



STATE OF HAWAII
DEPARTMENT OF HEALTH
P.O. Box 3378
HONOLULU, HAWAII 96801-3378

In reply, please refer to:
File:

**Senate Committee on Judiciary and Government Operations
S.B. 932 SD 1, Relating to Infectious Disease Testing**

**Testimony of Chiyome Leinaala Fukino, M.D.
Director of Health**

February 26, 2009, 9:00 am

1 **Department's Position:** The Department strongly supports this Administration bill.

2 **Fiscal Implications:** None.

3 **Purpose and Justification:** The purpose of this bill is to facilitate Human Immunodeficiency syndrome
4 (HIV) testing by health care providers to improve early diagnosis of HIV infections by removing
5 significant procedural barriers to HIV testing. This will be accomplished by amending Hawaii Revised
6 Statutes §325-16 to replace the requirement for pre-test HIV counseling and for written informed
7 consent with an opt-out requirement. Opt-out requires a health care provider to inform a patient, either
8 verbally or in writing that they plan to perform a test to detect HIV infection and allows the patient to
9 decline this test. Physicians will still be required to provide HIV counseling for all patients who have a
10 positive, preliminarily positive or indeterminate HIV test result.

11 Implementing this bill will not violate constitutional rights of privacy. Health care providers will
12 be required to inform the patient that a test for HIV will be performed and allow the patient to decline
13 the test. The Legislature has already ensured through HRS § 325-101 that all communication, including
14 records, that identifies any individual with HIV or AIDS are to remain strictly confidential. Hawai'i law
15 also requires health care providers to report the names of patients who test positive for HIV, as is done
16 in all states. HRS § 325-101 mandates that this information will continue to be protected with the same

1 obligation of confidentiality. Additionally, HRS § 92F-17 provides that disclosure of information
2 protected by a specific confidentiality statute is a misdemeanor.

3 In 2006, the Centers for Disease Control and Prevention (CDC) strongly recommended that States
4 that have laws requiring written informed consent and pre-test counseling change to a procedure that
5 notifies the patient that a test to detect HIV infection is planned and allows the patient to decline the test.
6 CDC estimates that one out of four Americans who have HIV do not know they are infected, in part, due
7 to barriers to HIV testing. The American Academy of HIV Medicine, American Medical Association,
8 American College of Physicians, American College of Emergency Physicians, American College of
9 Obstetrics and Gynecology, Association of State and Territorial Health Officials, and many other
10 respected medical and nursing organizations already endorse this recommendation.

11 This change in law will have numerous positive benefits for the patient, their partners, the
12 community, and providers of health care services. It will allow Hawaii's health care providers to more
13 easily offer HIV testing and will result in more individuals, including pregnant women, being able to
14 learn their HIV status early and access HIV care and treatment if they are infected. An early HIV
15 diagnosis will allow many individuals to remain healthy, continue working, and maintain their health
16 insurance. They will be able to access prevention services earlier, which can lower the risk of HIV
17 transmission to their partners and others. It will also help to contain the costs of emergency and
18 inpatient HIV critical care for private and public medical insurers and/or individual patients.

19 Thank you for the opportunity to testify.



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Thursday, February 26, 2009, 9:00 a.m. CR 016

To: COMMITTEE ON JUDICIARY AND GOVERNMENT OPERATIONS
Senator Brian T. Taniguchi, Chair
Senator Dwight Y. Takamine, Vice Chair

From: Hawaii Medical Association
Gary A. Okamoto, MD, President
Philip Hellreich, MD, Legislative Co-Chair
Linda Rasmussen, MD, Legislative Co-Chair
April Donahue, Executive Director
Richard C. Botti, Government Affairs
Lauren Zirbel, Government Affairs

Re: SB 932 RELATING TO INFECTIOUS DISEASE TESTING

Chairs & Committee Members:

Hawaii Medical Association supports this measure.

For the sake of patients and to protect the public and health care workers, physicians should be able test for HIV the way they do for all other infectious diseases, such as syphilis, hepatitis, and tuberculosis.

This measure will increase early detection of HIV and help ensure the safety of all our citizens from this infectious disease.

Thank you for the opportunity to provide this testimony.

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**Hawai'i HIV/AIDS Community Planning Group
C/O Hawaii Department of Health, STD/AIDS Prevention Branch
3627 Kilauea Avenue, Room 305
Honolulu, Hawaii 96816**

Committee: Senate Judiciary and Government Operations Committee Chairperson Senator Taniguchi

Hearing Date: Thursday, February 26 - 2009 at 9:00 am - in Senate Conference Room 016

Bill title: **Relating to Infectious Disease Testing**

Bill number: **SB 932, SD 1**

Dear Chair Senator Taniguchi and Senate Judiciary and Government Operations Committee Members:

Thank you for the opportunity to testify in strong support of SB 932, SD 1. My name is Jon Berliner and I am one of the Community Co-Chairs of the **Hawai'i HIV/AIDS Community Planning Group**. I am providing this testimony on behalf of the Hawaii HIV/AIDS Community Planning Group Steering Committee. At our Steering Committee meeting, Monday, February 9, 2009, we voted to authorize testimony on behalf of the Steering Committee of the Hawaii HIV/AIDS Community Planning Group (CPG) in support of this bill. The CPG Steering Committee oversees the vision and direction of community planning around prevention and care services for HIV and AIDS, and in turn advises the Hawaii Department of Health on these services. This bill will support the reduction in barriers to HIV counseling and testing and is in line with recommendations issued by the Centers for Disease Control and Prevention.

We have also closely looked at issues related to privacy and patient confidentiality this bill may impact and have found that this bill does not reduce the protections available under Hawaii law. We have found the following:

- *Health care providers must inform patients about the HIV test and afford the opportunity for the patient to decline the test
- *HIV testing will remain voluntary, confidential and afford the patient the right to learn their HIV status
- *HIV confidentiality and constitutional privacy rights are strictly protected by HRS 325-101
- Medical records and any disclosure of medical information requires written patient consent
- Routine testing will help reduce the stigma of testing based only on risk behavior

The **Hawai'i HIV/AIDS Community Planning Group Steering Committee** strongly supports passage of this bill. The following documents the benefits of this bill:

- reduce barriers to HIV counseling and testing by make it more efficient for healthcare providers
- allow Hawaii to follow the recommendations of CDD and major national organizations in support of increased testing in health care settings
- help reduce the estimated 25% of Americans who are HIV positive but do not know their HIV status because they have not been tested
- help many individuals in Hawaii to learn their HIV status and seek care and treatment
- help reduce transmission of HIV in Hawaii and reduce the long term costs to those infected and to our state
- help make HIV testing by healthcare providers more routine and reduce the stigma based on offering testing by perceived risk
- make it easier for healthcare providers to offer HIV testing to pregnant women and other patients
- reduce the missed opportunities for individuals to learn their HIV status when they are in contact with healthcare providers
- allow individuals to learn their HIV status earlier and receive early care services which will allow them to stay healthier, maintain employment and reduce the high costs of emergency room and hospital care
- allow individuals to learn their HIV status earlier and receive early prevention services which reduce HIV transmission to others
- ensure that all patients testing HIV positive will receive their results and be offered appropriate counseling

Thank you for the opportunity to testify in strong support of SB 932, SD 1.

Sincerely and with aloha,

Jon Berliner, Community Co-Chair
Hawai'i HIV/AIDS Community Planning Group



GREGORY HOUSE PROGRAMS

Hawaii's Statewide HIV/AIDS Housing and Support Services Provider

Committee: Senate Judiciary and Government Operations Committee
Hearing Date: Thursday, February 26 - 2009 at 9:00 am - in Senate Conference Room 016
Bill title: **Relating to Infectious Disease Testing**
Bill number: **SB 932, SD 1**

Dear Chair Senator Taniguchi and Judiciary and Government Operations Committee Members:

Thank you for the opportunity to testify **in strong support of SB 932, SD1**. My name is Jon Berliner and I am Executive Director of Gregory House Programs, Hawaii's statewide HIV/AIDS housing and support services provider. This bill will support the reduction to barriers to HIV counseling and testing and is in line with recommendations issued by the Centers for Disease Control and Prevention. I have closely looked at issues related to privacy and patient confidentiality related to this bill and any possible impact and found the bill does not reduce the protections available under Hawaii law. I offer the following:

- Health care providers must inform patients about the HIV test and afford the opportunity for the patient to decline the test
- *HIV testing will remain voluntary, confidential and afford the patient the right to learn their HIV status
- *HIV confidentiality and constitutional privacy rights are strictly protected by HRS 325-101
- Medical records and any disclosure of medical information requires written patient consent
- Routine testing will help reduce the stigma of testing based only on risk behavior

Gregory House Programs strongly supports passage of this bill. The following documents additional benefits of this bill:

- reduce barriers to HIV counseling and testing by make it more efficient for healthcare providers
- allow Hawaii to follow the recommendations of CDD and major national organizations in support of increased testing in health care settings
- help reduce the estimated 25% of Americans who are HIV positive but do not know their HIV status because they have not been tested
- help many individuals in Hawaii to learn their HIV status and seek care and treatment
- help reduce transmission of HIV in Hawaii and reduce the long term costs to those infected and to our state
- help make HIV testing by healthcare providers more routine and reduce the stigma based on offering testing by perceived risk
- make it easier for healthcare providers to offer HIV testing to pregnant women and other patients
- reduce the missed opportunities for individuals to learn their HIV status when they are in contact with healthcare providers
- allow individuals to learn their HIV status earlier and receive early care services which will allow them to stay healthier, maintain employment and reduce the high costs of emergency room and hospital care
- allow individuals to learn their HIV status earlier and receive early prevention services which reduce HIV transmission to others
- ensure that all patients testing HIV positive will receive their results and be offered appropriate counseling

Thank you for the opportunity to testify in strong support of SB 932, SD1.

Sincerely and with aloha,

Jon Berliner

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"Housing is Healthcare"



Life Foundation

WRITTEN TESTIMONY

Hawaii State Senate
Committee on Judiciary and Government Operations
Thursday, February 26, 2009, 9:00 a.m. - Room 016

FIGHTING AIDS
IN HAWAII
AND THE PACIFIC

SB 932 RELATING TO INFECTIOUS DISEASE TESTING

Chairman Taniguchi, Vice Chairman Takamine and Members of the Committee:

Life Foundation, Hawaii's oldest and largest HIV/AIDS organization asks to be recorded **In Support** of this bill, which seeks to amend the state's longstanding HIV Informed Consent statute.

The bill before you, which has passed through the Health Committee, was developed by a diverse group of people convened by the Department of Health, the Life Foundation and the Hawaii Medical Association in consultation with the U. S. Centers for Disease Control and Prevention (CDC).

The CDC has determined that nearly 25% of people infected by HIV do not know their status and, as a result, are not in a position to seek early medical intervention for the treatment of HIV and related conditions. Rather than having a chilling effect on HIV testing, this legislation will lead to more testing of people who never considered seeking an HIV test. The test may be declined. It is purely voluntary and will not be accomplished surreptitiously. Privacy will be preserved.

This legislation only pertains to healthcare settings. Sites that provide anonymous or confidential HIV testing, such as the Life Foundation and the Department of Health, will still be required to offer counseling before and after a test is administered. In the past year, Life Foundation performed nearly 2,000 HIV tests at its site office and various remote locations around Oahu. Approximately 1.2% of these tests were positive for HIV.

In addition to helping a greater number of people learn their HIV status, this process will also serve to begin eroding the shame and stigma of AIDS. After 28 years, it is time for AIDS to become a health issue and not a moral one.

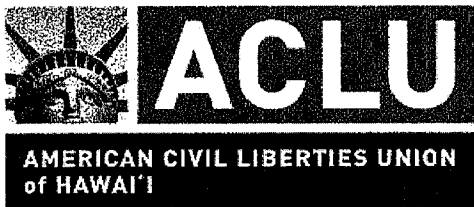
Thank you for your consideration.

Paul S. Groesbeck
Executive Director.

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VIA EMAIL: JGOtestimony@capitol.hawaii.gov

Committee: Committee on Judiciary and Government Operations
Hearing Date/Time: Thursday, February 26, 2009, 9:00 a.m.
Place: State Capitol, Conference Room 016
Re: *Testimony of the ACLU of Hawaii in Opposition to S.B. 932, S.D.1, Relating to Infectious Disease Testing*

Dear Chair Taniguchi and Members of the Committee on Judiciary and Government Operations:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in opposition to S.B. 932, S.D.1, which proposes to expand routine HIV testing by eliminating the safeguards that ensure HIV testing is voluntary and informed. While we agree that increasing access to testing and care is a critically important goal, S.B. 932, S.D.1’s proposal to eliminate written consent and counseling requirements is not the answer. HIV testing must remain informed and voluntary.

Eliminating written consent and counseling requirements threatens Hawaii residents’ health and privacy, goes against long-standing principles of patient autonomy in medical decision-making and ignores the important benefits that informed consent and counseling provide to patients being testing for HIV.

1. *Involuntary and uninformed medical testing for HIV violates the privacy rights of Hawaii’s citizens.*

The Hawaii Constitution explicitly protects every individual’s fundamental right to privacy, including privacy in the informational and personal autonomy sense.

Art. I, §6, of the Hawaii Constitution, as adopted by the 1978 Constitutional Convention and as ratified by the electorate, secures personal privacy as a fundamental right of the highest order. Specifically, the provision states:

The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

American Civil Liberties Union of Hawaii
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Hon. Sen. Taniguchi, JGO Committee,
and Members Thereof
February 26, 2009
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Art. I, §6, Haw. Const. The Supreme Court of Hawaii has held that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it. *State v. Kam*, 69 Haw. 483, 492, 748 P.2d 372, 377 (1988) (citing *State v. Lester*, 64 Haw. 659, 649 P.2d 346 (1982)). The fundamental principle in interpreting a constitutional provision is to give effect to that intent. *Id.* (citing *Huihui v. Shimoda*, 64 Haw. 527, 644 P.2d 968 (1982); *State v. Kahlbaun*, 64 Haw. 197, 638 P.2d 309 (1981); *State v. Miyasaki*, 62 Haw. 269, 614 P.2d 915 (1980)). In discussing the intent of the framers in adopting the Art. I, §6, of the Hawaii Constitution, the Supreme Court of Hawaii has noted:

The proposal to expressly acknowledge the ‘right of the people to privacy’ was offered by the Committee on Bill of Rights, Suffrage and Election of the Constitutional Convention of Hawaii of 1978. After reviewing the privacy provision in the Hawaii counterpart of the Fourth Amendment, the committee reported ‘it would be appropriate to retain [this] privacy provision ... but limit its application to criminal cases, and create a new section as it relates to privacy in the informational and personal autonomy sense.’

Nakano v. Matayoshi, 68 Haw. 140, 147, 706 P.2d 814, 818 (1985) (citing Stand. Comm. Rep. No. 69, in Proceedings of the Constitutional Convention of Hawaii of 1978 (Proceedings), Vol. I, at 674) (emphasis added).

The plain language of the Constitution, as bolstered by the framers’ intent, makes clear that the right to privacy in Hawaii is — in and of itself — a fundamental right. The right of privacy “is so important in value to society that it can be infringed upon only by the showing of a compelling state interest. If the State is able to show a compelling state interest, the right of the group will prevail over the privacy rights or the right of the individual. However, in view of the important nature of this right, the State must use the least restrictive means should it desire to interfere with the right.” *State v. Kam*, 69 Haw. at 493, 748 P.2d at 378 (citing Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Vol. I at 674-75).

S.B. 932 erodes our privacy rights contrary to our State’s values and to the stated purpose of Hawaii’s privacy clause in that it would allow doctors to invade patients’ bodies without their consent and without informing them of important consequences, including that Hawaii state law requires doctors to report the names of those who test positive for HIV. Patients would also not

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be informed that anonymous testing (in which the individual's name is not reported) is available in Hawaii. If the state of Hawaii is going to invade people's privacy by searching their bodies and collecting their names and personal information, then it is imperative under the Hawaii Constitution that people at least have the right to know what they are being asked to do and what their alternatives are before they consent to testing.

2. *Obtaining documented and informed consent is the best way to avoid potential liability in malpractice and discrimination lawsuits.*

While, on the surface, forgoing written consent and pre-test counseling may seem appealing to medical professionals, the reality is that doctors take the risk that they will later have to prove -- with no written record -- that a patient consented to an HIV test after being informed fully of the implications.

3. *People who are tested with their knowledge are more likely to get the care they need.*

While diagnosis soon after infection can add to life expectancy, it only applies if people get treatment after testing positive. Patients tested without consent and/or without understanding the possible significance of the test are more likely to be alienated from care.

Similarly, because HIV-positive adolescents are at greater risk of self-destructive behavior without adequate counseling, eliminating the requirements may jeopardize teen health and actually hamper efforts to prevent transmission of HIV.

4. *People need more information about why they may be at risk for HIV, not less.*

Many people are still in the dark about basic facts regarding HIV transmission. Increased offers of testing provide an excellent opportunity to educate patients about HIV and thus change risk behaviors and reduce the HIV/AIDS stigma that is fueled by misinformation about the routes of HIV transmission. Eliminating pre-test prevention counseling means losing a critical opportunity to educate people about HIV.

5. *Tangible benefits result from the doctor-patient dialogue that the informed consent requirement envisions, including increased trust and a greater likelihood that a patient will be linked to follow up care.*

Many of the populations that are in the most need of increased testing may already be mistrustful of public-health efforts. Even those who trust the government and their doctors are likely to fear them if they are tested without their knowledge or fully informed consent.

If the Committee finds that the current rules are not effective, then Hawaii should look at successful models that encourage providers to offer HIV testing to a broader range of people without abandoning safeguards that ensure that testing is informed and voluntary.¹

Written consent and counseling need not be barriers to testing. People will be better able to take care of themselves and one another if medical providers routinely offer testing and explain its benefits. When people can make voluntary and informed decisions to protect their health, everyone wins.

For other resources on why written informed consent and counseling are important, see:

- American Bar Association comments on the CDC recommendations, available at <http://www.champnetwork.org/media/aba.pdf>
- American Academy of HIV Medicine comments to the CDC, available at <http://www.champnetwork.org/media/AAHIVM.pdf>
- AIDS Alliance for Children, Youth and Families comments to the CDC, available at <http://www.champnetwork.org/media/AIDS-Alliance.pdf>
- National Association of People with AIDS (NAPWA) comments on CDC recommendations, available at http://www.napwa.org/documents/routine_testing_counseling.pdf

¹ See Centers for Disease Control and Prevention, Revised Recommendations for HIV testing of adults, adolescents, and pregnant women in health-care settings, MMWR (No. RR-14), at 6 (2006) [citing Rothman, *supra* note 8, at 33 (finding that emergency room testing can be increased by streamlining the counseling and providing some information in writing, as well as by involving non-physician staff in counseling)]. Available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.html>

Hon. Sen. Taniguchi, JGO Committee,
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- Comments on the CDC recommendations by community-based organizations serving people living with HIV, available at http://www.aidschicago.org/pdf/2006/adv_testing_statement.pdf
- Ann Fisher, Catherine Hanssens & David Schulman, The CDC's Routine HIV Testing Recommendation: Legally, Not so Routine, 11 HIV/AIDS Policy & Law Review 17 (Dec. 2006), available at <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=955>

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,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

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