



HIV CRIMINALIZATION REFORM IN CALIFORNIA: WHAT DOES IT MEAN FOR ME?

In 2017, Governor Jerry Brown signed Senate Bill 239 into law, transforming the legal landscape with respect to HIV criminalization in California. Under the new law, authored by Senator Scott Wiener (D-San Francisco) and Assemblymember Todd Gloria (D-San Diego), criminal penalties based on a person's HIV status cannot be imposed unless the person acts with the intent to harm another person.

Californians for HIV Criminalization Reform (CHCR) celebrates the passage of this landmark bill and offers the following Q&A to help people understand the changes to the law, how these changes will improve public health, and the steps those previously convicted under these laws may be able to take to clear up their criminal record.

1. How did the law change?

Under the old law, HIV was the only medical condition that could trigger a felony prosecution under certain circumstances, with punishment of up to 8 years in prison. Exposure to all other communicable diseases—including some that are also potentially fatal—were subject to prosecution as misdemeanors only.

With the changes to the law, HIV is treated the same as all other significant communicable diseases. To convict someone of a misdemeanor, punishable by up to 6 months in jail, the government must prove that a person who knows they are living with a communicable disease acted with the intent to transmit that disease to another person and that the conduct in question posed a substantial risk of transmission.

The law also makes clear that anyone who has taken precautions to reduce the risk of transmission—including using a condom to reduce risk of transmission of a sexually transmitted disease or taking medications to eliminate the risk of transmission—does not have the intent to transmit required by the statute.

2. What are the changes related to sex workers living with HIV?

For a sex worker (or client) living with HIV under the old law, a felony conviction could occur even if the activity for which the person was arrested presented absolutely no risk of HIV transmission. For instance, a person who merely engaged in conversation through a car window or was prosecuted for “walking while trans” would face a felony sentence enhancement if they had previously been convicted under the sex work laws and tested positive for HIV. Again, HIV was the only medical condition singled out by this law.

SB 239 completely eliminated the felony penalty enhancement for engaging in commercial sexual activity while living with HIV. Along with that change, the bill eliminated the compulsory HIV testing of people engaged in such activity and the mandatory sex education to which this “captive” audience was subjected. By eliminating a special penalty and compulsory testing/education, SB 239 recognizes that two consenting adults engaged in commercial sexual activity share responsibility for maintaining sexual health and should be subject to the same standard for prosecution as those who engage in sexual activity in the absence of any monetary exchange.

3. Wasn't the old law useful for preventing the spread of HIV?

No. In fact, the old law was probably more of a hindrance than a help. The federal Department of Justice, the Centers for Disease Control, and other public health officials all agree that the best way to prevent new cases of HIV is to treat HIV as a public health issue, rather than as a potential crime. Applying public health principles means ensuring that as many people as possible are choosing to get tested, getting the care and treatment they need, and adhering to their medication plan.

By contrast, laws which unnecessarily criminalize HIV are a disincentive to testing and engaging in care. You can't be prosecuted for knowingly spreading HIV if you never knew that you were HIV-positive in the first place! And laws designed to compel “disclosure” also create a false sense of security with respect to the health of one's sexual partners. An expectation that one's partners are going to disclose—or even know—their status is unrealistic, thereby encouraging riskier behaviors and more sexually transmitted infections.

4. Why reduce the penalty for exposure to HIV from a felony to a misdemeanor?

In California, the transmission of any other serious infectious or communicable disease is classified as a misdemeanor—and HIV should be the same. HIV is not the disease it once was. With proper treatment, people living with HIV can lead very healthy, long lives. In fact, the life expectancy of a 25-year-old who is newly

diagnosed with HIV and has access to appropriate care is nearly the same as a 25-year-old who does not have HIV. Like a number of other infectious diseases, HIV is now a chronic, manageable condition. Because the consequences of an HIV diagnosis are similar to the consequences associated with other communicable diseases, its potential transmission should be addressed the same way under the criminal law.

5. If intentional transmission of HIV is so rare, who was getting charged under the old law?

Most of the prosecutions under California's HIV criminal laws took place under the provisions relating to sex work. Like laws prohibiting sex work, the provisions relating to sex work while living with HIV were disproportionately enforced against women and people of color. Data shows that women and people of color were arrested and prosecuted under these laws much more frequently than their white male counterparts and at a much higher rate than they are represented within the epidemic in the state. Though law enforcement does not collect information regarding gender identity for those who are arrested, prosecuted and convicted, there is good reason to believe that transgender women—especially transgender women of color—were also disproportionately affected by these laws. The changes to the law embodied in SB 239 will ensure that these gender and racially-based disparities are eliminated.

6. Does this mean we're "going easy" on people who intentionally spread HIV?

Not at all. But people who knowingly expose others to HIV with the intent to transmit the virus are about as rare as unicorns. In the rare event that someone like that comes along, the new law will still allow that person to be prosecuted. The biggest difference between the old law and the new law is that the criminal penalties that would result are now the same as those for the intentional spread of any other serious communicable disease.

7. What about a person who sexually assaults someone and gives them HIV? Can that person only be charged with a misdemeanor?

Sexual predators will still be prosecuted as felons. Sexual assault is already punishable as a felony and, in most cases, carries a long prison sentence. And SB 239 did not change the law pertaining to sexual assault by a person living with HIV. If the perpetrator of a sexual assault is HIV-positive, current law allows for their sentence to be made even longer.

8. Don't we need laws making it a crime to donate blood if HIV positive to keep the blood supply safe?

No, such laws are completely unnecessary. All blood donations are screened and tested for HIV before they enter the general blood supply. The only donations containing HIV that could potentially enter the blood supply would be from people who have been exposed so recently they would not even test positive yet. A criminal law addressing blood donation while HIV-positive would not apply to a person who did not even know they had HIV. The only thing such laws do is stigmatize people living with HIV, and that is why SB 239 eliminated them.

9. If I was convicted under the old laws, how do these changes affect me?

If you were previously convicted of solicitation or prostitution with a sentence enhancement making that violation a felony for people living with HIV, your sentence enhancement has been vacated under the new law. That means if asked, you no longer need to say that you were convicted of a felony under the old law. However, it's important to know that even though the sentence is vacated, the conviction is still on your record and may show up in background checks. To have it permanently removed from your criminal record, you must file a petition for dismissal in the county where you were convicted. The status of previous convictions under the other provisions has not changed. Unfortunately, there is no guarantee this will remove the conviction from private background check databases.

10. How will my life change under the new law?

If you are living with HIV, you no longer have to live with the threat of felony prosecution as a result of other people's ignorance or someone's attempt to harm you through a vindictive prosecution. If you are *not* living with HIV, you should continue taking responsibility for your sexual health and make appropriate choices regarding the sexual risks you are willing to take. And you can expect that more people living with HIV will be willing to have frank conversations about HIV and other sexual health risks, because they no longer have to fear retribution through the criminal justice system. Passage of SB 239 means more informed choices and better health for everyone who is sexually active!

