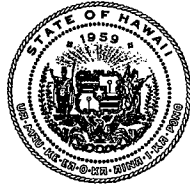


SB 932



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

In reply, please refer to:
File:

**Senate Committee on Health
HB 1114, S.B. 932, Relating to Infectious Disease Testing**

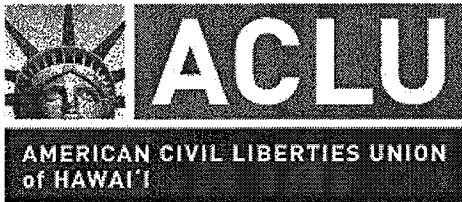
**Testimony of Chiyome Leinaala Fukino, M.D.
Director of Health**

February 11, 2009, 3:00 p.m.

- 1 **Department's Position:** The Department strongly supports this Administration proposal.
- 2 **Fiscal Implications:** None.
- 3 **Purpose and Justification:** The purpose of this proposal is to facilitate HIV testing by health care
- 4 providers to improve early diagnosis of HIV infections by removing significant procedural barriers to
- 5 HIV testing. This will be accomplished by amending Hawaii Revised Statutes §325-16 to replace the
- 6 requirement for pre-test HIV counseling and for written informed consent with an opt-out requirement.
- 7 Opt-out requires a health care provider to inform a patient, either verbally or in writing that they plan to
- 8 perform a test to detect HIV infection and allows the patient to decline this test.
- 9 In 2006, the Centers for Disease Control and Prevention (CDC) strongly recommended that States
- 10 that have laws requiring written informed consent and pre-test counseling change to a procedure that
- 11 notifies the patient that a test to detect HIV infection is planned and allows the patient to decline the test.
- 12 CDC estimates that one out of four Americans who have HIV do not know they are infected, in part, due
- 13 to barriers to HIV testing. The American Academy of HIV Medicine, American Medical Association,
- 14 American College of Physicians, American College of Emergency Physicians, American College of
- 15 Obstetrics and Gynecology, Association of State and Territorial Health Officials, and many other
- 16 respected medical and nursing organizations already endorse this recommendation.

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

9 Thank you for the opportunity to testify.



VIA EMAIL: hthtestimony@capitol.hawaii.gov

Committee: Committee on Health
Hearing Date/Time: Wednesday, February 11, 2009, 3:00 p.m.
Place: State Capitol, Conference Room 016
Re: *Testimony of the ACLU of Hawaii in Opposition to S.B. 932, Relating to Infectious Disease Testing*

Dear Chair Ige and Members of the Committee on Health:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in opposition to S.B. 932, 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 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.

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*

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Hon. Sen. Ige, HTH Committee,
and Members Thereof
February 11, 2009
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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 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

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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.

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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>

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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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Life Foundation

WRITTEN TESTIMONY

Hawaii State Senate - Committee on Health
Wednesday, February 11, 2009, 3:00 p.m. - Room 016

SB 932 RELATING TO INFECTIOUS DISEASE TESTING

Chairman Ige, Vice Chairman Green and Members of the Committee on Health:

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.

In the early years of the AIDS epidemic in Hawaii, the legislature, in its wisdom, enacted a law that prohibited testing anyone for HIV infection without pre and post test counseling and written informed consent by the person to be tested. Given the significant shame, stigma, prejudice and ignorance surrounding AIDS at that time, the approach taken by the state was both commendable and appropriate.

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. At the same time, the CDC reports that annual HIV infections in the United States are not declining but remain stable at about 56,000 newly reported cases each year.

The purpose of this legislation is to remove the requirements of pre-test counseling and a separate written informed consent before an HIV test can be administered in a healthcare setting. As with all diagnostic tests, a general consent will still be required before testing.

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.

Because this legislation will help make HIV testing a routine healthcare practice, it has the potential of finding HIV positive people who would not otherwise seek HIV testing. At the same time, we are confident that existing privacy laws and healthcare practices will continue to safeguard the confidentiality that is so important to people infected with HIV.

Paul S. Groesbeck
Executive Director

Email: pgroesbeck@lifefoundation.org
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IN HAWAII
AND THE PACIFIC

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9 February 2009

Committee: Senate Committee on Health

Chair Person: Senator David Ige

Hearing Date: Wednesday, February 11, 2009. 3:00 PM.

Bill title: Relating to Infectious Disease Testing

Bill number: SB 932

Testimony submitted by Alan Katz, MD, MPH, 1030 Mokapu Blvd., Kailua, HI 96734

My name is Alan Katz. I am a physician epidemiologist and faculty member at the John A. Burns School of Medicine, University of Hawaii, but I do not represent the University of Hawaii. I only represent myself. Thank you for the opportunity to testify in strong support of SB 932.

This bill will greatly reduce existing barriers to HIV testing. The recommended legislation has been developed in consultation with the US Centers for Disease Control and Prevention. If passed it will help facilitate HIV testing for persons being seen in health care settings but will continue to protect the confidentiality of persons being tested. By making HIV testing more routine, the stigma which is still attached to HIV testing will be minimized. It is essential for persons to learn their HIV status as early as possible, as early therapeutic intervention can optimize an HIV-infected person's health and reduce health care costs associated with the severe manifestation related to delayed diagnosis and untreated HIV disease.

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