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ATTORNEY GENERAL OPINION NO. 92- 29

The Honorable Wint Winter, Jr.  
State Senator, 2nd District  
State Capitol, Room 120-S  
Topeka, Kansas 66612

Re: Crimes and Punishments -- Crimes Against Persons --  
Assault; Battery; Prosecution for Intentional  
Exposure to Human Immunodeficiency Virus (HIV)

Synopsis: The present assault and battery statutes are not adequate to prosecute an HIV infected individual who engages in conduct defined in 42 U.S.C.S. § 300ff-47. Senate Bill No. 287 with its proposed amendments would allow such a prosecution. Senate Bill No. 358 which redefines the crime of battery, combined with the criminal attempt statute when appropriate, may permit such a prosecution. Cited herein: K.S.A. 21-3301; 21-3408; 21-3412; 21-3414; 42 U.S.C.S. § 300ff-41; 42 U.S.C.S. § 300ff-47.

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Dear Senator Winter:

As state senator for the second district you ask our opinion regarding whether existing criminal statutes satisfy the requirements of 42 U.S.C.S. § 300ff-47. That section of what is commonly known as the Ryan White law requires states to make intentional exposure to another of the human immunodeficiency virus (HIV) virus a crime as a condition of receiving certain federal grants. If existing statutes are not satisfactory, you ask whether Senate Bill No. 358 or

Senate Bill No. 287, with proposed amendments, would meet the federal requirement.

42 U.S.C.S. § 300ff-47 provides:

"(a) In general. The Secretary may not make a grant under section 2641 [42 USCS § 300ff-41] to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who -

"(1) makes a donation of blood, semen, or breast milk, if the individual knows that he or she is infected with HIV and intends, through such donation, to expose another [to] HIV in the event that the donation is utilized;

"(2) engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV; and

"(3) injects himself or herself with a hypodermic needle and subsequently provides the needle to another person for purposes of hypodermic injection, if the individual knows that he or she is infected and intends, through the provision of the needle, to expose another to such etiologic agent in the event that the needle is utilized."

Since the crimes of battery, K.S.A. 21-3412, and aggravated battery, K.S.A. 21-3414, are both defined in terms of a "touching or application of force," in our opinion neither statute would allow a prosecution for the conduct defined in 42 U.S.C.S. § 300ff-47(a)(1) or (3). Those sections mandate that states proscribe conduct which does not require any touching or application of force.

Because a prosecution for assault under K.S.A. 21-3408 requires an "immediate apprehension of bodily harm," in our opinion that statute would not permit a prosecution for

conduct required to be proscribed under 42 U.S.C.S. § 300ff-47.

We now turn to an evaluation of Senate Bill No. 287 with its proposed amendments:

"Section 1. (a) it is unlawful for an individual who knows one self to be infected with human immunodeficiency virus (HIV) a life threatening communicable disease knowingly:

"(1) To engage in sexual intercourse or sodomy with another individual with intent to infect without first informing that individual of with the human immunodeficiency virus (HIV) that life threatening communicable disease;

"(2) to sell or donate one's own blood, blood products, semen, tissue, organs or other body fluids with the intent to infect the recipient with a life threatening communicable disease;

"(3) to share with another individual a hypodermic needle, syringe, or both, for the introduction of drugs or any other substance into, or for the withdrawal of blood or body fluids from, the other individual's body with the intent to infect another person with a life threatening communicable disease without first informing that individual that the needle or syringe, or both have been used by someone infected with human immunodeficiency virus (HIV).

"(b) As used in this section, the term 'sexual intercourse' shall not include penetration by any object other than the male sex organ; the term 'sodomy' shall not include the penetration of the anal opening by any object other than the male sex organ.

"(c) Violation of this section is a class A misdemeanor. Sec. 2. This act shall take effect and be in force from and after its publication in the statute book."

This bill virtually mirrors the federal requirements as set forth in 42 U.S.C.S. § 300ff-47 with the exception that the more generic term of "a life threatening communicable disease" is substituted for an "HIV infected individual." In our opinion this bill with its proposed amendments would be adequate to enable a prosecution of any HIV infected individual who engaged in any of the conduct required to be proscribed by 42 U.S.C.S. § 300ff-47.

Senate Bill No. 358 would amend K.S.A. 21-3412, battery, to include in its prohibition "intentionally or recklessly causing bodily harm to another person." Such an amendment may provide a Kansas statute adequate to prosecute any HIV infected individual who engaged in the conduct defined by 42 U.S.C.S. § 300ff-47 if the recipient of donated blood, semen, breast milk, sexual activity, or a hypodermic needle actually became infected with HIV. In the absence of actual infection, such an HIV infected individual arguably could be prosecuted for attempted battery pursuant to K.S.A. 21-3301 which defines attempt as:

"An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime."

However, in the absence of any identifiable victim, there is some question of whether the element of "harm to another person" would be established in a prosecution for attempted battery. We note this more as a potential question which could be raised in such a prosecution than as a definitive statement of an absolute defense to such a charge.

In conclusion, the present assault and battery statutes are not adequate to prosecute an HIV infected individual who engages in conduct defined in 42 U.S.C.S. § 300ff-47. Senate Bill No. 287 with its proposed amendments would allow such a prosecution. Senate Bill No. 358 which redefines the

crime of battery, combined with the criminal attempt statute  
when appropriate, may permit such a prosecution.

Very truly yours,



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