You have asked whether 11 Del. C. § 6523(b), when considered in conjunction with the Legislature’s recent enactment of Chapter 12, Title 16, requires the Department of Correction (“Department”) to test individuals committed to its care for the presence of the AIDS virus (“HIV”). For the reasons stated below, we conclude that while the Department may test, and may even test without an inmate’s consent, the Department is not required to test under the language of the aforementioned statutes.

Eleven Del. C. § 6523(b) states:

(a) There shall be within the Department a diagnostic service, consisting of 1 or more branches, to make social, medical, psychological and other appropriate studies and investigations of persons committed to its care. . .
(b) The diagnostic service shall take steps to ensure that infectious diseases are not disseminated among persons committed to the Department’s care and staff. In performing this function, the diagnostic service is empowered to review medical histories, to complete medical histories, to complete appropriate medical examinations, to perform laboratory tests as are deemed appropriate, and to begin a course of treatment on persons committed to its care.

(Emphasis added).

The Legislature acknowledged the Department’s authority to conduct infectious disease testing when enacting Chapter 12, Title 16, which concerns informed consent and confidentiality of HIV related tests. Specifically, 16 Del. C. § 1202(c)(5) states that individuals may be tested for the presence of HIV without their informed consent when “[n]ecessary to control the transmission of HIV infection as may be allowed pursuant to . . . § 6523(b) of Title 11 as it relates to the Department of Correction.” (Emphasis added).

It is a basic principle of statutory construction that “[a]bsent a clearly expressed legislative intention to the contrary, [the] language of a statute must ordinarily be regarded as conclusive.” Evans v. State, Del. Supr., 516 A.2d 477, 478 (1986). Furthermore, words used in a statute which are undefined should be given their ordinary common meaning. Coastal Barge Corporation v. Coastal Zone Industrial Control Board, Del. Supr., 492 A.2d 1242, 1246 (1985). Eleven Del. C. § 6536 indicates that the Legislature intended the Department to have extensive discretion concerning the medical management of persons committed to its care. [FN1] With regard to infectious disease testing, the plain language of 11 Del. C. § 6523(b) specifically indicates that
the diagnostic service can initiate such tests “as are deemed appropriate.” We find that the words “as are deemed appropriate” vests broad discretion in the Department's diagnostic service as to what testing it must conduct to fulfill its statutory obligation to attempt to prevent the dissemination of infectious diseases. Such discretion, if challenged, will apparently be evaluated based upon the most recent scientific and medical information concerning the utility of mandatory testing and segregation of those inmates testing positive in preventing the further communication of HIV among the inmates or staff. The reasonableness of the Department’s choice regarding mandatory HIV testing is beyond the scope of this opinion. [FN2]

*2* We further find that the Legislature’s enactment of 16 Del. C. § 1202(c)(5) merely recognized the Department’s authority to test, rather than requiring testing for any specific condition. Again, the plain language of 16 Del. C. § 1202(c)(5) does not restrict in any way the discretion of the Department recited in 11 Del. C. § 6523(b).

With respect to this issue we note that courts have received contrary complaints from inmates concerning correction officials' testing decisions in other states. See, eg., Glick v. Henderson, 855 F.2d 536, 539 (8th Cir. 1988) (dismissing an inmate's complaint requesting mandatory HIV testing and segregation of inmates, among other things, holding that the complaint was defective as it did not allege how the correction officials' actions failed to comport with proper medical guidelines); and Lewis v. Prison Health Services, Inc., et al., No. 88-1247 (E.D. PA. September 13, 1988) (segregation of inmate because of HIV status was within Correction Department’s discretion.)

In conclusion, we find that the Legislature has endowed the Department with broad discretion concerning testing. The Department can authorize mandatory HIV testing if it believes it would be reasonable to do so, however, it is not required to test by statute.

If you have any further questions, please do not hesitate to contact us.

Thank you.

Very truly yours,

Michael F. Foster
State Solicitor

David J. Lyons
Deputy Attorney General

APPROVED:

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[FN1]. 11 Del. C. § 6536 states:

The Department shall promulgate reasonable standards, and shall establish reasonable health, medical and dental services, for each institution, including preventive, diagnostic and therapeutic measures on both an out-patient and hospital basis for all types of patients. The nature and extent of such medical and dental services shall be determined by the Commissioner of Correction in consultation with the chief medical officer of the Department. The Department may authorize, under regulations,
inmates to be taken, with or without guard, to a medical institution or facility outside the institution.

(Emphasis added.)

[FN2]. In this regard, we note that as of August 21, 1986 the Department promulgated management procedures for clinically suspected AIDS inmates. This document discusses the circumstances under which testing and segregation are considered prudent.