

1 **AN ACT** *to renumber and amend* 939.617 (1); *to amend* 301.48 (1) (e) 1. and
 2 939.617 (2); *to repeal and recreate* 948.02 (1), 948.025 (1) and 948.025 (2); and *to*
 3 *create* 301.48 (1) (e) 2. d. and 939.617 (1g) of the statutes; **relating to:** reconciling
 4 2005 Wisconsin Acts 430, 431, and 437; mandatory terms of confinement for certain
 5 child sex offenses, sexual assault of a child, global positioning system tracking for
 6 certain sex offenders, and providing penalties

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

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This bill draft was prepared for the Joint Legislative Council’s Special Committee on Review of Crimes Against Children.

The bill draft reconciles 2005 Wisconsin Acts 430, 431, and 437. The Revisor of Statutes has determined that provisions of these acts are mutually inconsistent.

2005 Wisconsin Act 430 (“Act 430”), commonly referred to as “Jessica’s Law”, modified the offense of 1st-degree sexual assault of a child as follows:

- Whoever has sexual intercourse with a person who has not attained the age of 12 years is guilty of a Class B felony and is subject to a mandatory minimum term of confinement in prison of 25 years.
- Whoever has sexual intercourse with a person who has not attained the age of 16 years by the use or threat of force or violence is guilty of a Class B felony and is subject to a mandatory minimum term of confinement in prison of 25 years.
- Whoever has sexual contact with a person who has not attained the age of 16 years by the use or threat of force or violence if the actor is at least 18 years of age when the sexual contact occurs is guilty of a Class B felony and is subject to a mandatory minimum term of confinement in prison of 5 years.
- Whoever has sexual contact with a person who has not attained the age of 13 years is guilty of a Class B felony.

Act 430 also created a new definition of “sexual intercourse” for purposes of the offense of 1st-degree sexual assault of a child. Under the act, “sexual intercourse” means vulvar penetration as well as cunnilingus, fellatio, or anal intercourse between persons or any intrusion of an inanimate object into the genital or anal opening either by the defendant or upon the defendant’s instruction. The emission of semen is not required. Under prior law, “sexual intercourse” for purposes of the offense of 1st-degree sexual assault of a child also included the intrusion, however slight, of any part of a person’s body into the genital or anal opening either by the defendant or upon the defendant’s instruction.

2005 Wisconsin Act 431 (“Act 431”), effective July 1, 2007, requires global positioning system (GPS) tracking for persons found to have committed 1st-degree sexual assault of a child as follows: (a) the person had sexual intercourse with a person under 12 years of age; (b) the person had sexual intercourse by use or threat of force or violence with a person under 16 years of age; or (c) the person had sexual contact by use or threat of force or violence with a person under 16 years of age and the person was 18 years of age or older at the time of the offense.

2005 Wisconsin Act 437 (“Act 437”) modified the offense of 1st-degree sexual assault of a child so that it is a Class B felony to have sexual contact or sexual intercourse with a person who is under 13 years of age and it is a Class A felony to have sexual contact or sexual intercourse with a person who is under 13 years of age if the sexual contact or sexual intercourse resulted in great bodily harm.

The bill draft does make some substantive changes to make the statutes consistent. These changes are described in the notes following each section.

1 **SECTION 1.** 301.48 (1) (e) 1. of the statutes, as created by 2005 Wisconsin Act 431, is
 2 amended to read:
 3 301.48 (1) (e) 1. Section 948.02 (1) (am), (b), (c), or (d) or 948.025 (1) (a), (b), or ~~(ag)~~
 4 (c).

NOTE: This SECTION expands the GPS tracking requirements so that they also apply to a person found to have committed 1st-degree sexual assault of a child if the sexual assault resulted in great bodily harm.

5 **SECTION 2.** 301.48 (1) (e) 2. d. of the statutes is created to read:

1 301.48 (1) (e) 2. d. The actor has sexual contact or sexual intercourse with a person who
2 has not attained the age of 13 years and the sexual contact or sexual intercourse results in great
3 bodily harm, as defined in s. 939.22 (14), to the person.

NOTE: This SECTION requires GPS tracking for a person found to have committed 1st-degree sexual assault of a child under the 2003 statutes if the actor had sexual contact or sexual intercourse with a person under the age of 13 years and the sexual contact or sexual intercourse resulted in great bodily harm to the person.

4 **SECTION 3.** 939.617 (1) of the statutes, as created by 2005 Wisconsin Act 430, is
5 renumbered 939.617 (1r) and amended to read:

6 939.617 (1r) If a person is convicted of a violation of s. 948.02 (1) (b) or (c) or 948.025
7 (1) ~~(a)~~ (b), the court shall impose a bifurcated sentence under s. 973.01. The term of
8 confinement in prison portion of the bifurcated sentence shall be at least 25 years. Otherwise
9 the penalties for the crime apply, subject to any applicable penalty enhancement.

NOTE: This SECTION changes a cross-reference to reflect the renumbering of s. 948.025 (1) in the bill draft.

10 **SECTION 4.** 939.617 (1g) of the statutes is created to read:

11 939.617 (1g) If a person is convicted of a violation of s. 948.02 (1) (am) or 948.025 (1)
12 (a), notwithstanding s. 973.014 (1g) (a) 1. and 2., the court may not make an extended
13 supervision eligibility date determination on a date that will occur before the person has served
14 a 25-year term of confinement in prison.

NOTE: This SECTION provides that if a person is convicted of having sexual intercourse or sexual contact with a person who is under 13 years of age and the sexual contact or intercourse resulted in great bodily harm or having repeatedly committed such an act, the court must order a term of confinement in prison of at least 25 years. The underlying offense is a Class A felony.

15 **SECTION 5.** 939.617 (2) of the statutes, as created by 2005 Wisconsin Act 430, is
16 amended to read:

1 939.617 (2) If a person is convicted of a violation of s. 948.02 (1) (d) or 948.025 (1)
2 ~~(ag)~~ (c), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement
3 in prison portion of the bifurcated sentence shall be at least 5 years. Otherwise the penalties
4 for the crime apply, subject to any applicable penalty enhancement.

NOTE: This SECTION changes a cross-reference to reflect the
 renumbering of s. 948.025 (1) in the bill draft.

5 **SECTION 6.** 948.02 (1) of the statutes, as affected by 2005 Wisconsin Acts 430 and 437,
6 is repealed and recreated to read:

7 948.02 (1) FIRST DEGREE SEXUAL ASSAULT. (a) In this subsection, “sexual intercourse”
8 means vulvar penetration as well as cunnilingus, fellatio, or anal intercourse between persons
9 or any intrusion of any inanimate object into the genital or anal opening either by the defendant
10 or upon the defendant’s instruction. The emission of semen is not required.

11 (am) Whoever has sexual contact or sexual intercourse with a person who has not
12 attained the age of 13 years is guilty of a Class A felony if the sexual contact or sexual
13 intercourse results in great bodily harm to the person.

14 (b) Whoever has sexual intercourse with a person who has not attained the age of 12
15 years is guilty of a Class B felony.

16 (c) Whoever has sexual intercourse with a person who has not attained the age of 16
17 years by use or threat of force or violence is guilty of a Class B felony.

18 (d) Whoever has sexual contact with a person who has not attained the age of 16 years
19 by use or threat of force or violence is guilty of a Class B felony if the actor is at least 18 years
20 of age when the sexual contact occurs.

21 (e) Whoever has sexual contact with a person who has not attained the age of 13 years
22 is guilty of a Class B felony.

NOTE: This SECTION recreates the offense of 1st-degree sexual assault of a child to reflect the changes made in Acts 430 and 437. Under this SECTION, the separate definition of “sexual intercourse” applies to all offenses of 1st-degree sexual assault of a child instead of only those created in Act 430.

COMMENT: Act 430 created the separate definition of sexual intercourse for the offense of 1st-degree sexual assault of a child. The new definition is similar to the general definition of “sexual intercourse” but does not include any intrusion, however, slight, of any part of a person’s body (e.g., digital penetration). In addition, “object” is qualified by “inanimate”. Under prior law, the general definition of “sexual intercourse” applied to 1st-degree sexual assault of a child.

For other provisions of ch. 948, stats., the definition is not affected by the bill draft. Therefore, for the purposes of the offenses of 2nd-degree sexual assault of a child, incest with a child, child enticement, use of a computer to facilitate a child sex crime, sexual assault of a child placed in substitute care, sexual intercourse with a child age 16 or older, and sexual assault by a school staff person, the general definition of “sexual intercourse” applies.

Will having a separate definition applicable to a narrow class of offenses be confusing for judges, prosecutors, defense attorneys, and others involved in a prosecution of 1st-degree sexual assault of a child?

Also, the bill draft prohibits sexual intercourse with a person under 12 years of age and prohibits sexual contact with a person under 13 years of age. Arguably, sexual intercourse is covered in the definition of “sexual contact”. Is it problematic to have different age thresholds for the offenses?

- 1 **SECTION 7.** 948.025 (1) of the statutes, as affected by 2005 Wisconsin Acts 430 and 437,
2 is repealed and recreated to read:
3 948.025 (1) (a) A Class A felony if at least 3 of the violations were violations of s. 948.02
4 (1) (am).
5 (b) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am),
6 (b), or (c) but fewer than 3 of the violations were violations of s. 948.02 (1) (am).

1 (c) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am),
2 (b), (c), or (d) but fewer than 3 of the violations were violations of s. 948.02 (1) (am), (b), or
3 (c).

4 (d) A Class B felony if at least 3 of the violations were violations of s. 948.02 (1) (am),
5 (b), (c), (d), or (e) but fewer than 3 of the violations were violations of s. 948.02 (am), (b), (c),
6 or (d).

NOTE: This SECTION reconciles Acts 430 and 437 for the offense of repeated acts of sexual assault of the same child. Under this section, a person is guilty of a Class A felony if at least 3 of the violations resulted in great bodily harm. A person is guilty of a Class B felony if:

- At least 3 of the violations resulted in great bodily harm, involved sexual intercourse with a person under the age of 12 years, or involved sexual intercourse with a person under the age of 16 years by use or threat of force or violence. A person found guilty under this provision is subject to a mandatory term of confinement prison of at least 25 years.
- At least 3 of the violations resulted in great bodily harm, involved sexual intercourse with a person under the age of 12 years, involved sexual intercourse with a person under the age of 16 years by use or threat of force or violence, or involved sexual contact with a person under the age of 16 years by use or threat of force or violence if the actor was at least 18 years of age when the offense occurred but fewer than 3 of the violations resulted in great bodily harm. A person found guilty under this provision is subject to a mandatory term of confinement in prison of at least 5 years.
- At least 3 of the violations resulted in great bodily harm, involved sexual intercourse with a person under the age of 12 years, involved sexual intercourse with a person under the age of 16 years by use or threat of force or violence, involved sexual contact with a person under the age of 16 years by use or threat of force or violence if the actor was at least 18 years of age when the offense occurred, or involved sexual contact with a person under the age of 13 years, but fewer than 3 of the violations were violations of the first 3 offenses, listed above.

7 **SECTION 8.** 948.025 (2) of the statutes, as affected by 2005 Wisconsin Acts 430 and 437,
8 is repealed and recreated to read:

1 948.025 (2) (a) If an action under sub. (1) (a) is tried to a jury, in order to find the
2 defendant guilty the members of the jury must unanimously agree that at least 3 violations of
3 s. 948.02 (1) (am) occurred within the specified period of time but need not agree on which
4 acts constitute the requisite number.

5 (b) If an action under sub. (1) (b) is tried to a jury, in order to find the defendant guilty
6 the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (am),
7 (b), or (c) occurred within the specified period of time but need not agree on which acts
8 constitute the requisite number and need not agree on whether a particular violation was a
9 violation of s. 948.02 (1) (am), (b), or (c).

10 (c) If an action under sub. (1) (c) is tried to a jury, in order to find the defendant guilty
11 the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (am),
12 (b), (c), or (d) occurred within the specified period of time but need not agree on which acts
13 constitute the requisite number and need not agree on whether a particular violation was a
14 violation of s. 948.02 (1) (am), (b), (c), or (d).

15 (d) If an action under sub. (1) (d) is tried to a jury, in order to find the defendant guilty
16 the members of the jury must unanimously agree that at least 3 violations of s. 948.02 (1) (am),
17 (b), (c), (d), or (e) occurred within the specified period of time but need not agree on which
18 acts constitute the requisite number and need not agree on whether a particular violation was
19 a violation of s. 948.02 (1) (am), (b), (c), (d), or (e).

NOTE: This SECTION reconciles Acts 430 and 437 for the required jury findings to convict a person of repeated acts of sexual assault of the same child. Under this SECTION, in an action alleging that a person committed at least 3 violations that resulted in great bodily harm, the members of the jury must unanimously agree that at least 3 violations resulting in great bodily harm occurred within the specified period of time but need not agree on which acts constitute the requisite number.

For the other actions of repeated sexual assault of the same child, the members of the jury must unanimously agree that at least 3 of the specified violations occurred within the specified period of time but need not agree which acts constitute the requisite number and need not agree on whether a particular violation was a violation of a specific 1st-degree sexual assault of a child provision (i.e., whether the act involved sexual intercourse with a person under the age of 12 years or involved sexual intercourse with a person under the age of 16 years by use or threat of force or violence).

COMMENT: Would it be clearer to draft the offense of engaging in repeated acts of the same child as follows?

The offense of repeated acts of sexual assault of the same child is as follows:

- A person is guilty of a Class A felony if at least 3 of the violations involved sexual intercourse or sexual contact with a person less than 13 years of age and resulted in great bodily harm.
- A person is guilty of a Class B felony if at least 3 of the violations were violations of 1st-degree sexual assault of a child but fewer than 3 resulted in great bodily harm.
- A person is guilty of a Class C felony if at least 3 of the violations were violations of 1st- or 2nd-degree sexual assault of a child but fewer than 3 were violations of 1st-degree sexual assault of a child.

A person convicted of this offense must be sentenced as follows:

- If at least 3 of the violations involved intercourse or contact with a child under 13 years of age and resulted in great bodily harm, involved intercourse with a child under 12 years of age, or involved intercourse with a child less than 16 years of age by use or threat of force or violence, the person must be sentenced to a prison term of at least 25 years.
- If the 25-year mandatory minimum does not apply and at least 3 of the violations were violations of 1st-degree sexual assault other than sexual contact with a person less than 13 years of age, the person must be sentenced to a prison term of at least 5 years.

1 **SECTION 9. Effective dates.**

- 2 (1) The treatment of section 301.48 (1) (e) 1. and 2. d. of the statutes takes effect on July
3 1, 2007.

NOTE: This SECTION provides that the treatment of the statutes relating to GPS tracking take effect on July 1, 2007, the effective date of Act 431.

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(END)