

1999 DRAFTING REQUEST

Bill

Received: 01/24/2000

Received By: **olsenje**

Wanted: **As time permits**

Identical to LRB:

For: **Brian Burke (608) 266-8535**

By/Representing: **Debbie**

This file may be shown to any legislator: **NO**

Drafter: **olsenje**

May Contact:

Alt. Drafters:

Subject: **Criminal Law - guns and weapons**
Criminal Law - miscellaneous

Extra Copies: **MGD**

Pre Topic:

No specific pre topic given

Topic:

Department of Justice authority to prosecute certain weapons offenses

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	olsenje 02/08/2000	csicilia 02/08/2000	martykr 02/08/2000	_____	lrb_docadmin 02/08/2000	lrb_docadminState 02/28/2000	

FE Sent For:

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Seaf Burke

by Debbie

If needed, give DOJ
authority * to prosecute
under 941.29 & 175.35 (re)

* Concurrent w/PA

175.35(4)
941.29 (11)

27.01(12)

(12) **Legal counsel.** A representative of the department of justice designated by the attorney general shall act as legal counsel for said department of natural resources, both in proceedings and litigation, and in giving advice and counsel. The respective district attorneys of the county or counties where said park is or shall be located shall prosecute all violations of this section occurring within their respective counties as provided in s. 26.18.

40.03(3)

(3) **Department of justice.** The department of justice shall furnish legal counsel and shall prosecute or defend all actions brought by or against the board, department, group insurance board or any employe of the department as a result of the performance of the department employe's duties.

49.495

49.495 Jurisdiction of the department of justice. The department of justice or the district attorney may institute, manage, control and direct, in the proper county, any prosecution for violation of criminal laws affecting the medical assistance program including but not limited to laws relating to medical assistance contained in this subchapter and laws affecting the health, safety and welfare of recipients of medical assistance. For this purpose the department of justice shall have and exercise all powers conferred upon district attorneys in such cases. The department of justice or district attorney shall notify the medical examining board or the interested affiliated credentialing board of any such prosecution of a person holding a license granted by the board or affiliated credentialing board.

101.02(5)(f)

(f) Upon the request of the department, the department of justice or district attorney of the county in which any investigation, hearing or trial had under this subchapter is pending, shall aid the department in the investigation, hearing or trial and, under the supervision of the department, prosecute all necessary actions or proceedings for the enforcement and punishment of violations of this subchapter and all other laws of this state relating to the protection of life, health, safety and welfare.

102.64(2)

(2) Upon request of the department of administration, the attorney general shall appear on behalf of the state in proceedings upon claims for compensation against the state. The department of justice shall represent the interests of the state in proceedings under s. 102.49, 102.59 or 102.66. The department of justice may compromise claims in such proceedings, but the compromises are subject to review by the department of workforce development. Costs incurred by the department of justice in prosecuting or defending any claim for payment into or out of the work injury supplemental benefit fund under s. 102.65, including expert witness and witness fees but not including attorney fees or attorney travel expenses for services performed under this subsection, shall be paid from the work injury supplemental benefit fund.

103.005(5)(f)

(f) Upon the request of the department, the department of justice or district attorney of the county in which any investigation, hearing or trial had under chs. 103 to 106 is pending, shall aid therein and prosecute under the supervision of the department, all necessary actions or proceedings for the enforcement of those sections and all other laws of this state relating to the regulation of employment, and for the punishment of all violations thereof.

103.28(3)

(3) The department may refer violations of ss. 103.21 to 103.275 for prosecution by the department of justice or the district attorney for the county in which the violation occurred.

103.545(6)

(6) Upon complaint of an affected employer, labor organization or employee, the department may investigate violations and issue orders to enforce this section. The investigations and orders shall be made as provided under s. 103.005. Orders are subject to review as provided in ch. 227. The department of justice may, upon request of the commission, prosecute violations of this section in any court of competent jurisdiction.

133.17(1)

(1) The department of justice or the district attorney shall institute, manage, control and direct, in the proper county, all prosecutions for violations of this chapter. When prosecuting violations of this chapter, the department of justice shall have and exercise all powers conferred upon district attorneys.

165.065(1)

(1) At least one assistant attorney general shall be assigned to the investigation and prosecution of violations arising under ch. 133 and shall carry out the duties imposed on the attorney general by ch. 133. All apparent violations of ch. 133 which come to the attention of any officer or agency of state government shall be reported to one of such assistant attorneys general. All officers and agencies shall cooperate with and assist the department of justice in the investigation and prosecution of such apparent violations.

301.45(6)(a)

(a) Whoever intentionally fails to comply with any requirement to provide information under subs. (2) to (4) may be fined not more than \$10,000 or imprisoned for not more than 9 months or both. Subject to s. 971.19 (9), a district attorney or, upon the request of a district attorney, the department of justice may prosecute a violation of this subsection. If the department of corrections determines that there is probable cause to believe that a person has intentionally failed to comply with any requirement to provide information under subs. (2) to (4), the department shall forward a certified copy of all pertinent departmental information to the applicable district attorney. The department shall certify the copy in accordance with s. 889.08.

440.48(1)(a)

(a) The department of justice may bring an action to prosecute a violation of this subchapter or the rules promulgated under this subchapter, including an action for temporary or permanent

injunction.

Olsen, Jefren

To: ~~XXXXXXXXXX~~
Subject: AG's power to prosecute crimes

Matt,

You asked about the legal basis for the limitation on the attorney general's power to prosecute criminal actions.

Under article IV, section 3 of the Wisconsin Constitution the attorney general has only those powers and duties "prescribed by law." This provision of the constitution has been interpreted by the courts as removing from the office of the attorney general any powers and duties which were found in that office under common law. Thus, the attorney general has no inherent power to initiate and prosecute litigation. Rather, such power must be specifically granted by the legislature. "Unless the power to prosecute a specific action is granted by law, the office of the attorney general is powerless to act." *Estate of Sharp*, 63 Wis. 2d 254, 261 (1974), citing *State ex rel. Beck v. Duffy*, 38 Wis. 2d 149, 163 (1968), *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 538 (1963), and *State v. Snyder*, 172 Wis. 415, 417 (1920); see also *Public Intervenor v. DNR*, 115 Wis. 2d 28, 35-37 (1983) and *State v. Wickstrom*, 118 Wis. 2d 339, 345 (Ct. App. 1984).

Under current law, the district attorney has the duty to prosecute all criminal actions before the courts of his or her prosecutorial unit. Section 978.05 (1), stats. However, the legislature has granted explicit powers to the attorney general to prosecute criminal actions under certain circumstances. For example, under current statutes, the attorney general has the duty to "appear for the state and prosecute or defend all actions and proceedings, civil or criminal, *in the court of appeals and the supreme court*, in which the state is interested or a party, . . ." Section 165.25 (1), stats. The attorney general also may prosecute civil or criminal matters on behalf of the state "if requested by the governor or either house of the legislature". *Id.* Finally, the attorney general has been given authority to prosecute certain offenses (civil and criminal) in the specific statutes dealing with those offenses. See, for instance, ss. 49.495 (crimes relating to the medical assistance program); 101.02 (5) (f) (violations of the state building and safety codes); 103.28 (3) and 103.545 (6) (certain employment law violations); 133.17 (1) and 165.065 (1) (antitrust law violations); and 301.45 (6) (a) (violations of sex offender registry requirements).

Thus, the constitution limits the power of the attorney general. That limitation is reflected in (and reinforced by) both the explicit grants of power that current law makes to the attorney general to prosecute certain actions and the explicit statutory duty of the district attorney to prosecute all criminal actions in his or her prosecutorial unit. Thus, without an explicit grant of authority to the attorney general to prosecute violations of s. 175.35 or 941.29, stats., the attorney general will be unable to commence and maintain such prosecutions.

I hope that this information is helpful. Please let me know if you have any questions.

Jefren Olsen

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State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-4305/1

JEO:1:...

Soon

gjs

1999 BILL

ger

1 AN ACT ...; relating to: authorizing the department of justice to prosecute
2 violations of certain laws regulating firearms.

Analysis by the Legislative Reference Bureau

The Wisconsin constitution provides that powers and duties of the attorney general shall be prescribed by law. This provision of the constitution has been interpreted to mean that the attorney general has only those powers and duties that are specifically granted by the legislature. *Estate of Sharp*, 63 Wis. 2d 254, 261 (1971). The same limitation applies to the department of justice (DOJ), which is under the direction and supervision of the attorney general.

The legislature has not granted the attorney general or DOJ a general power to prosecute criminal cases. Rather, under current law the duty to prosecute criminal cases generally lies with district attorneys. However, current law does explicitly provide that DOJ may prosecute certain criminal cases, such as those relating to the medical assistance program and those involving violations of the state building and safety codes, state antitrust laws and the sex offender registration requirements. Current law also provides that, with certain exceptions, the attorney general has the duty to represent the state in criminal cases being reviewed by the court of appeals or the supreme court.

This bill provides that DOJ may prosecute criminal cases that involving violations of the following laws: 1) the law requiring that a prospective purchaser of a handgun provide identifying information to a firearms dealer and undergo a background check before taking possession of the handgun; and 2) the law prohibiting certain persons (such as convicted felons) from possessing a firearm.

Barman, Mike

From: Barman, Mike
Sent: Friday, February 11, 2000 4:02 PM
To: Sybell, Debra
Subject: LRB 99-4305/1 (per your request)



99-4305/1

Mike Barman

Mike Barman - Senior Program Asst. (PH. 608-266-3561)
(E-Mail: mike.barman@legis.state.wi.us) (FAX: 608-264-6948)

State of Wisconsin
Legislative Reference Bureau - Legal Section - Front Office
100 N. Hamilton Street - 5th Floor
Madison, WI 53703

**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 02/08/2000

To: Senator Burke

Relating to LRB drafting number: LRB-4305

Topic

Department of Justice authority to prosecute certain weapons offenses

Subject(s)

Criminal Law - guns and weapons, Criminal Law - miscellaneous

1. **JACKET** the draft for introduction B Burke
in the Senate or the Assembly (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____
A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____
If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Jefren E. Olsen, Senior Attorney
Telephone: (608) 266-8906