From: Lynn Gattis
To: Helen Phillips
Subject: FW: SAM Offenses and Harassment 1 Overlap in HB 14
Date: Saturday, April 20, 2019 1:56:34 PM

Please place in HB 14 folder

From: Schroeder, Kaci K (LAW) <kaci.schroeder@alaska.gov>
Sent: Saturday, April 20, 2019 1:54 PM
To: Rep. Andy Josephson <Rep.Andy.Josephson@akleg.gov>
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Subject: SAM Offenses and Harassment 1 Overlap in HB 14

Representative Josephson,

You asked about the current version of HB 14 and the overlap between sexual abuse of a minor offenses and harassment in the first degree.

This issue came up in House Judiciary as well. The issue is that there is significant overlap between harassment in the first degree (AS 11.61.118), when the offender gets semen on a person with the intent to harass or annoy, and sexual abuse of a minor offenses. While the use of force or the threat of force can be used to distinguish sexual assault offenses from harassment in the first degree, the sexual abuse of a minor statutes do not require the use of force or threat of force.

To try to address this issue House Judiciary adopted an amendment to HB 14 which changes the wording "knowingly causing the victim to come into contact with ejaculate" to "knowingly ejaculates on the victim." This new language will require the State to prove that the offender ejaculated onto the victim and that there was no intervening method of transport (i.e. ejaculated into his hand and wiped it on the victim etc.). This also means that if the victim is incapacitated at the time that the offender ejaculates, we will only have evidence of the end result (i.e. that the victim has semen on her) to show that the offender actually ejaculated onto the victim. While this is circumstantial evidence that the offender ejaculated onto the victim, we are uncertain if this will be enough to prove that element beyond a reasonable doubt.

A similar overlap exists in current law with harassment in the first degree (AS 11.61.118(a)(2)) when the offender engages in offensive physical contact that is touching though clothing another person's genitals, buttocks, or female breast. Much of this conduct qualifies as "sexual contact" under 11.81.900(A)(i). However, the legislature did not intend for all conduct which involves this type of touching to be a sex offense. Therefore, the language "**under circumstances not proscribed under AS 11.41.434 - 11.41.440**" is used to clarify this distinction. What this language signifies is that if the conduct described in AS 11.61.118(a)(2) occurs between two individuals with enough of an age difference to qualify as sexual abuse of a minor, the conduct may be charged as such. For example,

if a 20 year old were to touch a 12 year old's female breast over her clothing, that would be sexual abuse of a minor in the second degree (AS 11.41.436(a)(2)). However, if a 15 year old were to touch a 12 year old's female breast over her clothing with the intent to annoy or harass it would be harassment in the first degree (class A misdemeanor). The individuals in the second scenario are too close in age to trigger the sexual abuse of a minor statutes.

Similar language could be used in the harassment in the first degree statute under AS 11.61.118(a)(1) (offensive physical contact with semen). This language would clarify that if an adult causes a child victim to come into contact with ejaculate/semen it would qualify as sexual abuse of a minor. However, if a 15 year old caused a 12 year old to come into contact with ejaculate/semen with the purpose to harass or annoy, those individuals would be too close in age to trigger the sexual abuse of a minor statutes and the conduct would be harassment in the first degree. If the language "**under circumstances not proscribed under AS 11.41.434 - 11.41.440**" were added to harassment in the first degree, the definition of "sexual contact" could be reverted back to what it was in the original version of the bill "knowingly causing the victim to come into contact with ejaculate/semen".

The hypothetical given in House Judiciary was a person throwing a towel with semen on it on a juvenile. If this language were added to the harassment in the first degree statute, an adult engaging in such conduct with a child would qualify as sexual abuse of a minor. However, a person who is closer in age to the victim would be committing harassment in the first degree. The policy question for the legislature is whether the legislature wants an adult to be able to masturbate and ejaculate into a towel and throw it on a child and have that conduct be a misdemeanor/non-sex offense.

Additionally, prosecutors use discretion when making charging decisions every day. While we have not had a recent case involving a person ejaculating on to a towel and throwing it on another person, if we were to ever have such a case referred, the prosecutor would look at the totality of the circumstances when making any charging decision and when deciding how to resolve the case. The language suggested above, would in no way lock a prosecutor in to charging or resolving a case as a sex offense.

Please let me know if you have any questions.

I am copying Rep. Lincoln's staff on this email to keep them in the loop.

Kaci Schroeder
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Sent from my iPhone