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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.

## BLOG

# A Side-by-Side Comparison of the Proposed Bills to Reform Missouri's HIV Criminal Laws

by CHLP Staff

On December 3, 2018, Missouri State Representatives Tracy McCreery (D-88) and Holly Rehder (R-148) both filed bills proposing changes to Missouri's HIV criminal laws. While both bills attempt to modernize problematic features of Missouri's laws, they differ in their approach and specific terms. A close examination of each bill is useful to advocates considering different approaches to modernizing HIV criminal exposure statutes in their states.

### HB 166

Filed by Representative McCreery, [HB 166](#) closely reflects the priorities and advocacy of the [Missouri HIV Justice Coalition](#).

### HB 167

Filed by Representative Rehder, [HB 167](#) represents some of the Coalition's priorities, but with several differences from HB 166, some of which are problematic.

#### Required State of Mind (*mens rea*)

Currently, [Missouri Rev. Stat. §191.677<sup>1</sup>](#) requires only that a PLHIV knows their status and "recklessly" exposes someone else via sex, sharing needles, or biting/causing some other kind of contact with bodily fluids, regardless of whether the contact poses significant risk of transmission. Also, a person acts "knowingly" when they are aware of the nature of their conduct or they are aware that their conduct is practically certain to cause a particular result ([Mo. Rev. Stat. § 562.016](#)).

HB 166 adds the requirement that someone acts "with the specific purpose of transmitting a serious infectious or communicable disease" in order for prosecution to occur.

<sup>1</sup> The links to the specific statutes are contained in the section on Missouri law in CHLP's [HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice](#), The Center for HIV Law and Policy (2017), and each statute can be found at the end of the document.

HB 167 alters the language of the current law to require that a person "knowingly" expose someone else to a substantial risk of transmission for application of the most severe penalty. "Reckless" conduct that does not result in transmission can also still be punished as a Class A misdemeanor. These changes allow for the prosecution of a larger number of PLHIV than acting with the "specific purpose" of transmission under HB 167.

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## HB 166

## HB 167

**Penalty Level: Misdemeanor vs. Felony**

*Missouri's criminal exposure statute [currently imposes](#) a Class A or B felony (depending on whether transmission occurred) punishable by 30 or 15 years of incarceration, respectively. Engaging in activities that pose no real risk of transmission, and which do not result in transmission, can still result in up to 15 years of prison time.*

HB 166 downgrades punishment to a misdemeanor rather than a felony. It proposes misdemeanor penalties for intentional transmission or attempted transmission of a serious infectious or communicable disease. Where transmission results, a Class A misdemeanor is imposed, punishable by up to one year of incarceration. Where transmission does not result, a Class B misdemeanor is imposed, punishable by up to six months imprisonment. These penalties represent a much more proportionate response to the harm of intentional disease transmission.

HB 167 proposes penalties that are somewhat less harsh than current law, but keeps felony punishments, which have a negative impact on a person's life opportunities, including employment, post-conviction and completion of a sentence. It proposes felony penalties for knowing exposure, even when there is no transmission. Knowing exposure that results in transmission is a Class B felony, punishable by up to 15 years of imprisonment. Knowing exposure that does not result in transmission is a Class C felony, punishable by up to seven years of incarceration. These penalties represent approximately half the severity level that someone could face for similar conduct under [current law](#). HB 167 also retains a Class A misdemeanor penalty for "reckless exposure" that does not result in transmission (up to one year of jail time).

**Risk of Transmission**

*[Under current law](#), even activities that do not pose a significant risk of disease transmission can be severely punished as a felony, such as oral sex, sex with a condom or while on effective therapy, and biting.*

HB 166 adds the limitation that someone engaged in an "activity that has a substantial risk of disease transmission as determined by the Centers for Disease Control and Prevention or other epidemiological evidence" for prosecution to occur.

HB 167 also adds the requirement that someone engaged in an "activity that creates a substantial risk of transmission" in order for prosecution to occur. However, the bill does not specifically refer to the Centers for Disease Control and Prevention as an authority—rather, the assessment of "substantial risk" is to be made using "competent medical or epidemiological evidence." (Which would presumably include standards from the CDC).

**Risk Reduction Measures**

*[Current Missouri law](#) specifically excludes condom use as a defense to prosecution.*

HB 166 includes recognition of risk reduction measures, proposing that a person does not act with the purpose of transmitting disease if they "take or attempt to take practical measures to prevent transmission." This means a good faith effort to do anything that is "demonstrated scientifically to measurably limit or reduce the risk of transmission," whether that is using a condom, taking medication, or using other forms of protection. Importantly, not taking any kind of risk reduction measure cannot be the sole basis of establishing that a person acted with the specific purpose of transmitting disease.

HB 167 also includes recognition of risk reduction measures and it proposes that a person cannot be found to have acted knowingly if they "take or attempt to take practical measures to prevent transmission." This means a good faith effort to do anything that is "demonstrated scientifically to measurably limit or reduce the risk of transmission," whether that is using a condom, taking medication, or other forms of prophylaxis.

## HB 166

## HB 167

**HIV Exceptionalism**

*Current Missouri law singles out HIV.*

HB 166 shifts away from “HIV exceptionalism” by focusing on intentional transmission of a “serious infectious or communicable disease[s],” and targeting conduct intended to transmit any “serious infectious or communicable disease” rather than singling out HIV. A serious infectious or communicable disease is defined as a “nonairborne disease that is transmitted from person to person and determined to have significant, long-term implications on physical health or life activities.” This definition excludes casually transmitted conditions, such as tuberculosis or measles, and makes the criminal law’s treatment of HIV consistent with the treatment of other serious health conditions.

HB 167 also shifts away from “HIV exceptionalism,” and proposes a narrower definition of “serious infectious or communicable disease.” Under this bill, a serious infectious or communicable disease is defined as a “nonairborne disease spread from person to person that is fatal or causes disabling long-term consequences in the absence of lifelong treatment and management.” Like HB 166, this definition excludes casually transmitted conditions, but is further narrowed by the requirements that the condition is fatal or disabling for an individual absent lifelong clinical management. As such, only the most serious infectious diseases would be targeted.

**Uniquely Harsh Punishment for Sex Workers Living with HIV**

*Currently, [Missouri Rev. Stat. § 567.020\(2\)](#) makes engaging in prostitution a Class B felony if you are a PLHIV, punishable by up to 15 years of incarceration. Prostitution is otherwise a Class B misdemeanor, punished with a maximum of 6 months in jail. This is a 30-fold disparity in punishment on the basis of HIV status alone.*

HB 166 would eliminate this unfair and extreme penalty enhancement for sex workers living with HIV.

HB 167 does nothing to address uniquely harsh penalties for sex workers living with HIV. Evidence from some jurisdictions (see

e.g., [California](#), [Florida](#), [Georgia](#)) shows that sex workers are disproportionately targeted by and incarcerated because of HIV exposure laws.

**The Role of Disclosure**

*Under current Missouri law, disclosure is not spelled out as a standalone affirmative defense.*

HB 166 does not create an affirmative defense of disclosure.

HB 167 creates an affirmative defense of disclosure when the exposed person knew about the infectious or communicable disease and consented to exposure with that knowledge.

**Donation**

*Under current law, [Missouri Rev. Stat. § 191.677.1\(1\)](#), donation or attempted donation of blood, tissue, organs or sperm, unless deemed necessary for medical research, is a class B felony, or class A if transmission occurs.*

HB 166 would eliminate the penalties for blood/organ/sperm/tissue donation by PLHIV, as rigorous screening methods address such concerns.

HB 167 does not eliminate penalties for blood/organ/sperm/tissue donations. However, it does include an additional criterion for allowing such donations. The bill allows donations “deemed medically appropriate by a licensed physician,” in addition to what is allowed under current law, donations “deemed necessary for medical research.”

## HB 166

## HB 167

**Endangering a Mental Health or Correctional Employee**

*Under current law, [Missouri Rev. Stats. §§ 575.155.1 and 575.157.1](#), HIV and viral hepatitis function to enhance penalties for exposing others to blood, semen, urine, feces, or saliva in correctional settings or in secure mental health facilities. While normally punished as a Class D felony, with a maximum of 4 years' imprisonment, HIV or viral hepatitis can be used to bump this up to a Class C felony, with a maximum of 7 years' incarceration.*

HB 166 would eliminate the offenses of endangering a correctional or mental health employee altogether, regardless of whether someone is living with HIV or viral hepatitis.

HB 2574 does not eliminate the offenses of endangering a correctional or mental health employee via exposure to bodily fluids. However, the bill makes two important changes to these statutes. First, the enhanced penalties are no longer specific only to HIV and viral hepatitis. Instead, they apply to a "serious infectious or communicable disease," using the same definition as above (a "nonairborne disease spread from person to person that is fatal or causes disabling long-term consequences in the absence of lifelong treatment and management.") Second, rather than applying to blood, seminal fluid, urine, feces, or saliva, the revised laws would apply only to "bodily fluid[s] that ha[ve] been scientifically shown to be a known means of transmission of a serious infectious or communicable disease."