



January 30, 2013

To: Hon. Roger Goodman   
Chair, Committee on Public Safety

cc: Reps. Moeller, Ryu, Roberts and Pollet  
 Sarah Koster, Esq., Committee Counsel

RE: **House Bill 1262, 2013 Regular Session, 63rd Legislature:**

**AN ACT relating to expanding criminal penalties for assault;  
amending RCW 9A.36.011, 9A.36.021, and 70.24.140; and prescribing penalties.**

Dear Chair:

**The Center for HIV Law and Policy is a national legal and policy resource and strategy center for people with HIV and their advocates. CHLP works to reduce the impact of HIV on vulnerable and marginalized communities and to secure the human rights of people affected by HIV.**

The Positive Justice Project, which CHLP coordinates, seeks to assist State Legislatures and other decision makers in improving existing statutes to reflect the current understanding of HIV. PJP members include hundreds of individuals and organizations, including the National Alliance of State and Territorial AIDS Directors, the HIV Medicine Association, the National Organization of Black Law Enforcement Executives, the Association of Nurses in AIDS Care, and many people living with HIV as well as legal, social science, health and other professionals.

We applaud the inclination to eliminate HIV-specific criminal laws and prosecution policies. The intent stated in Section 1, “to reduce the stigma that …disparate treatment brings upon those infected with the human immunodeficiency virus,” reflects a worthy, and urgent, goal.

However, the problem is not just limited to the focus on HIV in these laws, but also the reliance on a 1980’s-era understanding of the actual routes, risks and consequences of HIV transmission. The bill, by failing to address it, reinforces the broad misunderstanding of what actually constitutes “exposure” in the context of HIV and other STIs. The application of felony laws and severe sentences (of as much as 25 years for one charged incident– more than what is meted out to some charged with rape and manslaughter) to what typically is no-risk conduct (spitting, biting), negligible to no-risk conduct (oral sex) and in almost all cases, consensual sex between adults, has produced terrible injustices that the bill effectively re-ratifies. Extending this injustice to others with different diseases does not address the HIV stigma problem.

In short, the stigma of the current law is not just perpetrated by specific reference to HIV; it is perpetuated in the treatment of an HIV diagnosis as evidence of intent to harm; and in the treatment of consensual sex while HIV/STI-positive as equivalent to assaulting someone with a gun or knife.

HIV is serious, but it is, in 2013, a chronic, manageable disease. It is not the equivalent of carrying an unlicensed, loaded gun, nor is consensual sex while HIV positive the equivalent of stabbing someone with the intent of causing them severe harm. These false equivalencies in the current law, and HB 1261, are very harmful not just to people living with HIV, but to their health care providers and prevention specialists dedicated to controlling the HIV epidemic through increased diagnosis and linkage to care.

HB 1261 largely reinforces, rather than addresses, any of these very real harms. We believe that the decision to introduce and advance HB 1261 is well intended, but has multiple serious, unintended consequences.

The following are some specific problems with the current bill:

* Specifically, Section 1 states, “The legislature does not intend to prevent the [HIV] virus from being treated as any other destructive or noxious substance.” The continued characterization of HIV (or herpes, HPV, or other STIs, for that matter) as a “noxious substance” reinforces the 1980’s perception of people with HIV as innately dangerous.
* Treating infection with HIV or another STI under RCW9A.36.011 as a Class A felony amounts to punishment that is grossly disproportionate to the harm, even in the case of actual transmission. To reduce the risk (and current reality) that people with HIV are unjustly treated, at the very least there must be more guidance on “intent” under the statute.
* Section 2 (1) fails to define “intent to inflict great bodily harm” or what constitutes evidence of that intent. We would proposed the following as possible way to clarify that and similar problems in Sec. 3:

1. “A person who knows he/she is infected with a contagious or infectious disease and acts with the intent to transmit the disease to another person in a manner that poses a substantial, unjustifiable risk of transmission which results in the actual infection of that person commits a violation of this act.”
2. A person who knows he/she is infected with a contagious or infectious disease does not act with the intent to transmit a disease or pose a substantial risk of transmission if the person undertook or attempted to undertake practical means to prevent transmission.
   1. *Practical means to prevent transmission* shall mean any method, device, behavior, or activity demonstrated epidemiologically to measurably limit, reduce, or eliminate the risk of transmission of a contagious or infectious disease, and generally accepted and recommended by the medical profession for such purposes, including, but not limited to the use of a barrier protection or prophylactic device, or adherence to the medical treatment regimen prescribed by a physician for that infectious disease
3. Consent as defense. (a) the complainant's effective consent or the actor's reasonable belief that the complainant consented to the actor's conduct is a defense to prosecution under this act if:
   1. The conduct did not pose a statistically significant threat of, or in fact inflict, serious bodily injury; or
   2. The complainant knew or reasonably should have known that the threat or occurrence of harm was a risk of his/her voluntary conduct or occupation;

* The language of HB1262 assumes that an “administration” or an “exposure” or even a “transmission” of a destructive or noxious substance, always reflects the prohibited conduct of intent to do harm. For instance, an “exposure” of seminal fluids on the skin of an individual would, under the proposed language, be sufficient for conviction, when such conduct, even if willful, cannot possibly result in death or serious bodily harm.
* HB 1262 also brings up the fact that in the context of sexual conduct, adult individuals could actually consent to activity proscribed therein. Would the person “exposed” be also charged with Complicity to the proscribed conduct? See RCW 9A.08.020.
* Section 3’s prohibition of sexual intercourse with disclosure to a partner is incapable of fair enforcement for multiple reasons:
  + A partner who is the subject of, or at risk of, domestic violence may not have a reasonable ability to either disclose or to refuse sex.
  + Individuals with HIV, or other STIs’, who are on treatment that reduces their transmission risk to zero or near-zero may in fact not pose, and almost certainly would not intend to pose, even a negligible risk of transmission. This, and the use of other prophylaxis used to prevent transmission, are not taken into account in determining criminal intent, which should be the basis of criminal liability. Inclusion of the language suggested above would help to address this problem.
  + Many years of experience have demonstrated that this kind of disclosure law provides a vehicle for partners to use the criminal justice system to punish current or former partners whom they feel have betrayed them, particularly as disclosure is typically impossible for a defendant to prove. Hinging criminal liability on the ability to prove disclosure places an unusual, and unfair, burden on the defendant in such cases.

* + Federal and state HIV prevention campaigns focus on the right and ability of people living with HIV to continue to have healthy sex lives. In fact, federal guidance about to be released by the President’s Advisory Council on HIV/AIDS recognizes that disclosure is context-driven and cannot reasonably be mandated in all cases or at any specific time.

The issues addressed in this bill are complex; we ask that, at the least, you postpone further action on the current bill to allow further discussion, and further input from medical providers and others who can address the unintended consequences of both HB 1262 and the law as it is currently applied.

Thank you for your consideration of these comments.

Respectfully yours,

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