

HB 1928



**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
Transportation and International Affairs**

March 21, 2012, 1:15p.m.

H.B. No. 1928: RELATING TO TESTING FOR INTOXICANTS

Chair English and Members of the Committee:

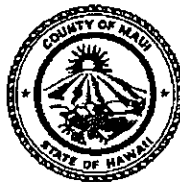
The Office of the Public Defender supports H. B. 1928.

The 2010 ignition interlock legislation amended our DUI statutes by criminalizing refusals to submit to a breath or blood test. As a member of the ignition interlock task force, we voiced strong opposition to the criminalization of refusals at the task force meetings. We proposed a lengthier license suspension and an SR-22 requirement for people who refused the breath or blood test.

We continue to oppose the criminalizing of refusals (refusing to be tested for breath or blood alcohol content) and allowing refusals as evidence in an OVUII trial. There are many reasons why an arrestee may not be able to consent to a breath alcohol test at the police station. Arrestees are not allowed to consult with an attorney prior to taking the breath alcohol test. The test subject may be frightened and confused, and not understand the lengthy and complicated implied consent form. Some arrestees do not have a strong enough lung capacity to effectively complete the breath alcohol test. Furthermore, classifying a refusal as a petty misdemeanor could result in an increased caseload for probation officers assigned to the District Court Division.

The testimony of the Maui Prosecuting Attorney's office is evidence of the fact that the law and implied consent warning surrounding a refusal to submit to a breath or blood test is flawed, and has led to OVUII cases being dismissed. Please give strong consideration to repealing Sec. 291E-68. Thank you for the opportunity to provide input on this measure.

ALAN M. ARAKAWA
Mayor



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TESTIMONY

ON

HB 1928 - RELATING TO TESTING FOR INTOXICANTS

March 21, 2012

The Honorable J. Kalani English
Chair
The Honorable Will Espero
Vice Chair
and Members
Senate Committee on Transportation and International Affairs

Chair English, Vice Chair Espero and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui supports this measure.

This bill seeks to *repeal* Hawai'i Revised Statutes § 291E-68, which was passed pursuant to Act 166, Session Laws of Hawai'i 2010. Under this statute, it is a petty misdemeanor for an individual to refuse to submit to a breath, blood, or urine test as required by H.R.S. § 291E-15.

Our Department concurs with the finding by the Legislature that the criminalization of the refusal to submit to a chemical test is causing serious problems with the prosecution of individuals arrested for operating a vehicle under the influence of an intoxicant (OUI). Several cases in our jurisdiction have been dismissed because of purported constitutional violations relating to the potential for criminal penalties associated with a defendant's refusal to submit to a chemical test. Additionally, it is very likely that more cases will be dismissed or compromised because of this issue.

Prior to the enactment of H.R.S. § 291E-68, the status of the law was clear that police were not required to inform an OUI arrestee of his/her constitutional right to remain silent and/or his/her right to counsel when advising the arrestee of the sanctions for refusing to submit to a chemical test. This was due to the fact that there was no *criminal* penalty for refusing to submit to a chemical test. However, that changed when Act 166, Session Laws of Hawai'i 2010 was passed.

Accordingly, based upon the above considerations, the Department of the Prosecuting Attorney, County of Maui, requests that this measure be PASSED. Thank you very much for the opportunity to testify.



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March 21, 2012

To: Senator J. Kalani English, Chair –Senate Committee on Transportation and International Affairs; Senator Will Espero, Vice Chair; and members of the committee

From: Carol McNamee/Arkie Koehl — Co-chairmen, Public Policy Committee - MADD Hawaii

Re: House Bill 1928 – Relating to Testing for Intoxicants

I am Carol McNamee, offering testimony on behalf of the Hawaii organization of Mothers Against Drunk Driving in opposition to HB 1928, relating to testing for intoxicants. This bill repeals section 291E-68 of the Hawaii Revised statutes and if passed would repeal the criminalization of refusing to submit to chemical testing after an arrest for OVUII.

Criminalization of refusal to submit to the chemical test in OVUII cases was included in the ignition interlock program by the Ignition Interlock Task Force which was cognizant of the fact that the sanction for refusing the chemical test must always be greater than the sanctions for taking the test in order to encourage compliance with the request to test. Drivers arrested for OVUII are now able to legally drive with an interlock device and individuals who refuse the chemical test are also given the privilege of driving interlock equipped vehicles, albeit they are required to keep the device installed for a longer period. The ability of drivers who refuse the chemical test to maintain their driving privilege reduces the deterrent value of the longer license revocation period for this group. Therefore, the Task Force recommended criminalization of refusal to make the act of refusing the chemical test subject to stronger penalties.

At least fifteen other states have criminal sanctions for refusal. The basic reasons for criminalization are as follows:

- NHTSA (2008) issued a recommendation that States should review their laws to ensure that refusal is a criminal offense and that penalties are greater than those for conviction on an OVUII offense.
- The ability to refuse a chemical test is not a constitutional right, but a statutory right created under the Implied Consent Law.
- Probable cause for a DUI arrest must be present before a person is asked to take a chemical test.
- Researchers have realized that many drivers refuse to take the test in order to avoid or reduce the chance of facing criminal sanctions resulting from a conviction for DUI.
- Individuals who refuse to take the chemical test are more likely to be repeat offenders than those who take the test.

- The lack of criminal penalties for chemical test refusal means the suspect, if not convicted of a DUI, will not be identified as having an alcohol-related offense and will be treated as a first offender by the court if arrested again.
- The additional criminal charge for refusal should not complicate DUI prosecutions. The refusal crime can be charged concurrently with DUI. (OVUII) Prosecutors may choose to dismiss the refusal crime upon a plea to DUI. Courts may choose to impose concurrent sentences on DUI and the refusal crime. The possibility of suffering a refusal penalty even if not found guilty of the DUI charge already exists with the administrative sanction.

Although the use of an interlock may be an inconvenience, the device allows people who have been arrested for OVUII to drive anywhere, anytime. Therefore, someone who refuses the test can continue to drive to work and carry out other duties even though his or her license has been revoked. From a public policy standpoint, 291 E-68 is needed as a deterrent to people refusing to be tested. MADD encourages the Senate TIA committee to hold this bill and retain Section 291E-68 of the Hawaii Revised Statutes.

Thank you for this opportunity to testify.