1999 DRAFTING REQUEST

Bill

Received: 03/4/99				Received By: olsenje				
Wanted: As time permits For: Michael Huehsch (608) 266-0631				Identical to LRB: By/Representing: Don Dyke				
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May Co	ntact:							
Subject: Criminal Law - crimes agnst kids				Extra Copies: Don Dyke, Leg. Council				
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Sexual 6	exploitation of	f a child						
Instruc	tions:							
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Vers.	<u>Drafted</u>	Reviewed	<u>Typed</u>	<u>Proofed</u>	Submitted	<u>Jacketed</u>	Required	
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Receive	ed: 03/4/99				Received By: ols	senje								
Wanted: As time permits For: Michael Huebsch (608) 266-0631 This file may be shown to any legislator: NO				Identical to LRB: By/Representing: Don Dyke Drafter: olsenje										
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State af Misconsin 1999 - 2000 LEGISLATURE

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Monday 3/8
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LRB-240911 JEO:هرنا

1999 BILL

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AN ACT ...; relating to: sexual exploitation of a child.

Analysis by the Legislative Reference Bureau

Under current law, a person is guilty of sexual exploitation of a child who has not attained the age of 18 if the person does any of the following with knowledge of the character and content of the sexually explicit conduct involving the child: 1) employs, induces, entices or coerces any child to engage in sexually explicit conduct for the purpose of photographing, recording or displaying the conduct; 2) photographs, records or displays a child engaged in sexually explicit conduct; or 3) produces, performs in, profits from, promotes, sells or distributes any photograph, recording or other reproduction of a child engaging in sexually explicit conduct.

The Wisconsin Supreme Court has decided that part of the current law prohibitions against sexual exploitation of a child is unconstitutional. State *v. Zarnke*, __ Wis. 2d __ (No. 97–1664–CR, decided February 26, 1999). Specifically, the court struck down the prohibition relating to profiting from, promoting, selling or distributing material showing a child engaging in sexually explicit conduct. The court decided that to be held criminally responsible for sexual exploitation of a child the defendant must know that the child had not attained the age of 18. Although current law requires a prosecutor to prove that the child involved in the sexually explicit conduct is under the age of 18, current law does not require the prosecutor to prove that the defendant *knew* that the child is under the age of 18.

Current law does provide that a defendant charged with sexual exploitation of a child has a defense to the charge if the defendant had reasonable cause to believe that the child had attained the age of 18 and the child exhibited an official or apparently official document purporting to show that the child had attained the age **BILL**

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of 18. However, the court found that it is virtually impossible for a defendant to prove the defense if he or she is charged with profiting from, promoting, selling or distributing material showing a child engaging in sexually explicit conduct because in such cases a defendant's conduct does not entail a personal meeting with the child during which the child could exhibit the document purporting to show his or her age. Thus, the court decided that the affirmative defense does not prevent a defendant in such cases from being convicted even though he or she did not know that the child was under the age of 18.

This bill changes the current statute prohibiting sexual exploitation of a child to require the prosecutor to prove that the defendant knew or had reason to know that the child engaged in the sexually explicit conduct is under the age of 18. The bill also eliminates the affirmative defense provided under current law for persons charged with sexual exploitation of a child. It is no longer appropriate to provide an affirmative defense given the requirement under the bill that the prosecutor prove the defendant's knowledge of the child's age.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

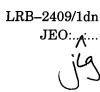
SECTION 1. 948.05 (1) (intro.) of the statutes is amended to read:

948.05 (1) (intro.) Whoever does any of the following with knowledge of knowing or having reason to know that the child engaged in the sexually explicit conduct has not attained the age of 18 years and knowing the character and content of the sexually explicit conduct involving the child is guilty of a Class C felony:

History: 1987 a. 332. X SECTION 2. 948.05 (3) of the statutes is repealed.

7 (END)

DRAFTER'S NOTE FROMTHE LEGISLATIVE REFERENCE BUREAU



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., itgoes 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 ins. 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.

Jefren E. Olsen Legislative Attorney Phone: (608) 266–8906

E-mail: Jefren.Olsen@legis.state.wi.us

DRAFTER'S NOTE FROMTHE LEGISLATIVE REFERENCE BUREAU

LRB-2409/1dn JEO:ilg:lp

March 5, 1999

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