



## MEMORANDUM

**TO:** The Pennsylvania House of Representatives

**FROM:** Elizabeth Randol, Legislative Director, ACLU of Pennsylvania

**DATE:** March 12, 2021

**RE: OPPOSITION TO HB 103 P.N. 73 (SCHMITT)**

**Summary:** [HB 103](#) (PN 73) creates a new offense, defined as intentionally or knowingly causing a law enforcement officer to come into contact with saliva or other bodily fluid by throwing, tossing, spitting or expelling bodily fluid or material. If an individual knew, should have known, or believed such fluid or material came from someone infected by a communicable disease, the offense is graded a felony of the third degree, punishable by 3.5–7 years in prison and up to \$15,000 in fines. In any other instance, the offense is graded as a misdemeanor of the first degree, punishable by incarceration for 2.5–5 years and up to \$10,000 in fines.

According to the bill sponsor, HB 103 is intended to address a “[loophole](#)”<sup>1</sup> in current law ([§ 2703 Assault by prisoner](#)) that criminalizes contact with bodily fluids only when committed by someone who is incarcerated against correctional staff. HB 103 replicates the bodily fluids offense under § 2703, but applies it to *any person* who commits that offense against *any* law enforcement officer.

**On behalf of over 100,000 members and supporters of the ACLU of Pennsylvania, I respectfully urge you to oppose House Bill 103.**

### **HB 103 is based on unscientific, outdated, and fear-based assumptions about HIV transmission.**

HB 103 would make it a first-degree misdemeanor to cause (or attempt to cause) a law enforcement officer to come into contact with “blood, seminal fluid, saliva, urine or feces by throwing, tossing, spitting or expelling such fluid or material.” HB 103 enhances this offense to a third-degree felony if “the person knew, had reason to know, should have known or believed such fluid or material to have been obtained from an individual, including the person charged under this section, infected by a communicable disease, including, but not limited to, human immunodeficiency virus (HIV) or hepatitis B.” And yet, according to the CDC:

- HIV cannot be transmitted through [saliva](#);<sup>2</sup>
- There is negligible, if any, risk of HIV transmission through [feces or urine](#);<sup>3</sup>
- HIV can be transmitted through [blood and seminal fluid](#), but these fluids “must come in contact with a mucous membrane or damaged tissue or be directly injected into the bloodstream (from a needle or syringe) for transmission to occur. Mucous membranes are found inside the rectum, vagina, penis, and mouth.”<sup>4</sup> And to be transmissible, the fluids must contain a detectable [viral load](#).<sup>5</sup>

In order to be charged with the felony enhancement, HB 103 does not require proof that the defendant tests positive for HIV (or another communicable disease). It does not consider whether or how infectious a person might be. It does not require that transmission occurred. And it fails to consider the risk of harm or the likelihood of transmission. Outdated and fear-based assumptions about HIV inform the criminal penalties in HB 103 rather than any scientific understanding of how HIV is actually transmitted.

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<sup>1</sup> Representative Louis Schmitt, Co-sponsorship memorandum: *Harassment of Law Enforcement Officer*, December 9, 2020, at <https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20210&cosponId=33333>.

<sup>2</sup> <https://www.cdc.gov/hiv/basics/hiv-transmission/not-transmitted.html>

<sup>3</sup> <https://stacks.cdc.gov/view/cdc/20711>

<sup>4</sup> <https://www.cdc.gov/hiv/basics/hiv-transmission/body-fluids.html>

<sup>5</sup> <https://www.cdc.gov/hiv/basics/hiv-transmission/increase-hiv-risk.html>

**Provisions in HB 103 could easily be weaponized against civilians, particularly during the pandemic.**

Compounding this bill's fraught communicable disease provision is the arrival of COVID-19. Because COVID-19 can be transmitted by droplets, merely "expelling" saliva could trigger the felony enhancement. It's easy to imagine any number of saliva-expelling interactions with police, all of which would heighten the risk of a felony charge, from someone yelling or speaking loudly at — *or near* — an officer, to protestors chanting in front of a police line, to a heated exchange while being questioned, or even maskless rioters confronting police officers inside a building. Furthermore, given the high rate of asymptomatic transmission of COVID-19, an officer could argue that s/he reasonably believed a defendant could be infected and, for the same reason, argue that the defendant should have known they could be infected. In this context, police could use the communicable disease provision and the spectre of COVID-19 broadly — and selectively — to justify use of force, arrest, or as the pretext to shut down First Amendment protected speech, protest, and/or assembly.

**HB 103 creates a new offense for actions that could be charged under current statute.**

The creation of new crimes, especially those that criminalize behavior that can already be charged under existing statute, continues the [legislature's relentless churn of overcriminalization](#)<sup>6</sup> in Pennsylvania. It strains credulity to argue there is a "loophole" in our crimes code that fails to protect law enforcement officers from harassment or assault. Are there instances where someone (not incarcerated or being transported) has, for example, thrown feces at a police officer and walked because a district attorney couldn't find an offense to charge them with? Offenses against officers already carry serious penalties; the most obvious include:

- [§ 2702 \(a\)\(2\)](#) Aggravated assault. Felony of the first degree to cause, attempt to cause, or even recklessly cause, an officer serious bodily injury (10– 20 years in prison; up to \$25,000 in fines).
- [§ 2702 \(a\)\(3\)](#) Aggravated assault. Felony of the second degree to cause an officer bodily injury (5–10 years in prison; up to \$25,000 in fines).

In addition to needlessly expanding the crimes code, HB 103 would add yet another offense for police to selectively enforce and for prosecutors to wield when charging a defendant. In our new normal under COVID-19, its communicable disease provision could be weaponized broadly against civilians, including those engaged in First Amendment protected speech, protest, or assembly. And perhaps most troubling, its unscientific assumptions about HIV transmission — rooted in fear, stigma, and ignorance — become grounds to impose unjustifiable and disproportionately severe penalties on people living with HIV.

**For these reasons, we urge you to oppose House Bill 103.**

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<sup>6</sup> ACLU of Pennsylvania, *More Law, Less Justice*, October 2019, at <https://www.aclupa.org/en/publications/more-law-less-justice>.