

A Bill for an Act Relating to HIV Testing for Sexual Offenses.

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

SECTION 1. The legislature finds that thousands of people are sexually assaulted annually and that the transmission of HIV infection occurs about two times per one thousand sexual contacts. Those who work with victims of sexual assault estimate a higher infection rate because the violent nature of sexual assaults increases the chances of transmission. The legislature also finds that a growing number of states, currently twenty-one, are passing legislation mandating HIV testing of those charged or convicted of sexual assaults.

An HIV test will detect the presence of HIV infection if the attacker contracted the virus as early as six months prior to the test. Victims fearing infection from an encounter or assault need to ascertain whether the attackers are HIV positive. Current law does not adequately address the anxiety victims face. Current law provides for testing of those convicted of sexual assault only if the court orders it, but not all perpetrators charged with sexual assault are convicted. Victims whose perpetrators are not convicted do not have an opportunity to either gain some measure of peace from knowing that their perpetrator did not carry the HIV virus or learn that their assaulter carried the HIV virus and take actions to address that fact, including self testing and medication to combat the virus.

Current law also fails to include sex offenses other than sexual assault that could lead to HIV infection, such as incest and child abuse. The benefits of alleviating anxiety or addressing the possibility of infection are no less for the victims of these crimes.

The purpose of this Act is to require HIV testing of individuals charged with sexual assault crimes and to address the aforementioned shortcomings of current law.

SECTION 2. Section 325-16, Hawaii Revised Statutes, is amended to read as follows:

“§325-16 Informed consent for testing or disclosure. (a) No health care provider, blood bank, plasma center, or any other public or private agency, institution, or individual may subject a person’s body fluids or tissue to a test for the presence of human immunodeficiency virus (HIV) infection unless the subject of the test first provides informed written consent to the testing. Any person in this State whose body fluids or tissue are subject to a test for the presence of HIV infection shall be afforded the opportunity to receive HIV counseling by the party ordering or requesting that the test be performed and shall be afforded the opportunity to obtain the test results. The counseling provided shall be consistent with guidelines established by the department. The opportunity to receive counseling shall be afforded both prior to obtaining a sample for HIV testing and upon disclosure of the test results, regardless of the serostatus of the individual tested, except that testing conducted pursuant to subsection (b)(1) and (2) shall be exempted from the counseling requirements of this subsection.

(b) Consent to testing is not required for any of the following:

- (1) A health care provider or organ donor center that procures, processes, distributes, or uses human body parts donated for scientific purposes, without obtaining consent, may test for the presence of HIV in order to assure medical acceptability of the gift for the purpose intended;

- (2) 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; provided that informed oral consent is obtained;
 - (4) Testing of body fluids or tissue 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) 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 to make a diagnosis or 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 this paragraph, and the patient shall be provided the opportunity to obtain the test results and appropriate counseling;
 - (6) 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,~~] charged, or a juvenile who has been [~~adjudicated,~~] charged, pursuant to [~~sections~~] section 707-730, 707-731, [~~or~~] 707-732(1)(a), 707-733.5, or 707-741 shall be tested to determine the person's HIV status upon court order issued pursuant to section 325-16.5. The test shall be performed according to the protocols set forth in section 325-17[-]; and
 - (8) A person who has been convicted, or a juvenile who has been adjudicated, pursuant to section 707-730, 707-731, 707-732(1)(a), 707-733.5, or 707-741 shall be tested to determine the person's HIV status upon court order issued pursuant to section 325-16.5. The test shall be performed according to the protocols set forth in section 325-17.
- (c) Confidentiality. The confidentiality of all records held pursuant to this section is governed by section 325-101.
- (d) Civil penalty. Any person or institution who wilfully violates any provision of this section shall be fined not less than \$1,000 nor more than \$10,000 for each violation plus reasonable court costs and attorney's fees as determined by the court, which penalty and costs shall be paid to the person whose records were

released. This subsection shall not be construed as limiting the right of any person or persons to recover actual damages.

~~[(e) Good faith exception. No health care provider, blood bank, plasma center, or any other public or private agency, institution, or individual, which, in good faith, provides results of any test for the presence of HIV infection to a specified third party as the result and in response to an informed written consent by the person to be tested, shall be in violation of confidentiality requirements pursuant to this section and governed by section 325-101 if the test results later prove to be false or otherwise defective.~~

~~(f)[(e) The department shall adopt rules, pursuant to chapter 91, to establish procedures and standards to implement this section.]~~

SECTION 3. Section 325-16.5, Hawaii Revised Statutes, is amended to read as follows:

“[§325-16.5] 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]~~ charged with an offense listed in section 325-16(b)(7), involving the victim,¹ be tested for HIV. The victim, or the parent or guardian of a minor or incapacitated victim, and the ~~[convicted]~~ charged 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]~~ charged person.

Any sexual assault victim, or the parent or guardian of a minor or incapacitated victim, shall be informed as soon as practicable after a conviction, 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 demand that the person convicted of an offense listed in section 325-16(b)(8), 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]~~ charged 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]~~ charged 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]~~ charged 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]~~ charged 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[.] subject to a showing of probable cause. Notwithstanding any law to the contrary, for purposes of determining probable cause for this order, a court may consider all relevant facts indicating whether HIV transmission is demonstrated by the preponderance of the evidence. The proceedings to determine whether or not such an order is issued shall be in camera.~~²

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.

The HIV test results shall remain otherwise confidential and the court may fashion orders to effectuate the prohibition against dissemination of the information. The adult probation division shall not disclose the HIV test results obtained under this section through any report. The court shall not take into account the HIV test results obtained under this section for any purpose, including determination of pretrial release of defendants, trial and sentencing. The Hawaii paroling authority shall not take into account the HIV test results obtained under this section for any purpose, including determination of minimum terms of incarceration and granting or denying of parole.

(c) The court shall order a convicted person to be tested for the etiological agent for HIV. The procedures used when ordering the test shall be as follows:

- (1) The victim or the parent or guardian of a minor or incapacitated victim shall be informed, as soon as practicable, of the court order mandating 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. The victim, parent, or guardian shall designate a physician or a certified HIV counselor to receive the test results of the convicted person, provide counseling, and notify the victim, parent, or guardian of the test results; and

- (2) The proceedings to issue such an order shall be in camera.

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.

The HIV test results shall remain otherwise confidential and the court may fashion orders to effectuate the prohibition against dissemination of the information. The adult probation division shall not disclose the HIV test results obtained under this section through any report. The court shall not take into account the HIV test results obtained under this section for any purpose, including determination of pretrial release of defendants, trial and sentencing. The Hawaii paroling authority shall not take into account the HIV test results obtained under this section for any purpose, including determination of minimum terms of incarceration and granting or denying of parole.

[(e)] (d) The results of the charged or 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 charged or 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)]~~ (e) 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)]~~ (f) As used in this section, unless the context requires otherwise:

“Charged person” means a person who has been charged with an offense under section 707-730, 707-731, 707-732(1)(a), 707-733.5, or 707-741, including a juvenile charged of such an offense. A person is charged when a formal complaint, information, or indictment has been accepted by the court.

“Convicted person” means a person who has been convicted of an offense under [sections] section 707-730, 707-731, ~~[(a)]~~ 707-732(1)(a), 707-733.5, or 707-741, 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 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 5. This Act shall take effect upon its approval.

(Approved June 28, 2002.)

Notes

1. Comma should be underscored.
2. Period should be underscored.