

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2409/1dn
JEO:jlg:lp

March 5, 1999

Please note the following when reviewing this draft:

1. This draft amends s. 948.05 (1) (intro.), stats., to require the state to prove in all prosecutions for sexual exploitation of a child that the defendant knew or had reason to know that the child was under the age of 18. The "reason to know" language follows the language in s. 948.12 (3), stats., which prohibits the possession of child pornography.

Because the draft requires proof of the defendant's knowledge of the child's age in all prosecutions under s. 948.05 (1), stats., and not just prosecutions under s. 948.05 (1) (c), stats., it goes beyond what is necessary to fix the statute in light of *State v. Zarnke*, __ Wis. 2d __ (2/26/99). However, you should note that in paragraph 48 of the *Zarnke* opinion the court explicitly reserved the question of whether the remaining portion of s. 948.05 (1) (c), stats., is constitutional. Also, there may be acts under s. 948.05 (1) (a) and (b), stats., that run into the same problem encountered in the *Zarnke* case, namely, that the defendant has no personal interaction with the child and therefore cannot as a practical matter avail himself or herself of the affirmative defense in s. 948.05 (3), stats. Thus, even though the broad approach taken in this draft is not necessary to deal with the result of the *Zarnke* decision, it obviates the need for further litigation about the constitutionality of other provisions of s. 948.05 (1), stats., based on the holding under *Zarnke* that an "essential element" of s. 948.05, stats., is "the accused's knowledge of the minority of the child-victim" (*Zarnke* at paragraph 25).

2. This draft does not have an initial applicability provision on the assumption that the knowledge element being added to offenses under s. 948.05 (1), stats., should apply to pending cases because of the constitutional implications of *not* requiring the state to prove knowledge.

Please let me know if you have any questions or changes.

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