



**House
Legislative
Analysis
Section**

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AIDS TESTING: HIGH-RISK CRIMES

House Bill 4008 (Substitute H-3)
First Analysis (11-30-88)

RECEIVED

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Sponsor: Rep. David Honigman Mich. State Law Library
Committee: Public Health

THE APPARENT PROBLEM:

Local health departments have the authority to test people arrested and charged with prostitution-related offenses for venereal disease as a means of combating its spread to the general population. Some people have recommended that similar testing should be authorized to prevent the transmission of human immunodeficiency virus (HIV), the virus associated with acquired immune deficiency syndrome (AIDS). While AIDS is not officially classified as a venereal disease, it too is spread by intimate sexual contact (notably, but not only, by homosexual contact), and can be spread from mother to child during pregnancy or birth. It is also commonly spread by the sharing of needles by intravenous drug abusers. People cannot be protected from the AIDS virus by vaccine and there is no known cure for AIDS itself. Prevention of the spread of AIDS depends on identifying those who are carrying the virus and motivating them to change the behavior that leads to its transmission. People arrested for prostitution-related offenses, some sex offenses, and offenses related to the abuse of intravenous drugs fall into categories of individuals with a high risk of being infected with HIV, and it makes sense to provide courts and health departments with a similar kind of authority for recommending counseling and carrying out testing for the AIDS virus that now exists for venereal disease.

THE CONTENT OF THE BILL:

Under the bill, voluntary counseling regarding AIDS and AIDS-related complex (ARC) would be recommended to people arrested and charged with gross indecency, with certain prostitution-related offenses, or with offenses related to the intravenous use of a controlled substance. People convicted of crimes involving sexual conduct with sexual penetration or a crime involving the intravenous use of an illegal drug would be ordered by the court to be tested for the presence of human immunodeficiency virus (HIV) or an antibody to HIV and to receive counseling regarding AIDS and ARC. People convicted of certain prostitution-related crimes ("aiding and abetting," keeping a "house of ill fame," and pandering) would be ordered to obtain counseling. People receiving such counseling or testing who were found to be infected with HIV would be referred by the agency doing the counseling for appropriate medical care.

Voluntary counseling. More specifically, the bill would amend the Public Health Code to require that the judge or magistrate responsible for setting conditions of release pending trial for people arrested and charged with certain crimes at high risk for transmission of HIV recommend that the individual voluntarily obtain counseling at a local health department testing and counseling center regarding AIDS and ARC.

Mandatory counseling and testing. If someone were convicted of a crime involving either sexual conduct with sexual penetration or the intravenous use of an illegal drug,

the court would be required to order the convicted person to be tested for the presence of HIV or an antibody to HIV and to receive counseling. Testing would be done by a licensed physician or by the state or local health department. Counseling also would be ordered for people convicted of the prostitution-related crimes of "aiding and abetting," keeping a house of ill-fame, or pandering.

Notification of test results. Test results and any other medical information obtained from the mandatory testing would be made part of the court record. If the crime involved sexual conduct with sexual penetration, the court would be required to give the person or agency doing the test the victim's name, address, and telephone number. If the test results were positive, the person or agency doing the test would be required to (a) immediately notify anyone with whom the defendant was known to have engaged in sexual penetration during the course of the crime, and (b) to refer the defendant for appropriate medical care (though agencies providing counseling or testing would not be financially responsible for that medical care).

Test results (and other medical information obtained from the test) would be confidential, but would be given (a) to the test subject, (b) to the victim (if any), (c) upon written authorization of the defendant, or (d) "as otherwise provided by law."

Definitions. The bill would define "crime involving sexual conduct" and "sexual penetration." "Crime involving sexual conduct" would be defined as "criminal sexual conduct in any degree, assault with intent to commit criminal sexual conduct, sodomy, gross indecency" or violation of the prostitution provisions of the Michigan Penal Code (MCL 750.448, 750.449, and 750.449a). "Sexual penetration" would mean "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

MCL 333.5261

FISCAL IMPLICATIONS:

The House Fiscal Agency says that there will be fiscal implications to the state, since the bill mandates counseling and testing (as well as providing for voluntary counseling for those arrested and charged with certain crimes), but at this time the costs cannot be determined. (11-30-88)

ARGUMENTS:

For:

The bill would mandate the counseling and testing of people with a high risk of being infected with the virus associated with acquired immune deficiency syndrome (AIDS) when they were convicted of violating any of a number of sex-related and intravenous drug-related laws. This parallels the authority available to public health officials now for venereal disease testing. Although AIDS

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is not officially classified as a venereal disease, it too can be spread by intimate sexual contact, and certainly there is as much justification for protecting the public against the spread of this frightening, new fatal disease as there is for combating the spread of venereal disease.

The bill is narrowly drawn to target high risk groups; the categories of offenses to which the bill applies correspond to categories of high-risk individuals. Among those identified as high-risk by health officials are: homosexual-bisexual men, intravenous drug users, children of infected women, and the heterosexually promiscuous. Since neither immunization nor cure is available, the control of AIDS requires that high risk people be identified and be made aware of the changes they need to make in their behavior in order to prevent the transmission of the AIDS virus. Testing and education are essential. Yet many high risk people who are infected with the HIV virus do not know it, and some might not respond to general educational efforts encouraging them to be tested.

The bill provides health officials with an opportunity to reach some people in high risk populations. The value of this opportunity to reach intravenous drug abusers is underscored by press accounts that quote a new federal Public Health Service report on AIDS as saying: "intravenous drug abusers serve as the major reservoir for transmission of infection to heterosexual adults and their infants, as well as among themselves." (The AIDS virus is commonly spread by the sharing of needles by drug users, as well as by sexual contact.)

The bill represents a reasonable approach; it does not aim to harass or intimidate anyone. It does not mandate testing for those arrested and charged with certain high risk crimes, but does encourage them to obtain potentially life-saving counseling. It does mandate both testing and counseling for those convicted of these crimes, but it preserves the confidentiality of information derived from tests and examinations.

Against:

Testing and counseling people with a high risk of developing AIDS or related conditions or of transmitting the AIDS virus is important, but effective education and counseling that motivates those at risk to change their behavior is best done through voluntary programs in clinical settings and not through mandatory efforts in criminal justice settings. Unlike the testing authorized for venereal disease (which is rarely done and is itself considered of little practical value), testing for the AIDS virus does not lead to treatment, because there is no treatment available.

The prevention of the spread of the AIDS virus depends upon the cooperation of those infected or at risk of being infected, and this cooperation is less likely when testing is carried out in the context of a criminal proceeding. It does no good to force people to learn the results of tests performed on them, and such coercion might prove counterproductive to AIDS prevention efforts if the fear and mistrust generated by the bill force high-risk individuals underground and makes them unreceptive to public health counseling efforts.

In any case, the testing proposed under the bill would reach only a small proportion of those in high-risk groups, and the resources it would involve could be put to better use as part of large-scale voluntary testing and counseling programs that addressed themselves to the particular needs and interests of the high-risk populations.

Response: Surely even if mandatory counseling is not as effective as voluntary counseling, and even if such counseling reaches only a small proportion of people engaging in these high risk, nevertheless the nature of AIDS is so serious that even less than optimal results are well worth while. In the second place, the proposed testing is for public health purposes and not to assist in criminal prosecutions, and there is certainly a compelling state interest in preventing the transmission of the AIDS virus.

POSITIONS:

The Department of Public Health does not oppose the bill. (11-28-88)

The Michigan Organization for Human Rights opposes the bill. (11-29-88)