

Re: SB 3183
SB 3184

Hearing by Human Services and Public Housing Committee, February 2nd,
1:15 p.m., Conference Room 016.

To Committee Chairs and Members:

I urge support for these bills. I would like to know my tax dollars are going for food and health care for the truly needy and those who are really trying to help themselves get out of a cycle of poverty. While I sincerely understand the need to assist those who are dependent on drugs, I would like to see help addressed to that particular problem and not have general assistance given that might only provide more opportunity or resources to acquire drugs.

Thank you,

Shirley Hasenyager
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**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

S.B. NO. 3183, RELATING TO DRUG TESTING.

BEFORE THE:

SENATE COMMITTEE ON HUMAN SERVICES AND PUBLIC HOUSING

DATE: Saturday, February 2, 2008 **TIME:** 1:15 PM

LOCATION: State Capitol, Room 016
Deliver to: Committee Clerk, Room 226, 1 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Cori K. Woo, Deputy Attorney General.

Chair Chun Oakland and Members of the Committee:

The Attorney General has serious concerns regarding this bill, as it appears to be unconstitutional.

This bill requires recipients of benefits administered by the Department of Human Services Med-QUEST division to submit to random drug testing.

The Attorney General believes that this bill presents significant constitutional concerns under the searches and seizures provisions of the Fourth Amendment. If the bill is amended as explained below, these concerns may be lessened. Given the complexity of Fourth Amendment law and its application in the context of public benefits, however, any attempt to require Medicaid recipients to submit to random drug testing raises the possibility of a court challenge.

The fact that a Medicaid recipient may choose to decline benefits rather than agree to random drug testing does not necessarily end the constitutional inquiry. Under the doctrine of "unconstitutional conditions," once the government elects to provide benefits, in many situations the conditions placed on those benefits must also comply with the constitution. *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2005), discussing *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

In order to comply with the Fourth Amendment, random or "suspicionless" searches, such as the drug tests proposed here,

generally must be justified by the government's "special needs, beyond the normal need for law enforcement[.]" Scott, 450 F.3d at 868. Those non-law enforcement "special needs" include, for example, verifying eligibility for welfare programs, Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006), and protecting children from the dangers of drug abuse and trafficking, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

It is an open question whether a random drug testing requirement for Medicaid recipients is constitutional. To lessen the constitutional concerns, the bill may be amended by doing the following:

1. Clearly articulating, in a purpose section, the special needs (beyond law enforcement) that this proposal seeks to address. These interests must be concrete, and closely related to the harms the bill seeks to address. Hypothetical concerns may be insufficient. Scott, 450 F.3d at 870.

2. Supporting the bill with concrete information and evidence demonstrating a marked and documented problem of drug abuse among Medicaid recipients, over and above the same problem among the general population.

3. Not using the program for law enforcement purposes. This should be explained both in the statutory terms and as implemented by the Department. For example, if the major goal of the provision is to enable prosecutions for drug crimes, the special needs requirement will not be met.

4. Making a drug-free life an explicit condition of eligibility for the benefits. The measure proposed here makes random drug testing a requirement "in order to retain eligibility" for the benefits program. Neither the Hawaii Revised Statutes nor the Hawaii administrative rules require a recipient to lead a drug-free life. If statutes or the rules were amended to make living a drug-free lifestyle a condition of eligibility, the measure's position in a constitutional challenge may be improved. That is because the Supreme Court and the

Ninth Circuit have upheld the constitutionality of state laws requiring home visits for welfare applicants, in part because the visits help to assure that the recipients meet eligibility requirements. *Wyman v. James*, 400 U.S. 309 (1971); *Sanchez v. City of San Diego*, 464 F.3d 916 (9th Cir. 2006).

5. Including statutory wording requiring the Department, in adopting rules, to use the least intrusive means in all aspects of the drug testing program. This should include maximizing individuals' privacy in collecting urine samples, and restricting the use of the information obtained.

As noted above, the constitutionality of this proposal is an open question. Amending the bill as suggested above should lessen the constitutional concerns posed here. Given the complexity of this area of law, however, a court challenge is likely even if the bill is amended as suggested.

Thank you for this opportunity to testify.

LINDA LINGLE
GOVERNOR



LILLIAN B. KOLLER, ESQ.
DIRECTOR

HENRY OLIVA
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

February 2, 2008

MEMORANDUM

TO: The Honorable Suzanne Chun Oakland, Chair
Senate Committee on Human Services and Public Housing

FROM: Lillian B. Koller, Director

SUBJECT: **S.B. 3183 – RELATING TO DRUG TESTING**

Hearing: Saturday, February 2, 2008, 1:15 pm
Conference Room 016 State Capitol

PURPOSE: The purpose of S.B. 3183 is to require recipients of medical assistance to submit to random drug testing as a condition of eligibility.

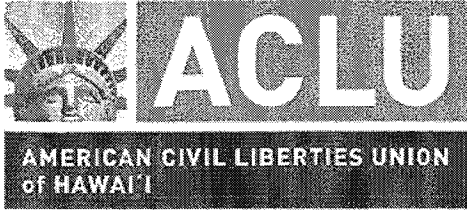
DEPARTMENT'S POSITION: The Department of Human Services (DHS) cannot support this bill as written, as it would adversely impact the priorities set forth in the Executive Supplemental Budget because it is problematic in two key areas.

First, implementing this additional eligibility requirement would first require the approval from the Federal Centers for Medicare and Medicaid Services (CMS) through a State Plan Amendment (SPA). Until Federal approval is received, the Department would be unable to access Federal funding so this bill would require complete dependence on State funds.

Secondly, Federal Medicaid funding is available only for services that are medically necessary. Currently, access to substance abuse services is available only to individuals with a medical diagnosis of substance abuse. The Department is concerned that the totality of the population addressed in this bill, which also includes all children, will not meet the Medicaid criteria for medical necessity in order to claim Federal funds, thus increasing the State's funding responsibility.

We defer to the Department of the Attorney General as to the legality of this proposed bill.

Thank you for the opportunity to provide comments on this bill.



LATE TESTIMONY

BY EMAIL: testimony@capitol.hawaii.gov

Committee: Committee on Human Services and Public Housing
Hearing Date/Time: Saturday, February 2, 2008, 1:15 p.m.
Place: Room 016
Re: Testimony of the ACLU of Hawaii in Opposition to S.B. 3183, Relating to Drug Testing

Dear Chair Chun Oakland and Members of the Committee on Human Services and Public Housing:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to S.B. 3183, which seeks to require recipients of Med-Quest benefits to submit to random drug testing.

No one should have to give up constitutional rights to get basic necessities like medical care, food, or shelter. Med-Quest recipients' constitutional rights are no less sacred than the rights of any other citizens. This bill, however, sends a clear message: if you are poor, your constitutional rights are unimportant.

This bill violates MedQuest recipients' rights under the Fourth Amendment to the United States Constitution and Article I, Sections 6 and 7 of the Hawaii Constitution. When Michigan passed a similar law authorizing suspicionless drug testing of welfare recipients, a federal appeals court struck it down as unconstitutional. *See Marchwinski v. Howard*, 60 Fed.Appx. 601 (6th Cir. 2003), *aff'g* 113 F.Supp.2d 1134 (E.D. Mich. 2000).

The ACLU of Hawaii's mission is to protect the fundamental freedoms enshrined in the U.S. and Hawaii 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
Staff Attorney, ACLU of Hawaii

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COMMITTEE ON HUMAN SERVICES AND HOUSING

Sen. Suzanne Chun Oakland, Chair

Sen. Les Ihara, Jr., Vice Chair

Saturday, February 2, 2008

1:15 PM

Room 016

STRONG OPPOSITION - SB 3183 - DRUG TESTING MED-QUEST RECIPIENTS

LATE TESTIMONY

Aloha Chair Chun Oakland, Vice Chair Ihara and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative working on prison reform and criminal justice issues in Hawai`i for a decade. I respectfully offer our testimony being mindful that Hawai`i has more than 6,000 people behind bars and more than 2,000 who are serving their sentences abroad, thousands of miles away from their homes and their loved ones.

SB 3183 requires recipients of Med Quest benefits to submit to random drug testing.

Community Alliance on Prisons strongly opposes this bill and is ashamed to see our Legislature even consider targeting our economically-challenged citizens by threatening to terminate their Med-Quest benefits. We assert that suspicionless drug testing violates the Hawai`i State Constitution:

SEARCHES, SEIZURES AND INVASION OF PRIVACY

Section 7. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted. [Am Const Con 1968 and election Nov 5, 1968; ren and am Const Con 1978 and election Nov 7, 1978]

Besides the economic issues involved – who will pay for such testing, analysis and treatment - we caution that such a bill could lead to racial profiling and the marginalization of our most economically-challenged citizens.. Most disturbingly, this suspicionless drug testing proposal is more likely to deter such individuals – particularly parents of minor children – from seeking critical medical care for fear that their substance abuse will lead to state sanctions, including the loss of benefits and the custody of their children.

The likely deterrent effect of this suspicionless drug testing proposal is that it will deprive needy families of essential medical care, resulting in disastrous consequences. Therefore, Community Alliance on Prisons respectfully asks the committee to hold this measure.

Mahalo for this opportunity to testify.