1999 DRAFTING REQUEST

Bill

Received: **03/4/99**

Received By: **olsenje**

Wanted: **As time permits**

Identical to LRB:

For: **Michael Huehsch (608) 266-0631**

By/Representing: **Don Dyke**

This file may be shown to any legislator: NO

Drafter: **olsenje**

May Contact:

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Subject: **Criminal Law - crimes agnst kids**

Extra Copies: **Don Dyke, Leg. Council**

Pre Topic:

No specific pre topic given

Topic:

Sexual exploitation of a child

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/1	olsenje 03/4/99	jgeller 03/5/99	lpaasch 03/5/99	_____ _____	lrb-docadmin 03/5/99	lrb-docadmin 03/8/99	

FE Sent For:

Not Needed

<END>

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for Assm per JEO

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FE Sent For:

<END>

r. Huebsch by Dan Dyke

948.05 Zamba

proof of (of age)
Require knowledge for
all offenses

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-240911
JEO:

D-Nobe
By Monday 3/8 a.m.

1999 BILL

gen cat

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

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.

SECTION 2. 948.05 (3) of the statutes is repealed.

(END)

DRAFTER'S NOTE
FROMTHE
LEGISLATIVE REFERENCE BUREAU

LRB–2409/1dn
JEO:...

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 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
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DRAFTER'S NOTE
FROMTHE
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 (l), 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 (l), 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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