



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SIXTH LEGISLATURE, 2012**

ON THE FOLLOWING MEASURE:

H.B. NO. 1666, H.D. 1, RELATING TO THE PENAL CODE.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Monday, March 19, 2012 **TIME:** 10:00 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): David M. Louie, Attorney General, or
Lance Goto, Deputy Attorney General

Chair Hee and Members of the Committee:

The Department of the Attorney General (the "Department"), appreciates the intent of the bill in protecting vulnerable users of our streets and highways, and submits the following comments and concerns.

The purpose of this bill is to increase the grade of offense for certain negligent homicide and negligent injury offenses when the offenses involve vulnerable users of streets and public highways.

This bill increases the grade of offense for the offenses of negligent homicide in the second degree, negligent homicide in the third degree, and negligent injury in the second degree, when the offenses are committed against a vulnerable user, as defined in the bill. While the Department appreciates the intent of this bill, it recommends that the bill be amended to achieve this intent in another manner.

In section 3 of the bill, subsection (2) of section 707-703, Hawaii Revised Statutes (HRS), is amended to read as follows:

(2) Negligent homicide in the second degree is a class C felony[-]; provided that if the person whose death is caused by the operation of a vehicle in a negligent manner is a vulnerable user, negligent homicide in the second degree is a class B felony.

By changing the statute in this manner, the bill makes the offense of negligent homicide in the second degree, in violation of section 707-703, HRS, both a class B *and* class C felony offense. The problem is that this makes a single offense – under one section – into two different offenses. This may result in confusion, and also make it difficult to maintain accurate criminal history

records. Sections 4 and 5 of the bill create the same type of problem with the proposed amendments to sections 707-704 and 707-706, HRS, regarding the offenses of negligent homicide in the third degree and negligent injury in the second degree.

Instead of the proposed amendment in section 3 of the bill as currently drafted, the Department recommends that the amendment instead be made to section 707-702.5, HRS, regarding the class B felony offense of negligent homicide in the first degree, so that it reads as follows:

§707-702.5 Negligent homicide in the first degree. (1) A person ~~[is guilty of]~~ commits the offense of negligent homicide in the first degree if ~~[that]~~:

- (a) That person causes the death of another person by the operation of a vehicle in a negligent manner while under the influence of drugs or alcohol[-]; or
 - (b) That person causes the death of a vulnerable user by the operation of a vehicle in a negligent manner.
- (2) Negligent homicide in the first degree is a class B felony.

The wording from negligent homicide in the second degree, with the addition of "vulnerable user" will create a new form of negligent homicide in the first degree.

We recommend that similar amendments be made to the offenses of negligent homicide in the second degree and negligent injury in the first degree, in lieu of the proposed amendments in sections 4 and 5 of the bill.

The Department has one other recommendation. Section 2 of the bill, on page 2, at lines 8-20, should be deleted. Section 2 adds the definition of "vulnerable user" to chapter 706, HRS, but the term is not being used in that chapter. The mandatory minimum sentencing provisions involving a vulnerable user were deleted from the bill in H.D. 1.

We respectfully recommend that the Committee make these proposed changes.



**Office of the Public Defender
State of Hawaii
Timothy Ho, Chief Deputy Public Defender**



**Testimony of the Office of the Public Defender,
State of Hawaii to the Senate Committee on Judiciary and Labor**

March 19, 2012, 10:00 a.m.

H.B. No.1666, H.D. 1: RELATING TO THE PENAL CODE

Chair Hee and Members of the Committee:

This measure would create a new category of victim called a “vulnerable user,” such as a pedestrian, bicyclist or roadway worker. Anyone convicted of negligent homicide or negligent injury against a vulnerable user would be subjected to enhanced sentencing. The Office of the Public Defender strongly opposes H.B. 1666, H.D. 1.

This measure is overbroad and overreaching, especially since the state of mind for these offenses is negligence. A negligent state of mind does not require actual the knowledge of the existence of a substantial and unjustifiable risk. It does not require the actor to actively disregard a substantial and unjustifiable risk. It just requires that the actor should have been aware of or should have known of the existence of the substantial and unjustifiable risk. In other words, the actor need not have acted intentionally, knowingly or recklessly. To mandate a lengthy jail term for a negligent act is excessive. The definition of a ‘vulnerable user’ is overbroad, and includes anyone who could possibly be injured by a motorist.

Some motorists who have killed or injured others in a negligent manner are more culpable than others. A person who is inebriated and/or driving at an excessive rate of speed may be deserving of a sentence of imprisonment. For others, however, who are less culpable, what amounts here to an extended term of imprisonment is excessive.

The state of mind required to prove the offense of negligent homicide in the third degree is simple negligence, which is means any negligence, and does not require a gross deviation from the standard of care from that of a law-abiding person. Our office represented a person who was charged with negligent homicide in the third degree after he swerved to avoid hitting a dog, and lost control of his car, knocking over a backyard wall, which fell and killed an elderly woman who had been tending to her garden on the other side of the wall. The driver had not been speeding excessively and had no prior criminal or traffic record. What if instead of hitting a wall that fell on a woman, he hit a light pole that fell on a pedestrian waiting to cross the street. Should a person like this, who is involved in an accident, face the possibility of being sentenced to five years

imprisonment? Should this person be treated differently because the victim of the accident is a vulnerable user? All traffic fatalities are bad. As a matter of fairness, we should not single out protected class of victim for offenses with a negligent state of mind.

The elevation of sentences for a misdemeanor and class C felony to a class C felony and a class B felony respectively is confusing, and also excessive. Under this measure, a negligent homicide in the second degree involving a vulnerable user would have the same classification as a negligent homicide in the first-degree charge. Both cases would be class B felonies. In addition to the confusion caused by the elevation of the class of offenses involving "vulnerable users," and the unfairness of meting out increased penalties for a specialized group of people as a result of a motor vehicle accident, this measure will create an additional layer of proof for the prosecution. Current case law requires a separate jury verdict in order to sentence a defendant to an extended term of imprisonment. It is very likely that after a conviction for negligent homicide or injury, the jury would have to be reconvened in order to determine whether the decedent or injured person was a "vulnerable user," which will add time and court costs to the trial.

The difference between simple negligence and no negligence can be miniscule at times. A driver could have averted their eyes from the road for a split second, or be travelling only a few miles over the speed limit and found to be simply negligent. The very low standard of proof in these cases means that in many cases, drivers will be deserving of deferred prosecution. Under this measure, such individuals would be sentenced to a mandatory term of imprisonment.

The Office of the Public Defender opposes H. B. 1666, H.D. 1. Thank you for the opportunity to be heard on this matter.



LATE TESTIMONY

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Testimony in Support of HB 1666, HD1 RELATING TO THE PENAL CODE

JDL Rm 016 10am 3/1912

Senator Clayton Hee, Chair; Senator Maile Shimabukuro, Vice Chair

Submitted by Chad Taniguchi, Executive Director, Hawaii Bicycling League

We want to promote more healthy living, energy independence, clean environment, and keep more money in Hawaii through walking and bicycling.

--Our laws need to protect the ability to walk, bicycle, and perform police and emergency work on our roads in safety.

Vulnerable road users without metal cages suffer far greater injury when involved in a crash with motorized vehicles.

--Hawaii is in the top 12 states with the highest pedestrian/cyclist injuries and deaths.

--The risk of pedestrian death in crashes rises from 5% at 20mph to 45% at 30mph and 85% at 40mph.

--For motorists, the risk of death is far less at the same speeds because of being protected by metal barriers of the vehicle.

-- A car or truck is a deadly weapon if a vulnerable user is struck.

Motorized vehicle drivers must exercise a heightened level of care when passing or interacting with vulnerable users – walkers, cyclists, police and emergency road workers.

--The heightened level of care required is emphasized through mandatory stiffer penalties when a motorist NOT OBEYING THE LAW causes a crash that kills or seriously injures a law abiding nonmotorist road user, including those using shoulders, sidewalks and crosswalks.

--Our laws require drivers of large trucks and buses to have greater training and are more regulated because their risk of harm to others is greater.

--This bill requires all motorists to be more careful in relation to nonmotorists legally using the roads.

--The penalties in this bill do not take effect if the motorist is obeying the law, or if the nonmotorist is the lawbreaker.

Our roads are public and must be safe for all users. As Kamehameha said, "Everyone has the right to be safe on Hawaii's roads." (Law of the Splintered Paddle 1797, made part of State Constitution 1978). --Young and old, women and children, those without a car on the roads deserve to be protected with this bill.

We extend our deepest condolences to the families of Officers Garret Davis and Eric Fontes, and to Chief Kealoha and members of the Honolulu Police Department, who daily risk their lives to protect our safety. It is a tragedy when anyone is killed or seriously injured on our public roads because these crashes can be avoided by obeying the speed limits and concentrating to adjust to changing conditions.

The Hawaii Bicycling League met and consulted with the Honolulu Police Department on drafts of this bill.

Ride Aloha! Drive Aloha! Chad Taniguchi, Executive Director