

ACT 238

S.B. NO. 1273

A Bill for an Act Relating to Victims of Sexual Assault.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that sexual assault victims are often fearful of contracting HIV as a result of having been sexually assaulted. The fear of contracting this life-threatening disease adds to the extraordinary psychological trauma felt by the victims of sexual assault. However, the legislature further finds that research conducted by the Centers for Disease Control and Prevention (CDCP) indicates that the probability of contracting HIV as a result of a sexual assault is very low, at approximately .003 percent. The CDC also indicates in its most recent advisory guidelines for the treatment of sexually transmitted diseases, that to be effective, HIV preventive treatment must begin no later than 24 to 36 hours post-exposure.

Additionally, prosecutors indicate that it is very difficult to anticipate or control the amount of time between the actual assault and the arrest or indictment of the alleged offender, due to the specific factors of each case. Therefore, unless the test is initiated immediately after contact to consider the results in connection with the most effective preventive treatment available, subsequent mandatory HIV testing of the offender, even upon arrest or indictment, is medically useless to victims and, could put victims at-risk if they choose to wait to be tested until after the offender is tested.

Thus, while the legislature believes that mandatory testing of sex offenders at the request of the victim may provide some psychological remedy, it is more important to provide victims with immediate counseling, including accurate and up-to-date information regarding HIV preventive treatment, offering them HIV testing immediately after the assault, and, upon request, the result of the HIV test of the convicted adult or adjudicated juvenile sex offender. In order to provide such counseling and testing for victims, the legislature is passing this Act to qualify for federal funds which shall be used by the State to provide direct services to victims of sexual assault.

The purpose of this Act is to: permit victims of sexual assault to require a convicted adult or adjudicated juvenile sex offender to be tested for the human immunodeficiency virus (HIV); allow the victim to receive the results through a designated health care professional; and direct that any federal funds received as a result of this Act be used for direct services to victims.

SECTION 2. Chapter 325, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:

“§325- Counseling and testing of sexual assault victims; testing of sex offenders upon request of victim. (a) Any sexual assault victim, or the parent or guardian of a minor or incapacitated victim, shall be informed as soon as practicable after the assault, of the availability of human immunodeficiency virus (HIV) testing for the victim, the availability of counseling for the victim, and the right of the victim to request that the person convicted of a sexual assault offense involving the victim be tested for HIV. The victim, or the parent or guardian of a minor or incapacitated victim, and the convicted person shall be provided HIV counseling prior to being

tested, and follow-up counseling at the time the results are presented to the victim or the parent or guardian of a minor or incapacitated victim and the convicted person.

(b) The court shall order a convicted person to be tested for the etiological agent for the human immunodeficiency virus (HIV) if the victim has requested that the person be tested for HIV. The following procedures shall be used when ordering the test:

- (1) The victim or the parent or guardian of a minor or incapacitated victim shall be informed, as soon as practicable, of the right to request that the convicted person be tested for HIV, the availability of department of health funded HIV testing for the victim, and the availability of HIV counseling for the victim. If the victim or parent or guardian of a minor or incapacitated victim requests the HIV status of a convicted person, the victim, parent, or guardian shall designate a physician or a certified HIV counselor to receive the test result, provide counseling, and notify the victim, parent, or guardian of the test result;
- (2) If the victim or parent or guardian of a minor or incapacitated victim requests, in writing, that the convicted person be tested for HIV, the court shall seek the consent of the convicted person to voluntarily submit to an HIV test;
- (3) If the convicted person does not voluntarily consent to take an HIV test or fails to take an HIV test, the court shall order the person to submit to an HIV test.

Whenever practicable, blood samples taken for HIV testing under this section shall be taken in conjunction with samples taken for DNA testing under section 706-603; provided that the HIV test results shall not be disclosed to any person other than the physician or HIV counselor designated to receive the results by the victim or the parent or the guardian of a minor or incapacitated victim.

(c) The results of the convicted person's HIV test shall be forwarded by the laboratory to the designated physician or HIV counselor, and shall be released by the physician, in consultation with the department of health or the HIV counselor, to the convicted person and the victim or the parent or guardian of a minor or incapacitated victim. Prior to such release, the victim or the parent or guardian shall be required to sign a notice of HIV status disclosure advising them of the confidentiality provisions regarding HIV test results and the penalties for unlawful disclosure pursuant to section 325-101.

(d) No person authorized under this paragraph to withdraw blood or assist in the performance of the HIV test, or any medical facility where the blood is drawn or tested that has been ordered by the court to withdraw or test blood, shall be liable in any civil or criminal action if the test is performed in a reasonable manner according to generally accepted medical practices.

(e) As used in this section, unless the context requires otherwise:

“Convicted person” means a person who has been convicted of an offense under sections 707-730, 707-731, or 707-732(1)(a), including a juvenile adjudicated of such an offense. A person is convicted when a verdict or adjudication has been rendered by a judge or jury, or a plea of guilty or nolo contendere has been accepted by the court.

“HIV counseling” means HIV counseling which conforms to the guidelines of the department of health or the Centers for Disease Control and Prevention, and includes referral for appropriate health care and support services.

“HIV counselor” means any person who has been trained and certified in HIV counseling by the department of health or the Centers for Disease Control and Prevention and who is not a victim counselor employed by or a volunteer with any law enforcement agency.”

SECTION 3. Section 325-16, Hawaii Revised Statutes, is amended by amending subsection (b) to read as follows:

- “(b) Consent to testing is not required for any of the following:
- (1) [Anatomical gifts.] A health care provider or organ donor center [which] that procures, processes, distributes, or uses human body parts donated for scientific purposes [may], without obtaining consent [to the testing], may test for the presence of HIV in order to assure medical acceptability of the gift for the purpose intended[.];
 - (2) [Research.] The department, laboratories and research facilities, health care providers, blood banks, plasma centers, and educational institutions may subject any body fluids or tissue to be used in research to a test for HIV infection if the test is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher[.];
 - (3) Anonymous testing carried out at HIV test sites established by the department;¹ provided that informed [verbal] oral consent is obtained[.];
 - (4) Testing of body fluids or tissue [which is] ordered by a third party, so long as that third party, including but not limited to an insurance company, employer, or school, obtains the informed written consent of the person to be tested authorizing the release of the test results to the third party, and transmits a signed copy of the written informed consent to the health provider prior to any release of the requested test results to the third party[.];
 - (5) [Patient diagnosis or treatment.] Informed consent is not required where the patient is unable to give consent and it is determined by the patient’s treating physician that the patient’s HIV status is necessary [(A)] to make a diagnosis[,], or [(B)] to determine an appropriate course of treatment for the patient. The patient shall be informed in a timely manner that a test for the presence of HIV has been performed pursuant to [the provisions of] this paragraph, and the patient shall be provided the opportunity to obtain the test results and appropriate counseling[.];
 - (6) [Protection of health care workers.] A treating physician may order an HIV test without the patient’s informed consent if the physician has determined that the patient is incapable of giving consent prior to the rendering of treatment and when there is reason to believe that the safety of a health care worker may be affected due to exposure to the blood or bodily fluids of a patient suspected of possible HIV infection. The availability and quality of health care services shall not be compromised based on the findings and testing performed pursuant to this paragraph. The costs of any testing performed shall be borne by the health care provider and may not be claimed against the patient or the patient’s health care insurer. The patient and the health care worker shall be informed in a timely manner that a test for the presence of HIV has been performed pursuant to the provisions of this paragraph, and the patient and the health care worker shall be provided the opportunity to obtain the test results and appropriate counseling[.]; and
 - (7) A person who has been convicted, or a juvenile who has been adjudicated, pursuant to sections 707-730, 707-731, or 707-732(1)(a) shall be tested to determine the person’s HIV status upon court order issued pursuant to section 325- . The test shall be performed according to the protocols set forth in section 325-17.”

SECTION 4. Section 325-101, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) The records of any person that indicate that a person has a human immunodeficiency virus (HIV) infection, AIDS related complex (ARC), or acquired immune deficiency syndrome (AIDS), which are held or maintained by any state agency, health care provider or facility, physician, laboratory, clinic, blood bank, third party payor, or any other agency, individual, or organization in the State shall be strictly confidential. For the purposes of this part, the term “records” shall be broadly construed to include all communication [which] that identifies any individual who has HIV infection, ARC, or AIDS. This information shall not be released or made public upon subpoena or any other method of discovery. Notwithstanding any other provision to the contrary, release of the records protected under this part shall be permitted under the following circumstances:

- (1) Release is made to the department of health in order that it may comply with federal reporting requirements imposed on the State. The department shall ensure that personal identifying information from these records [are] is protected from public disclosure;
- (2) Release is made of the records, or of specific medical or epidemiological information contained therein, with the prior written consent of the person or persons to whom the records pertain;
- (3) Release is made to medical personnel in a medical emergency only to the extent necessary to protect the health, life, or well-being of the named party;
- (4) Release is made from a physician licensed pursuant to chapter 453 or 460 to the department of health to inform the sexual or needle sharing contact of an HIV seropositive patient where:
 - (A) [there] There is reason for the physician to believe that the contact is or has been at risk of HIV transmission as a result of the index patient having engaged in conduct which is likely to transmit HIV[.]; and
 - (B) [the] The index patient has first been counseled by the physician of the need for disclosure and the patient is unwilling to inform the contact directly or is unwilling to consent to the disclosure of the index patient’s HIV status by the physician or the department of health; provided that the identity of the index patient is not disclosed; and provided further that there is no obligation to identify or locate any contact. Any determination by a physician to disclose or withhold disclosure of an index patient’s sexual contacts to the department of health pursuant to this subsection which is made in good faith shall not be subject to penalties under this part or otherwise subject to civil or criminal liability for damages under the laws of the State;
- (5) Release is made by the department of health of medical or epidemiological information from the records to medical personnel, appropriate county and state agencies, blood banks, plasma centers, organ and tissue banks, schools, preschools, day care centers, or county or district courts to enforce this part and to enforce rules adopted by the department [of health] concerning the control and treatment of HIV infection, ARC, and AIDS, or to the sexual or needle sharing contacts of an HIV seropositive index patient for purposes of contact notification as provided in paragraph (4)[.]; provided that the identity of the index patient, if known, shall not be disclosed; provided further that release of information under this paragraph shall only be made by confidential

- communication to a designated individual charged with compliance with this part;
- (6) Release of a child's records is made to the department of human services for the purpose of enforcing chapters 350 and 587;
 - (7) Release of a child's records is made within the department of human services and to child protective services team consultants under contract to the department of human services for the purpose of enforcing and administering chapters 350 and 587 on a need to know basis pursuant to a written protocol to be established and implemented, in consultation with the director of health, by the director of human services;
 - (8) Release of a child's records is made by employees of the department of human services authorized to do so by the protocol established in paragraph (7) [in a case arising under chapters 350 and 587] to a natural parent of a child who is the subject of the case when the natural parent is a client in the case, the guardian ad litem of the child, the court, each party to the court proceedings, and also to an adoptive or a prospective adoptive parent, an individual or an agency with whom the child is placed for twenty-four hour residential care, and medical personnel responsible for the care or treatment of the child. When a release is made to a natural parent of the child, it shall be with appropriate counseling as required by section 325-16. In no event shall proceedings be initiated against a child's natural parents for claims of child abuse under chapter 350 or harm to a child or to affect parental rights under chapter 587 solely on the basis of the HIV seropositivity of a child or the child's natural parents;
 - (9) Release is made to the patient's health care insurer to obtain reimbursement for services rendered to the patient; provided that release shall not be made if, after being informed that a claim will be made to an insurer, the patient is afforded the opportunity to make the reimbursement directly and actually makes the reimbursement;
 - (10) Release is made by the patient's health care provider to another health care provider for the purpose of continued care or treatment of the patient;
 - (11) Release is made pursuant to a court order, after an in camera review of the records, upon a showing of good cause by the party seeking [the] release of the records; [or]
 - (12) Disclosure by a physician, on a confidential basis, of the identity of a person who is HIV seropositive and who also shows evidence of tuberculosis infection, to a person within the department of health as designated by the director of health for purposes of evaluating the need for or the monitoring of tuberculosis chemotherapy for the person and the person's contacts who are at risk of developing tuberculosis[.]; or
 - (13) Release is made for the purpose of complying with sections 325- and 801D-4(b). Nothing in this section shall be construed to prohibit a victim to whom information is released pursuant to section 325- from requesting the release of information by a physician or HIV counselor to a person with whom the victim shares a privileged relationship recognized by chapter 626; provided that prior to such release, the person to whom the information is to be released shall be required to sign a notice of HIV status disclosure advising them of the confidentiality provisions regarding HIV test results and the penalties for unlawful disclosure to any person other than a designated physician or HIV counselor.

As used in this part, unless the context requires otherwise:

“Medical emergency” means any disease-related situation that threatens life or limb.

“Medical personnel” means any health care provider in the State, as provided in section 323D-2, who deals directly or indirectly with the identified patient or the patient’s contacts, and includes hospital emergency room personnel, the staff of the communicable disease division of the department of health, and any other department personnel as designated by the director.”

SECTION 5. Section 801D-4, Hawaii Revised Statutes, is amended to read as follows:

“§801D-4 Basic bill of rights for victims and witnesses. (a) Upon written request, victims and surviving immediate family members of crime shall have the following rights:

- (1) To be informed by the police and the prosecuting attorney of the final disposition of the case. If the crime charged is a felony, the victim or a surviving immediate family member shall be notified of major developments in the case and whenever the defendant or perpetrator is released from custody. The victim or a surviving immediate family member shall also be consulted and advised about plea bargaining by the prosecuting attorney[.];
- (2) To be notified by the prosecuting attorney if a court proceeding to which they have been subpoenaed will not proceed as scheduled[.];
- (3) To receive protection from threats or harm[.];
- (4) To be informed by the police, victim/witness counselor, or other criminal justice personnel, of financial assistance and other social services available as a result of being a witness to or a victim of crime, including information on how to apply for the assistance and services[.];
- (5) To be provided by the court, whenever possible, with a secure waiting area during court proceedings that does not require them to be in close proximity to defendants and families and friends of defendants[.];
- (6) To have any stolen or other personal property expeditiously returned by law enforcement agencies when [such] the property is no longer needed as evidence. If feasible, all [such] the property, except weapons, currency, contraband, property subject to evidentiary analysis, and property, the ownership of which is disputed, shall be returned to the person within ten days of being taken[.]; and
- (7) To be informed by the department of public safety of changes planned by the department in the custodial status of the offender that allows or results in the release of the offender into the community, including escape, furlough, work release, placement on supervised release, release on parole, release on bail bond, release on appeal bond, and final discharge at the end of the prison term.

(b) Upon written request, the victim or the parent or guardian of a minor or incapacitated victim of an offense under section 707-730, 707-731, or 707-732(1)(a) shall have the right to be informed of the human immunodeficiency virus (HIV) status of the person who has been convicted or a juvenile who has been adjudicated under that section and to receive counseling regarding HIV. The testing shall be performed according to the protocols set forth in section 325-17. Upon request of the victim, or the parent or guardian of a minor or incapacitated victim, the department of health shall provide counseling.”

SECTION 6. Statutory material to be repealed is bracketed. New statutory material is underscored.²

SECTION 7. This Act shall take effect upon its approval.

(Approved July 20, 1998.)

Notes

1. Semicolon should be underscored.
2. Edited pursuant to HRS §23G-16.5.