

2137D SEXUAL ASSAULT OF A CHILD PLACED IN A SUBSTITUTE CARE FACILITY¹: SEXUAL INTERCOURSE — § 948.085(2)**Statutory Definition of the Crime**

Sexual assault of a child, as defined in § 948.085(2) of the Criminal Code of Wisconsin, is committed by a person who has sexual intercourse with a child who was placed in a substitute care facility, where the person (works or volunteers at the facility) (is responsible² for managing the facility).

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant had sexual intercourse with (name of victim).

“Sexual intercourse” is defined as (insert the applicable definition set forth in Wis JI–Criminal 2101B).³

2. (Name of victim) was under the age of 18 years⁴ at the time of the alleged sexual intercourse.

Knowledge of (name of victim)’s age is not required⁵ and mistake regarding (name of victim)’s age is not a defense.⁶

Consent to sexual intercourse is not a defense.⁷

3. (Name of victim) was placed in a substitute care facility.

“Substitute care facility” means

[a shelter care facility licensed under s. 48.66(1)(a).]⁸

[a group home licensed under s. 48.625 or 48.66(1).]⁹

[a facility described in s. 940.295(2)(m).]¹⁰

4. The defendant (worked or volunteered at the facility) (was responsible¹¹ for managing the facility).

Jury’s Decision

If you are satisfied beyond a reasonable doubt that all four elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

COMMENT

Wis JI–Criminal 2137D was approved by the Committee in October 2025. Previously, this material appeared in an earlier version of Wis JI–Criminal 2137B, which addressed both “sexual contact” and “sexual intercourse” in a single instruction. In October 2025, the Committee bifurcated Wis JI–Criminal 2137B to separate those topics and provide greater clarity regarding the essential elements, consistent with the Wisconsin Court of Appeals’ recommendation in State v. Goth, 2024 WI App 74, 15 N.W.3d 518 (unpublished).

This instruction addresses violations of § 948.085(2) involving “sexual intercourse” only. For violations involving “sexual contact,” see Wis JI–Criminal 2137B.

This instruction is for violations of § 948.085(2), which was created by 2005 Wisconsin Act 277 (effective date: April 20, 2006). For violations of § 948.085(1), see Wis JI–Criminal 2137A and Wis JI–Criminal 2137C.

1. The instruction uses the term “substitute care facility,” borrowing it from the title of the statute. The offense definition refers to “any of the following facilities” and then lists three types of facilities that are defined primarily by cross references to other statutes. See notes 8, 9, and 10, below.

2. The statute refers to a person who “is directly or indirectly responsible” for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being “indirectly” responsible for managing the facility it may be helpful to add “directly or indirectly” to the fourth element. See note 11, below.

3. The appropriate definition of “sexual intercourse” should be selected from the alternatives provided in Wis JI–Criminal 2101B, based on the specific facts of the case.

4. “Child” is defined in § 948.01(1) as “a person who has not attained the age of 18 years.”

5. Section 939.23(6).

6. Section 939.43(2).

7. “Without consent” is not an element of this offense, and the Committee concluded it may be helpful to advise the jury of that fact.

8. Section 48.66(1)(a) refers to licensing shelter care facilities but does not provide a definition of the term.

9. Section 48.625 requires a license to operate a group home but does not provide a definition of the term. Section 48.66(1) lists a variety of institutions and agencies.

10. Section 940.295(2)(m) refers to: “A residential care center for children and youth operated by a child welfare agency licensed under s. 48.60 or an institution operated by a public agency for the care of neglected, dependent, or delinquent children.” Sec. 48.60 does not include a definition or list of agencies to which it applies. Sub. (2) lists many types of institutions to which it does not apply.

11. The statute refers to a person who “is directly or indirectly responsible” for managing the facility. The Committee concluded that it was not necessary to include the full statement in most cases. If the case is expected to focus on the defendant being “indirectly” responsible for managing the facility it may be helpful to add “directly or indirectly” to the fourth element.