

HPB

109

# HOUSE COMMITTEE REPORT

(9)

Date Referred: January 29, 1993

FURTHER REFERRALS:

Judiciary  
Finance

Date of Committee Action: 2-16-93

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered:

HB 109

HOUSE BILL NO. 109

BLOOD TESTS ON SEX CRIME PERPETRATORS

"An Act relating to blood tests for persons charged with sex offenses; and providing for an effective date."

RECOMMENDATIONS:

be replaced with \_\_\_\_\_

CS HB 109 (HESS)

the same title  
 a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

fiscal impact H+SS

fiscal note(s) \_\_\_\_\_

zero fiscal note Corrections, Law

zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	X				
<i>[Signature]</i>	X				
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*[Signature]*  
CHAIRMAN'S SIGNATURE



# Alaska State Legislature

House of Representatives  
 COMMITTEE ON HEALTH, EDUCATION  
 AND SOCIAL SERVICES

DATE: FEBRUARY 16, 1993

PLACE: Capitol Room 106

**SUBJECT OF MEETING:**

\* HB 109: BLOOD TESTS ON SEX CRIMES  
 PERPETRATORS  
 JOHN JENSEN, PHD, ON LEARNING METHODS  
 FOR GREATER RETENTION

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Dana Latour	Corrections				465-3376	Y	<input checked="" type="radio"/> N	HB 109
Margaret Knuth	Law	1711 9th 3425			465-4049	<input checked="" type="radio"/> Y	N	HB 109
Peter Nakamura	DHSS				465 3090	<input checked="" type="radio"/> Y	N	H.B. 109
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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### MEMORANDUM

February 17, 1993

**SUBJECT:** Blood Testing of Sex Offenders - CSHB 109(HES) (Work Order No. 8-LS0462\K)

**TO:** Representative Cynthia Toohey  
Attn: Lynne Smith

**FROM:** Jerry Luckhaupt *JL*  
Legislative Counsel

FEB 17 1993

Enclosed is the final committee substitute you requested for the above-referenced bill. I have a few comments about the changes that were made.

1. On page 2, line 1, of the committee substitute, the committee added that "the parent or guardian" may file a petition for a blood test of a defendant. The language the committee adopted would seemingly permit a parent to seek a petition for a test even if the victim of the offense, their child, has reached the age of majority. It would probably be better to use language similar to that used on page 2, lines 16 - 17, such as "or if the alleged victim is a minor or incompetent, the alleged victim's parents or guardian."
2. On page 2, lines 3 - 9, the court is required to make a determination that probable cause exists to believe that a crime for which a test may be ordered was committed and that sexual penetration took place. The committee added language that in making this determination the court may rely on evidence presented before the grand jury or at any preliminary hearing. My concern is that the present language could be interpreted so as to not give a court the authority to hold a hearing if it chose to do so. While the language in the CS uses the permissive term "may" in allowing the court to rely on the evidence adduced at earlier proceedings, and this could be regarded as implicitly giving the court the authority to hold a hearing, it would be better to explicitly state that the court may hold a hearing or may rely on previously presented evidence, or that the court may rely on previously presented evidence or if that evidence is insufficient the court may hold a hearing.
3. On page 5, lines 8 - 12, of the bill draft, the committee removed the criminal penalty for unauthorized disclosure of the results of a test conducted under the bill,

and substituted in that any unauthorized disclosure may be punished as contempt of court. Contempt of court is provided for in AS 09.50.010 - 09.50.060.<sup>1/</sup> Presumably, this contempt would be criminal contempt, as opposed to civil contempt, as one who has disclosed test results is being punished for past conduct and to vindicate the order and authority of the court, and any contempt order would not be conditioned on any future or remedial action of the person facing the contempt charge - that is a civil contempt order usually tries to coerce compliance with a court order and a person found in civil contempt is given the opportunity to purge the contempt charge by doing something the court was commanding the person to do.<sup>2/</sup> See Stadler v. State, 813 P.2d 270 (Alaska 1991); Johansen v. State, 491 P.2d 759 (Alaska 1971).

Further, though the committee was advised that contempt only carries a possible punishment of a fine of \$300 or less, actually the potential punishment could be substantially greater than \$300. An unauthorized disclosure of test results would be a violation of a court order which is provided for in AS 09.50.010(5). The penalty for most forms of contempt, including AS 09.50.010(5), is only \$100. AS 09.50.020. But if by the contempt the "right or remedy of a party to an action or proceeding was defeated or prejudiced by the contempt" the penalty is "by fine of not more than \$300 or by imprisonment for not more than six months." AS 09.50.020. It would appear that the unauthorized disclosure of the test results of the person whose blood was tested would result in the person's right or privilege in not having those results disclosed being defeated or prejudiced. Consequently, I believe a person that discloses test results in an unauthorized manner would be subject to a \$300 fine or six months in jail.<sup>3/</sup> Since the committee's rationale for adopting this change appeared to be based upon the concerns of the Department of Law that an alleged victim could be subjected to a jail sentence this change does not accomplish that goal.

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<sup>1/</sup> Criminal contempt is punishable as provided for in civil contempt proceedings. AS 12.80.010.

<sup>2/</sup> In a sense the contempt could be considered to be civil, in that any unauthorized disclosure could be considered to have occurred to the detriment of the person whose blood was tested and the person who made the disclosure could be ordered to compensate the person whose blood was tested for any damage sustained by the unauthorized disclosure. See AS 09.50.040 and Stadler, infra, at 272 - 273. But since there is no way the person making the disclosure can purge the contempt - the person cannot take back the unauthorized disclosure - it seems reasonable to assume that any contempt proceeding in this situation would be criminal contempt.

<sup>3/</sup> In Siggelkow v. State, 731 P.2d 57 (Alaska 1987), the Alaska Supreme Court found that a woman's right to be "left alone" by her ex-husband who constantly harassed her in violation of a no-contact order issued as part of the parties' divorce decree was such a right that authorized the increased penalty provisions of AS 09.50.020. I do not believe that it is a great reach from that decision to say that a person's right, under the bill, not to have their test results disclosed is such a right or privilege that the defeat or prejudice of that right by unauthorized disclosure would authorize the increased penalty provision of AS 09.50.020.

Representative Cynthia Toohey

February 17, 1993

Page 3

I am also concerned about the removal of the criminal penalty for unauthorized disclosures and how it may affect a court's review of the constitutionality of the entire blood testing scheme. It must be remembered that the Alaska Constitution contains an explicit right of privacy provision that does not exist under the United States Constitution or most other state constitutions. Providing for a certain level of confidentiality of the identifiable test data as is done in the bill and a provision that unauthorized disclosure is a crime provides a court at least some support in finding that this testing scheme is constitutional. While punishment of unauthorized disclosures as criminal contempt does not harm the bill vis-a-vis a constitutional challenge, the removal of any criminal sanction would weaken the bill if its constitutionality were under attack.

Finally, I am concerned about how someone not a party to the petition for testing could be prosecuted for contempt. How would the person have received notice that the test results could not be disclosed if they were not served with the original court order? If a person were aware that testing might be ordered and they might want to disclose the results for whatever personal reason they might have, if they were able to obtain the results by hook or crook, how could the person intervene in the criminal proceeding if they were not the victim or the state? I don't have answers to these questions, but if a criminal penalty is provided for unauthorized disclosure I don't believe that these questions would be implicated.

If you have any questions, please contact me at your convenience.

GPL:mi  
93-026.mai

Enclosure

Adopt the  
Bill  
Sec. 40  
Court Dept  
Wentley

Testimony in support of HB 109  
First Hearing in House HESS

ELIZA  
Wentley

Madame Chair, Members of the Committee:

HB 109 is a victims rights bill. Reported rapes in Alaska numbered 530 in 1991, up from 277 a mere two years earlier. Victims of rape and other sexual assaults are faced with a myriad of difficulties, not the least of which is the fear of having been infected by HIV and other communicable diseases. The trauma of sexual attack is now complicated in the aftermath by the concern that AIDS has been contracted. The state has a responsibility to provide some measure of relief for citizens who find themselves in such a predicament.

The victim of a sexual assault has a right to know whether the alleged offender is infected with HIV or other communicable diseases. In the unfortunate event that the defendant tests positive for HIV antibodies, the victim will be given early warning to take precautions necessary to protect herself and others from further spread of the virus. While not universally accepted as a prophylactic measure, AZT treatment is an alternative which the victim may wish to elect in the event the defendant's test is positive. HB 109 requires the department to provide information, counseling and referral for victims so that they may make informed decisions concerning their own health.

While a negative test result provides no assurance that infection has not occurred, it is information that may be beneficial in sustaining the

victim's natural hope that she has not contracted the virus. The positive psychological effect of such hope must not be discounted even though currently accepted medical advice asserts the victim's need to also be tested over a period of months following a sexual assault.

Since 1987, 24 states have enacted legislation similar to what is being proposed here. HB 109 requires the court to order the test when a victim requests it and the court finds probable cause that the defendant did commit certain specified sexual acts during which bodily fluids are likely to have been transmitted to the victim. Five other states (California, Florida, Georgia, Texas and Virginia) allow testing upon a court order at the time of arrest or when charges have been filed. Some states, including Idaho, Nevada and Ohio, have made such tests mandatory upon arrest. In light of Alaska's specific privacy provision, it would seem that a mandatory provision may be more difficult to sustain. Furthermore, some victim advocacy groups have indicated their preference for a process which is initiated by the victim.

In 1990, Congress made it clear to the states that it expected them to make provision in law for victims to receive information on the HIV status of their attackers. In the Crime Control Act of 1990, Congress tied action on this issue to the continued receipt of certain law enforcement assistance grants. States that do not comply will lose a percentage of their federal grants and the money will be redistributed equally among the states that do comply. Unless the 18th Legislature

passes a law similar to what HB 109 proposes, Alaska stands to lose approximately \$185,000 in FY94.

While the Federal guidelines only require the states to provide for testing after conviction, many advocacy groups insist that the delay between the alleged attack and conviction is too long to provide the kind of relief victims often desire. HB 109 was written to address the concerns of victims. It is an incidental, though salubrious, fact that in passing this bill we can also satisfy the intent of Congress expressed in the Crime Control Act of 1990, and continue to receive the full benefits of the Edward Byrne Memorial Grant Program.

Included in your packets is information from NCSL on trends in HIV prevention legislation relating to victims of sexual assault. Also included is a worksheet showing points at which HB 109 provides compliance with the Federal guidelines. I would be happy to answer any questions from the committee at this time.

CSHB 109  
SECTIONAL ANALYSIS

**"An Act relating to blood tests for  
persons charged with sex offenses;  
and providing for an effective date."**

Section 1.

Adds new sections to AS 18.15 as follows:

AS 18.15.300

(a) makes a defendant (including a minor) charged with a sexual offense under AS 11.41.410 - 11.41.440 that includes sexual penetration as an element of the crime subject to an order of the court requiring testing for HIV and other communicable diseases.

(b) allows the alleged victim, or the prosecuting attorney on behalf of the alleged victim, to petition the court for an order requiring the defendant to be tested.

(c) requires the court to make a probable cause determination 1) that a crime has taken place under the specified statutes, and 2) that sexual penetration took place. Allows the court to conduct a hearing to receive evidence to make the determinations required under this subsection.

(d) requires the court to order the test if the court finds probable cause that a crime was committed and that sexual penetration took place.

(e) designates the authorized recipients of test results obtained under an order authorized by subsection (c) of this act. Authorized recipients are the defendant, the victim (or the victim's parents or guardian) and the officer in charge and the chief medical officer of the facility in which the defendant is incarcerated.

(f) places time constraints on when the order authorized under (c) of this act

may be filed. The test may not be ordered sooner than seven days after the arrest nor more than 90 days after the defendant has been convicted and sentenced. Additionally, a test may not be ordered after a finding favorable to the defendant.

(g) provides definitions for "disposition favorable to defendant," and "sexual penetration."

#### AS 18.15.310

(a) requires that blood drawn for a test under this act be drawn by licensed medical personnel according to AS 08.64.

(b) requires that testing on blood drawn under provisions of this act be conducted by a licensed medical laboratory and according to accepted medical standards.

(c) requires that positive test results be transmitted to the Department of Health & Social Services.

(d) requires test results to be sent to the designated recipients and requires a disclaimer to be attached to test results.

(e) requires the court to order persons who receive the test results to maintain the confidentiality of personal identifying data related to the tests. Provides certain exceptions to this confidentiality: (1) the defendant, and (2) the victim for such disclosures as are necessary to provide for the victim's own health and the health of the victim's spouse, family and household.

(f) prohibits the test results from being used as evidence in a criminal or juvenile proceeding.

(g) provides civil immunity for persons performing the duties authorized by this act.

(h) if the test results are positive, requires the Department of Health & Social Services to provide free counseling and testing to the victim and counseling to the defendant upon request. Also requires the department to provide referral for the victim to appropriate health care facilities and support services.

(i) defines "AIDS," "counseling," and "HIV." Counseling is defined as providing medically appropriate information including information on the diseases, their treatment and the medical and social implications of the diagnosis and the tests.

#### AS 18.15.320

(a) requires the Department of Health & Social Services to pay for tests ordered under this act.

(b) requires a defendant who is convicted of an offense for which a test was ordered under this act to reimburse the department for the cost of the test. Allows the court to order the Department of Corrections to garnish wages earned in correctional industries to pay for the test.

#### AS 18.15.330

provides that intentional unauthorized disclosure of information restricted by this act constitutes a class A misdemeanor.

#### Section 2.

Provides that the act takes effect immediately according to AS 01.10.070(c).

Changes to HB 109 reflected in  
the blank Committee Substitute  
presented to the Committee on  
February 16, 1993

*Line numbers refer to the original bill.*

p.1, l.7 adds "indictment, or information" to include the various forms of initiating a felony prosecution.

p.1, l.8&9 uses more specific language denoting the acts for which the bill allows a petition to be initiated.

*This change is to ensure that the statute as amended by HB 109 conforms to Federal guidelines set forth in the Crime Control Act of 1990.*

p.2, l.1-6 requires the court to find probable cause that a crime has been committed under the statutes cited in (a); and that probable cause exists that the crime included sexual penetration as defined in AS 11.81.900(b)(54).

adds a new subsection (d) which requires the court to order a blood test on a defendant if probable cause is found as required in (c).

*This change is to ensure that the statute as amended by this bill conforms to the Federal guidelines set forth in the Crime Control Act of 1990.*

p.2, l.7 renumbers this subsection (e); and substitutes "provided" for "sent."

p.2, l.16 renumbers this subsection (f).

p.2, l.22 adds a new subsection (g) providing a definition of "disposition favorable to defendant." In the original version, this was found on p.5, l.3.

p.2, l.24 adds "registered physician assistant" to the list of those authorized to draw blood for the purposes of this section.

*This change was requested by the Department of Corrections.*

p.3, l.4 substitutes "provided" for "sent."

p.3, l.30 deletes the sentence which begins, "If the department delivers a brochure . . ." Adds a sentence which provides for "referral to appropriate health care facilities and support services at the request of the victim."

p.4, l.5&6 substitutes "HIV symptomatic disease" for "AIDS-related complex."

p.4, l.7 adds a subsection containing the definition of "HIV." In the original version, this was found on p.5, l.9.

8-LS0462J  
Luckhaupt  
2/16/93

CS FOR HOUSE BILL NO. 109( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
EIGHTEENTH LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE KOTT

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to blood tests for persons charged with sex offenses; and  
2 providing for an effective date."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 18.15 is amended by adding new sections to read:

5 ARTICLE 4B. BLOOD TESTS OF PERSONS CHARGED WITH SEX OFFENSES.

6 Sec. 18.15.300. ORDER FOR BLOOD TEST; DISCLOSURE OF RESULTS.

7 (a) A defendant charged in a criminal complaint, indictment, or information filed with  
8 a magistrate or court with a violation of AS 11.41.410 - 11.41.440 that includes sexual  
9 penetration as an element of the offense, or a minor with respect to whom a petition  
10 has been filed in a juvenile court alleging a violation of AS 11.41.410 - 11.41.440 that  
11 includes sexual penetration as an element of the offense, may be ordered by a court  
12 having jurisdiction of the complaint, indictment, information, or juvenile petition to  
13 submit to testing as provided in AS 18.15.300 - 18.15.330.

14 (b) An alleged victim listed in the complaint, indictment, information, or

1 juvenile petition, or the prosecuting attorney at the request of an alleged victim, may  
2 petition the court for an order authorized under this section.

3 (c) Upon receipt of a petition filed under (b) of this section, the court shall  
4 determine if (1) probable cause exists to believe that a crime for which a test may be  
5 ordered under (a) of this section has been committed, if such a determination has not  
6 already been made, and (2) probable cause exists to believe that sexual penetration  
7 took place between the defendant or minor and the alleged victim in an act for which  
8 the defendant or minor is charged under (a) of this section. The court may hold a  
9 hearing at which evidence may be received concerning the probable cause  
10 determinations required by this subsection.

11 (d) If the court finds probable cause exists to believe that (1) a crime for  
12 which a test may be ordered under (a) of this section has been committed, if that  
13 determination has not already been made, and (2) sexual penetration described in (c)(2)  
14 of this section took place, the court shall order that the defendant or minor provide two  
15 specimens of blood for testing as provided in AS 18.15.300 - 18.15.330.

16 (e) Copies of the blood test results shall be provided to the defendant or minor,  
17 each requesting victim, the victim's designee or, if the victim is a minor or  
18 incompetent, the victim's parents or legal guardian. If the defendant or minor is being  
19 incarcerated or detained at the time of the blood test or thereafter, the blood test results  
20 shall be provided to the officer in charge and the chief medical officer of the facility  
21 in which the defendant or minor is incarcerated or detained, including an incarceration  
22 or detention ordered as a result of conviction or judgment of delinquency or child in  
23 need of aid for an act for which the defendant or minor is charged under (a) of this  
24 section.

25 (f) A court may not order a test under this section

26 (1) before seven days after the defendant or minor's arrest;  
27 (2) after the entry of a disposition favorable to a defendant; or  
28 (3) if the defendant is convicted or adjudicated delinquent or in need  
29 of aid, after 90 days after the issuance of the judgment and sentence or the judgment  
30 in a juvenile action.

31 (g) In this section,

1 (1) "disposition favorable to defendant" means an adjudication by a  
2 court other than a conviction, or if the defendant is a minor not being prosecuted as  
3 an adult, that the minor is not adjudicated delinquent or a child in need of aid, for an  
4 offense for which a blood test could be ordered under AS 18.15.300;

5 (2) "sexual penetration" has the meaning given in AS 11.81.900(b).

6 Sec. 18.15.310. TESTING; TEST RESULTS. (a) The withdrawal of blood  
7 for a test under AS 18.15.300 - 18.15.330 shall be performed in a medically approved  
8 manner. Only a physician licensed under AS 08.64, physician's assistant registered  
9 under AS 08.64, registered nurse, licensed practical nurse, or certified emergency  
10 medical technician may withdraw blood specimens for the purposes of AS 18.15.300 -  
11 18.15.330.

12 (b) The court shall order that the blood specimens withdrawn under  
13 AS 18.15.300 - 18.15.330 be transmitted to a licensed medical laboratory and that tests  
14 be conducted on them for medically accepted indications of exposure to or infection  
15 by the human immunodeficiency virus (HIV) and other communicable diseases for  
16 which medically approved testing is readily and economically available as determined  
17 by the court.

18 (c) Copies of test results that indicate exposure to or infection by HIV or other  
19 communicable diseases shall also be transmitted to the department.

20 (d) The test results shall be provided to the designated recipients with the  
21 following disclaimer:

22 The tests were conducted in a medically  
23 approved manner but tests cannot determine  
24 exposure to or infection by HIV or other  
25 communicable diseases with absolute accuracy.  
26 Persons receiving this test result should continue  
27 to monitor their own health and should consult a  
28 physician as appropriate.

29 (e) The court shall order all persons, other than the test subject, who receive  
30 test results under AS 18.15.300 - 18.15.330 to maintain the confidentiality of personal  
31 identifying data relating to the test results except for disclosures by the victim, or if

1 the victim is a minor or incompetent by the victim's parents or legal guardian, as is  
2 necessary to obtain medical or psychological care or advice or to ensure the health of  
3 the victim's spouse, immediate family, or persons occupying the same household as  
4 the victim.

5 (f) The specimens and the results of tests ordered under AS 18.15.300 -  
6 18.15.330 are not admissible evidence in a criminal or juvenile proceeding.

7 (g) A person performing testing, transmitting test results, or disclosing  
8 information under AS 18.15.300 - 18.15.330 is immune from civil liability for an  
9 action undertaken in accordance with the provisions of AS 18.15.300 - 18.15.330.

10 (h) If the results of a blood test conducted under AS 18.15.300 indicate  
11 exposure to or infection by HIV or other communicable diseases for which testing was  
12 conducted, the department shall provide (1) free counseling and free testing to a victim  
13 for HIV and other diseases reasonably communicable through the offense; and (2)  
14 counseling to the alleged perpetrator or defendant upon request of the alleged  
15 perpetrator or defendant. The department shall provide referral to appropriate health  
16 care facilities and support services at the request of the victim.

17 (i) In this section,

18 (1) "AIDS" means acquired immunodeficiency syndrome or HIV  
19 symptomatic disease;

20 (2) "counseling" means providing a person with information and  
21 explanations relating to AIDS and HIV that are medically appropriate for that person,  
22 including all or part of the following:

23 (A) accurate information regarding AIDS and HIV;

24 (B) an explanation of behaviors that reduce the risk of  
25 transmitting AIDS and HIV;

26 (C) an explanation of the confidentiality of information relating  
27 to AIDS diagnoses and HIV tests;

28 (D) an explanation of information regarding both social and  
29 medical implications of HIV tests;

30 (E) disclosure of commonly recognized treatment or treatments  
31 of AIDS and HIV;

1 (3) "HIV" means the human immunodeficiency virus.

2 Sec. 18.15.320. COST OF PERFORMING TEST; REIMBURSEMENT. (a)

3 The cost of performing a blood test under AS 18.15.300 shall be paid by the  
4 department.

5 (b) If a defendant for whom a blood test has been ordered under AS 18.15.300  
6 is convicted of an offense for which the defendant was charged, and for which a blood  
7 test could be ordered under AS 18.15.300, the court shall order the defendant to  
8 reimburse the department for the cost of the test and may order the Department of  
9 Corrections to deduct the amount of the test from any pay the inmate receives under  
10 AS 33.30.201.

11 Sec. 18.15.330. PENALTY FOR DISCLOSURE. A person who intentionally  
12 discloses personal identifying data regarding information obtained under  
13 AS 18.15.300 - 18.15.330 to any person who is not authorized to receive data under  
14 AS 18.15.300 - 18.15.330, by court order, or with the written consent of the defendant,  
15 or as otherwise authorized by law, is guilty of a class A misdemeanor.

16 \* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

Alaska State Legislature  
House of Representatives

COMMITTEES:  
HEALTH, EDUCATION  
& SOCIAL SERVICES  
JUDICIARY  
STATE AFFAIRS

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Representative Pete Kott  
SPONSOR STATEMENT

HB 109 — HIV Testing for Sex Offenders

The purpose of HB 109 is to provide relief for victims of sexual assault. The threat of HIV infection and of infection from other communicable diseases, especially venereal diseases, is a serious complicating side-effect of being victimized by sexual assault. The state has a compelling interest in assuring that innocent victims of crime are afforded timely relief from the anxiety that may result from sexual assault.

It is true that the accused has certain rights that also must be protected by the state. The defendant's right to privacy and to due process is an important part of Alaska's judicial process. HB 109 includes several provisions designed to protect the defendant's rights while balancing those rights against the alleged victim's right to know if he or she has been exposed to infection. The following factors should be noted with respect to this concern:

- 1) The test is not automatically required, the victim must petition the court to request the test;
- 2) The court must find probable cause that there was a transfer of bodily fluids;
- 3) The release of information obtained as a result of the test is strictly controlled in that
  - a) only the defendant, the victim, and officials of the defendant's place of incarceration are to receive the test results, except that the Department of Health & Social Services may receive statistical information;
  - b) unauthorized disclosure of test results is strictly prohibited and is defined as a class A misdemeanor; and
  - c) the time period during which the alleged victim may request the test is narrowly defined.

HB 109 also provides that the state must make available to both the victim and the alleged perpetrator counseling relating to HIV and AIDS which is medically appropriate for those persons.

Finally, HB 109 is designed to minimize the cost to the state of implementing this program. If the defendant is convicted, he or she must reimburse the state for the cost of the test. The court may order the Department of Corrections to provide for the reimbursement through garnishment. Furthermore, the Federal Crime Control Act of 1990 provided that states which do not have a law such as that proposed by HB 109 shall lose part of their law enforcement assistance grants. The loss to Alaska if we fail to pass such a law this year will be approximately \$185,000 in FY94.

This bill can satisfy the Federal requirement and simultaneously form an integral part of an effort by the state of Alaska to ensure that victims of crime in our state are afforded every opportunity to find appropriate relief.



Sponsor Statement

**HB 109**  
**SECTIONAL ANALYSIS**

**"An Act relating to blood tests for  
persons charged with sex offenses;  
and providing for an effective date."**

Section 1.

Adds new sections to AS 18.15 as follows:

AS 18.15.300

(a) makes a defendant (including a minor) charged with a sexual offense under AS 11.41.410 - 11.41.440 subject to an order of the court requiring testing for HIV and other communicable diseases.

(b) allows the alleged victim, or the prosecuting attorney on behalf of the alleged victim, to petition the court for an order requiring the defendant to be tested.

(c) requires the court to conduct a hearing on a petition filed under subsection (b), and requires the court to order the test if the court finds probable cause that a transfer of bodily fluids took place between the defendant and the alleged victim.

(d) designates the authorized recipients of test results obtained under an order authorized by subsection (c) of this act. Authorized recipients are the defendant, the victim (or the victim's parents or guardian) and the officer in charge and the chief medical officer of the facility in which the defendant is incarcerated.

(e) places time constraints on when the order authorized under (c) of this act may be filed. The test may not be ordered sooner than seven days after the arrest nor more than 90 days after the defendant has been convicted and sentenced. Additionally, a test may not be ordered after a finding favorable to the defendant.

*Sectional Analysis*

AS 18.15.310

(a) requires that blood drawn for a test under this act be drawn by licensed medical personnel according to AS 08.64.

(b) requires that testing on blood drawn under provisions of this act be conducted by a licensed medical laboratory and according to accepted medical standards.

(c) requires that positive test results be transmitted to the Department of Health & Social Services.

(d) requires test results to be sent to the designated recipients and requires a disclaimer to be attached to test results.

(e) requires the court to order persons who receive the test results to maintain the confidentiality of personal identifying data related to the tests. Provides certain exceptions to this confidentiality: (1) the defendant, and (2) the victim for such disclosures as are necessary to provide for the victim's own health and the health of the victim's spouse, family and household.

(f) prohibits the test results from being used as evidence in a criminal or juvenile proceeding.

(g) provides civil immunity for persons performing the duties authorized by this act.

(h), if the test results are positive, requires the Department of Health & Social Services to provide counseling and testing to the victim; and counseling to the defendant upon request. Further provides that the Department's duty to provide counseling is satisfied if the Department delivers to the victim and the defendant a brochure containing the relevant information, and refers the defendant and victim to the Department for further information.

(i) defines "AIDS" and "counseling." Counseling is defined as providing medically appropriate information including information on the diseases, their treatment and the medical and social implications of the diagnosis and the tests.

AS 18.15.320

(a) requires the Department of Health & Social Services to pay for a test ordered under this act.

(b) requires a defendant who is convicted of an offense for which a test was ordered under this act to reimburse the Department for the cost of the test. Allows the court to order the Department of Corrections to garnish wages earned in correctional industries to pay for the test.

AS 18.15.330

provides that intentional unauthorized disclosure of information restricted by this act constitutes a class A misdemeanor.

AS 18.15.350

provides definitions of terms essential to the act.

Section 2.

Provides that the act takes effect immediately according to AS 01.10.070(c).

HB 109  
Rep Kott  
2/8/93

# STATE LEGISLATIVE REPORT



## TESTING SEX OFFENDERS FOR HIV

by

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## TESTING SEX OFFENDERS FOR HIV

"The public good to be achieved must be balanced against the costs of the policy."  
Larry Gostin, *The Politics of AIDS*, 1989

### INTRODUCTION

In the United States each year between 1973 and 1987 some 155,000 women reported they had been raped. (1, p. 7) Although rape is not solely a crime against women, national statistics on homosexual rape are not available. All victims of sexual assault (or survivors, the term some advocacy groups such as the Center for Women Policy Studies prefer) suffer physical and emotional trauma. (2) When the fear of being infected with the human immunodeficiency virus (HIV) is added, the emotional burden increases. Because the victims not only have been assaulted but also possibly threatened with a deadly disease, they often want to know if their assailant is infected with HIV, and public sentiment tends to support requiring the accused to undergo HIV testing.

States feel pressure to respond with legal remedies. One option is to require offenders to be tested for HIV infection (the presence of HIV antibodies) so that victims may have the information. Federal legislation passed in 1990, the Martin amendment to the Comprehensive Crime Control Act of 1990 (P.L.101-647), pressures states to require HIV testing of convicted sex offenders at the victim's request or lose 10 percent of their victim's assistance funds.

Still, questions exist about the usefulness of testing and the legality of mandatory testing. Being infected with HIV is not a crime; infection only becomes relevant to criminal proceedings in the cases involving reckless endangerment, such as assault with intent to infect or deliberate transmission of the virus.

The states have the task of balancing the rights of victims and defendants. To do so, legislators need to conduct careful research about the issues and involve rape victim assistance groups, other relevant community organizations and public health agencies, as well as legal counsel. As Larry Gostin, executive director of the American Society of Law and Medicine, asserts, "The public good to be achieved must be balanced against the costs of the policy [including] . . . the invasion of human rights, the financial cost or the practical burdens of the policy." (3, p. 1020) This report examines some of those policy costs, focusing on issues for legislators to consider regarding HIV testing. The issues include both practical and legal questions about requiring HIV tests for sex offenders.

### PRACTICAL CONSIDERATIONS ABOUT HIV TESTING

Tests for HIV infection screen for antibodies produced by the immune system's response to HIV, not for the virus itself. The usual testing procedure is to screen with the ELISA (enzyme-linked immunosorbent assay) and then to confirm positive results with the more labor intensive Western blot test. (4, p. 261-2) Testing sex offenders for HIV raises a number of questions, including the small risk of transmission, the reliability of the tests, the usefulness of the information and the cost.

The risk of transmission of HIV from a single sexual assault. HIV is transmitted through the transfer of body fluids such as semen and blood. The risk of HIV transmission from a single sexual encounter is relatively low. Currently available data suggest at most a 1-in-500 chance of

infection from a single male-to-female exposure if the male is infected. (5, p. 2429 and 6) Risk may be somewhat higher if tissue damage occurs, as may be likely in cases of forcible rape. Of those who died from AIDS-related illness between 1981 and 1990, only 3.6 percent (3,587) were infected through heterosexual contact. (7) The most recent Centers for Disease Control data attribute 10,011 (6 percent) of all known AIDS cases in the United States to heterosexual contact. (8) No cases of HIV transmission from rape have been reported in the United States and only one in Great Britain. (9, p. 36 and 10, p. 2)

Reliability of HIV tests. Most individuals with detectable antibodies are assumed capable of transmitting infection. Current tests are quite reliable, but no test is 100 percent so. (4, p. 260) Especially in low-risk populations, there are significant problems with false positive results (positive tests when the virus is not present) and false negative results (negative tests when the virus is actually present). (4, p. 263) Test results vary among laboratories and are vulnerable to subjective interpretation. Most infected people test HIV-positive within four to six weeks after exposure, but some may not test positive for up to six months, possibly longer, because tests monitor antibodies produced in response to the virus rather than the actual presence of the virus. There is hope for more reliable tests in the future.

Usefulness of testing information. Sexual assault victims might want information about the accused offender's HIV status for two primary reasons: concern for their own health and concern for the health of their sex partners. The victims and their sex partners would be relieved to know if the offender did not test HIV-positive. If the offender tested HIV-positive, victims would want to know quickly to initiate preventive medical action and to protect their partners. A pregnant woman or a woman considering pregnancy has a particularly compelling need to know the offender's HIV status so she can make informed decisions about the health of her future children. Testing the victim will not give useful, reliable information immediately after the assault, because the virus can have an incubation period of six months or more.

A victim might request treatment with AZT (zidovudine), which is used to delay the progression from HIV infection to full-blown AIDS and to increase the length and quality of life of infected patients. Some physicians recommend immediate administration of AZT as a prophylaxis to healthcare workers who have been exposed to HIV, but no studies to date have proven the effectiveness of AZT as a preventive measure. The U.S. Public Health Service recommends that physicians and exposed individuals (but not specifically victims of sexual assault) make decisions about the use of AZT based on risk of infection, time elapsed since exposure, and counseling about the risk of toxicity and the uncertainty about the effectiveness of the medication as a preventive measure. (11, p. 7)

Time also is an issue. Because early intervention may be more effective (if AZT intervention is beneficial at all), testing and communication of test results to the victim need to be completed as quickly as possible after the assault. Waiting until conviction, which can take up to three years, decreases the usefulness of the information to the victim. Testing all accused offenders may solve this problem but raises legal questions. If the offender is not tested promptly, then testing the victim provides at least as much useful information to the victim, because it may show the actual presence or absence of the virus. (12, p. 264)

Cost and payment of mandatory or court-ordered testing. Testing costs vary widely, depending on whether testing is done in bulk, as through a state health department, or individually, by private physicians. Costs also depend on the number of tests required, determined by preliminary test results and the individual's risk factor(s). Costs for tests in bulk are estimated at \$3 to \$15 for the ELISA and \$25 to \$40 for the Western blot assay. Individual tests are substantially more expensive, averaging \$50 to \$75, and can cost as much as \$200.

Only a few states have laws that provide for paying for testing, and none unconditionally pays for a victim's testing. Florida draws on general revenue funds. Kansas, Ohio, South Carolina and Virginia demand repayment from the convicted offender, either directly or as part of the court's judgment. If the defendant is indigent, then the state, municipality or county pays. Oregon uses Crime Victim Compensation funds. Missouri's Department of Health pays for the victim's test if the defendant tests HIV positive, and Idaho pays only to the extent that the Legislature appropriates specific funds.

## LEGAL CONSIDERATIONS ABOUT HIV TESTING

The Fourth and Fourteenth Amendments to the U.S. Constitution raise two major issues concerning mandatory testing of offenders and non-voluntary disclosure of test results to victims and others. The Fourth Amendment guarantees protection of the individual from unreasonable searches and seizures and requires that search warrants be based on probable cause. The Fourteenth Amendment is concerned with personal liberty, restrictions on state action and the right to privacy.

Reasonable search. Obtaining a blood sample for HIV testing is a "search" under federal law. The U.S. Supreme Court's interpretation is that the reasonableness of a search is determined "by balancing the government's need to conduct the search against the invasion which the search entails." (13) Warrantless administrative searches may be allowed in non-criminal proceedings when the government's interest in protecting public safety outweighs the individual's privacy interest. (14) The uncertainty surrounding HIV test accuracy and the decreasing usefulness of the offender's test results over time may weaken the case that testing protects public safety in terms of sexual assault victims.

Privacy. Discrimination against HIV-infected individuals is a serious problem. There are concerns about fairness of trials and treatment in correctional facilities. Knowledge that an individual was tested, regardless of the results, can be damaging. Perhaps more important, if the defendant is tested before conviction, it may prejudice the presumption of innocence. On the other hand, if testing is restricted only to convicted sex offenders, it fails to allow for early medical intervention and provides little physical or emotional benefit to the victim.

Court-ordered testing. If a court receives the defendant's written, informed consent to test, or if a court weighs the need for testing against the right of the defendant and finds cause to test, then there are fewer constitutional constraints on testing. A Connecticut law (S.B. 812, 1989), although not specifically directed at sex offenders, is an example of legislation that balances public need and legal protection. Before a court may issue an order for testing, it must find clear and imminent danger to the public health or the health of another person. In addition, the person requesting testing must demonstrate a compelling need that cannot be met by other means. To assess "compelling need," the court must weigh the need for the test result against the test subject's privacy interests and the public interest, which may be poorly served by involuntary testing. (15, p. 61) The problem with these procedures is how long they take.

## OPTIONS OTHER THAN HIV TESTING OF THE OFFENDER

The Presidential Commission on the HIV Epidemic and others concerned with the needs of assault victims have recommended focusing on the victim's needs and health status, providing HIV and rape counseling, and making medical care available. (2,16,17,18)

When reason exists to suspect HIV transmission from an assault, testing the victim, and retesting over the period of incubation, is the most reliable source of information. (19, p. 1632) In

addition, the victim may better benefit from an immediate assessment of the risk status of the accused offender, with or without HIV testing, to the extent possible within the legal limits of confidentiality. The victim also needs to know the latest information about preventive measures, such as AZT treatment.

The Centers for Disease Control recommend that pre-test counseling include information about:

- ▶ The risk of infection;
- ▶ The limitation of the test results;
- ▶ The consequences of a positive test result, such as concerns about insurance, employment and housing discrimination; and
- ▶ Measures to prevent the spread of the virus.

## STATE RESPONSES

As of May 1991, at least 23 states had passed laws concerning HIV testing of sexual offenders. In addition, at least 70 bills about this issue were proposed in 26 states during the 1991 legislative sessions.

States have taken different approaches to concerns about sex assault. Some have emphasized the rights of victims, others the rights of defendants. California's and New York's laws tend to illustrate the range.

California (S.B. 1007, 1988 and S.B. 2643, 1989) places greater emphasis on victims' rights. One law mandates HIV testing of convicted sex offenders. Another requires the court to issue a search warrant to obtain a blood sample for HIV testing from a person charged with sexual assault when there is probable cause to believe there was a transfer of body fluids. Counseling for both the victim and the accused is required. If the test is positive and confirmed, the victim is notified. The victim is immune from civil liability for disclosing the information as necessary to protect the health and safety of self, sex partner(s) and family. (12, p. 244 and 16, p. 1625)

New York's AIDS Testing and Confidentiality Law [NY PUB. HEALTH LAW 2781.1], which does not specifically address testing sex offenders, protects the rights of the defendant while weighing the needs of the victim. It does not give the victim the right to have the defendant tested. The person to be tested must give written, informed consent unless the test is authorized by law. The court must weigh the victim's needs against the defendant's privacy interests and find "clear and imminent danger" to the victim's life or health before ordering testing or disclosure of test results to the victim. Any further disclosure or redisclosure is prohibited. (12, p. 229 and 16, pp. 1627-29)

The Appendix contains a chart of state laws concerning HIV testing of sex offenders and their provisions on the issues addressed in this report. The following is a summary of the provisions:

- ▶ **Testing Requirements:** fourteen states (CO, FL, ID, IL, IN, MS, MO, NV, ND, OH, OR, SC, TN, WV) require testing for convicted or, in some cases, charged sex offenders; 11 states (AK, AZ, CA, FL, GA, KS, MI, OR, TX, VA, WA) require a court order, some only after failure to get the accused's consent.

- ▶ **Timing:** At least nine states (CA, CO, FL, GA, ID, NV, OH, TX, VA) allow testing at the time of arrest or after charges have been filed, as opposed to after conviction. Four of them require the victim to first request the testing.
- ▶ **Access to Test Results:** Almost all states with testing laws make results available to the victim and the accused as well as to public health authorities. In some states the court and penal system also have access to the results.
- ▶ **Penalties for Unauthorized Disclosure:** Three states (AZ, KS, OR) consider it a misdemeanor to reveal test results to anyone not legally authorized to have access. Penalties include fines.
- ▶ **Counseling:** Laws in 14 states (AK, AZ, CA, FL, GA, IN, KS, MI, MN, OH, OR, VA, WA, WV) include provisions for counseling the victim and/or the accused.
- ▶ **Funding:** Nine states (FL, GA, ID, KS, MO, OH, OR, SC, VA) have included methods of paying for testing in their laws. In Ohio and South Carolina the accused is charged for testing; Kansas and Virginia pay for testing and then include restitution through the convicted person's court costs. Florida draws on general revenue funds, and Oregon uses crime victim compensation funds.

Legislation proposed in 1991 continued to focus on mandatory testing for convicted sex offenders and mandatory or permitted testing of individuals arrested for sex offenses. Other issues under consideration included victim counseling and methods of paying for testing and counseling.

## COURT RESPONSES

State laws concerning HIV testing of sex offenders are relatively new and have undergone little court scrutiny. Michael Stoy, Idaho deputy attorney general, says of his state's law that requires testing of anyone charged with a sex offense, "I keep waiting for our own law to be challenged constitutionally . . . but there has not yet been a definitive nationwide statement as to whether someone can be tested against their will. It's a Fourth Amendment privacy right balanced against a public health situation." (9, p. 38)

## CONCLUSION

Requiring HIV testing is one highly visible legislative response to the problems of sexual assault and AIDS. State policymakers are faced with constitutional issues of balancing both the rights of victims and defendants and with practical concerns about risks, reliability, usefulness and costs of testing. So far, at least 23 states have responded with a variety of legislative provisions concerning testing: mandatory vs. court ordered, before or after conviction, with or without compulsory counseling, and with various notification procedures. Testing, by itself, may not best serve policymakers' intent to assist victims. It may provide some relief to victims, but programs that include counseling, monitoring of victims' own health status, and emphasis on their own well-being may generate greater long-term benefits. States will continue to be involved in addressing this highly emotional and legally difficult issue. Legislators may want to consult with legal counsel, rape victim assistance groups, other relevant community organizations and public health personnel when considering appropriate responses.

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APPENDIX

State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Arizona 1990, Chap. 335 (HB 2173)		✓ (1)			✓	• Victim • Accused • Dept. of Health Services	Class 3 misdemeanor (Fine ≤ \$5,000)	• Victim • Accused	
Arkansas 1989, Act 614 (HB 1496)		✓				• Victim		• Victim	
California 1989, Chap. 1360 (SB 2643) [Penal Code 1524.1] 1988, Chap. 1597 (SB 1007) 1988, Chap. 1582 (AB 3255)	✓	✓ (1)		✓	✓	• Victim • Accused • Those victim "deems necessary"	\$1,000 - \$10,000	• Victim • Accused	
Colorado 1988, Act 18-3-415 (SB 8)	✓			✓ (2)		• Victim (1) • Court			
Florida 1990, Chap. 90-210 (HB 1115)	✓ (5)	✓ (1)		✓	✓	• Victim (1) • Accused • Dept. of Health & Rehab.		• Victim • Accused	General Revenue Fund
Georgia 1988, Act 1440 (HB 1281) 1991, Act 411 (HB 554)		✓ ✓ (1) ✓ (15)			✓ (3) ✓	• Victim • Court • Penal Facility • Dept. of Human Res.		• Victim	Victim or arrested person, at court's discretion

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
- (7) Restitution by convicted offender (court costs)

- (8) All prisoners
- (9) For victim if defendant tests HIV positive
- (10) Treatment of accused required
- (11) If indigent, then municipality or county or state

- (12) If defendant does not consent and after victim has been tested
- (13) After conviction if HIV positive
- (14) Within 15 days
- (15) If defendant does not consent
- (16) Sentencing judge
- (17) After indictment

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	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Idaho 1988, Chap. 45 (HB 432)  1990, Chap. 310 (HB 638)	✓			✓		<ul style="list-style-type: none"> <li>• Victim (1)</li> <li>• Public health authorities (5)</li> <li>• Court</li> <li>• Victim (5)</li> </ul>			State (4)
Illinois 1987, P.A. 85-935 (HB 2044)	✓				✓	<ul style="list-style-type: none"> <li>• Judge</li> </ul>			
Indiana 1988, P. Law 88-123 (SB 9)	✓				✓	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Probation Officer</li> <li>• Board of Health</li> </ul>		<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> </ul>	
Kansas 1988, Chap. 230 (HB 2659)		✓			✓ (6)	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Victim's health care provider</li> <li>• Secty. of Health &amp; Env.</li> <li>• Secty. of Corrections</li> </ul>	Class C Misdemeanor	<ul style="list-style-type: none"> <li>• Victim</li> </ul>	State (7)
Michigan 1988, P.A. 471 (HB 4008)  1988, P.A. 488 (HB 5189)		✓			✓	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Corrections Department</li> <li>• Health Department</li> </ul>	\$1,000 - \$5,000	<ul style="list-style-type: none"> <li>• Accused</li> <li>• Victim, after test</li> </ul>	
Minnesota 1990, Chap. 436 (SB 2046)								<ul style="list-style-type: none"> <li>• Victim</li> </ul>	

- (1) At request of victim/guardian  
 (2) After preliminary hearing  
 (3) Within 45 days of guilty verdict, guilty plea or no contest plea  
 (4) Only to extent of funding and appropriations

- (5) By court order  
 (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)  
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	Mandatory	Court Order	Consent of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Mississippi 1991, Chap. 425 (HB 492)	✓				✓	<ul style="list-style-type: none"> <li>• Rape victim &amp; spouse</li> <li>• Accused &amp; spouse</li> </ul>			
Missouri 1989, Section 191.226 (SB 138)	✓ (8)				✓				Department of Health (9)
Nevada 1989, Chap. 138 (SB 73)	✓			✓		<ul style="list-style-type: none"> <li>• Victim</li> </ul>		(10)	
North Dakota 1989, Chap. 181 (SB 2048)	✓				✓				
Ohio 1989, Vol. 143 (SB 2)	✓			✓	✓ (6)	<ul style="list-style-type: none"> <li>• Accused</li> <li>• Victim (1)</li> <li>• Penal facility</li> <li>• Court</li> </ul>		• Anyone tested	Accused (11)
Oregon 1989, Chap. 568 (HB 2030)		✓ (12)	✓		✓ (6)	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Victim's health care provider</li> <li>• Health Division</li> </ul>	Class C Misdemeanor	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused, at arrest (13)</li> </ul>	Crime Victim Compensation
1987, Chap. 600 (HB 2067)	✓				✓				
South Carolina 1988, Ratification No. 547 (HB 2807)	✓				✓ (14)	<ul style="list-style-type: none"> <li>• Victim</li> <li>• Accused</li> <li>• Department of Health</li> </ul>			• Accused (11)
Tennessee 1991, Public Chap. 25 (HB 52)	✓ (1)				✓	<ul style="list-style-type: none"> <li>• Victim</li> </ul>			

- (1) At request of victim/guardian
- (2) After preliminary hearing
- (3) Within 45 days of guilty verdict, guilty plea or no contest plea
- (4) Only to extent of funding and appropriations

- (5) By court order
- (6) And 6 months later if first test HIV negative (in some cases 3-6 months later)
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State Laws Concerning HIV Testing of Sexual Offenders (1983-1991)

State Statute	Requirement for Testing			Timing		Disclosure			
	Mandatory	Court Order	Consent Of Accused	At Arrest or When Charged	After Conviction	Who has Access to Test Results:	Penalty for Unauthorized Disclosure	Counseling Required For:	Testing Paid By:
Texas 1987, Chap. 55 (SB 66-XX)		✓ (1)		✓ (17)		• Victim • Local Health Authority			
Virginia 1990, Chap. 957 (HB 815)		✓ (15) ✓	✓	✓	✓	• Victim • Accused • Department of Health		• Accused	State (7)
Washington 1988, Chap. 206 (SB 6221)		✓ (16)			✓			• Accused, pre- and post-test	
West Virginia 1988, Chap. 16 (HB 303)	✓				✓	• Victim (5)		• Accused	

- |  |  |  |   |
|--|--|--|---|
| (1) At request of victim/guardian                                    | (5) By court order   | (8) All prisoners                                      | (12) If defendant does not consent and after victim has been tested |
| (2) After preliminary hearing  | (6) And 6 months later if first test HIV negative (in some cases 3-6 months later) | (9) For victim if defendant tests HIV positive         | (13) After conviction if HIV positive                               |
| (3) Within 45 days of guilty verdict, guilty plea or no contest plea | (7) Restitution by convicted offender (court costs)                                | (10) Treatment of accused required                     | (14) Within 15 days   |
| (4) Only to extent of funding and appropriations                     |  | (11) If indigent, then municipality or county or state | (15) If defendant does not consent                                  |
|  |  |  | (16) Sentencing judge   |
|  |  |  | (17) After indictment   |

Source: Intergovernmental Health Policy Project, George Washington University:  
*A Synopsis of State AIDS Laws Enacted During the 1983-1987 Legislative Sessions.*  
*A Summary of AIDS Laws from the 1988 Legislative Sessions.*  
*A Summary of AIDS Laws from the 1989 Legislative Session.*  
*A Summary of the HIV/AIDS Laws from the 1990 State Legislative Sessions.*  
 Preliminary 1991 information as of May 30, 1991.

## HIV/AIDS Information and Education Project for State Legislators

NCSL works in partnership with the Centers for Disease Control (CDC) to educate and inform state legislatures on HIV and AIDS trends. Continued funding from the CDC enables NCSL's HIV/AIDS Project to serve legislators and their staff as an information resource and a forum to communicate with legislative colleagues, experts, and government officials around the country.

Legislators and legislative staff of the nation's 50 states, its commonwealths and territories are encouraged to request assistance from NCSL's HIV/AIDS Project. The following services are available at no cost to legislators and staff:

- o information clearinghouse
- o technical assistance
- o publications
- o meetings and workshops

The project is funded through a cooperative agreement with the U.S. Centers for Disease Control. For further information contact Tracey Hooker, policy specialist, at NCSL's Health Services Program (303/830-2200).

### The Difference Between HIV and AIDS

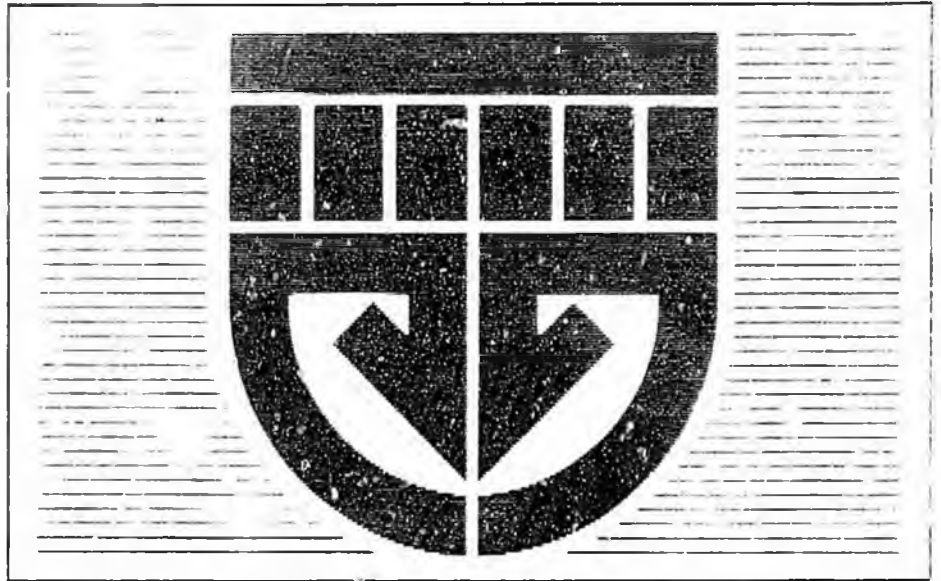
It is important for legislators to understand the distinction between the terms "HIV" and "AIDS" when they formulate policies. There is an immense difference between being infected with HIV and being diagnosed as having AIDS.

HIV is the term for the virus that damages the immune system and may eventually cripple the body's ability to fight disease. AIDS is the end result of HIV infection. People infected with HIV are diagnosed as having AIDS if they develop certain serious diseases or conditions, such as Kaposi's sarcoma (a rare skin cancer), pneumocystis carinii pneumonia, or HIV dementia.

Many more people are infected with HIV than have developed AIDS. An estimated one million individuals are believed to be infected. Many HIV-infected people experience no symptoms of illness for up to 10 years or more. "HIV infection" more correctly defines the scope of the public health problem that legislators face today.

#### Some of the most regularly misunderstood phrases related to HIV:

Misleading	More Accurate
Infected with AIDS .....	HIV infection
AIDS virus .....	HIV (human immunodeficiency virus)
HIV virus .....	HIV
AIDS test .....	HIV antibody test
AIDS antibodies .....	HIV antibodies
Positive AIDS test .....	Positive test for HIV antibodies
AIDS transmission .....	HIV transmission
AIDS victim .....	PWA (person with AIDS) or PLWA (person living with AIDS)
High risk groups .....	High risk behaviors



STATE  
LEGISLATIVE  
REPORT

National Conference  
of State Legislatures  
1560 Broadway, Suite 700  
Denver, Colorado 80202

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HB 109  
Rep. Kott  
2/8/93

## Appendix

# Worksheet

For Fiscal Year 1994, States and other Jurisdictions (for convenience hereafter referred to as States) must be in compliance with the HIV mandatory testing standards for certain offenders established by Sec. 1804 of the Crime Control Act of 1990, 42 U.S.C. § 3756(f) (hereafter referred to as Section 1804) in order to receive continued full funding under the Edward Byrne Memorial State and Local Law Enforcement Assistance Formula Grant Program.

The purpose of this worksheet is to assist the States in providing a self-assessment of their compliance with Section 1804. It need not be returned.

### 1. Victim Request.

Does the State statute require an HIV testing procedure at the request of any victim of a sexual act for which the person to be tested was convicted in State court (or make such a test mandatory for *all* persons thus convicted regardless of victim request)?

Yes     No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300

### 2. Administration of the Test.

Does the State statute require an agency of the State (such as a court, health department, correctional authority, etc.) to direct that a test be administered in such cases?

Yes     No

Does the State statute specifically require testing in these cases for the presence of acquired immune deficiency syndrome (AIDS) or its precursor, human immunodeficiency virus (HIV)?

Yes     No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300(c)

AS 18.15.310(b)

i

3. The Person to be Tested.

Does the State statute require persons to be tested who have been convicted under State law of a defined sexual act?

Yes, in all cases . . .  Yes, but only at the request of a victim  No

Does this either specifically or by definitional inclusion encompass persons found guilty of the offense by a jury or court, as well as those entering a pleas of guilty? (Note: Because Question 6 below concerns the definition of juveniles as persons "convicted," please disregard that issue for Question 3).

Yes  No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300  
(cf. AS 11.41.410 - 11.41.440)

4. Disclosure of the Test Results.

Does the State statute provide for disclosure of the test results to the both the victim and the person tested?

Yes  No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300 (d)

5. Victim Services.

Does the State statute provide for making the following services available to the victims of these sexual acts at their request:

1. Counseling regarding HIV disease?

Yes  No

2. HIV testing in accordance with applicable law?

Yes  No

3. Referral for appropriate health care and support services?

Yes  No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.310 (h) - AS 18.15.310 (i)

What are the sources of the funds to pay for these services?

Dept. of Health + Social Services

(test paid by defendant by order of the court  
if defendant found guilty.)

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.320

AS 18.15.310 (h)

**6. Definition of the term "convicted" as including Juveniles.**

Does the State statute require HIV testing for juveniles who have been adjudicated under State law of committing sexual acts as it does with adults?

Yes     No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 18.15.300

**7. Definition of the term "Sexual Act."**

Does the State statute define "sexual act" as having the meaning (either literal or approximate) as that given the term in 18 U.S.C. § 2245(2)(A) or (B)? (See Division 7 of the "Guide for the States").

Yes     No

What statutory section(s), subsection(s), paragraph(s), or subparagraph(s) or non-statutory materials provide this authority?

AS 11.41.410 - 11.41.440

*Position Paper*

*Alaska Women's Commission  
Post Office Box 82977  
Fairbanks, Alaska 99708*

*Approval By Alaska Women's Commission  
House Bill 109*

*This bill would require blood tests from persons charged with sexual offenses and provide an avenue for victims of the sexual assault to receive the results of those tests.*

*HB 109 provides victims of sexual assault a means to determine whether they have been exposed to communicable diseases. At the present time privacy laws prohibit this testing of alleged perpetrators of sexual assault or disclosure of test results. Victims have no recourse to determine if they have contracted a sexually transmitted disease. This bill would provide that recourse.*

*The Alaska Women's Commission supports HB 109. Victims of sexual assault are innocent people whose person and whose own right to privacy have been violated. The statutes should provide them access to the medical information about their attacker necessary to determine any medical treatment needed to preserve their physical - and mental - health. Sexual assault victims need a great deal of help and support for recovery. HB 109 provides an important remedy without compromising legitimate protection of the alleged attacker's rights.*

*The proposed bill appears to adequately address both the necessary protections and practical means of achieving the desired results. The Alaska Women's Commission supports HB 109 as written.*

*Alaska Women's Commission*

*Barbara B. Tyndall*  
Barbara B. Tyndall  
Chair

POSITION PAPER - ALASKA WOMEN'S COMMISSION

Bill No. HB 109  
Bill No.\*\*\*AST

Date: February 12, 1993

Contact: Joanne F. Lopez  
Executive Director  
CDVSA

## DRAFT

Title: An Act relating to  
blood test for persons  
charged with sex offenses.....

A total of 530 rapes were reported in 1991. Rapes account for 15.5% of all violent crimes. There are concerns for victims who may become infected with human immunodeficiency virus (HIV). Cases have been reported.

The Council on Domestic Violence and Sexual Assault supports the concept of a bill that would allow a victim of sexual assault to learn if her/his assailant is infected with HIV.

The Council supports the concept in HB 109 to test at the time of the arrest and strongly recommends that the testing be conducted once probable cause for a violation in AS 11.41.410 - 11.41.440 has been established. If testing is postponed until after conviction, it take as long as two years to obtain this crucial information.

The Council recommends that the victim not be put through a legal procedure in order to force the blood test of the offender. To do so would re-victimization the victim which is unacceptable. Prosecutors would likely not force the blood testing issue if this were the case in order to save the victim this additional distress since the victim will be needed for testimony in the actual assault litigation.

The Council recommends that the victim be informed that because the offender's blood test is negative, it does not mean that they are safe. The nature of HIV is such that there is an incubation/latency period of six to eight months during which a carrier's blood will not reveal the presence of HIV but they can transmit the virus. Victims need to be aware that they should be (re)tested six to eight months later. The Council would like to see funding for the Department of Health & Social Services to pay for victim testing.

The Council also believes that the legislation should specify how the information will be transmitted to the victim. The Council recommends that the information should be provided to the victim only if the victim (or the victim's legal custodian, if the victim is a minor) wants the information. The information should never be transmitted by letter and the victim, or victim's legal custodian if the victim is a minor, should be allowed to name a designee to receive the information if the victim doesn't want to learn of it directly.

The Council recommends that counseling of victims concerning the results of the alleged offender's blood test need to be handled sensitively. A counseling brochure does not meet this standard. A trained counselor or nurse or other appropriate service provider needs to

be available to help the victim deal with the situation and to counsel the victim on safe sex and protection of their partner due to the potential exposure.

Since there is a stigma involved with this condition, the Council suggests to consider protecting the confidentiality of HIV positive individuals, and suggests the court be required to order all parties to keep the information confidential.

---

Willie Kinnebrew, Acting Chair  
Council on Domestic Violence &  
Sexual Assault

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: \_\_\_\_\_ Dept. Affected: Health and Social Services  
 Title: Blood Tests for persons charged with sex offenses BRU: State Health Services  
 Component: Laboratories  
 Sponsor: Kott  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. #291

**Expenditures/Revenues:** (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES	27.9	27.9	27.9	27.9	27.9	27.9
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE						
---------------------	--	--	--	--	--	--

**FUNDING:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	27.9	27.9	27.9	27.9	27.9	27.9
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>	<b>27.9</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: None

**ANALYSIS:** (Attach a separate page if necessary)

This fiscal note is based on the costs for the laboratory testing alone. It does not take into account the costs of medical personnel to perform the requisite counseling and testing, travel for medical personnel to communities where qualified personnel are unavailable, shipment of specimens, cost to ensure chain of evidence, and documentation of procedures and test results.

In 1992, 339 charges were made for arrests for sex offenses. Using 350 as the base, the laboratory costs associated with HB 109 is as follows:

Prepared by: Peter M. Nakamura, MD, MPH  
 Division: Division of Public Health

Phone: (907) 465-3090  
 Date: 2/8/93

Approved by Commissioner: Theodore A. Mala, MD, MPH  
 Agency: Department of Health & Social Services

Date: 2/9/93

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## ANALYSIS (cont.):

1. Cost for initial HIV screening @ \$16.30/test	5,705
2. Assuming that 0.9% initially screened were positive, the cost for HIV Western blot for making a positive diagnosis is \$93.15/test	293
3. Cost for screening negative results after the six month window period for 347 @ \$16.30/test	5,656
4. Cost for West Blot for the 0.9% of those persons which tested positive after the 6 month window period	293
5. Cost of Hepatitis B screening @ \$16.30/test	5,705
6. Cost of Hepatitis B testing on the 11.2% that will test positive @ \$114.10/test	4,473
7. Cost of RPR test for syphilis @ \$16.30/test	5,705
TOTAL	\$27,830

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: \_\_\_\_\_ Dept. Affected: Corrections  
 Title: "An Act relating to blood tests  
for persons charged with sex offenses." BRU: Statewide Programs  
 Component: Inmate Health Care  
 Sponsor: \_\_\_\_\_  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 705

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: \$ -0-

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Dana LaTour Phone: 465-3376  
 Division: Commissioner's Office Date: 2-11-93  
 Approved by Commissioner: Lloyd G. Rupp Date: 2-11-93  
 Agency: Department of Corrections

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 109

Revision Date: February 3, 1993  
Title: "...relating to blood tests for persons charged with sex offenses."  
Sponsor: Representative Kott  
Requestor: Representative Kott

Department Affected: Department of Law  
BRU: Prosecution, Legal Services  
Component: Prosecution - All Legal Services - Operations  
COMPONENT SERIAL NO. 0085 through 0090, 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director  
Division: Administrative Services Division  
Approved by Commissioner: Charles E. Cole, Attorney General  
Agency: Department of Law

Phone: 465-3672  
Date: February 3, 1993  
Date: February 3, 1993

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*Fiscal Note - Dept of Law*

FISCAL NOTE

BILL NO. HB 109

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

ANALYSIS (Continued):

This bill amends AS 18.15 to provide that a defendant charged with a violation of the state's sexual assault laws, including a minor subject to a juvenile proceeding for committing the same violations, is subject to an order of a court to require testing for HIV and other communicable diseases. The bill would permit the alleged victim, or the prosecuting attorney at the request of an alleged victim, to petition the court for an order to require the testing. A court would then have to promptly conduct a hearing on the petition. If the court finds that probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant, or minor, and the alleged victim, the court shall then order the tests.

The Department of Law handles about 200 sexual assault cases a year where criminal charges are filed, and where the assault includes conduct that would fall within the requirements of this bill. The department also handles a somewhat smaller number of sexual assaults involving minors in juvenile proceedings that would be subject to this bill.

We cannot predict how many sexual assault victims will request the department to petition on their behalf for a court hearing to require HIV and other communicable disease testing. If the number is large there could be a significant expense for the department. This is because our prosecutors would have to conduct a mini-trial and present evidence for each petition sufficient enough to convince a court that probable cause exists to believe that a transfer of blood, saliva, semen, or other bodily fluid took place between the defendant, or minor, and the alleged victim.

Defendants would be expected to resist prosecutors' efforts to show probable cause because of the effect that the hearing might have on their eventual defense at trial. In many cases, prosecutors would be required to prematurely reveal their evidence substantially earlier than normally required by court rule, in order to show probable cause. This could result in an additional level of defense discovery, giving the defense first crack at the state's case and witnesses.

However, because we cannot predict the number of times petitions will be requested, sufficient to warrant fiscal impact funding at any given location, fiscal note funds have not been requested.