

DRAFT Statutory Recommendations – CHLP Comments

Note: CHLP staff received this draft set of recommendations less than a week ago. We regret that the time frame in which we have been asked to comment is not sufficient to provide a thorough analysis and explanation of our comments here or on the draft bill that we propose as a more specific set of recommendations. We also offer these comments and recommendations tentatively, as the time frame has not allowed us to consult with the Nevada coalition. We believe that the input of the coalition is imperative and we would not typically offer these recommendations without it. We hope that the task force will seek, and receive, additional time to consider its recommendations that allows for a more inclusive and thoughtful consideration of needed changes and alternatives to Nevada's current law.

General recommendation: Mention of AIDS vs. HIV

As the Task Force was reviewing state statutes, we noticed a place where acquired immunodeficiency syndrome (AIDS) was mentioned when human immunodeficiency virus (HIV) should have been used. While HIV is a virus that causes an infection, AIDS is a condition that only occurs at the last stage of HIV infection. While we only noticed this in NRS 441A.300, it's possible that AIDS is incorrectly mentioned elsewhere as well. There is a clear difference between AIDS and HIV, and we recommend that the Nevada Revised Statutes be completely reviewed to correct any incorrect mention of AIDS.

NRS 174.031: No change

NRS 201.205: Repeal

This statute criminalizes intentional conduct that is likely to transmit HIV. While we appreciate that the statute establishes an affirmative defense and specifically mentions "intentional" behavior, categorizing this crime as a "category B felony" is considered to be unreasonably harsh under elements of modernization.

A remedy to this issue is to amend the statute so that the crime is categorized as a misdemeanor rather than a category B felony. This change would be in accordance to a prime element of modernization while still criminalizing cases of intentional transmission.

Recommend misdemeanor designation, not repeal, as well as reforms to the definition of the offense. See proposed language.

NRS 201.354: No change

NRS 201.356: Remove fine OR no change

OPTION 1: This statute requires that someone who is arrested for a violation of NRS 201.354 (unlicensed sex work) be tested for HIV and also establishes other guidelines relating to that test. While we see no problem with the statute as a whole, we are uncomfortable with the requirement that the arrestee be charged \$100 for the cost of the test if charged with the crime

of unlicensed prostitution.

Change? from “remove fine” to “change fine to reflect actual cost of HIV test”

We recommend that this statute be amended so that the arrestee is not required to pay for the cost of the HIV test. The existence of this mandate is yet another unjust barrier in the criminal justice system that disproportionately affects low-income individuals. According to multiple studies (1 and 2), the existence of such fines goes against rehabilitation efforts and can be ineffective at raising revenue. Additionally, we believe this requirement is unnecessary considering the high number of opportunities for Nevadans to get a free HIV test.

OPTION 2: No change

The task force should recommend repealing mandatory HIV testing for sex workers following arrests for prostitution.

NRS 201.358: Repeal

This statute makes it a class B felony for a person living with HIV to engage in sex work within our state. A key element of HIV modernization is the elimination of any enhanced sentence that applies only to people living with HIV. Consequently, we recommend that this statute be repealed in its entirety.

It's important to note that people living with HIV cannot engage in legal sex work in a Nevada brothel. Consequently, people who are in violation of this statute are already in violation of NRS 201.358 and are guilty of a misdemeanor according to that statute. The addition of the enhanced sentence based on HIV status goes against HIV modernization efforts and may be considered excessive punishment.

It is also important to note the potential impact of this law on actual Nevadans. The Advisory Task Force on HIV Exposure Modernization had a chance to hear from a person living with HIV who admitted to engaging in survival sex work. The story highlighted that people who violate this law may do so out of necessity and with no intent to transmit HIV. Furthermore, like other HIV related statutes in Nevada, this law does not account for people who cannot transmit HIV due to a low or undetectable viral load.

Agree with the task force that it is imperative for this statute to be repealed; however, prohibiting anyone from engaging in any form of legal employment, including legal sex work, violates federal disability antidiscrimination law, and so that prohibition should be repealed.

NRS 209.385: Segregation and authority given to the Department

This statute requires imprisoned individuals to be tested for HIV, and establishes additional provisions if that person tests positive. This statute states that an imprisoned person with HIV may be segregated from imprisoned individuals without HIV at the discretion of the Department of Corrections. The Task Force sees two possible issues with this requirement.

First, we're curious what "segregated" means in this context, and why segregation would be necessary. Secondly, this statute gives wide authority to the Department in determining risky behavior that is likely to transmit HIV. In other states, people with inadequate knowledge of HIV and its transmission are sometimes given authority in determining behavior that is risky or likely to transmit (see 3, 4, and 5 for cases in which people living with HIV were criminalized for exposing HIV for doing something that cannot transmit the virus). In this case, it seems possible that an inmate could be segregated because someone in the Department incorrectly believed that risky behavior happened. For example, a person with a low viral load who cannot transmit HIV may be wrongfully segregated under this law. It's extremely important that laws like this one are advised by science and not stigma, and this statute should be amended to ensure that decisions are always informed by science.

We strongly urge the task force to consider repealing this statute that singles out PLHIV. Legal challenges to segregation of PLHIV produced federal appeals court decisions outlawing segregation regimes as violative of the ADA and other federal antidiscrimination law.

NRS 441A.160: No change?

NRS 441A.180: No change

We suggest changes to the language in this statute. As written, it offers no guidance on what is “likely to expose others” nor on what “occupation[s]” put someone in a position where they are likely to transmit disease to others. The only context in which the prohibitions in this provision are appropriate are in the context of airborne/casually transmitted diseases and places of employment or public accommodation where transmission of a serious communicable disease is possible (e.g., TB, COVID) Please see suggest language for other changes we suggest.

NRS 441A.230: No change

NRS 441A.300: Repeal

This statute establishes that a person living with AIDS can be subject to confinement if they fail to comply with a written order of a health authority. First of all, this statute wrongly mentions AIDS when it should mention HIV.

Other than that, this statute is identical to other statutes that govern behavior that can transmit diseases. NRS 441A.180, for example, states that a person with a communicable disease shall not conduct themselves in a way that is likely to expose others to that disease (in which a violation of this statute is subject to a misdemeanor charge). Considering that the type of violation governed by NRS 441A.300 is already covered by other statutes that don't single out HIV or AIDS, we recommend that this statute be repealed. This change conforms to elements of modernization, which states that the law should be applicable to all diseases and not just HIV.

Support the task force's position on repealing.

NRS 441A.320: Mention of HIV and STDs

While we see no issue with this statute as a whole, we think the mention of “human immunodeficiency virus and any commonly contracted sexually transmitted disease” is repetitive, unnecessary, and only furthers stigma for people living with HIV. Since HIV is an STD, there is no reason to list both of these items out separately, and we recommend amending this to remove the unnecessary mention of HIV in the above quoted phrase.

Agree with the task force – see proposed language of simply removing specific reference to HIV.

NRS 441A.910: No change?

NRS 441A.195: Possible transmission of a communicable disease

This statute allows a court to order a person to be tested for a communicable disease if possible transmission occurred. More specifically, if a law enforcement officer, firefighter, coroner, or another public employee or volunteer comes into contact with a person's blood or other bodily fluids, then that public employee/volunteer can petition the court to require that the person be tested for a communicable disease.

In several other states, people living with HIV have been charged under HIV criminalization laws when biting or spitting on law enforcement or other public employees (3, 4, and 5). Considering that HIV cannot be transmitted through saliva, these criminalization cases completely disregard science and are extremely unfair. With NRS 441A.195, it may be possible for a similar situation to happen where a person living with HIV is wrongfully criminalized for behavior that cannot transmit HIV.

We recommend amending this statute by adding an additional subsection for clarification. This added language can read something like the following: "Method of transmission for communicable diseases must be considered. A court shall deny such a petition if the bodily fluid that was exchanged cannot transmit a disease in question. The intent of the perpetrator must also be considered. The addition of such a clause would align with science and ensure that people living with HIV are not unnecessarily convicted.

See proposed language for accomplishing this addition, at least in part, within the currently existing subsections.

Also, in thinking about the necessity of this offense, we propose that the task force consider the fact that an officer or other public employee who fears transmission of disease could simply get tested for the disease of concern, and/or take post-exposure prophylactics. Perhaps there are means outside this law to make these options available to an officer under these circumstances. There may be ways to protect an officer without requiring the person who may have exposed the officer to get tested.

Citations

1. <https://nicic.gov/fines-fees-and-bail-payments-criminal-justice-system-disproportionately-impact-poor>
2. <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>
3. <https://www.brproud.com/news/local-man-who-allegedly-spit-on-officer-admits-to-knowing-he-has-hiv/>
4. <https://www.augustachronicle.com/news/20191029/hiv-positive-augusta-inmate-charged-after-spitting-in-deputys-face>
5. <https://wsbt.com/news/local/elkhart-county-jail-inmate-faces-new-charges-after-spitting-on-two-officers>