



**VIA Fax: 586-6051**

Committee: Committee on Health  
 Hearing Date/Time: Wednesday, March 19, 2008, 8:30 a.m.  
 Place: Room 329  
 Re: Testimony of the ACLU of Hawaii to Offer Comments On S.B. 3075, SD1 Relating To Epidemiologic Investigations

Dear Chair Green and Members of the Committee on Health:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes to offer comments on S.B. 3075, SD1. The proposed bill, which has the admirable purpose of protecting the health of Hawaii's citizens, may infringe on individuals' rights under both the United States and Hawaii Constitutions.

### 1) Searches of people versus searches of property

As currently written, the bill threatens to violate individuals' constitutional rights to be free from unreasonable searches and seizures, particularly with regard to bodily searches.

The word "personnel" in subsection "d," seems to allow the collection of blood, urine, or other biological samples from a person (which is a much different thing than taking water samples from a person's property). The warrant language in part "e" does not seem to address human biological samples, such that there appears to be some internal inconsistency in the bill.

By permitting searches of *people* versus searches of *property*, there is a threat that biological samples may be used for purposes other than testing for epidemiological purposes. For example, suppose that the Department of Health ("DOH") tests an individual for evidence of tuberculosis, and the blood test reveals that the person being sampled recently used crystal methamphetamine. We are very concerned that this bill will allow biological samples to be used as evidence of a crime against the person providing the sample and allow biological samples to supply the necessary probable cause to allow the police to obtain a search warrant to collect a second biological sample. Without protecting against these harms, this bill will likely violate individuals' constitutional right to be free from unreasonable searches and seizures.

### 2) Possibility of non-Mirandized custodial interrogation

This bill also raises the possibility that the property owner or tenant could be subjected to questioning without being read his/her "Miranda" rights (that the person has the right to remain

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silent, has the right to an attorney, and so on), again in violation of individuals' constitutional right to be free from unreasonable searches and seizures as well as self-incrimination.

Say, for example, that there is an outbreak of a disease and the DOH believes that the disease agent was deliberately imported into Hawaii to cause harm. Assume that a DOH employee and a police officer go to a person's house to investigate the outbreak and the person shows signs of the disease, leading the DOH official and the police officer to believe that the person being questioned might be responsible for the importation of the disease agent. Suddenly, the administrative investigation has become a criminal investigation.

The ACLU of Hawaii is concerned that DOH epidemiologists are not sufficiently trained to know what they can ask and what they can't ask without running afoul of the Fourth and Fifth Amendments. Police officers receive *extensive* training on these issues and still – frequently – run into problems. However, this bill does not include any language requiring training and/or limiting the types of questions that DOH employees may ask.

### 3) Liability

The bill's language limiting state liability may be insufficient to protect individuals' rights against unconstitutional government takings.

Suppose, for example, that a property owner has a rare plant collection; the Department of Health officials believe that the plants are causing some harm to the public health and seizes the plants. After analyzing them (and destroying them in the process), the Department of Health officials determine that the plants were causing no harm to the public health whatsoever – just as the plant owner had been saying all along. Under the current language, the plant owner would have no recourse against the Department, even if s/he had lost hundreds or thousands of dollars in property. This would be an unconstitutional "taking" in violation of the Fifth Amendment because there is no established process that allows a property owner to recover the fair market value of any property that is seized/destroyed during the course of the administrative searches. Establishing a process by which the owner could submit a claim for that property may help to resolve these disputes and avoid unnecessary tension between property owners and the State.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck  
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