



2013 ASSEMBLY BILL 641

January 21, 2014 - Introduced by Representatives NASS, PETRYK, HESSELBEIN, KULP, KOLSTE, MURPHY, LEMAHIEU, PRIDEMORE, T. LARSON, VRUWINK, BERNARD SCHABER, MARKLEIN, BERNIER, RIPP and BIES, cosponsored by Senators PETROWSKI, KEDZIE, LEHMAN, OLSEN and SCHULTZ. Referred to Committee on Veterans.

1 **AN ACT to amend** 322.001 (15), 322.001 (23), 322.016 (2) (a), 322.026 (2) (a) and
2 322.139 (1); **to repeal and recreate** 322.120; and **to create** 322.1201,
3 322.1202 and 322.1203 of the statutes; **relating to:** stalking and sexual
4 offenses under the code of military justice.

Analysis by the Legislative Reference Bureau

Currently, the statutes include the Wisconsin Code of Military Justice, which provides the procedures, responsibilities, and penalties concerning actions involving members of the state military forces, generally the members of the Wisconsin Air and Army National Guard, that may result in a court-martial. This code parallels the federal code of military justice, which applies to active members of the U.S. armed forces. These codes establish the members of and methods used in a court-martial, as well as the types of behavior that may result in being the subject of a court-martial.

This bill replaces one section of the code currently dealing with rape and carnal knowledge with four new sections concerning sexual assault of adults and children, other sexual misconduct, and stalking, to make the Wisconsin code consistent with changes made in the federal code in 2011. The bill defines what constitutes sexual assault against an adult and against a child, other sexual misconduct, and stalking, specifies what defenses are available to a defendant, and provides for punishment as determined by the members of the court martial.

The bill also allows a commissioned officer of the U.S. armed forces to preside over a court-martial involving a member of the state military forces. Currently, only

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a commissioned officer of a Wisconsin military force may preside over a court-martial involving a member of the state military forces.

The bill removes the requirement that the commanding officer convene a board of three commissioned officers to investigate and recommend action regarding a complaint that a member of a state military force damaged or took another person's property. Instead, the bill allows the commanding officer to investigate the complaint and determine the amount, if any, that has to be paid to an injured party.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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

1 **SECTION 1.** 322.001 (15) of the statutes is amended to read:

2 322.001 (15) "Military offenses" means those offenses prescribed under articles
3 77, principals; 78, accessory after the fact; 80, attempts; 81, conspiracy; 82,
4 solicitation; 83, fraudulent enlistment, appointment, or separation; 84, unlawful
5 enlistment, appointment, or separation; 85, desertion; 86, absence without leave; 87,
6 missing movement; 88, contempt toward officials; 89, disrespect towards superior
7 commissioned officer; 90, assaulting or willfully disobeying superior commissioned
8 officer; 91, insubordinate conduct toward warrant officer, noncommissioned officer,
9 or petty officer; 92, failure to obey order or regulation; 93, cruelty and maltreatment;
10 94, mutiny or sedition; 95, resistance, flight, breach of arrest, and escape; 96,
11 releasing prisoner without proper authority; 97, unlawful detention; 98,
12 noncompliance with procedural rules; 99, misbehavior before the enemy; 100,
13 subordinate compelling surrender; 101, improper use of countersign; 102, forcing a
14 safeguard; 103, captured or abandoned property; 104, aiding the enemy; 105,
15 misconduct as prisoner; 107, false official statements; 108, military property — loss,
16 damage, destruction, or wrongful disposition; 109, property other than military

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1 property — waste, spoilage, or destruction; 110, improper hazarding of vessel; 111,
2 drunken or reckless operation of a vehicle, aircraft, or vessel; 112, drunk on duty;
3 112a, wrongful use, or possession of controlled substances; 113, misbehavior of
4 sentinel; 114, dueling; 115, malingering; 116, riot or breach of peace; 117, provoking
5 speeches or gestures; 120, ~~rape or carnal knowledge; and sexual assault generally;~~
6 120a, stalking; 120b, rape and sexual assault of a child; 120c, sexual misconduct;
7 121, larceny and wrongful appropriation; 122, robbery; 123, forgery; 124, maiming;
8 126, arson; 127, extortion; 128, assault; 129, burglary; 130, housebreaking; 131,
9 perjury; 132, frauds against the government; 133, conduct unbecoming an officer and
10 a gentleman; and 134, general; of this code.

11 **SECTION 2.** 322.001 (23) of the statutes is amended to read:

12 322.001 (23) “State military forces” means the Wisconsin army and air national
13 guard, the national guard, as defined in 32 USC 502, 503, ~~or 904~~ 101, the state
14 defense force, the organized naval militia of the state, and any other military force
15 organized under the Constitution and laws of the state, ~~and but~~ does not include the
16 unorganized militia, ~~state guard, or home guard, when not in.~~ “State military forces”
17 does not include the national guard when under a status subjecting them to exclusive
18 jurisdiction under 10 USC ch. 47.

19 **SECTION 3.** 322.016 (2) (a) of the statutes is amended to read:

20 322.016 (2) (a) A military judge and not less than 3 members. ~~An accused may~~
21 ~~waive having 12 members and proceed to a special court-martial with not less than~~
22 ~~6 members.~~

23 **SECTION 4.** 322.026 (2) (a) of the statutes is amended to read:

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1 322.026 (2) (a) Be a commissioned officer of the armed forces of the United
2 States or of a component thereof or a commissioned officer of an organized state
3 military force.

4 **SECTION 5.** 322.120 of the statutes is repealed and recreated to read:

5 **322.120 Article 120 - Rape and sexual assault generally.**

6 **(1)** In this section:

7 (a) “Bodily harm” means any offensive touching of another, however slight,
8 including any nonconsensual sexual act or nonconsensual sexual contact.

9 (b) 1. “Consent” means a freely given agreement to the conduct at issue by a
10 competent person.

11 2. An expression of lack of consent through words or conduct means there is no
12 consent. Submission or lack of oral or physical resistance, resulting from the use of
13 force, threat of force, or placing another person in fear, does not constitute consent.
14 A current or previous dating or social or sexual relationship by itself or the manner
15 of dress of the person involved with the accused in the conduct at issue shall not
16 constitute consent. A sleeping, unconscious, or incompetent person cannot consent.
17 A person cannot consent to force causing or likely to cause death or grievous bodily
18 harm or to being rendered unconscious. A person cannot consent while under threat
19 or in fear.

20 3. Lack of consent may be inferred based on the circumstances of the offense.
21 All the surrounding circumstances are to be considered in determining whether a
22 person gave consent or whether a person did not resist or ceased to resist only
23 because of another person’s actions.

24 (c) “Force” means any of the following:

25 1. The use of a weapon.

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1 2. The use of physical strength or violence that is likely to overcome, restrain,
2 or injure a person.

3 3. Inflicting physical harm that is likely to coerce or compel submission by the
4 victim.

5 (d) "Grievous bodily harm" means serious bodily injury, including fractured or
6 dislocated bones, deep cuts, torn members of the body, serious damage to internal
7 organs, or other severe bodily injuries. "Grievous bodily harm" does not include
8 minor injuries such as a black eye or a bloody nose.

9 (e) "Sexual act" means any of the following:

10 1. Contact between the penis and the vulva or anus or mouth, and for purposes
11 of this subparagraph contact involving the penis occurs upon penetration, however
12 slight.

13 2. The penetration, however slight, of the vulva or anus or mouth, of another
14 by any part of the body or by any object, with an intent to abuse, humiliate, harass,
15 or degrade any person or to arouse or gratify the sexual desire of any person.

16 (f) "Sexual contact" means any of the following:

17 1. Touching, or causing another person to touch, either directly or through the
18 clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person,
19 with an intent to abuse, humiliate, or degrade any person.

20 2. Any touching, or causing another person to touch, either directly or through
21 the clothing, any body part of any person, if done with an intent to arouse or gratify
22 the sexual desire of any person. Touching may be accomplished by any part of the
23 body.

24 (g) "Threatening or placing that other person in fear" means a communication
25 or action that is of sufficient consequence to cause a reasonable fear that

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1 noncompliance will result in the victim or another person being subjected to the
2 wrongful action contemplated by the communication or action.

3 (h) "Unlawful force" means an act of force done without legal justification or
4 excuse.

5 (2) Any person subject to this chapter who commits a sexual act upon another
6 person without consent by doing any of the following is guilty of rape and shall be
7 punished as a court-martial may direct:

8 (a) Using unlawful force against that other person;

9 (b) Using force causing or likely to cause death or grievous bodily harm to any
10 person.

11 (c) Threatening or placing that other person in fear that any person will be
12 subjected to death, grievous bodily harm, or kidnapping.

13 (d) Rendering that other person unconscious.

14 (e) Administering to that other person by force or threat of force, or without the
15 knowledge or consent of that person, a drug, intoxicant, or other similar substance
16 and thereby substantially impairing the ability of that other person to appraise or
17 control his or her conduct.

18 (3) Any person subject to this chapter who does any of the following is guilty
19 of sexual assault and shall be punished as a court-martial may direct:

20 (a) Commits a sexual act upon another person without consent by doing any
21 of the following:

22 1. Threatening or placing that other person in fear.

23 2. Causing bodily harm to that other person.

24 3. Making a fraudulent representation that the sexual act serves a professional
25 purpose.

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1 4. Inducing a belief by any artifice, pretense, or concealment that the person
2 is another person.

3 (b) Commits a sexual act upon another person when the person knows or
4 reasonably should know that the other person is asleep, unconscious, or otherwise
5 unaware that the sexual act is occurring.

6 (c) Commits a sexual act upon another person when the other person is
7 incapable of consenting to the sexual act due to any of the following:

8 1. Impairment by any drug, intoxicant, or other similar substance, and that
9 condition is known or reasonably should be known by the person.

10 2. A mental disease or defect or a physical disability, and that condition is
11 known or reasonably should be known by the person.

12 **(4)** Any person subject to this chapter who commits or causes sexual contact
13 upon or by another person, if to do so would violate sub. (2) had the sexual contact
14 been a sexual act, is guilty of aggravated sexual contact and shall be punished as a
15 court-martial may direct.

16 **(5)** Any person subject to this chapter who commits or causes sexual contact
17 upon or by another person, if to do so would violate subsection (3) had the sexual
18 contact been a sexual act, is guilty of abusive sexual contact and shall be punished
19 as a court-martial may direct.

20 **(6)** In a prosecution under this section, in proving that a person made a threat,
21 it need not be proven that the person actually intended to carry out the threat or had
22 the ability to carry out the threat.

23 **(7)** An accused may raise any applicable defenses available under this chapter
24 or the rules for court-martial. Marriage is not a defense for any conduct in issue in
25 any prosecution under this section.

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1 **SECTION 6.** 322.1201 of the statutes is created to read:

2 **322.1201 Article 120a - Stalking.**

3 **(1)** In this section:

4 (a) “Course of conduct” means any of the following:

5 1. A repeated maintenance of visual or physical proximity to a specific person.

6 2. A repeated conveyance of oral threat, written threats, or threats implied by
7 conduct, or a combination of such threats, directed at or toward a specific person.

8 (b) “Immediate family” means a spouse, parent, son, daughter, or sibling of the
9 person, or a relative or intimate partner of the person who regularly resides in the
10 household of the person or who within the six months preceding the commencement
11 of a course of conduct regularly resided in the household of the person.

12 (c) “Repeated,” with respect to a course of conduct, means two or more occasions
13 of such conduct.

14 **(2)** Any person subject to this chapter who does all of the following is guilty of
15 stalking and shall be punished as a court-martial may direct:

16 (a) Wrongfully engages in a course of conduct directed at a specific person that
17 would cause a reasonable person to fear death or bodily harm, including sexual
18 assault, to himself or herself or a member of his or her immediate family.

19 (b) Has knowledge or should have knowledge that the specific person will be
20 placed in reasonable fear of death or bodily harm, including sexual assault, to himself
21 or herself or a member of his or her immediate family.

22 (c) Commits acts that induce reasonable fear in the specific person of death or
23 bodily harm, including sexual assault, to himself or herself or a member of his or her
24 immediate family.

25 **SECTION 7.** 322.1202 of the statutes is created to read:

ASSEMBLY BILL 641**1 322.1202 Article 120b - Rape and sexual assault of a child.**

2 **(1)** In this section:

3 (a) “Child” means any person who has not attained the age of 16 years.

4 (b) “Force” means any of the following:

5 1. The use of a weapon.

6 2. The use of physical strength or violence that is likely to overcome, restrain,
7 or injure a child.

8 3. Inflicting physical harm.

9 4. In the case of a parent-child or similar relationship, the abuse of parental
10 or similar authority.

11 (c) “Lewd act” means any of the following:

12 1. Any sexual contact with a child.

13 2. Intentionally exposing one’s genitalia, anus, buttocks, or female areola or
14 nipple to a child by any means, including via any communication technology, with
15 an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the
16 sexual desire of any person.

17 3. Intentionally communicating indecent language to a child by any means,
18 including via any communication technology, with an intent to abuse, humiliate, or
19 degrade any person, or to arouse or gratify the sexual desire of any person.

20 4. Any conduct intentionally done with or in the presence of a child, including
21 via any communication technology, that amounts to a form of immorality relating to
22 sexual impurity which is grossly vulgar, obscene, and repugnant to common
23 propriety, and tends to excite sexual desire or deprave morals with respect to sexual
24 relations.

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1 (d) "Sexual act" and "sexual contact" have the meanings given in s. 322.120 (1)

2 (e) and (f).

3 (e) "Threatening or placing that child in fear" means a communication or action
4 that is of sufficient consequence to cause the child to fear that noncompliance will
5 result in the child or another person being subjected to the wrongful action
6 contemplated by the communication or action.

7 **(2)** Any person subject to this chapter who does any of the following is guilty
8 of rape and shall be punished as a court-martial may direct:

9 (a) Commits a sexual act upon a child who has not attained the age of 12 years.

10 (b) Commits a sexual act upon a child who has attained the age of 12 years by
11 doing any of the following:

12 1. Using force against any person.

13 2. Threatening or placing that child in fear.

14 3. Rendering that child unconscious.

15 4. Administering to that child a drug, intoxicant, or other similar substance.

16 **(3)** Any person subject to this chapter who commits a sexual act upon a child
17 who has attained the age of 12 years is guilty of sexual assault of a child and shall
18 be punished as a court-martial may direct.

19 **(4)** Any person subject to this chapter who commits a lewd act upon a child is
20 guilty of sexual abuse of a child and shall be punished as a court-martial may direct.

21 **(5)** In a prosecution under this section, it need not be proven that the accused
22 knew the age of the other person engaging in the sexual act or lewd act. It is not a
23 defense that the accused reasonably believed that the child had attained the age of
24 12 years.

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1 **(6)** In a prosecution under this section, it need not be proven that the accused
2 knew that the other person engaging in the sexual act or lewd act had not attained
3 the age of 16 years, but it is a defense in a prosecution under subs. (3) or (4), which
4 the accused must prove by a preponderance of the evidence, that the accused
5 reasonably believed that the child had attained the age of 16 years, if the child had
6 in fact attained at least the age of 12 years.

7 **(7)** In a prosecution under this section, in proving that a person made a threat,
8 it need not be proven that the person actually intended to carry out the threat or had
9 the ability to carry out the threat.

10 **(8)** Lack of consent is not an element and need not be proven in any prosecution
11 under this section. A child not legally married to the person committing the sexual
12 act, lewd act, or use of force cannot consent to any sexual act, lewd act, or use of force.

13 **SECTION 8.** 322.1203 of the statutes is created to read:

14 **322.1203 Article 120c - Other sexual misconduct.**

15 **(1)** In this section:

16 (a) "Act of prostitution" means a sexual act or sexual contact on account of
17 which anything of value is given to, or received by, any person.

18 (b) "Broadcast" means to electronically transmit a visual image with the intent
19 that it be viewed by a person.

20 (c) "Distribute" means delivering to the actual or constructive possession of
21 another, including transmission by electronic means.

22 (d) "Indecent manner" means conduct that amounts to a form of immorality
23 relating to sexual impurity which is grossly vulgar, obscene, and repugnant to
24 common propriety, and tends to excite sexual desire or deprave morals with respect
25 to sexual relations.

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1 (e) "Private area" means the naked or underwear-clad genitalia, anus,
2 buttocks, or female areola or nipple.

3 (f) "Under circumstances in which that other person has a reasonable
4 expectation of privacy" means any of the following:

5 1. Circumstances in which a reasonable person would believe that he or she
6 could disrobe in privacy, without being concerned that an image of a private area of
7 the person was being captured.

8 2. Circumstances in which a reasonable person would believe that a private
9 area of the person would not be visible to the public.

10 **(2)** Any person subject to this chapter who, without legal justification or lawful
11 authorization who does any of the following is guilty of sexual misconduct and shall
12 be punished as a court-martial may direct:

13 (a) Knowingly and wrongfully views the private area of another person,
14 without that other person's consent and under circumstances in which that other
15 person has a reasonable expectation of privacy.

16 (b) Knowingly photographs, videotapes, films, or records by any means the
17 private area of another person, without that other person's consent and under
18 circumstances in which that other person has a reasonable expectation of privacy.

19 (c) Knowingly broadcasts or distributes any such recording that the person
20 knew or reasonably should have known was made under the circumstances
21 proscribed in pars. (a) and (b).

22 **(3)** Any person subject to this chapter who compels another person to engage
23 in an act of prostitution with any person is guilty of forcible pandering and shall be
24 punished as a court-martial may direct.

