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The Center for HIV Law and Policy is a national resource and advocacy organization working to advance the rights of people affected by HIV. We combine an online HIV Policy Resource Bank, a creative national advocacy agenda, and case assistance focused on systems and institutions with significant impact on marginalized communities.

# The 2017 Modernization of California's HIV Criminal Exposure Laws

## *What Did It Do, Who Will It Affect?*

On October 6, 2017 California Governor Jerry Brown signed Senate Bill 239, which will repeal and amend several state laws relating to HIV criminal exposure, effective January 1, 2018. These new laws are a significant victory for Californians who believe in an evenhanded application of justice, and treatment of HIV like any other serious disease.

Currently, it is a felony, punishable by imprisonment for three, five or eight years, for a person living with HIV (PLHIV) with knowledge of their HIV status to engage in anal or vaginal sex without prior disclosure and with specific intent to transmit HIV.<sup>1</sup> There are also heightened penalties for PLHIV who engage in sex work or soliciting sex,<sup>2</sup> and obligatory disclosure relating to a person's HIV status in a criminal investigation.<sup>3</sup> Finally, it is illegal for PLHIV to donate blood, organs or tissue, punishable by two, four or six years' imprisonment.<sup>4</sup> These laws will be repealed by the end of the year.

## The Revised Infectious or Communicable Disease Law

The amended law is titled "Intentional transmission of an infectious or communicable disease"<sup>5</sup> and essentially replaces the current HIV felony exposure law. It has many sections, but two of the most important establish separate but related crimes. The first section provides for imprisonment for not more than six months if a person with an infectious or communicable disease:

1. engages in conduct that poses a substantial risk of transmission
2. with knowledge of their infectious or communicable disease
3. with specific intent to transmit the disease

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<sup>1</sup> Cal. Health & Safety Code §120291 (2017).  
<sup>2</sup> Cal. Penal Code §647f (2017).  
<sup>3</sup> Cal. Health & Safety Code §120292 (2017).  
<sup>4</sup> Cal. Health & Safety Code §1621.5 (2017).  
<sup>5</sup> Cal. Health & Safety Code § 120290 (2018).

4. without the knowledge of the individual exposed that the person had the disease, and
5. transmits the infectious or communicable disease to that person.<sup>6</sup>

This is a marked improvement in the law. The penalty for transmission is significantly reduced to six months.<sup>7</sup> HIV is no longer singled out as an exceptionally dangerous disease requiring harsher punishment. The law also incorporates supportable scientific standards to determine the risk posed by a person's conduct. Only behavior that poses a "substantial risk of transmission" is targeted, and this must be established by competent medical or epidemiologic evidence.<sup>8</sup> If a behavior is known to pose low or negligible risk, such as oral sex or sex while virally suppressed, then it is excluded from the scope of the new law. Unlike current law, the amended law allows consideration of condom use, medical treatment (which would include use of antiretroviral therapy) or other practices that limit transmission risk,<sup>9</sup> to negate a finding of "specific intent" to transmit, a necessary element for prosecution. Moreover, a person's not taking such measures is insufficient on its own to establish that they acted with specific intent to transmit disease.<sup>10</sup>

The amended law also includes protections for people living with HIV or other communicable diseases who are pregnant or about to become pregnant, to make decisions about their pregnancy and medical treatment.<sup>11</sup> Also included are important privacy protections, limiting the identification of a complaining witness or defendant,<sup>12</sup> whereas in the past, a person accused of violating the law was frequently publically "named and shamed."

Although the law is unquestionably a vast improvement in most respects, the scope of health conditions encompassed by its definition of "infectious or communicable disease" is surprisingly broad and arguably over-inclusive. The new law encompasses any "disease that spreads from person to person, directly or indirectly, that has significant public health implications."<sup>13</sup> The definition can be interpreted to include conditions such as influenza, tuberculosis, measles, or other airborne and casually transmitted conditions.

### **The Scope of the Health and Safety Code's "Willful Exposure" Provision is Narrowed But Leaves Public Health Officials with Broad Restrictive Powers**

While the amendments to California's Health & Safety Code leave the already-existing misdemeanor infectious disease exposure law<sup>14</sup> in place, the revision narrows the scope of this section of the law in several important ways.<sup>15</sup> The revised law requires that a health officer provide an individual with specific instructions to refrain from particular conduct prior to prosecution, and when it is "infeasible" to get a quarantine or other type of health officer order.<sup>16</sup> It limits criminalized behavior to conduct that poses a "substantial risk of transmission," rather than the more general prohibition on "expos[ing]" others. And it places a time limitation of 96 hours after issuance of the instruction from a health officer on when a violation of the statute may be charged. The expectation is that these changes will produce a significant reduction in prosecutions under this

<sup>6</sup> Cal. Health & Safety Code § 120290(a)(1) (2018).

<sup>7</sup> A person who otherwise meets all of the criteria but who does not actually transmit disease may be punished with a misdemeanor up to 90 days in jail. Cal. Health & Safety Code § 120290(g)(2)(2018).

<sup>8</sup> Cal. Health & Safety Code § 120290(e)(1) (2018).

<sup>9</sup> Cal. Health & Safety Code § 120290 (b), (e)(3) (2018).

<sup>10</sup> Cal. Health & Safety Code § 120290 (c) (2018).

<sup>11</sup> Cal. Health & Safety Code § 120290(d) (2018).

<sup>12</sup> Cal. Health & Safety Code § 120290(h) (2018).

<sup>13</sup> Cal. Health & Safety Code § 120290(e)(2) (2018).

<sup>14</sup> Cal. Health & Safety Code § 120290 (2017).

<sup>15</sup> Cal. Health & Safety Code § 120290(a)(2) (2018).

<sup>16</sup> For example, a health officer might secure an order directing an individual with infectious tuberculosis to not board a plane, or an order requiring that someone with a highly infectious disease be isolated from others for a specified period of time.

provision of the law.<sup>17</sup> At the very least, these changes likely will eliminate the use of the “willful exposure” misdemeanor provision as an add-on in prosecutions for other offenses.<sup>18</sup>

Despite these important limitations, this section of the revised statute continues the public health department’s authority to control or facilitate punishment of people living with HIV or other communicable conditions without the safeguards related to intent, risk, and harm that are established in the first part of the amended law, yet at the same level of punishment attached to intentional disease transmission under the revised law.

Under California’s new law, a person with an infectious or communicable disease is guilty of willful exposure if:

1. a health officer or their designee
2. acting under circumstances that make securing a quarantine or health officer order infeasible
3. instructs a person not to engage in conduct that poses a substantial risk of transmission of the disease, and
4. the person engages in that conduct within 96 hours of the instruction.<sup>19</sup>

A violation of this section of the statute is a misdemeanor, punishable by imprisonment for not more than six months, the same penalty that is applied in cases of intentional transmission.<sup>20</sup>

<sup>21</sup> However, in contrast to the first section of the law, conviction of a defendant is considerably

easier because neither “specific intent” to transmit the disease, nor transmission of the disease, are required for conviction.

The new law does not define the circumstances under which securing a quarantine or health officer order is “infeasible.” The lack of a definition for these circumstances, which may permit arbitrary discretion, is concerning in light of the fact that a health officer is allowed to issue a restrictive instruction, not once, but twice, without having to go to court.<sup>22</sup> Finally, the second section of the law may not afford a defendant or a complaining witness the same privacy protections discussed above.<sup>23</sup>

## Unfair Impact of the Law on Sex Workers is Eliminated

Perhaps the most important change in California’s laws, certainly in terms of impact, is that the provision targeting sex workers<sup>24</sup> will be repealed. Under that section of the current law, if a PLHIV was found guilty of soliciting or engaging in prostitution, had previously been convicted of a misdemeanor solicitation or felony sex offense, and had tested positive for HIV following such previous conviction, they were guilty of a felony and could be imprisoned for up to three years in addition to whatever sentence is imposed for the prostitution/solicitation offense.

As the Williams Institute found in its influential 2015 report *HIV Criminalization in California*, California’s HIV criminal laws have disproportionately affected sex workers, Latinx, and Black people.<sup>25</sup> A startling

<sup>17</sup> Research by the Williams Institute, U.C.L.A., found 82 prosecutions under § 120290 (2017) between 1988 and 2014. See Amira Hasenbush et al., *HIV Criminalization in California: Penal Implications for People Living with HIV/AIDS* (updated 2016) at 12, available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-California-Updated-June-2016.pdf>.

<sup>18</sup> *People v. Castaneda*, 2017 Cal. App. Unpub. LEXIS 2101, March 23, 2017.

<sup>19</sup> Cal. Health & Safety Code, § 120290(a)(2) (2018).

<sup>20</sup> Cal. Health & Safety Code, § 120290(g)(1) (2018).

<sup>21</sup> Under Cal. Health & Safety Code § 120275 (2017) it is already a misdemeanor to violate a health officer’s official order when it relates to “quarantine or disinfection” of persons.

<sup>22</sup> Cal. Health & Safety Code, § 120290(a)(2)(2018).

<sup>23</sup> Compare Cal. Health & Safety Code, § 120290(h) (2018) and Cal. Health & Safety Code, § 120290(a)(2). The first provides privacy protections for a “complaining witness,” while the second only references a “health officer” and makes no mention of a “complaining witness,” which suggests that the privacy protections may not apply under § 120290(a)(2).

<sup>24</sup> Cal. Penal Code § 647f (2017).

<sup>25</sup> The report noted that the reasons for this disproportionate impact are unidentified and additional research is necessary. Williams Institute, *HIV Criminalization in California* at 4 (updated 2016). The Williams Institute has also since released a publication that more specifically examines the

95% of all HIV-specific criminal incidents between 1988 and 2014 concerned people engaged in or suspected of engaging in sex work.<sup>26</sup> Equally important under the revised laws, current arrests, charges and convictions for solicitation or engaging in solicitation/prostitution while HIV positive are to be dismissed and vacated.<sup>27</sup> Based on California's history of HIV law enforcement, the repeal of this provision alone would eliminate most HIV-related criminal punishment.

with any such change in the law, it is important that advocates closely monitor implementation of the new law, particularly when it comes to the broad discretion reflected in the "willful exposure" provision.

## **Sentencing Enhancements Remain on the Books for Sexual Assault Convictions**

The new law, however, leaves one significant HIV criminal law unchanged. PLHIV who are convicted of "rape, unlawful intercourse with a person less than 18 years of age, spousal rape, sodomy, or oral copulation with the knowledge that he or she is infected with HIV at the time of commission" are subject to three additional years in prison for each offense.<sup>28</sup>

Neither the intent to transmit HIV, actual transmission, nor transmission risk posed by the conduct at issue is required for the increased sentence to apply. Prosecuting attorneys may use test results obtained from mandatory testing pursuant to previous sex offense convictions to establish a defendant's HIV status and their knowledge of that status.<sup>29</sup> In short, when it comes to those charged and convicted of sex offenses as defined under California law, the irrational treatment of HIV remains unchanged.

In summary, California has made remarkable advances in modernizing its HIV criminal laws. As

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effect of HIV criminal laws on sex workers between 2004 and 2013. See Williams Institute, *HIV Criminalization and Sex Work in California* (2017), available at <https://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/hiv-criminalization-sex-work-ca/>

<sup>26</sup> [HIV Criminalization in California](#) at 2.

<sup>27</sup> Cal. Penal Code § 1170.21 (2018).

<sup>28</sup> Cal. Penal Code § 12022.85 (2017).

<sup>29</sup> Cal. Penal Code § 1202.1(a), (e) (2018).