DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–2379/1dn
JEO:jlg:lp

March 5, 1999

Please note the following when reviewing this draft:

1. This draft amends s. 948.05 (1) (c), stats., to remove *only* the language struck down by *State v. Zarnke,* __ Wis. 2d __ (2/26/99). It then creates a new subsection in s. 948.05, stats., that includes the language removed from s. 948.05 (1) (c), stats., plus the requirement that the state prove that the defendant knows or reasonably should know that the child in the offending material was under the age of 18. The "reasonably should know" language was not discussed by the court in *Zarnke* but I included it in this draft for consistency with s. 948.12 (3), stats., which prohibits the possession of child pornography.

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, you may want to consider whether the draft should require the state to prove the defendant's knowledge of the child's age in prosecutions for any of the other acts under s. 948.05 (1), stats. (though broadening the scope of the draft in this way is *not* necessary to deal with the result of the *Zarnke* decision).

2. Proposed s. 948.05 (1m) requires proof that the defendant knows "the character and content of the sexually explicit conduct *involving the child*". This follows s. 948.05 (1) (intro.), stats. On the other hand, s. 948.12 (2), stats., requires knowledge of "the character and content of the sexually explicit conduct *shown in the material*". It seems to me that in the context of proposed s. 948.05 (1m) there may be no difference between the two formulations. However, you may want to get the opinion of prosecutors as to whether requiring proof of the character and content of the conduct "involving the child" presents any practical (or legal) problems.

3. I assume that you intend for the acts prohibited under proposed s. 948.05 (1m) to carry the same consequences as they did when covered under s. 948.05 (1) (c), stats. On this assumption, the draft inserts cross–references to proposed s. 948.05 (1m) in ss. 939.615 (1) (b) 1., 948.05 (2), 948.13 (1) (a) and 973.034, stats. Is my assumption correct?

4. The draft does not contain an initial applicability provision because I don't think such a provision is necessary. Acts covered by the draft that occurred before the

effective date of the bill cannot be prosecuted under *either* s. 948.05 (1) (c), stats. (because of the constitutionality problem) *or* proposed s. 948.05 (1m) (because of the *ex post facto* clause of the state and federal constitutions).

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

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