



LATE TESTIMONY

**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2014**

ON THE FOLLOWING MEASURE:

H.B. NO. 888, H.D. 1, RELATING TO FIREARMS.

BEFORE THE:

SENATE COMMITTEES ON PUBLIC SAFETY, INTERGOVERNMENTAL AND
MILITARY AFFAIRS AND ON JUDICIARY AND LABOR

DATE: Wednesday, March 18, 2014 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Douglas S. Chin, Attorney General, or
Laura Maeshiro, Deputy Attorney General

Chairs Espero and Keith-Agaran and Members of the Committees:

The Department of the Attorney General (Department) takes no position on the measure but provides comments.

This measure creates a petty misdemeanor criminal offense when a person recklessly possesses a loaded firearm while that person is intoxicated.

The following are concerns to consider if this measure is to be passed.

1. **In subsection (a), on page 1, lines 5-6, the definition of "intoxicated" may pose problems.**

This measure uses a definition of "intoxicated" that is used to determine a person's intoxication while *driving a vehicle*. But a person prosecuting the offense of Operating a Vehicle Under the Influence of an Intoxicant ("OVUII") would be able to rely on evidence to prove intoxication of the defendant that would not be available to prove the intoxication of an offender of the new offense being proposed by this measure.

For the purposes of this measure, a person is "intoxicated" if the person meets the definition of "under the influence" as defined in section 291E-1, Hawaii Revised Statutes (HRS), relating to the use of intoxicants while operating a vehicle. Specifically, section 291E-1 provides:

"Under the influence" means that a person:

- (1) Is under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty;

- (2) Is under the influence of any drug that *impairs the person's ability to operate the vehicle in a careful and prudent manner*;
- (3) Has .08 or more grams of alcohol per two hundred ten liters of the person's breath; or
- (4) Has .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of the person's blood.

(Emphasis added.)

It is very likely that only paragraph (1) would apply to the new offense because paragraph (2) requires that the offender be operating a vehicle, and paragraphs (3) and (4) require that the offender consent to take a blood or breath test. Under chapter 291E, drivers of vehicles on public roads have already given implied consent to the blood or breath test. Failure to consent to the blood or breath test can result in the revocation of the person's driver's license. This measure does not contain a similar provision that would compel persons to take the blood or breath test. Therefore, the prosecution would not be able to obtain the breath or blood alcohol content of the offender that would be required for paragraphs (3) or (4). It should also be noted that paragraph (1) only applies to alcohol intoxication, and not to drug intoxication.

This is the problem. If an arrest made under this measure falls under subsection (1), it will hinge on a layperson's perception of whether a person was "under the influence of alcohol *in an amount sufficient to impair the person's normal mental faculties* or ability to care for the person and guard against casualty." This determination will be based on highly subjective evidence. It may be difficult to prove that a person was under the influence "in an amount sufficient to impair the person's normal mental faculties." Is it enough to show the Defendant had "red eyes", "slurred speech", or was "falling asleep at the bar"? OVUII cases also rely on this type of indicia, but law enforcement officers are also able to utilize the National Highway Traffic Safety Administration's Field Sobriety Test ("FST"), where an officer is able to give a definitive answer based on a national standard as to whether a person is under the influence as a result of how that person performs on the FST. Moreover, law enforcement officers use the FST result as probable cause for the arrest, and prosecutors use it for evidence at trial. This is *in addition to* any other observed indicia of intoxication.

Using a definition intended for OVUII will make it difficult to establish whether a person is intoxicated for purposes of this measure.

2. **Subsection (a) is unclear as to whether the criminal conduct requires the person to be in a public place, the person's residence, the residence of another, etc..**

Because the criminal conduct is unclear on this point, we recommend that if the measure is to pass that a more specific provision be included.

3. **In subsection (d), the phrase "...punishable by up to thirty days imprisonment, a fine of not more than \$1,000, or both" may be deleted as it is not necessary.**

The maximum term of imprisonment and fine for a petty misdemeanor are already set out in sections 701-107(4) and 706-640(e), HRS.

Thank you for the opportunity to testify on this measure.