

July 13, 2009 Senate Bill 77

The Honorable Thomas A. Anderson
New Mexico State Representative
10013 Plunkett Drive, NW
Albuquerque, NM 87114

Re: Opinion Request - Senate Bill 77

Dear Representative Anderson:

You have requested our advice regarding the scope of a legislator's liability when the legislator votes on a bill that may conflict with an existing criminal statute. According to your letter, Senator John Ryan introduced Senate Bill 77 ("Stem Cell Biomedical Research") during the 2009 legislative session, "which permits biomedical research on human embryonic stem cells."^[1] Your letter noted that existing law, NMSA 1978, Section 24-9A-6, does not authorize this type of activity and carries a misdemeanor penalty for a violation of the law. According to your letter: "As a legislator, we take an oath to uphold ... the laws of the State ... [I]f I vote for SB 77 ... what is my own liability for breaking the law?" Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude the legislature has plenary authority to enact and amend criminal statutes. Consequently, you as an individual legislator cannot incur any liability as a result of the legislature's action on a criminal law.

There are three important court cases and opinions that are applicable to this matter. First, "[b]y the constitution of the state the legislature is invested with plenary legislative power, and the defining of crime and prescribing punishment therefore are legislative function." State v. Thompson, 57 N.M. 459, 465, 260 P.3d 370 (1953). Second, the legislature "certainly has the power to amend" an existing criminal statute. State v. Alvarez-Lopez, 136 N.M. 309, 323, 98 P.3d 699 (2004). Third, a legislator's vote on a bill to amend an existing criminal statute does not implicate legislative liability. See N.M. Att'y Op. 93-04 (1993) (discussing the scope of the legislative privileges and immunities doctrine found in Article IV, Section 13); N.M. Att'y Op. 69-83 (1969) (discussing the history of the legislative privileges and immunities doctrine).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY A. SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General
The Honorable Karen Giannini, New Mexico State Representative

[1] It is our understanding that our office telephonically communicated these propositions to your office during the legislative session, but you requested a final, written copy on this matter. It is also our understanding that the 2009 House of Representatives defeated Senate Bill 77 by a total of 30-38 and therefore this bill failed to become law.