

**REPORT TO THE GOVERNOR, and DIRECTOR OF THE LEGISLATIVE COUNSEL BUREAU
for transmittal to the 81ST SESSION OF THE LEGISLATURE**

**Advisory Task Force on HIV Exposure Modernization
2020**

Authorizing legislation: SB 284 (2019)

André Wade, Advisory Task Force Chair
Senator Dallas Harris, Advisory Task Force Co-Chair

Task Force Members:

- Senator David Parks
- Steven B. Amend, Esq.
- Vince Collins
- Ruben Murillo
- Stephan Page
- Octavio Posada
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TABLE OF CONTENTS

Executive Summary.....	4
Background.....	4
Summary of Task Force Work	6
Recommendations.....	10
Recommendation 1: Non-Statutory Recommendations	10
Recommendation 2: DRAFT Recommendations	10
Recommendation NRS 174.031.....	10
Recommendation NRS 201.205.....	10
Recommendation NRS 201.354.....	11
Recommendation NRS 201.356.....	11
Recommendation NRS 201.358.....	11
Recommendation NRS 209.385.....	11
Recommendation NRS 441A.160.....	12
Recommendation NRS 441A.180.....	12
Recommendation NRS 441A.230.....	12
Recommendation NRS 441A.300.....	12
Recommendation NRS 441A.320.....	12
Recommendation NRS 441A.910.....	12
Recommendation NRS 441A.195.....	12
Conclusion and Next Steps.....	12
Appendices	
Appendix A: 248B Modernization Task Force By-Laws.....	14
Appendix B: 2019 Senate Bill 284 (19 SB284) Task Force Activities and Timeline.....	19
Appendix C: Williams Institute Research on HIV Criminalization.....	26
Appendix D: Written Testimony of Brad Sears, Associate Dean of Public Interest Law UCLA School of Law, & David Sanders, Distinguished Scholar, Williams Institute.....	27

Appendix E: CHLP Suggestions to SB248 Modernization Task Force..... 41
Appendix F: SIDLEY..... 47

Executive Summary

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BACKGROUND

Senate Bill No. 2841, primarily sponsored by Senators David Parks, Chris Brooks, Pat Spearman, and Assemblyman Tyrone Thompson, and with support from nine co-sponsors was passed during Nevada's 80th (2019) Legislative session with bipartisan support. On May 17, 2020, Governor Steve Sisolak signed SB 284 onto law to create the Advisory Task Force on Human Immunodeficiency Virus (HIV) Exposure Modernization appointed by Governor Sisolak.

Task Force Members

The following individuals were appointed by Governor Sisolak to be part of the Advisory Task Force: André Wade, Chair; Senator Dallas Harris, Co-Chair; Senator David Parks; Steven B. Amend, Esq.; Vince Collins; Ruben Murillo; Stephan Page; Octavio Posada; and Quentin Savvoir. The Task Force received support from Nevada's Division of Public and Behavioral Health's staff. The Task Force was commissioned to conduct a comprehensive examination during the 2019-2020 legislative interim of the statutes and regulations in the State of Nevada related to the criminalization of exposing a person to HIV. This bill also requires the Task Force to submit a report of its findings and recommendations to Governor Sisolak and the Legislative Counsel Bureau not later than September 1, 2020.

Nevada Revised Statutes

HIV criminalization is the use of state statutes that either criminalize what would otherwise be legal conduct or by increasing the penalties for illegal conduct based upon an individual's HIV status. (2) In Nevada, neither the intent to expose another person to HIV nor actual transmission is a required element of the crime; the current statutes only require "intentionally, knowingly, or willfully engaging in conduct in a manner that is intended or likely to transmit the disease to another person." (3) Conduct "likely to transmit" HIV is not defined. (4) Similarly, In Nevada, it is a Class B felony, punishable by two to ten years in prison and/or a fine of up to \$10,000 for a PLHIV to engage in licensed or unlicensed sex work after receiving notice of their HIV status. (5) At this time, HIV is the only communicable disease explicitly named in Nevada's criminal statutes. Other communicable diseases like Hepatitis B and C, are implicitly named in the Public Health and Safety Statutes, but not in criminal statutes.

With some laws enacted more than 20 years ago, it is necessary to modernize these outdated statutes to bring them current to scientific advances in the understanding of transmission and treatment of HIV. The drafting of SB 284 adheres to similar efforts in other U.S. states to decriminalize HIV exposure. Several peer-review studies (6) and increasing evidence shows that HIV-specific laws do not reduce the risk of contracting HIV; on the contrary, these laws reduce the willingness for those affected the most by these laws to get tested. (7) Furthermore, research shows that the impact of efficient prevention and treatment of HIV is now better understood: Antiretroviral Treatment (ART) reduces the likelihood of HIV treatment by up to 96%, and Preexposure prophylaxis (PrEP) has shown to have effectiveness with preventing HIV transmission. (8)

SB 284 AS ENACTED INTO LAW

Below are three items assigned to the Task Force from Section 1 of SB 284, as passed into law discussed in more detail within this report.

- (6) The Task Force shall solicit input from persons and nongovernmental agencies with expertise in matters relevant to the Task Force in carrying out its duties pursuant to this section, including, without limitation, persons, organizations and communities that are directly affected by the current statutes and regulations of this State that criminalize exposure to HIV or mandate HIV testing or disclosure as part of any civil or criminal law or are likely to be affected by any law or policy recommended by the Task Force.
- (10) The Task Force shall:
 - a. Identify, review and evaluate the current statutes and regulations of this State that criminalize exposure to HIV intending to identify recommendations for modernizing those statutes and regulations and addressing discrimination with respect to people living with HIV/AIDS.
- (11) The Task Force may make recommendations concerning any matter relating to the review and evaluation pursuant to subsection 10, including, without limitation, recommendations concerning proposed legislation, proposed regulations, and policies.

Acknowledgments

The efforts of the Advisory Task Force on Human Immunodeficiency Virus (HIV) Exposure Modernization are a continuation of the tireless work of local community champions and organizations at the forefront of modernizing HIV laws in Nevada.

1 <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6502/Text>

2 See Brad Sears, Shoshana K. Goldberg, Christy Mallory, Williams Institute, *The Criminalization of HIV and Hepatitis B and C in Missouri: An Analysis of Enforcement Data From 1990 to 2019* 7 (2020)

3 NEV. REV. STAT. § 201.205

4 *HIV Criminalization in the United States: A source on State and Federal HIV Criminal Law and Practice. Nevada.*

5 NEV. REV. STAT. § 201.358

6 Lehman, J.S., Carr, M.H., Nichol, A.J. et al. *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States. AIDS Behavior* 18, 997–1006 (2014).

<https://doi.org/10.1007/s10461-014-0724-0>

7 *Id.*

SUMMARY OF TASK FORCE WORK

Summary of Work

The Advisory Task Force on HIV Exposure Modernization held its first meeting on July 8, 2020. The first order of business was the nomination and election of André Wade as Chair of the Task Force and Senator Dallas Harris as Co-Chair, which was followed by the review and adoption of the By-Laws.

Article 1 Section 2.2 of the Task Force By-Laws identifies specific duties and responsibilities of the Council, which includes:

- a. Identify, review, and evaluate the current statutes and regulations of this State that criminalize exposure to HIV;
- b. Research the implementation and impact of such statutes and regulations, including without limitation, quantifying their impact through the analysis of the records, information, and data relevant to this State to the extent possible;
- c. Identify any disparities in arrests, prosecutions, or convictions under such statutes or regulations related to race, color, sex, sexual orientation, gender identity or expression, age or national origin;
- d. Evaluate current medical and scientific research with respect to the modes of HIV transmission implicated by such statutes and regulations;
- e. Identify any court decisions enforcing or challenging such statutes and regulations;
- f. Assess developments occurring in other states and nationally with respect to modernizing HIV criminalization laws;
- g. The Task Force may make recommendations concerning any matter relating to the review and evaluation pursuant to subsection 10, including, without limitation, recommendations concerning proposed legislation, proposed regulations and policies;
- h. The Task Force shall, on or before September 1, 2020, prepare and submit a report of the activities, findings, and recommendations of the Task Force.

There were four Nevada Revised Statutes (NRS) that were immediately identified as needing review and discussion. The four statutes include:

NRS 201.205: Penalty; affirmative defense – “A person who, after testing positive in a test approved by the State Board of Health for exposure to the human immunodeficiency virus and receiving actual notice of that fact, intentionally, knowingly or willingly engages in conduct in a matter that is intended or likely to transmit the disease to another person is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 2 years and a maximum term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000, or by both fine and imprisonment.”

NRS 201.358: Engaging in prostitution or solicitation for prostitution after testing positive for exposure to human immunodeficiency: Penalty; definition – “A person who violates NRS 201.354 (prostitution or solicitation except in a licensed establishment) or works as a prostitute in a licensed house of prostitution, after testing positive in a test approved by the State Board of

Health for exposure to the human immunodeficiency virus and receiving notice of that fact is guilty of a category B felony and shall be punished by imprisonment in the state prison for a

minimum of term of not less than 2 years and a maximum term of not more than 10 years, or by a fine of not more than \$10,000 or by both fine and imprisonment.”

NRS 441A.300: Confinement of person whose conduct may spread acquired immunodeficiency syndrome – “A person who is diagnosed as having acquired immunodeficiency syndrome who fails to comply with a written order of a health authority, or who engages in behavior through which the disease may spread to others, is, in addition to any other penalty imposed pursuant to this chapter, subject to confinement by order of a court of competent jurisdiction.”

NRS 441A.180 Contagious person to prevent exposure to others; warning by health authority; penalty – “1) A person who has a communicable disease in an infectious state shall not conduct himself or herself in any manner likely to expose others to the disease or engage in any occupation in which it is likely that the disease will be transmitted to others. 2) A health authority who has reason to believe that a person is in violation of subsection 1 shall issue a warning to that person, in writing, informing the person of the behavior which constitutes the violation and of the precautions that the person must be served upon the person by delivering a copy to him or her. 3. A person who violates the provisions of subsection 1 after service upon him or her of a warning from a health authority is guilty of a misdemeanor.”

These four statutes were identified by the Nevada HIV Modernization Coalition, which has been meeting for several years, with the goal of modernizing HIV laws. “The Coalition brings together people living with HIV (PLHIV), medical and public health leaders, policy experts, and other allies to improve public health, advance social justice, humanize PLHIV, and end HIV criminalization.” (1) Additionally, these four statutes, and eight others, were identified in a memo written by law firm Sidley, by way of Equality California/Silver State Equality, regarding HIV Decriminalization. (See Appendix F). The memo summarizes and reviews “(1) The Laws of the State of Nevada to confirm what provision are likely to be impacted in connection with the implementation of any modernization and reform efforts related to HIV/AIDS criminal laws, including any relevant Laws that would need to be updated to implement the modernization and reforms; and (2) the Laws described in Section III.(3) for purposes of referencing those provisions that provided for HIV/AIDS criminalization modernization and reform, which such review included both on the substance of each relevant Law and summaries of the argument raised for and against enactment of such Laws.”(2)

Elements of Modernization

The Task Force adopted the use of the Nevada HIV Modernization Coalition’s Elements of Modernization. The Elements of Modernization include:

- a. Lower any penalty to the lowest graded misdemeanor;
- b. Eliminate any sentence enhancement that results from being a PLHIV (Person Living with HIV);
- c. Assign all burdens of proof to [the] prosecution;

1 Nevada HIV Modernization Coalition, 2020

2 Becker, Justin et. Al 2020. HIV Decriminalization. Sidley.

- d. Make the law applicable to all non-airborne contagious or infectious disease, not HIV in isolation. No specific disease or condition should be the focus of a criminal law or sentence enhancement.(3)
- e. Include a requirement that the law apply only to those act[s] with specific intent to transmit and who engage in conduct that carries a substantial risk of transmission defined as a reasonable probability of transmission as proven by competent medical evidence;
- f. Include a statement that the prosecution cannot meet its burden of proving specific intent to transmit where PLHIV undertook or attempted to undertake practical means to prevent transmission defined as any method, device, behavior or activity demonstrated epidemiologically to measurably limit, reduce, or eliminate the risk of transmission (use of barrier protection, use of ART).
- g. Any penalty must be proportionate to the harm and prioritize alternatives to incarceration, and classification as a sex offender should never result.(5)

The Task Force decided to meet weekly and work to create a list of tasks and timeline needed to complete the report by September 1, 2020, with the caveat that additional information would be submitted later in the year. The 2019 Senate Bills 284 (19 SB284) Task Force Activities and Timeline was created and lists the specific duties and responsibilities of the Task Force, which is outlined in the By-Laws and listed above, related Nevada Revised Statutes, Member(s) Responsible, Status, Completion Deadline, Source Documentation and Comments/Notes. (See Appendix A)

To help further inform the work of the Task Force, various stakeholders in Nevada and across the nation, who have lived and/or otherwise expertise in HIV Modernization were invited to present to members of the Task Force. The following individuals were invited and presented information:

1. Chris Reynolds, Chair of the Nevada HIV Modernization Coalition
2. Brad Sears, J.D., Distinguished Scholar of Law & Policy at the Williams Institute, and the Associate Dean of Public Interest Law at UCLA
3. Cheryl Radeloff, HIV Advocate
4. Marguerite Schauer, Interim Staff Attorney, The Center for HIV Law and Policy
5. Christian Eduardo, Survivor Leader, Sanctuary for Families

Chris Reynolds spoke to the Task Force about HIV Modernization in general and HIV Modernization in Nevada. Mr. Reynolds attended subsequent meetings, as a standing presenter to the Task Force, and helped research the implementation and impact of NRS and regulations and their impact on records, information, and data. He also assisted with the evaluation of current medical and scientific research with respect to the modes of HIV transmission.

3 Positive Justice Project, Guiding Principles for Eliminating Disease-specific Criminal Laws.

www.hivlawandpolicy.org/pjp.

4 Nevada HIV Modernization Coalition, 2020

5 Positive Justice Project, Guiding Principles for Eliminating Disease-specific Criminal Laws.

www.hivlawandpolicy.org/pjp.

Brad Sears spoke to the Task Force about the work of the Williams Institute’s research for California, Florida, Georgia and Missouri. He outlined that these laws that were passed in the 1980s and 1990s when there was a lot of fear and uncertainty about the AIDS epidemic. He noted the following:

- a. These outdated laws do not require that someone actually infect another person with HIV to be held liable and punished with a felony conviction and imprisonment;
- b. These outdated laws do not require someone to intend to infect someone else; and
- c. Behavior that cannot transmit HIV is criminalized. These behaviors include, in part, biting, spitting, using a condom during sex with someone living with HIV, and someone living with HIV having an undetectable viral load when having sex.

Mr. Sears provided a written statement (See Appendix D) that outlines ten major trends and themes from various studies, which are listed below:

1. HIV criminal laws have impacted hundreds of people in every state we have studied.
2. HIV criminal laws are not based on the latest science and foundational principles of criminal law.
3. The enforcement of HIV criminal laws happens in cities, suburbs, and rural areas.
4. HIV criminal laws disproportionately impact Black people, Latinx, people, and other people of color.
5. HIV criminal laws disproportionately impact women and sex workers.
6. For recent immigrants, HIV criminal laws can not only mean incarceration but deportation.
7. HIV criminal laws bring new people into the criminal justice system.
8. HIV criminal laws bring young people into the criminal justice system, including minors.
9. HIV criminal laws cost states millions of dollars in incarceration costs alone.
10. HIV criminal laws undermine Nevada’s public health efforts to fight HIV disease. (6)

Cheryl Radeloff spoke to the Task Force, in part, about the work of the Nevada Ending the HIV Epidemic Project and the completion of a state plan to address the HIV Epidemic in Nevada. Ms. Radeloff was asked to help identify and invite other presenters to the meeting who have knowledge and expertise about sex workers and someone who identifies as Transgender or Gender Diverse.

Marguerite Schauer spoke to the Task Force about the criminalization of HIV, approaches to reform and consequences that have occurred and are ongoing across the nation.

Christian Eduardo spoke about his experiences as a survivor of sex trafficking, the inability for victims to negotiate condom use and obtain consent, and the intersections of sex trafficking, immigration, HIV and access to health care.

Moreover, the Task Force heard from many guests and advocates who attended the meeting to share their thoughts on HIV Modernization and the work of the Task Force.

6 Sears, Brad, et al., Williams Institute Research on HIV Criminalization: Statement of Dean Brad Sears. (August 6, 2020).

Over the course of the meetings, the Task Force reviewed and identified twelve (12) Nevada Revised Statutes to determine if the statutes needed to be repealed, modernized, reformed/effectively repealed or left alone. Preliminary recommendations were discussed, which are outlined in the Recommendations section of this report. Progress was noted, on an ongoing basis, on the Task Force Activities Timeline.

RECOMMENDATIONS

The following represents The Task Force’s recommendations based on consideration and input from the diverse stakeholders represented on the Task Force as well as input from outside groups. These are consensus recommendations, each member of the Task Force, and the organizations or interests they represent, may have drawn different conclusions from the research and the work of the Task Force.

Non-Statutory Recommendations

The following details the non-statutory recommendations of the Task Force of HIV Modernization:

The Task Force on HIV Modernization developed two recommendations pertaining to completion of the work.

- An extension of the deadline required by SB 284, in order to complete the work required to meet the mandates of the bill. The Task Force did not begin their work until July 8, 2020, due to challenges including the appointment of Task Force members and the COVID-19 pandemic.
- Recommendation: Completion of appointments to the HIV Modernization Task Force. Currently nine of the 15 possible appointments are serving on the Task Force. The Task Force is recommending additional members of the Task Force be appointed to represent segments of the LGBTQ+ community, women, people living with HIV, and sex workers to provide a broader spectrum of representation from the community.

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 instead. 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 recommendation

NRS 201.205: amend, lower to misdemeanor

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.

We recommend that this statute be amended 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.

Additionally, we also recommend that “intentionally, knowingly or willfully” be amended to read “intentionally, knowingly, **and** willfully” so that all three of these conditions must be met in order to be criminalized under this law.

NRS 201.354: no recommendation

NRS 201.356: repeal

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.

We recommend that this statute be repealed entirely. This statute is exemplary of an HIV specific law that could lead to excessive punishment for a person living with HIV. The repeal of this law would be in alignment with elements of modernization.

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 licensed house of prostitution. Consequently, people who are in violation of this statute are already in violation of NRS 201.354 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.

NRS 209.385: repeal

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.

We recommend that this statute be repealed in its entirety. This statute is yet another example of an HIV specific law that is potentially harmful for people living with HIV. Additionally, the term “segregated” is concerning because it is not defined, but it is definitely not in alignment with elements of modernization to segregate people living with HIV from people who are HIV negative. This requirement could even be considered illegal discrimination under disability laws. The repeal of this statute would resolve all of these issues.

NRS 441A.160: no recommendation

NRS 441A.180: no recommendation

NRS 441A.230: no recommendation

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.

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.

NRS 441A.910: no recommendation

NRS 441A.195: no recommendation

CONCLUSION AND NEXT STEPS

While this preliminary report is meant to summarize the work the Task Force has already completed, more research will be done. Once completed, this Task Force will supplement this report with our final findings and recommendations.

Work Still to be Completed

- Research the implementation and impact of such statutes and regulations, including without limitation, quantifying their impact through the analysis of the records, information, and data relevant to this State to the extent possible.
 - Currently we are waiting for the response from the Williams Institute at UCLA, to see if they can assist in this process. They have extensive experience in this area in the analysis of HIV laws in other states. This process will take from three (3) to six (6) months.
- Identify any disparities in arrests, prosecutions or convictions under such state statutes and regulations related to race, color, sex sexual orientation, gender identity or expression, age or national origin.

- This information will also likely be included in the Williams Institute report.
- Evaluate current medical and scientific research with respect to the modes of HIV transmission implicated by such statutes and regulations.
 - This work is ongoing and will be included in the final report.
- Identify any court decisions enforcing or challenging such statutes and regulations.
 - This information will likely be included in the Williams Institute report and included in our final report.
- The Task Force may make recommendations concerning any matter relating to the review and evaluation pursuant to subsection 10, including, without limitation, recommendations concerning proposed legislation, proposed regulations and policies.
 - This work is ongoing, and although some recommendations have already been made in this preliminary report, additional recommendation with be made in the final report.

APPENDICES