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**Submitted to the New York State Legislature
at the Joint Legislative Budget Hearing on Health**

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Lambda Legal submits the following comments on the 2024 New York State Legislative Budget supporting Part T (7) §9 repealing Section 2307 of the Public Health Law and opposing Part T (1) §4 lowering the informed consent requirements for HIV testing. Lambda Legal is headquartered in New York and is the oldest and largest legal organization in the nation dedicated to the civil rights of people living with HIV and LGBTQ+ individuals. We appreciate the opportunity to submit comments on these important provisions of the state budget.

I. PHL §2307 must be repealed

PHL §2307 is broad and unjust

Public Health Law 2307 (PHL §2307) is a New York Law that makes it a misdemeanor for a person who knows they currently have a sexually transmitted infection to have sexual intercourse with another person.

Lambda Legal in the Supreme Court of the United States won *Lawrence v. Texas*, the case that struck down sodomy laws in the United States, declaring them unconstitutional, thereby decriminalizing same-sex consensual activities in private.¹ The victory in *Lawrence* set a significant precedent in the fight against the criminalization of private, intimate life, mirroring the ongoing battle against HIV criminalization laws. Both these instances share a fundamental principle: opposition to unjust laws that penalize individuals for their private life choices and health conditions. PHL §2307 is an unjust law; it is indiscriminately broad with virtually no defenses. Neither intent to transmit nor actual transmission of an STI is necessary for violation of the law. It also does not matter if you disclose your status to your partner, if your partner consents, or if you use protection. Broad health status criminalization laws like these are

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003)





opposed by nearly every health organization in the nation.² Persons convicted under this statute are guilty of a misdemeanor and may face up to one year in jail and a \$1,000 fine.

PHL §2307 is contrary to Public Health

Public health advocates have long known that the best way to promote everyone's health is an approach that treats people as individuals who need care rather than vectors for disease or criminals to be punished.³ Leading harm reduction and public health organizations recognize the best way to further combat HIV and STI transmission is through testing and destigmatization. The American Medical Association, the Center for Disease Control, the Biden Administration, and the United Nations all oppose health status criminalization.⁴ Decreasing stigma and increasing access to testing, treatment, and support are the best ways to combat disease. PHL §2307, which criminalizes an individual's health status, is heavily stigmatizing and discourages individuals from testing leading to increased HIV transmission rather than reduction.

The law disproportionately harms communities of color, LGBTQ+ communities, and other vulnerable groups

PHL §2307 has a disproportionate impact on those most affected by HIV: communities of color, especially LGBTQ+ people of color.⁵ The law reflects oversized fear, stereotyping of those affected by the disease, and assignment of blame to already-marginalized members of society, such as the poor, sex workers, Black and brown communities, transgender people, and immigrants. These communities already encounter significant barriers to accessing employment, housing, and other necessities of life, which is only exacerbated by a criminal record. When a disease can be sexually transmitted, moral panic and stereotypes about the sexual practices of these groups can lead to laws that punish and condemn them, rather than provide care. These criminal laws are based on an outdated understanding of the routes and risks of transmission and reflect invidious discrimination against people living with HIV and other stigmatized diseases.

² HIV Criminalization and Ending the HIV Epidemic in the U.S., Center for Disease Control: <https://www.cdc.gov/hiv/policies/law/criminalization-ehe.html>

³ American Academy of HIV Medicine, HIV Criminalization: <https://aahivm.org/hiv-criminalization/>

⁴ See: American Medical Association Opposes HIV Criminalization, POZ Magazine: <https://www.poz.com/article/criminalization-ama-25757-3651> and UNDP and UNAIDS Policy brief on Criminalization of HIV Transmission, United Nations: <https://www.undp.org/publications/undp-and-unaid-policy-brief-criminalization-hiv-transmission>

⁵ HIV Criminalization, Williams Institute: <https://williamsinstitute.law.ucla.edu/issues/hiv-criminalization/>



PHL §2307 is a relic of the past

Laws must reflect the modern day and not be based on outdated beliefs. This law was originally written in 1909 to prevent the spread of “venereal disease” to members of the military. With the onslaught of World War II, combatting STIs became a national priority as their treatment took soldiers out of commission for months. In 1943 the legislature increased the penalty to a felony. In 1946 the law was rewritten again making it applicable to the general public and a misdemeanor. It remains unchanged 76 years later despite vast societal evolution and advances to medical science.⁶

PHL §2307 ignores modern science and medicine

Laws must be based on facts. Science has progressed by leaps and bounds in the past 76 years, making treatment of STIs more manageable and HIV no longer a death sentence. With treatment, many people living with HIV can achieve an undetectable viral load, making HIV transmission almost impossible.⁷ In 2021 in New York City, 79% of people living with HIV receiving treatment were virally suppressed.⁸ PHL §2307 does not make sense in the age of modern medicine.

The Legislature must go further to fully address health status criminalization

We urge the legislature to fully adopt the provisions in the bill REPEAL STI Discrimination Act (hereinafter REPEAL Act) introduced by Assemblymember Jessica Gonzalez-Rojas and Senator Brad Hoylman-Sigal.⁹ While repealing PHL §2307 is a positive initial first step, it does not fully address all the legal mechanisms that criminalizes individuals living with STIs. Accordingly, we urge the legislature to incorporate amendments to the criminal code prohibiting criminal liability on the basis of health status and allowing expungement of pass convictions.

Amending Criminal Liability

⁶ See legislative history available at:

https://nysl.ptfs.com/#!/s?a=f&q=*&type=16&criteria=browse2_ss%3D%22New%20York%20State%20Legislative%20Bill%20Jackets%22.

⁷ HIV Undetectable=Untransmittable (U=U), or Treatment as Prevention, National Institute of Health:

<https://www.niaid.nih.gov/diseases-conditions/treatment-prevention>

⁸ HIV Surveillance Annual Report 2021, New York City Department of Health and Mental Hygiene:

<https://www.nyc.gov/assets/doh/downloads/pdf/dires/hiv-surveillance-annualreport-2021.pdf>

⁹ New York Assembly Bill 334; NY A03347



The REPEAL Act would amend the Section 15.10 of the penal law to provide:

“A person living with a sexually transmitted infection who has sexual contact or other activity with another person has not engaged in conduct or activity that creates criminal liability for any offense where their status as a person with a sexually transmitted infection is a factor. For the purpose of this section, a sexually transmitted infection is transmitted primarily if not exclusively through sex or intimate physical contact.”

This provision would fully remove the ability to prosecute an individual due to their health status. Without this provision, health status can be criminalized under other statutes such as aggravated assault.¹⁰ As explained above, such criminalization of health status not only violates the principles of justice and equality but also can lead to adverse public health outcomes. By foreclosing health status as a ground for criminal liability, the legal system will better align with public health goals and human rights standards, fostering a more inclusive and health-focused approach to disease management and prevention.

Expungement

Incorporating expungement provisions is critical for several reasons. Firstly, it addresses the long-term impacts of a criminal conviction on an individual's life as the result of an outdated law. Convictions often carry consequences that extend far beyond the sentence, affecting employment, housing, education, and social relationships. By allowing for expungement it would acknowledge and mitigate ongoing hardships, and facilitate a more successful reintegration into society. For example, convictions for sex related offenses can be considered “crimes of moral turpitude” by USCIS serving as an absolute bar to any immigration relief for many individuals.¹¹

Additionally, expungement can be particularly important in cases such as these where the laws have evolved, recognizing that past convictions may no longer be in line with current societal values, modern medicine, or legal standards. By providing a pathway to expunge these convictions, the legislation not only supports individuals in overcoming barriers imposed by their criminal record but also aligns the legal system with contemporary principles

¹⁰ Bernard EJ, Symington A, Beaumont S. Punishing Vulnerability Through HIV Criminalization. *Am J Public Health.* 2022 Jun;112(S4):S395-S397. doi: 10.2105/AJPH.2022.306713. PMID: 35763735; PMCID: PMC9241463.

¹¹ INA 101(f)(3) and 8 CFR 316.10(b)(2)(i), (iv).



of justice and fairness. Expungement is a vital tool in repairing the long-term damage caused by a conviction, offering individuals a second chance and a clean slate to rebuild their lives.

In summary, an approach rooted in research, science, and objective facts is the best way to counter prejudice and end the STI and HIV epidemics. For these reasons, on behalf of Lambda Legal and the people living with HIV whom we represent, we urge passage of this important provision in the budget.

II. New York must maintain Informed Consent for HIV Testing

Lambda Legal also opposed the proposal in the budget amending the provisions of New York's Public Health Law that currently require a medical provider to provide direct oral notice of the test—including informing the patient about several crucial medical facts as well as the patient's rights—to an insufficient form of indirect consent such as in writing or through signage in a waiting room.¹²

Informed Consent is the Standard for Disease-Specific Medical Testing

The current New York standard, which mandates explicit and informed consent for HIV testing, is a cornerstone of medical ethics and patient autonomy.¹³ These standards parallel the recommended national standard.¹⁴ This protocol respects the individual's right to privacy and personal decision-making which are critical elements in any healthcare setting. Lowering these consent requirements risks undermining these fundamental rights leading to a decrease in trust between patients and healthcare providers.

Informed consent is not merely a procedural formality; it is an essential part of the patient-provider relationship.¹⁵ ¹⁶ It ensures that individuals are fully aware of the nature of the test, its implications, and their options. This awareness is crucial, especially in the context

¹² Pub. Health § 2781.

¹³ Pub. Health § 2803(1)(g).

¹⁴ CDC Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health Care Settings," available at <https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm> ("Patients should be informed orally or in writing that HIV testing will be performed unless they decline (opt-out screening). Oral or written information should include an explanation of HIV infection and the meanings of positive and negative test results, and the patient should be offered an opportunity to ask questions and to decline testing.").

¹⁵ See American Medical Association Code of Medical Ethics Opinion 2.1.1 available at <https://www.ama-assn.org/delivering-care/ethics/informed-consent>.

¹⁶ Brach, Cindy, *Even in an Emergency, Doctors Must Make Informed Consent An Informed Choice*, Health Aff (Millwood) 35(4) 739 (2016) ("There is a growing expectation that doctors should be effective communicators. Medical schools have begun to teach communication skills, especially since the United States Medical Licensing Examination started testing those skills with the use of simulated patients in 2004, and the communication skills component of the exam was enhanced in 2012").



of HIV, where the diagnosis can have significant personal, social, legal, and psychological impacts.

From a public health perspective, the goal of increasing HIV testing rates and early diagnosis is commendable. However, achieving this through the reduction of consent standards will lead to unintended negative consequences. These include potential stigmatization, fear, and a decrease in the overall willingness of individuals to engage with health services. It is crucial to foster an environment where individuals feel safe and empowered to seek testing voluntarily.

Removing Informed Consent will undermine the HIV Testing Statute

Crucial elements of New York's HIV testing law depend on notice testing and removing the requirement for informed consent in the HIV testing law will significantly alter and undermine the law's framework. This change may lead to inconsistencies and reduce its effectiveness. Key provisions, such as the obligation to offer testing¹⁷ and the availability of anonymous testing¹⁸, hinge on patients being adequately informed about testing procedures. Without proper notification, patients cannot make informed choices about opting in or out of testing, including choosing anonymous testing. The option for anonymous testing is vital for public health, especially in situations where patients may fear stigma or legal ramifications associated with HIV testing.

Violations of the Americans with Disabilities Act

Indirect forms of "notice" are not sufficient for HIV testing and potentially violate the Americans with Disabilities Act. While some advocates might argue that even without a requirement of direct notice, patients may still be provided with notice in other forms, those indirect forms of notice will not suffice for many patients. Notices in busy urban clinics, emergency rooms, or subways do not provide clear, individualized information to patients about their right to object to HIV testing during their admission and testing process. This method fails to consider those with visual impairments, illiteracy, mental or cognitive disabilities, or those in physical distress due to acute pain or illness, who may not be able to understand or assert their right to refuse testing. This overlooks the needs of people with disabilities, violating the Americans with Disabilities Act and other laws protecting individuals with mental health and substance use disorders.

¹⁷ Pub. Health § 2781.

¹⁸ Pub. Health § 2881-a requires that medical providers offer testing to all individuals over thirteen years old with limited exceptions.



Additionally, the proposal does not consider the implications for undocumented immigrants, where an HIV test during treatment for other health issues could affect their immigration status.^{19 20} It also disregards scenarios where mentally ill or people of color, often involved in confrontations with law enforcement, could face more severe legal consequences if HIV test results are obtained during these interactions. In essence, the proposed method of “notice” is ineffective for many, and it may be more beneficial for individuals to choose HIV testing at a different time and place.

Legal Implications of an HIV Diagnosis

An HIV diagnosis triggers numerous legal repercussions and patients must be prepared and consent to such a legally significant test. An HIV diagnosis implicates criminal liabilities across the nation.²¹ HIV diagnosis also implicates issues in family law such as custody or visitation.²² Finally, an HIV diagnosis has implications on potential immigration cases.²³ Accordingly, an individual must be fully prepared to manage the collateral legal consequences of a diagnosis otherwise an unexpected development in court will tend to produce unjust outcomes especially in the communities most vulnerable to HIV.

Lambda Legal understands and shares the urgency to address the challenges in the fight against HIV/AIDS. However, this should not come at the cost of compromising ethical standards and patient rights. There are alternative approaches to enhance HIV testing rates, such as increasing public awareness, destigmatizing HIV/AIDS, improving access to healthcare services, and encouraging voluntary testing through community-based initiatives.

Thank you for your attention to these important matters. I am hopeful that New York will continue to lead the nation by example in both public health innovation and the upholding of individual rights.

¹⁹ See “HIV Criminalization in California: What We Know,” The Williams Institute, *available at* <https://williamsinstitute.law.ucla.edu/wp-content/uploads/HIV-Criminalization-What-We-Know-2017.pdf> (“Based on the data available, it did appear that there were some individuals who had deportation proceedings brought immediately after an HIV-specific criminal incident.”).

²⁰ See Gruberg, Sharita, *How Policy Entanglement with Immigration Enforcement Puts LGBTQ Lives at Risk*, Center for American Progress (April 12, 2017), *available at* <https://www.americanprogress.org/>

²¹ HIV Criminalization Laws, Movement Advancement Project: https://www.lgbtmap.org/equality-maps/hiv_criminalization_laws

²² Family Law Issues, Center For HIV Law and Policy: <https://www.hivlawandpolicy.org/issues/family-law-issues>

²³ People Living with HIV, Immigration Equality: <https://immigrationequality.org/legal/legal-help/people-living-with-hiv/>