



## NEW JERSEY LAW REVISION COMMISSION

### Tentative Report Addressing the Use of the Term “Misdemeanor” in the New Jersey Statutes

**June 21, 2018**

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

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **August 20, 2018**.

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

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**MISDEMEANOR, n. An infraction of the law having less dignity than a felony and constituting no claim to admittance into the best criminal society.<sup>1</sup>**

**- Ambrose Bierce.**

### **Executive Summary**

This project originated after Staff undertook a review of the Model Entity Transaction Act<sup>2</sup> (META) to determine whether it would be useful to incorporate provisions of the Act into existing New Jersey law. As part of the META project, Staff read each of the New Jersey statutes on the subject of partnerships and trade names.<sup>3</sup> It is presently a “misdemeanor” for a partnership to conduct business in New Jersey if the members of this entity have not filed the required paperwork with the County Clerk’s Office.<sup>4</sup> Staff would soon learn that statutory references to the word misdemeanor were not limited to Title 56.

An in-depth search of the New Jersey statutes confirmed the prevalence of the term misdemeanor outside of the Code of Criminal Justice (the “Code”).<sup>5</sup> For individuals unfamiliar with the New Jersey Code of Criminal Justice (the “Code”), references to “misdemeanors” and “high misdemeanors” in non-Code statutes serve only to complicate the law contained in each statutory title. The breadth, depth and consequence each statutory reference is best understood after consultation with the New Jersey Code of Criminal Justice on this subject matter.

### **The New Jersey Code of Criminal Justice**

The New Jersey Code of Criminal Justice was enacted, “[t]o forbid, prevent and condemn conduct that unjustifiably and inexcusably inflicts or threatens serious harm to individual or public interests....”<sup>6</sup> The safety and welfare of the community as defined in the statutory proscription has been held to be of paramount importance.<sup>7</sup> Further, the statutes that comprise the Code are specifically designed to embody the constitutional precepts of fundamental fairness and due process for the protection of the accused.<sup>8</sup> Accordingly, the Code, “...give[s] fair warning [to the citizenry] of the nature of the conduct proscribed and the sentences authorized upon conviction....”<sup>9</sup> Where the criminal code clearly defines an offense, neither a due process argument based on a lack of notice nor the defense of laches is appropriate.<sup>10</sup> The Code, however, emphasizes both fault and culpability.<sup>11</sup>

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<sup>1</sup> Ambrose Bierce, *The Devil’s Dictionary* 219 (The World Publishing Co. 1911).

<sup>2</sup> Model Entity Transactions Act (META) Summary, Uniform Law.

<sup>3</sup> N.J.S. 56:1-1 to 56:1-7.

<sup>4</sup> N.J.S. 56-1-4.

<sup>5</sup> See Appendix at 1.

<sup>6</sup> N.J.S. 2C:1-2(a)(1).

<sup>7</sup> *State v. McCague*, 314 N.J. Super. 254, 265 (App. Div.), *certif. den.* 157 N.J. 542 (1998).

<sup>8</sup> CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:1-2 (*Gann*).

<sup>9</sup> N.J.S. 2C:1-2(a)(4).

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

<sup>11</sup> *State v. Pena*, 178 N.J. 297, 315 n.4 (2004).

The constitutional principles of fundamental fairness and due process set forth in the Code are not limited to the delineation of criminal activity. The Code also specifically sets forth the general purposes of the provisions governing the sentencing of an offender.<sup>12</sup> One of the general purposes governing the sentencing of an offender is, “to give fair warning [to the citizenry] of the nature of the sentences that may be imposed on conviction of an offense.”<sup>13</sup> In order to achieve this purpose, each crime enumerated in the Code reflects the gravity of such an offense.

The Code classifies a crime, for the purpose of sentence, into one of four degrees.<sup>14</sup> The statute, N.J.S. 2C:43-1(a), grades crimes as those of the first degree, second degree, third degree, and fourth degree.<sup>15</sup> Crimes defined by the Code are not classified as misdemeanors or high misdemeanors. An individual who has been convicted of a crime set forth in the Code may be sentenced to imprisonment in accordance with the statutory scheme set forth in the Code.<sup>16</sup> Pursuant to the Code, a sentence for a criminal offense may range from eighteen months<sup>17</sup> to life imprisonment.<sup>18</sup> The Code, however, is not the only statutory title that contains and defines criminal offenses.

The New Jersey Criminal Code recognizes that other statutory titles define criminal activity.<sup>19, 20</sup> The Code also recognizes that crimes, set forth in other statutes, may not follow the scheme set forth in N.J.S. 2C:43-1(a).<sup>21</sup> Nevertheless, the Code, is responsible for enumerating the penalties and sentences for criminal behavior set forth in other statutes.<sup>22</sup>

To understand a possible sentence for a non-Code offense one must first identify the non-Code statute. Next, the definitions and sentencing provisions must be read and understood. In order to ascertain the sentence to be imposed, a person must also have the wherewithal to cross-reference the contents of the statute with the applicable sections of the Code. Frequently, three sections must be read together, 2C:1-4(c), 2C:1-5(b), and, 2C:43-1(b).<sup>23</sup>

Pursuant to N.J.S. 2C:1-4(c), an offense defined by any statute of this State, other than the Code of Criminal Justice, will be classified according to this Code section or section 2C:43-1.<sup>24</sup> The general provisions of the Code, set forth in subtitle one, are applicable to offenses defined by other statutes.<sup>25</sup> Pursuant to the Code, the maximum penalty for non-Code offenses is

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<sup>12</sup> N.J.S. 2C:1-2(b).

<sup>13</sup> N.J.S. 2C:1-2(b).

<sup>14</sup> N.J.S. 2C:43-1(a).

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

<sup>16</sup> N.J.S. 2C:43-6 et seq.

<sup>17</sup> N.J.S. 2C:43-6(a)(4).

<sup>18</sup> N.J.S. 2C:11-3.

<sup>19</sup> N.J.S. 2C:43-1(b).

<sup>20</sup> Criminal activity set forth in statutory titles, other than the New Jersey Code of Criminal Justice, are commonly referred to as “non-Code” offenses.

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

<sup>22</sup> See N.J.S. 2C:1-4(c), 2C:1-5(b), and, 2C:43-1(b).

<sup>23</sup> CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:43-1 (*Gann*).

<sup>24</sup> N.J.S. 2C:1-4(c).

<sup>25</sup> N.J.S. 2C:1-5(b).

that which is provided in the statute defining the offense.<sup>26</sup> If, however, the non-Code offense is classified as a misdemeanor and has a maximum penalty of more than eighteen months imprisonment, then the provisions of section 2C:43-1(b) apply and the offense shall be considered a fourth degree offense.<sup>27</sup> These sections address the non-Code punishments that do not conform to the sentencing parameters set forth in the Code – such as those associated with misdemeanors and high misdemeanors.

### **Misdemeanors and High Misdemeanors**

Prior to the enactment of the New Jersey Criminal Code, non-Code criminal offenses were classified as either a “high misdemeanor” or as a “misdemeanor.”<sup>28</sup> The Code, in Subtitle 3, Chapter 43, Section 1, subsection b. provides, in relevant part, that “...a crime defined by any statute of this State other than this code and designated as a high misdemeanor shall constitute for the purpose of sentence a crime of the third degree.”

This section of the Code goes on to address non-Code statutory references to “misdemeanors.” Regarding misdemeanors, subsection b. provides, in relevant part, that “[e]xcept as provided in sections 2C:1-4(c) and 2C:1-5(b) and notwithstanding any other provision of law, a crime defined by any statute of this State other than this code and designated as a misdemeanor shall constitute for purpose of sentence, a crime of the fourth degree.”

The sentence imposed for a third or fourth degree offense, as set forth in the Code, can be significant.

Persons found guilty of a high misdemeanor, are subject to a three to a five-year state prison term.<sup>29</sup> A judge may also impose a fine of up to \$15,000 upon those individuals who are convicted of a high misdemeanor<sup>30</sup> if no sentence is set forth in the statute.<sup>31</sup> Those who violate a statute that employs the term “misdemeanor” are subject to punishment as if they committed a crime of the fourth degree.<sup>32</sup> They may be committed to the custody of the Commissioner of the Department of Corrections for a maximum term of eighteen months.<sup>33</sup> Further, they could be ordered to pay a fine of up to \$10,000<sup>34</sup> if no sentence is set forth in the statute.<sup>35</sup>

The existence of non-Code criminal offenses that reference misdemeanors and high misdemeanors may lead a person to several conclusions that are not factually accurate. The unwary researcher may believe that these terms accurately describe the criminal penalties associated with these non-Code offenses. In addition, the presence of these anachronistic terms may lead unsuspecting individuals to believe that they may only be prosecuted for the crime set

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

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

<sup>28</sup> N.J.S. 2C:43-1(b).

<sup>29</sup> N.J.S. 2C:43-6(3).

<sup>30</sup> N.J.S. 2C:43-3(b)(1).

<sup>31</sup> See CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:43-1(b),(Gann 2017).

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

<sup>33</sup> N.J.S. 2C:43-6(4).

<sup>34</sup> N.J.S. 2C:43-3(b)(2).

<sup>35</sup> See CANNEL, CRIMINAL CODE ANNOTATED, *Comment* N.J.S. 2C:43-1(b),(Gann 2017).

forth in the non-Code statutes. Also, the term “misdemeanor” is generally defined as: “[o]ffenses; lower than felonies and generally those punishable by a fine or imprisonment otherwise than in [a] penitentiary.”<sup>36</sup> The penalties associated with misdemeanors, as set forth in the New Jersey Code of Criminal Justice, depart dramatically from that definition. Both misdemeanors and high misdemeanors in this State have the potential to subject a defendant to a state prison term. Given the potential for confusion by laypersons and professionals, analyzing and removing these outdated terms from the body of statutes whenever possible appears to be a useful course of action.

## Analysis

Presently, the New Jersey Statutes contain five titular and twenty-eight statutory references to the term “high misdemeanors” that span eighteen titles. Individuals alleged to have violated a statute that references a high misdemeanor are subject to punishment for a crime of the third degree.<sup>37</sup> Separate and apart from these references, there are currently 256 New Jersey statutes that contain the term “misdemeanor.”<sup>38</sup> These references extend across thirty-eight titles and one appendix.<sup>39</sup>

In total, forty-four New Jersey titles and one appendix contain statutes that employ either the term misdemeanor or high misdemeanor.<sup>40</sup> Included in these titles are 284 statutes that reference these terms.<sup>41</sup> The titles and statutes were reviewed by Staff in sequential order to determine whether a commonality existed among them - other than the conspicuous reference to the word misdemeanor.

The New Jersey Statutes that contain a reference to the term misdemeanor can be divided into six categories.<sup>42</sup> For purposes of this report the each statute was placed in one of the following categories: No Action; Conform Statutory Language; Remove Classification; Substitute Degree; Reference a Statute in the Code of Criminal Justice; and, Repeal the Statute.<sup>43</sup> The number of statutes divided into each category are found in Figure 1.

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<sup>36</sup> Black’s Law Dictionary 901 (5<sup>th</sup> ed. 1979).

<sup>37</sup> N.J.S. 2C:43-1(b).

<sup>38</sup> See Appendix.

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

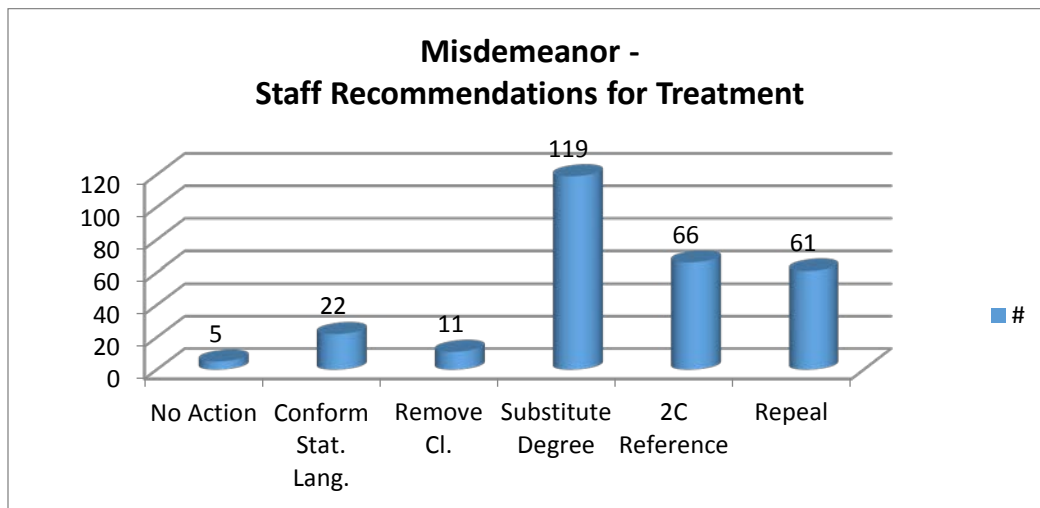
<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> For purposes of placing the statutes in one of the six categories Staff did not differentiate between the term misdemeanor and high misdemeanor. Once each statute was categorized, deference was given to the distinction set forth in the Code.

<sup>43</sup> Staff recognizes that these are not the only possible categories, or descriptors, that can be used to conduct this analysis. The categories were selected based on commonality of substance and ease of reference.

**Figure 1.**



- *No Action*

Certain statutory references to the term misdemeanor in the Code or those that reference out-of-state criminal activity are necessary, or high misdemeanor, are necessary. Accordingly, no action has been recommended to change these statutes.<sup>44</sup>

- *Conform Statutory Language*

Next, there are several statutes whose use of the term misdemeanor is anachronistic, yet a reference to the criminal activity is necessary. In these cases, the language in these statutes should be conformed to reflect that contained in the New Jersey Code of Criminal Justice.<sup>45</sup> Staff suggests that the use of the terms misdemeanor and high misdemeanor be eliminated where necessary and replaced with the appropriate terms such as “indictable offense” or “crime” where appropriate.

- *Remove Classification of Misdemeanor or High Misdemeanor*

There are certain non-Code offenses that may be ameliorated with monetary penalties, injunctive relief or may be declaratory or advisory in nature. These statutes could be amended to remove the classification of misdemeanor or high misdemeanor from the statute and any reference to the penalties associated with misdemeanors and their statutory equivalents.<sup>46</sup>

<sup>44</sup> See *infra* Appendix p. 2 and pp. 16-18.

<sup>45</sup> See *infra* Appendix p. 3 and pp. 19-34.

<sup>46</sup> See *infra* Appendix p. 4 and pp. 34-39.

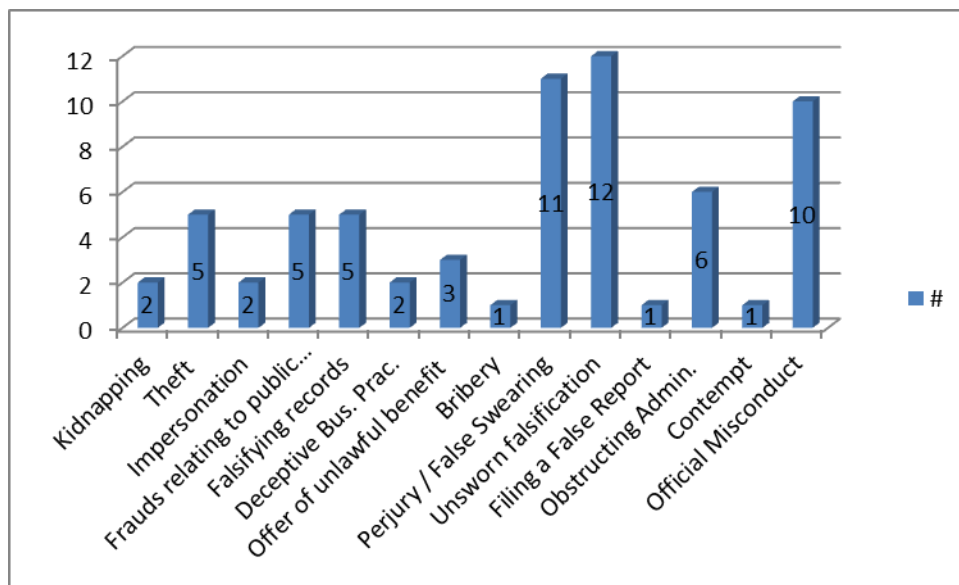
- *Replac e Misdemeanor with the Degree of the Offense*

Several statutory references to the term misdemeanor properly reside in titles outside of the Code. Nevertheless, references to the criminal penalties associated with these offenses should be updated to reflect the terminology presently used by the Code. These statutes should be amended to eliminate the term misdemeanor and set forth the degree of the crime as provided for in the Code.<sup>47</sup>

- *Reference Applicable Code Statutes*

Numerous non-Code statutes contain similar, or identical, elements of offenses that are also set forth in the New Jersey Code of Criminal Justice. While it is not necessary to repeal these statutes, each one should reference the appropriate crime as set forth in the Code of Criminal Justice.<sup>48</sup> The non-Code statutes that have statutory counterparts in the Code are set forth in Figure 2.

**Figure 2.**



- *Repeal*

Finally, there are several non-Code statutes that are anachronistic, duplicative or have been superseded by statutes contained in the Code of Criminal Justice. To avoid confusion in their application, these statutes should be repealed.<sup>49</sup>

<sup>47</sup> See *infra* Appendix pp. 5-9 and pp. 40-87.

<sup>48</sup> See *infra* Appendix pp. 10-12 and pp. 88-144 and Figure 2.

<sup>49</sup> See *infra* Appendix pp. 13-15 and pp. 145-172.

## **Conclusion**

The classification of an offense, for sentencing purposes, as a misdemeanor or a high misdemeanor is anachronistic and pre-dates the enactment of the New Jersey Code of Criminal Justice. The removal of the unnecessary statutory references would both clarify and simplify these statutes while securing the better administration of justice by having a common reference for all criminal behavior.

The Appendix, on the following pages, proposes the elimination of the term misdemeanor from virtually all the New Jersey Statutes. The removal of these references is consistent with the proscribed intent of the Legislature to "...give[s] fair warning [to the citizenry] of the nature of the conduct proscribed and the sentences authorized upon conviction..."<sup>50</sup> and is consistent with constitutional notions of fundamental fairness and due process.

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<sup>50</sup> N.J.S. 2C:1-2(a)(4).