VIA EMAIL: hltestimony@capitol.hawaii.gov

Committee: Committee on Health
Hearing Date/Time: Friday, February 13, 2009, 8:30 a.m.
Place: State Capitol, Conference Room 329
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 1114, Relating to Infectious Disease Testing

Dear Chair Yamane and Members of the Committee on Health:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 1114, 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.

> 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.’


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 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](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](http://www.champnetwork.org/media/AAHIVM.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](http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.html)
• Comments on the CDC recommendations by community-based organizations serving people living with HIV, available at


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