
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: SB 239 **Hearing Date:** March 28, 2017
Author: Wiener
Version: March 21, 2017
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Infectious and Communicable Diseases: HIV and AIDS: Criminal Penalties*

HISTORY

Source: American Civil Liberties Union of California
APLA Health
Black Aids Institute
Equality California
Lambda Legal
Positive Women's Network – USA

Prior Legislation: None

Support: A New Way of Life Re-Entry Project; A New Path; ACCESS Women's Health Justice; ACT for Women and Girls; AIDS Legal Referral Panel; AIDS Project of the East Bay; Alliance for Boys and Men of Color; Asian Americans Advancing Justice; Asian Law Alliance; Bay Area Lawyers for Individual Freedom; Being Alive; Billy DeFrank LGBTQ Community Center; Black Women for Wellness; Brown Boi Project; California Attorneys for Criminal Justice; California Communities United Institute; California Immigrant Policy Center; California Immigrant Youth Justice Alliance; California In-Home Supportive Services Consumer Alliance; California Pan-Ethnic Health Network; California Partnership; California Public Defenders Association; California Women's Law Center; Californians for Safety and Justice; Center for Health Justice, Inc.; Center for HIV Law and Policy; Center for LGBTQ and Gender Studies in Religion; Center of Excellence for Transgender Health; Citizens for Choice; Courage Campaign; Consumer Attorneys of California; Desert AIDS Project; Drug Policy Alliance; East Bay Community Law Center; East Los Angeles Women's Center; Equal Justice Society; Equality Federation; Fellowship of Affirming Ministries; Forward Together; Free Speech Coalition; Friends of Project 10 Inc.; Gender & Sexualities Alliance Network; Gender Health Center; GLMA: Health Professionals Advancing LGBT Equality; GroundSpark; Harm Reduction Coalition;; HIV Medical Association; HIV Modernization Movement – Indiana; HIVE; Holman United Methodist Church; Human Rights Watch; If/When/How: Immigration Equality Action Fund; Imperial Valley LGBT Resource Center; Justice NOW; Latino Equality Alliance; Lawyering for Reproductive Justice; LGBTQ Center of Long Beach; LGBTQ Center of Orange County; Los Angeles HIV Law & Policy Project; Los Angeles LGBT Cneter; MALDEF; NARAL Pro-Choice California; National Alliance of State & Territorial AIDS Directors; National Black Justice Coalition; National Compadres Network; National Council of Jewish Women, CA; National Day Laborer Organizing Network; National

Immigration Law Center; Our Family Coalition; Pacific Pride Foundation; Pangea Legal Services; Planned Parenthood Affiliates of California; PolicyLink; Project Inform; Queer Life Space; Root & Rebound; SCOPE LA; St. John's Well Child & Family Center; Sacramento LGBT Community Center; San Diego LGBT Community Center; San Francisco AIDS Foundation; SERO Project; Sex Workers Outreach Project of Los Angeles; Spahr Center; Stonewall Democratic Club; Tarzana Treatment Centers, Inc.; Transgender Gender Variant Intersex Justice Project; Trans Student Educational Resources; Transgender Law Center; Trans Latin@ Coalition; Voices for Progress Education Fund; Western Center on Law and Poverty; Western Regional Advocacy Project; Women's Foundation of California; 19 private individuals

Opposition: California Right to Life Committee

PURPOSE

The purpose of this bill is to reform criminal penalties related to human immunodeficiency virus (HIV) that specify higher punishment than those that apply to other communicable diseases.

Existing law makes it a felony punishable by imprisonment for 3, 5, or 8 years in the state prison to expose another person to HIV by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV. The court shall make an order protecting the identity of the victim, unless the victim requests otherwise. (Health & Saf. Code, § 120291, subd. (a).)

Existing law makes it a misdemeanor for any person afflicted with any contagious, infectious, or communicable disease to willfully expose himself or herself to another person, and for any person to willfully expose another person afflicted with the disease to someone else. (Health & Saf. Code, § 120290.)

This bill repeals the above provisions and would instead make the intentional transmission of an infectious or communicable disease, as defined, a misdemeanor, if:

- The defendant knows that he or she or a third party is afflicted with the disease;
- The defendant acts with the specific intent to transmit or cause an afflicted third party to transmit the disease to another person;
- The defendant or afflicted third party engages in conduct that poses a substantial risk of transmission to that person, as defined;
- The defendant or afflicted third party transmits the disease to the other person; and,
- If exposure occurs through interaction with the defendant and not a third party, the person exposed to the disease did not know that the defendant was afflicted with the disease.

This bill specifies that the defendant does not act with the intent to transmit the disease to another person if the defendant takes, or attempts to take, practical means to prevent transmission, and that failure to take practical means to prevent transmission alone is insufficient to prove the intent.

This bill provides that becoming pregnant while infected with an infectious or communicable disease, continuing a pregnancy while infected with an infectious or communicable disease, or declining treatment for an infectious or communicable disease during pregnancy does not constitute a crime for purposes of this new section.

This bill provides the following definitions for purposes of the new misdemeanor offense:

- “Conduct that poses a substantial risk of transmission” means an act that has a reasonable probability of disease transmission as proven by competent medical or epidemiological evidence. Conduct posing a low or negligible risk of transmission as proven by competent medical or epidemiological evidence does not meet the definition of conduct posing a substantial risk of transmission.
- “Infectious or communicable disease” means a disease that spreads from person to person that has significant public health implications.
- “Practical means to prevent transmission” means a method, device, behavior, or activity demonstrated scientifically to measurably limit or reduce the risk of transmission of an infectious or communicable disease, including, but not limited to, the use of a condom, barrier protection or prophylactic device, or good faith compliance with a medical treatment regimen prescribed by a physician for the infectious or communicable disease.

This bill specifies that a person who attempts to intentionally transmit an infectious and communicable disease but the disease is not actually transmitted is guilty of a misdemeanor punishable by imprisonment in county jail for up to six months.

This bill imposes various requirements upon the court in order to prevent the public disclosure of the identifying characteristics, as defined, of the complainant and the defendant.

This bill requires a court, upon a finding of reasonable suspicion that an individual has violated this new section, to order the production of the individual’s medical records or the attendance of a person with relevant knowledge thereof, so long as the return of the medical records or attendance of the person pursuant to the subpoena is submitted initially to the court for an in-camera inspection. Only upon a finding by the court that the medical records or proffered testimony are relevant to the pleading offense, the information produced pursuant to the court’s order shall be disclosed to the prosecuting entity and admissible if otherwise permitted by law.

This bill specifies that the medical records, medications, prescriptions, or medical devices of the defendant are not admissible as evidence or considered probative as to the specific intent required under the new section in the absence of the defendant’s stated intent required under this section within the medical record to do specific harm to the complainant.

This bill requires, before sentencing on the new misdemeanor, a defendant to be assessed for placement in one or more community-based programs that provide counseling, supervision, education, and reasonable redress to the victim or victims.

This bill specifies that the new misdemeanor does not apply to a person who donates an organ or tissue for transplantation or research purposes, or a person who donates breast milk to a medical center or breast milk bank that receives breast milk for purposes of distribution.

Existing law states, except as provided, that tissues shall not be transferred into the body of another person by means of transplantation, unless the donor of the tissues has been screened and found nonreactive by laboratory tests for evidence of infection with HIV, agents of viral hepatitis, and syphilis. (Health & Saf. Code, § 1644.5, subd. (a).)

Existing law makes references to the “Guidelines for Reducing Risk of Viral Transmission During Fertility Treatment” as published by the American Society for Reproductive Medicine in provisions of law related to the Department of Health Services’ duties to regulate facilities that perform sperm processing. (Health & Saf. Code, § 1644.5, subd. (d).)

This bill deletes references to the “Guidelines for Reducing Risk of Viral Transmission During Fertility Treatment” and instead refers to the most relevant and up-to-date recommendations published by the American Society for Reproductive Medicine.

Existing law requires if a defendant has been previously convicted of prostitution or of another specified sexual offense, and in connection with the conviction a blood test was administered with positive test results for acquired immunodeficiency syndrome (AIDS), of which the defendant was informed, the previous conviction and positive blood test results are to be charged in any subsequent accusatory pleading charging a violation of prostitution. If the previous conviction and informed test results are found to be true by the trier of fact or are admitted by the defendant, the defendant is guilty of a felony. (Pen. Code, § 647f.)

This bill repeals the above provision and declares that a conviction for a violation of the repealed provision is invalid and vacated. All charges alleging a violation of the repealed provision to be dismissed and all arrests for the violation are to be deemed to have never occurred and any court or agency having custody or control of records pertaining to the arrest, charge, or conviction of the repealed provision shall destroy those records by June 30, 2018.

This bill provides that a person who is serving a sentence as a result of a violation of the repealed provision may petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case.

Existing law requires the court to order a defendant convicted for a violation of soliciting or engaging in prostitution for the first time to complete instruction in the causes and consequences of AIDS and to submit to testing for AIDS. Existing law requires such a defendant, as a condition of either probation or participating in a drug diversion program, to participate in an AIDS education program, as specified. (Pen. Code, §§ 1001.10 and 1202.6.)

Existing law requires the health department in each county to select an agency, or agencies, in the county that shall provide AIDS prevention education to those persons sentenced to probation or a drug diversion program and provides that specified criminal fines shall be used to fund the program. (Pen. Code, §§ 1001.11 and 1463.23.)

This bill repeals the above provisions related to the AIDS education programs.

Existing law requires donated blood, tissue and semen to be screened and found nonreactive by laboratory tests for evidence of infection for HIV and other specified diseases and prior to transfer and prohibits transfer, except as provided. (Health & Saf. Code, § 1644.5.)

Existing law provides that it is a felony punishable by two, four, or six years in county jail for any person to donate blood or tissue, semen to any medical center or semen bank that receives semen for purposes of artificial insemination, or breast milk to any medical center or breast milk bank that receives breast milk for purposes of distribution, whether he or she is a paid or a volunteer donor, who knows that he or she has AIDS, as diagnosed by a physician and surgeon, or who knows that he or she has tested reactive to HIV. (Health & Saf. Code, § 1621.5, subd. (a).)

This bill repeals the felony provision related to donating blood, tissue or semen by a person who has been diagnosed with AIDS or HIV.

This bill makes other conforming changes.

COMMENTS

1. Need for This Bill

According to the author:

Beginning over twenty-five years ago, several laws were passed in California that criminalized behaviors of people living with HIV or added penalties to existing crimes for those with HIV. These laws were based on fear and the limited medical science of the time. In 1988, when most of these laws were passed, there were no effective treatments for HIV and discrimination towards people living with HIV was extremely high.

In the decades since these laws were passed, societal and medical understanding of HIV has greatly improved, and there are now effective treatments that lengthen and improve the quality of life for people living with HIV. Furthermore, there is no evidence that laws criminalizing sexual activity on the part of people living with HIV accomplish their intended goal of improving public health. In fact, research suggests that these laws may act as a disincentive for testing and disclosure of HIV status and may create a barrier to those seeking care. Today, HIV criminalization laws only increase stigmatization of people living with HIV and disproportionately impact women and people of color.

SB 239 would bring parity with existing laws regarding other communicable diseases by making it a misdemeanor, rather than a felony, to transmit any disease that is determined to have significant consequences on the physical health or life activities of the person infected. To be charged with the misdemeanor, the defendant must have: (1) known that he or she has the communicable disease at issue; (2) acted with the specific intent to transmit the disease to another person; (3) engaged in conduct that poses a substantial risk of transmission; and (4) actually transmitted the communicable disease to the other person.

The bill would also repeal other outdated provisions of law that significantly increase penalties for sex workers living with HIV. Lastly, SB 239 would repeal unnecessary laws regarding donation of blood, tissue, or, in certain circumstances, semen or breast milk, by those living with HIV.

2. Enforcement of Current HIV Criminalization Laws

California law has four HIV-specific criminal offenses: (1) prostitution or solicitation if the person was previously convicted of the same offense and was tested for AIDS with a positive result and the person knew of the result; (2) exposing another person to HIV by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV; (3) donating blood, body organs or other tissue, or, under specified circumstances, semen or breast milk, if the person knows that he or she has AIDS, or that he or she has tested reactive to HIV; and (4) committing specified sex crimes with the knowledge that he or she has AIDS or HIV at the time of the commission of those offenses. There is also a non-HIV statute that makes it a crime to willfully expose another to any contagious, infectious or communicable disease.

A 2015 report conducted by the Williams Institute of the University of California, Los Angeles, reviewed data on all law enforcement contacts for these HIV-related offenses and the general statute that criminalizes willful exposure to any communicable disease if it could be determined that the arrest was HIV related, from 1988 to 2014 in California. Of these crimes, the prostitution or solicitation offense was by far the most common reason for law enforcement contact making up about 94% of all of the contacts, or 1,113 people. The next most common offense was committing specified sex crimes which made up about 2% of all of the contacts, or 35 people. (Hasenbush, et al, *HIV Criminalization in California*, Williams Institute, UCLA School of Law (Dec. 2015) at 15.)

The report also looked at the demographics of the individuals who came in contact with the criminal justice system and found patterns that indicate that certain groups have been disproportionately affected by these laws. Black women, while only making up 4% of the population of people diagnosed with HIV in California, made up 21% of the population of people who had contact with the criminal justice system related to their HIV status. White women, while only making up 3% of the population of people diagnosed with HIV in California, made up 15% of the population of people who had contact with the criminal justice system related to their HIV status. By comparison, white men make up 40% of the population of people in California diagnosed with HIV, but only 16% of those who had contact with the criminal justice system related to their HIV status. (*Id.* at 17.)

This bill repeals the felony solicitation statute which is the most commonly enforced of the HIV-related laws. It also repeals the other HIV-related offenses as well as the misdemeanor statute that prohibits willful exposure to a communicable disease and creates a new statute that prohibits the intentional transmission of an infectious or communicable disease, which includes HIV. The new crime is punishable as a misdemeanor.

This bill does not change the existing law that imposes a three-year sentence enhancement if a person commits specified sex crimes while being HIV-positive.

3. Post-conviction Relief

Under existing law, prostitution and solicitation are generally punished as misdemeanors. However, prostitution is punishable as a felony for any defendant who has a prior conviction for prostitution or solicitation and based on the prior conviction the defendant was tested for AIDS

with positive results that was known to the defendant. This bill repeals this provision and provides post-conviction relief for anyone who was previously convicted of a violation of this statute.

Specifically, this bill would vacate any conviction, dismiss any charge, and legally deem that an arrest under the repealed provision never occurred. The bill would require any court or agency having custody or control of records pertaining to the arrest, charge, or conviction of a person for a violation of the deleted provision to destroy, as specified, those records by June 30, 2018. The court is required to send an order to the Federal Bureau of Investigation directing it to seal and destroy its records relating to the defendant's arrest, charge, and conviction for a violation of Section 647f within six months of receiving the order.

This bill would also authorize a person serving a sentence as a result of a violation of the deleted provision to petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case. The bill would require a court to vacate the conviction and resentence the person to any remaining counts while giving credit for any time already served. Judicial Council is required to promulgate and make available all necessary forms to enable the filing of petitions and applications related to the new recall provision enacted by this bill.

4. Creation of New Crime that Applies to All Communicable Diseases

Under existing law, there is a general statute that punishes the willful exposure of any communicable disease to another person a misdemeanor. (Health & Saf. Code, § 120290.) Existing law specifies that the intentional exposure HIV to another person is punishable as a felony. (Health & Saf. Code, § 120291, subd. (a).)

This bill repeals both the general communicable diseases statute and the HIV-specific statute and instead creates a new misdemeanor that encompasses the intentional transmission of all infectious and communicable diseases. The new statute would require that a defendant knows that he or she is afflicted with the disease; the defendant acts with the specific intent to transmit or cause to transmit the disease to another person; the defendant engages in conduct that poses a substantial risk of transmission to that person; the defendant transmits the disease to the other person; and the person exposed to the disease did not know that the defendant was afflicted with the disease.

These provisions also apply to third parties and the bill specifies that the attempt to transmit a communicable disease where the disease is not actually transmitted is also a misdemeanor.

5. Proposed Technical Amendment

The author intends on amending the bill in Committee to insert a missing cross-reference to in subdivision (g) of Health and Safety Code section 120290 as shown below in bold italic font.

(g) A person who attempts to intentionally transmit an infectious and communicable disease by engaging in the conduct described in paragraphs (1), (2), ~~and~~ (3), ***and*** (5) of subdivision (a) is guilty of a misdemeanor punishable by imprisonment in county jail for not more than six months.

6. Clarifying Language on Admissibility of Medical Records to Prove Specific Intent

This bill provides that “the medical records, medications, prescriptions, or medical devices of the defendant are not admissible as evidence or considered probative as to the specific intent required under the new section in the absence of the defendant’s stated intent required under this section within the medical record to do specific harm to the complainant.”

The presumed purpose of this provision is to prohibit the use of medical records as the sole evidence to prove that the defendant had the requisite intent to transmit HIV, however the provision may be unclear as currently written. The author may consider amending the bill to provide that the specific intent required in the new section created by this bill shall not be proven solely by the defendant’s medical records.

7. Arguments in Support

The HIV Medicine Association is in support of this bill and writes:

In the early years of the HIV epidemic, California and many other states enacted HIV criminal laws largely based on fear and misinformation. These laws created unique restrictions and harsher punishment for people living with HIV compared to people living with other less stigmatized communicable diseases. However, since the mid-1990s remarkable advances in available treatment for HIV infection have dramatically lengthened and improved the quality of life for people living with HIV. We now know that people living with HIV have a near normal life expectancy and the risk of transmission to others is negligible when they are successfully treated.

In addition, research suggests that criminal laws targeting people with HIV infection do not improve public health but fuel continued stigma and discrimination against people living with HIV and communities disproportionately impacted by HIV. California criminal laws should take the same approach to HIV as it does to other serious communicable diseases. We support promoting public health by reducing HIV stigma and eliminating any remaining barriers to testing and care. (Fn. omitted.)

Justice Now writes in support of this bill:

Current HIV-specific criminal laws in California fail to reflect a science-based understanding of HIV prevention, treatment and transmission. Research suggests that criminal laws targeting HIV have done nothing to further public health, as they have not been found to influence people’s behaviors or reduce the number of new infections. Instead, these laws have been found to disproportionately impact women and people of color in California. While women living with HIV comprise only 13 percent of people living with HIV, they make up 43 percent of those criminalized under California’s HIV-specific criminal laws. Furthermore, while about half of people living with HIV in California are Black or Latino, two thirds of people criminalized under HIV specific laws are Black or Latino. Thus, criminal prosecution under these laws serves only to fuel continued stigma and

discrimination against people living with HIV and communities disproportionately impacted by HIV.

California criminal law should take the same approach to HIV as it does to other serious communicable diseases. We support promoting public health by reducing HIV stigma and eliminating any remaining barriers to testing and care. For these reasons, we support SB 239 and your effort to bring California law into line with current science.

8. Arguments in Opposition

The California Right to Life Committee (CRLC) writes in opposition of this bill:

CRLC sees little to no value in this bill and its effort to lessen the criminal penalty for an HIV infected person who knowingly transmits a life threatening disease to another.

Reducing the charge for this criminal act to a misdemeanor has no significant consequence to the perpetrator.

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