.

⁴ *Id.*

⁵ Maryann Spoto, *Legislation Targets Dance Hall Building Code Violations, Lack of Insurance: Measures spurred by trampling deaths in Elizabeth*, The Star-Ledger, Jan 18, 1995.; *Bill Targets Unsafe Clubs*, Trenton Times, Nov. 8, 1996.; *Panel advances bill on safety-code violations*, The Home News & Tribune, Nov. 8 1996.; *Bill would impose jail if club patrons are hurt*, The Bergen Record, Apr. 22, 1997.; *Safer clubs law enacted*, The Trentonian, Apr. 22, 1997.; Sandy Lovell, *Manslaughter bill aims at dance club owners*, The Star-Ledger, Apr. 23, 1997.

⁶ Senator Raymond J. Lesniak, *Overcoming greedy indifference*, Asbury Park Press, Feb. 21, 1995.

⁷ *Id.*

⁸ S190, 207th Leg., Reg. Sess. (NJ. 1997).

⁹ S189, 207th Leg., Reg. Sess. (NJ. 1997).

Prohibits certain alcoholic beverage licensees from obtaining interest in another alcoholic beverage license.¹⁰

Establishes criminal offense dealing with violation of public health and safety statutes.¹¹

The bill entitled “Establishes criminal offense dealing with violation of public health and safety statutes,” known as S187, became N.J.S. 2C:40–18. It is the only bill of the package which was enacted into law. The remaining bills which were introduced at the same time as S187 did not proceed beyond introduction and referral to committee, apparently due to successful lobbying efforts by night club owners and the alcohol industry.¹²

The bill which became S187 in the 1996-1997 Legislative Session had been introduced in the 1994-1995 Legislative Session, originally, as two separate bills. The first bill amended N.J.S. 2C:11-4, the Manslaughter Statute, as follows:

[b. Criminal homicide constitutes manslaughter when:]

(4) The actor violated a provision of:

(a) The "Uniform Fire Safety Act," P.L.1983, c.383 (C.52:27D192 et seq.) or any rule or regulation promulgated thereunder; or

(b) A certificate of occupancy issued pursuant to the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D119 et seq.); and such violation resulted in the death of another person.¹³

The second bill amended N.J.S. 2C:2-1 as discussed below. During the Senate Judiciary Committee hearing, the bills were amended and combined into a single bill. In addition to combining the two bills, the amended bill created a new offense under N.J.S. 2C:40-18 instead of amending the Manslaughter Statute. Also, the specific language referring to the Uniform Fire Safety Act and the State Uniform Construction Code Act was amended to read, “knowingly violates a law intended to protect the public health and safety or knowingly fails to perform a duty imposed by a law intended to protect the public health and safety,” however, the language specifically mentioning the Uniform Fire Safety Act and the State Uniform Construction Code Act remained in the amendment to N.J.S. 2C:2-1.

Looking at the bills which did not advance beyond introduction and referral to committee, it appears that the Legislature achieved its aim of limiting the scope of the legislation to night club owners by tying violations to night club owners' liquor licenses. S188, for example, which would have prohibited certain alcoholic beverage licensees from obtaining interest in another alcoholic beverage license, reads as follows:

¹⁰ S188, 207th Leg., Reg. Sess. (NJ. 1997).

¹¹ S187, 207th Leg., Reg. Sess. (NJ. 1997).

¹² *Making business more accountable: Nightclub law is of limited value*, The Home News & Tribune, Apr 23, 1997.

¹³ S1730, 206th Leg., Reg. Sess. (NJ. 1995).

1. A licensee who holds or has held an interest in a license issued for a premises wherein a death occurred as a result of a violation of the certificate of occupancy or the "Uniform Fire Safety Act," P.L.1983, c.383 (C.52:27D-192 et seq.), or any rule or regulation promulgated pursuant thereto, shall be prohibited from obtaining an interest in any other license issued pursuant to Title 33 of the Revised Statutes.¹⁴

The other proposed bills also contain language referring to death or serious bodily injury occurring on the premises of liquor licensees.¹⁵ In addition, they reference violations of the certificate of occupancy (which stems from the Uniform Construction Code) and violations of the Uniform Fire Safety Act, "or any rule or regulation promulgated pursuant thereto."¹⁶

It is of interest that the Legislature chose to draft the liquor-license-related bills with the exclusive condition of violations of the certificate of occupancy and Uniform Fire Safety act and related regulations, while drafting such broad language as, "a law intended to protect the public health and safety" into S187.

Given the context in which this legislation was drafted, the most likely explanation is that the drafters intended to signal laws of the *type* of the Uniform Fire Safety Act and Uniform Construction Code Act without limiting S187 to those two provisions alone. Perhaps, since S187 created a new criminal offense, it was deemed that tying legislative effect to a liquor license was not an appropriate solution.

N.J.S. 2C:2-1

Through S187, the Legislature also amended N.J.S. 2C:2-1, which deals with omission of a duty as a basis for criminal liability.¹⁷ The original text of N.J.S. 2C:2-1 read in relevant part, as follows:

b. Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

...

(2) A duty to perform the omitted act is otherwise imposed by law.

S187 when signed into law, modified N.J.S. 2C:2-1b(2) to read as follows:

(2) A duty to perform the omitted act is otherwise imposed by law, including but not limited to, laws such as the "Uniform Fire Safety Act," P.L.1983, c.383 (C.52:27D-192 et seq.), the "State Uniform Construction Code Act," P.L.1975, c.217 (C.52:27D-119 et seq.), or any other law intended to protect the public safety or any rule or regulation promulgated thereunder.¹⁸

¹⁴ S188, 207th Leg., Reg. Sess. (NJ. 1997).

¹⁵ See S189, S190, 207th Leg., Reg. Sess. (NJ. 1997).

¹⁶ *Id.*

¹⁷ N.J.S. 2C:2-1.

¹⁸ N.J.S. 2C:2-1b(2).

The clause “laws such as” which precedes the specific mention of the Uniform Fire Safety Act and the State Uniform Construction Code Act may provide the strongest evidence to be found in the statute of the Legislature’s actual intent. It appears that, in an attempt to avoid restricting the law to just the Uniform Fire Safety Act and the State Uniform Construction Code Act, but to still indicate the Legislature’s intent that S187 was meant to specifically address those types of statutes, the drafters included with specific mention of the Uniform Fire Safety Act and the State Uniform Construction Code Act, the phrase “and any other law intended to protect public health and any rules or regulations promulgated thereunder.”¹⁹ This catch-all phrase prevented the Fire Safety and Construction Code Acts specifically mentioned in the bill and its statement from becoming an exclusive list; but also injected a measure of ambiguity which could complicate the plain meaning of the statute, leading to difficulties in its interpretation.

S187 Bill Statement

Little more exists in the legislative history to indicate the original intent of the Legislature beyond the bill statement that accompanied Senate Bill 187. Without the context afforded by the original text or contemporaneous news articles, a Court would have little to go on when interpreting the meaning and original legislative intent of N.J.S. 2C:40-18 and N.J.S. 2C:2-1. The original bill statement for S187 reads as follows:

This bill creates a new offense. Under this new offense, a person would be guilty of a crime if the person knowingly violated a law intended to protect public safety or health or knowingly failed to perform a duty imposed by such a statute. This offense would be graded as a crime of the third degree if the offense recklessly placed another person in danger of death or serious bodily injury. If the offense recklessly placed another person in danger of bodily injury, the offense would be graded as a crime of the fourth degree. The bill also amends N.J.S.2C:2-1, which deals with omission of a duty as a basis for criminal liability, to include reference to the "Uniform Fire Safety Act" (N.J.S.A.52:27D-192 et seq.), the "Uniform Construction Code Act" (N.J.S.A.52:270-119 et seq.) and any other law intended to protect public health and any rules or regulations promulgated thereunder.²⁰

Despite the fact that the official legislative history provides little in the way of guidance; the bill statement taken in context with the text of the legislation as originally introduced, the bill sponsor’s editorial article, the news stories of the time, and the titles of the package of bills in which S187 was introduced, it appears that the Legislature’s focus was on violations of building-code-related provisions, and not on provisions such as the Seat Belt Law. Moreover, the phrase “a law intended to protect public health or safety” appears less intended to refer to all laws intended to protect the public health and safety, than to apply to building-code-related provisions, and specifically the ones mentioned in the statement, while at the same time, leaving the statute open to include other building-code-related provisions which existed or which would potentially exist in the future.

¹⁹ *Id.*

²⁰ Statement to S187, 207th Leg., Reg. Sess. (NJ. 1997).

II. Case law response

*State v. Lisa*²¹

In 2007, the provision of N.J.S. 2C:2-1 which was added via the S187 amendment of 1997 was examined by the Appellate Division in the case of *State v. Lisa*.²² This case is of note, less for the facts of the case or the law that resulted therefrom, but more for the fact that the Court was compelled to engage in statutory interpretation of N.J.S. 2C:1b(2) as a result of potential ambiguity created by the 1997 amendment to N.J.S. 2C:2-1b(2).

In *Lisa*, the defendant was indicted with reckless manslaughter, sexual assault, and various drug charges for his role in the death of a young woman, a minor, with whom defendant had been “partying,” to whom defendant sold a tablet of methadone, and who had been consuming alcohol, marijuana, and other drugs.²³ The woman died after falling unconscious in defendant’s bedroom.²⁴ The State argued defendant neglected a duty to render aid to the victim after creating the circumstances under which she perished, and as such proffered the charge of reckless manslaughter, among others.²⁵

Defendant moved to dismiss the reckless manslaughter count based on the assistant prosecutor's charge to the grand jury, which defendant alleged was legally deficient.²⁶ The jury charge on the reckless manslaughter count incorporated a common law duty to render aid as a result of New Jersey’s adoption of the Model Penal Code.²⁷ At the motion hearing, defendant argued that the phrase “otherwise imposed by law” was limited by the 1997 amendment to enacted legislation, including “any rule or regulation enacted thereunder,” “intended to protect the public safety.”²⁸ The State countered that the phrase “otherwise imposed by law” includes duties flowing from the common law, including duties imposed by civil tort law.²⁹ The 1997 amendment, the State argued, was not intended to narrow the meaning of the statute as originally enacted, but to clarify it.³⁰ The motion judge accepted defendant's argument, finding that the 1997 amendment effected a major change in the provision, precluding reliance on common law principles as a source of the duty to act required for liability based on a failure to act and granted defendant’s motion to dismiss.³¹

The Appellate Division disagreed with the motion judge’s reasoning but arrived at the same conclusion from a different line of reasoning. The Appellate Division’s discussion revolved around

²¹ *State v. Lisa*, 391 N.J. Super. 556 (2007).

²² *Id.*

²³ *Id.* at 558-565.

²⁴ *Id.*

²⁵ *Id.* at 558-559.

²⁶ *Id.* at 564-565.

²⁷ *Lisa*, 391 N.J. Super. at 564-567. The Court stated, “[T]here is little doubt that the drafters of our Penal Code intended that the duty to act could be found in “some branch of the civil law,” which means the civil common law. Our Penal Code commentary is, in this respect, identical to the Model Penal Code Commentary.”

²⁸ *Id.* at 567.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

whether the phrase “otherwise imposed by law” incorporated principles laid out in the Restatement (Second) of Torts, (1965), with the Court ultimately concluding that, “N.J.S.A. 2C:2–1b(2), to the extent that it seeks to incorporate principles derived from civil common law, does not provide sufficient notice to satisfy prevailing standards of constitutionally adequate procedural due process.”³² The holding in *Lisa* turned on the question of incorporation of civil tort principles into criminal law, and not on interpretation of the text of the 1997 amendment to N.J.S. 2C:2–1b(2).³³ Nonetheless, the issues raised as a result of the 1997 amendment are illustrative of the possibility that litigants and courts will struggle with interpretation of the language of N.J.S. 2C:2–1b(2) and, potentially, by extension, N.J.S. 2C:40-18, both of which reference general “public health and safety” statutes or regulations.

Regarding the statutory interpretation of the 1997 amendment, the Appellate Division said:

There is no legislative history concerning the amendment, only the unilluminating statement accompanying the law: “Establishes criminal offense dealing with violation of public health and safety statutes.” Our task is to determine whether the amendment intended to change the meaning of “otherwise imposed by law” to eliminate the inclusion of civil common law duties, as originally intended by the drafters of the Penal Code. As a general proposition, a change in a statute, whether by revision or, as here, by amendment, will only be construed to effect a change in the substance of the law if the Legislature's intent is clear. (Citations omitted). We discern no such legislative intent here. Indeed, we find the language of the amendment to evidence a clear intent to the contrary. ...³⁴

...Indeed, we note the obvious: the statutes included by the amendment were already covered by the phrase, “otherwise imposed by law.” Thus, while we do not divine the Legislature's purpose in the amendment, it does appear to have been superfluous.³⁵

The discussion surrounding the 1997 amendment illustrates the dangers for difficulties in interpretation which could result from the lack of context and sparse legislative history for §187. In the context in which the question of the 1997 amendment was raised, the Appellate Division was able to correctly determine that the amendment was not intended to narrow the meaning of the statute as originally enacted, but the issue was unclear enough that it led to the question being raised in the first place. In addition, the Appellate Division was forced to rely on the principles of statutory interpretation. There was no clear indication in the plain language of the statute or the legislative history, of the Legislature's intent or the problem they were trying to remedy with the addition of the 1997 amendment. By extension, the analogous open-ended provisions created through enactment of N.J.S. 2C:40-18, produce similar confusion.

³² *Id.* at 558.

³³ *Lisa*, 391 N.J.Super. at 572-578.

³⁴ *Id.* at 579.

³⁵ *Id.*

*State v. Lenihan*³⁶

In 2014, the New Jersey Supreme Court held in *State v. Lenihan* that violation of the Mandatory Seat Belt Usage Law qualified as a predicate offense under N.J.S. 2C:40-18, and that 2C:40-18, which defendant was convicted of violating, was not unconstitutional as applied.³⁷

Defendant had been driving at a high rate of speed, in rainy conditions, while under the influence of difluoroethane inhaled from “huffing” an aerosol can, when she crashed in to a guardrail.³⁸ Neither defendant nor her passenger were wearing seatbelts, and the passenger, who was a minor, died as a result of her injuries.³⁹ Defendant was charged in count one with a violation of N.J.S. 2C:40-18a, a second-degree offense, based on the Seat Belt Law and recklessly causing the death of her passenger.⁴⁰ The indictment also charged defendant with second-degree vehicular homicide, N.J.S. 2C:11-5a; and first-degree vehicular homicide within 1000 feet of school property, N.J.S. 2C:11-5b(3).⁴¹

Defendant moved to dismiss count one, on the grounds that the Seat Belt Law was not intended to “protect the public health and safety” within the meaning of N.J.S. 2C:40-18.⁴² That motion was denied by the trial court.⁴³

As the result of a plea bargain, defendant was charged with a violation of N.J.S. 2C:40-18b, which provides that, “[a] person is guilty of a crime of the third degree, if the person knowingly violates a law intended to protect the public health and safety or knowingly fails to perform a duty imposed by a law intended to protect the public health and safety and recklessly causes serious bodily injury.”⁴⁴ The law which served as a predicate offense supporting the charge of N.J.S. 2C:40-18(b) was N.J.S. 39:3-76.2f, the Seat Belt Law.⁴⁵ The State agreed to recommend dismissal or merger of the vehicular homicide charge and to dismiss various summonses for failure to wear a seat belt and to ensure that defendant’s passenger buckled her seat belt, N.J.S. 39:3-76.2f(b); driving under the influence, N.J.S. 39:4-50(g); and reckless driving, N.J.S. 39:4-96.⁴⁶ Defendant retained the right to appeal the denial of her motion to dismiss count one. The judge imposed a three-year term of supervised probation conditioned upon serving 180 days in the Sussex County jail. Defendant moved for a stay of the custodial term pending appeal and the Appellate Division granted the application.⁴⁷ In a published opinion, the Appellate Division affirmed.⁴⁸

³⁶ *State v. Lenihan*, 219 N.J. 251 (2014).

³⁷ *Id.*

³⁸ *Id.* at 256.

³⁹ *Id.*

⁴⁰ *Id.* at 257.

⁴¹ *Id.*

⁴² *Lenihan*, 219 N.J. at 257.

⁴³ *Id.*

⁴⁴ N.J.S. 2C:40-18(b).

⁴⁵ *Lenihan*, 219 N.J. at 256.

⁴⁶ *Id.*

⁴⁷ *Id.* at 257.

⁴⁸ *Id.*

On appeal to the New Jersey Supreme Court, defendant argued against application of the Seat Belt Law as a predicate offense for a charge under N.J.S. 2C:40-18. The State argued that the Seat Belt Law is clearly intended to protect the public health and safety and, as such, the Seat Belt Law fell squarely within the definition of N.J.S. 2C:40-18.⁴⁹ The State also pointed out the fact that N.J.S. 2C:40-18 requires the infliction of serious bodily injury or death as a result of defendant's reckless conduct.⁵⁰

Amicus Curie, the Attorney General, also argued that the Seat Belt Law is a “law intended to protect the public health and safety” as understood by N.J.S. 2C:40–18.⁵¹ The Attorney General contended that the statute’s language is not ambiguous, suggesting that if the Legislature intended to restrict N.J.S.A. 2C:40–18 to only those public health and safety laws “affecting the ‘general public at large,’ ” as defendant maintained, then the Legislature would have done so.⁵² Thus, the Attorney General suggested, the Court should presume that the phrase at issue “carries its ordinary and well-understood meaning.”⁵³ In addition, the State pointed to the 1997 amendment of N.J.S. 2C:2-1 as evidence, “that the Legislature did not intend a narrow interpretation” of N.J.S. 2C:40-18.⁵⁴ Their support for this contention was that the amendment contained similar language imposing liability on those who violate “any other law intended to protect the public safety.”⁵⁵

The Defendant’s argument against application of the Seat Belt Law as a predicate offense for a charge under N.J.S. 2C:40-18 rested on the contention that the Seat Belt Law protects, “the community at large and not merely discrete individuals.”⁵⁶ In addressing defense counsel’s contention, the Supreme Court in *Lenihan* responded as follows:

Defendant argues that N.J.S.A. 2C:40–18b does not apply to this case because the Legislature intended to limit the types of predicate offenses contemplated by the statute to offenses such as “violations of fire and building codes, pollution controls, or other laws whose violations risk harm to the community at large.” Defendant argues that a violation of the Seat Belt Law, therefore, does not qualify as a predicate offense for N.J.S.A. 2C:40–18b. We disagree.

Our review of the meaning of a statute or the common law is de novo. We find nothing in N.J.S.A. 2C:40–18b that would limit the phrase, “law intended to protect the public health and safety,” in the manner suggested by defendant. Without a clear indication from the Legislature that it intended the phrase to have a special limiting definition, we must presume that the language used carries its ordinary and well-understood meaning. And, as the Attorney General points out, if the Legislature had intended to restrict N.J.S.A. 2C:40–18 to laws that affect the public at large, it would have done so.(Citations omitted)⁵⁷

⁴⁹ *Id.* at 260.

⁵⁰ *Id.*

⁵¹ *Id.* at 260-261.

⁵² *Id.* at 261.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 263.

⁵⁷ *Id.* at 262-263.

In fact, it appears that the Legislature intended this legislation to address the types of harm caused by violations of building-code-related provisions of the New Jersey Statutes and regulations promulgated thereunder but, likely due to the context in which the bill was introduced, coupled with the contemporaneous general awareness of the reasons for the bill's introduction, the specifics of those reasons were not included in the bill statement and legislative history. Those insights seem to have been unavailable to the Court in interpreting the vague and ambiguous language referring to the "public health and safety." Not having the public record of contemporary news articles, nor the sponsor's editorial which explained his reasoning for introducing the legislation, the Court was bound to follow the tenets of statutory interpretation, which led to the result in this case.

Commission Guidance Sought Regarding the Question of Broadening N.J.S. 2C:40–18 Beyond the Scope of Legislative Intent

Defense counsel in *Lenihan* argued that such broadening was a danger if the Seat Belt Law were allowed to serve as a predicate offense under N.J.S. 2C:40–18, saying that it, "places in the prosecutor's arsenal an unconstitutional ability to overreach into the legislative domain and raise virtually any" regulatory or local ordinance violation "to the serious level of an indictable crime."⁵⁸

The Commission also raised the possibility that unintended vagueness or generality in the statute could result in broadening the scope of N.J.S. 2C:40–18, and while the Court declined to examine in depth the questions raised by defense counsel, Commission Staff could, in fact, engage in such analysis.⁵⁹ The following questions were specifically raised by the Commission:

Do the following violations lead to criminal liability under 2C:40-18 if they result in injury or death?

- Exceeding the speed limit?
- Driving with a burned out taillight that results in a rear-end collision in which some is injured.
- Driving without having cleared the ice from the roof of one's car?
- Violation of any provision of Title 39?
- Failure to shovel the sidewalk in front of one's home in a timely manner?
- Violating the leash law with the result of some being injured by being bitten by the dog?

Based on the New Jersey Supreme Court's decision in *Lenihan*, it appears that criminal liability could indeed result under N.J.S. 2C:40-18 from violations of any of the above provisions. Viewed in light of the context surrounding S187's passage, the decision in *Lenihan* already broadens the pool of possible predicate offenses which would satisfy the statutory language of N.J.S. 2C:40–18 beyond those types of offenses, namely building codes, which were originally contemplated by the Legislature.

⁵⁸ *Id.* at 537.

⁵⁹ Memo from Bernard W. Bell, Commissioner, New Jersey Law Revision Commission, to Laura Tharney, Executive Director, New Jersey Law Revision Commission. (Jul. 9, 2015)(on file with the Commission).

Due to the lack of clarity in the statute and the lack of legislative history presented to the Court, the New Jersey Supreme Court in *Lenihan* accorded the phrase, “a law intended to protect the public health and safety,” its plain and ordinary meaning.⁶⁰ The Court determined that, by definition, the Seat Belt Law was “a law intended to protect the public health and safety.”⁶¹ The same could be said for violations in any of the above scenarios, as well as violations of a host of other statutes, ordinances, and provisions.

While N.J.S. 2C:40-18 requires the infliction of serious or significant bodily injury or death as a result of defendant's reckless conduct, and these requirements could potentially mitigate some of the negative consequences resulting from N.J.S. 2C:40-18's vagueness, the issue remains that the Legislature was not contemplating the Seat Belt Law, the dog bite ordinance, the speed limit, or any of the other potential statutes, ordinances, or laws which could be construed as protecting the public health and safety when they passed S187, which became N.J.S. 2C:40-18.⁶²

The issue of notice also remains a concern. If such a broad spectrum of laws and ordinances can be argued to be intended to “protect the public health and safety,” N.J.S. 2C:40-18 could be seen to potentially subject anyone to imprisonment on the basis of, what would otherwise be, a benign infraction. Even if the would-be defendant knowingly violated a law and significant or serious injury or death resulted, there is no indication in most laws or ordinances “intended to protect the public health and safety” that imprisonment could occur as a result of a violation.

Conclusion

At this juncture, Staff seeks guidance from the Commission. The concerns raised by the Commission during its consideration of the issues thus far were clearly well-founded.

With the context provided by the language of the original bill, and the contemporaneous news articles illuminating the circumstances surrounding the introduction of the bill which eventually became N.J.S. 2C:40-18, the Legislature's intent to heighten penalties for night club owners who flout building and safety codes becomes clear.

Staff seeks guidance from the Commission regarding the manner in which Staff should proceed. It seems appropriate to bring this issue to the Legislature in order to avoid continued broadening of the scope of N.J.S. 2C:40-18 if that does not meet with the approval of the Legislature. Staff is interested in any recommendations or comments from the Commission regarding the direction in which it would like to see the project progress.

⁶⁰ *Lenihan*, 219 N.J. at 514.

⁶¹ *Id.* at 511.

⁶² As a caveat, it is of note that the charge under 2C:40-18(b) was the more-lenient result for the defendant in *Lenihan*. Conviction and sentencing under the first-and-second-degree vehicular homicide charges would have subjected defendant to significant jail time, NERA considerations, and heightened penalties. By allowing defendant to plead to 2C:40-18(b), the prosecutor was providing a lesser sentence than defendant would otherwise have faced.