DAVID Y. IGE
GOVERNOR

STATE OF HAWAII
DEPARTMENT OF PUBLIC SAFETY
919 Ala Moana Boulevard, 4th Floor
Honolulu, Hawaii 96814

NOLAN P. ESPINDA
DIRECTOR

Cathy Ross
Deputy Director
Administration

Jodie F. Maesaka-Hirata
Deputy Director
Corrections

Renee R. Sonobe Hong
Deputy Director
Law Enforcement

No. ____________________

TESTIMONY ON SENATE BILL 997
RELATING TO THE CONTROLLED SUBSTANCES ACT
by
Nolan P. Espinda, Director
Department of Public Safety

Senate Committee on Judiciary and Labor
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair

Monday, February 27, 2017; 10:00 a.m.
State Capitol, Conference Room 016

Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee:

The Department of Public Safety (PSD) **supports** Senate Bill (SB) 997, which updates chapter 329 of the Hawaii Revised Statutes (HRS) to: 1) incorporate amendments made to the federal Controlled Substances Act, and 2) includes emergency scheduling as required under section 329-11, HRS.

First, chapter 329-11, HRS, provides that if a substance is added, deleted, or rescheduled under federal law, then PSD shall recommend to the Legislature that a corresponding change be made in Hawaii law. The following substances were scheduled by the federal government in 2016:

1. (3,4-dichloro-N-[(1-dimethylamino)cyclohexylmethyl]benzamide), its isomers, esters, ethers,salts, and salts of isomers, esters and ethers, also known as, “AH-7921.” (Schedule I)

2. N-(1-phenethylpiperidin-4-yl)-N-phenylbutyramide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers, also known as, “Butyryl Fentanyl.” (Schedule I)

"An Equal Opportunity Employer/Agency"

3. N-[1-[2-hydroxy-2-(thiophen-2-yl)ethyl]piperidin-4-yl]-N-phenylpropionamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers, also known as, "Beta-hydroxythiofentanyl." (Schedule I)

4. ((2S)-2-[(4R)-2-oxo-4-propylpyrrolidin-1-yl]butanamide) (other names: BRV; UCB–34714; Briviact) (including its salts), alson known as "Brivaracetam." (Schedule V)

5. (4-(methoxycarbonyl)-4-(N-phenmethoxyacetamido)-1-[2-(thienyl)ethyl]piperidine), including its isomers, esters, ethers, salts and salts of isomers, esters and ethers as possible, also known as, "Thiafentanil." (Schedule II)

Second, section 329-11(e), HRS, authorizes the Administrator of PSD's Narcotics Enforcement Division (NED) to make an emergency scheduling by placing a substance into schedules I, II, III, IV or V on a temporary basis if the Administrator determines that such action is necessary to avoid an imminent hazard or the possibility of an imminent hazard to the health and safety of the public. Under section 329-11(e), HRS, PSD is required to post public notice thirty days prior to the effective date of the emergency scheduling action of the controlled substances listed below, at the State Capitol, in the Office of the Lieutenant Governor, and on PSD's website for public inspection. If a substance is added or rescheduled under this subsection, the control shall be temporary. Section 329-11, HRS, also provides that if in the next regular session, the State Legislature has not enacted the corresponding changes in this chapter, the temporary designation of the added or rescheduled substance shall be nullified. Pursuant to section 329-11(e), HRS, the following controlled substances were emergency scheduled in 2016:

1. N-(1-phenethylpiperidin-4-yl)-N-phenylfuran-2-carboxamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers, also known as "Furanyl Fentanyl." (Schedule I)

2. Methyl -2-[1-(5-fluoropentyl)-1H-indazole-3-carboxamido]-3, 3-dimethylbutanoate (other names: 5F-ADB, 5-flouro-ADB and 5F-MDMB-PINACA),

its optical, positional, and geometric isomers, salts and salts of isomers, also known as “5F-ADB.” (Schedule I)

3. 3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-methylbenzamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers, also known as “U-47700.” (Schedule I).

To avoid such nullification of the controlled substances which were emergency scheduled in 2016, PSD supports the passage of SB 997. Equally importantly, PSD supports SB 997 as it amends chapter 329, HRS, to mirror recent changes to the federal Controlled Substances Act, thereby bringing clarity to the law and eliminating differences and confusion between federal and state law.

Thank you for the opportunity to present this testimony.

From:	Clif Otto
To:	JDLTestimony
Subject:	SB997
Date:	Friday, February 24, 2017 7:20:26 PM
Attachments:	Recognizing Hawaii"s Medical Use-Otto-21Feb2017.pdf

---

Dear JDL,

Please use your decision making for SB997 on Monday to consider taking the following two actions:

1. Require that PSD provide a scheduling recommendation for marijuana that recognizes that marijuana cannot be in a state schedule that requires the highest degree of danger.

And,

2. Make a statutory amendment stating that the state-accepted medical use of marijuana in Hawaii is accepted medical use in treatment in the United States.

Thank you.

Clifton Otto, MD
Honolulu, HI
C: 808-233-8267.

White paper attached.

References:
SB120: requesting a scheduling recommendation from PSD:
http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=120&year=2017

SB1093: Making an amendment to HRS 329D:
http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=1093&year=2017

Recognizing Hawaii's Medical Use of Marijuana

Clifton Otto, MD

February 21, 2017

cliftonotto@hotmail.com

Recognizing Hawaii's Medical Use of Marijuana

Clifton Otto, MD

THE LOW DOWN

Some folks still believe that marijuana is a Schedule I controlled substance. However, in order to be regulated as a controlled substance, there must be a valid scheduling provision in place at the state or federal level. Currently, in Hawaii, we have neither.

To be classified as a Hawaii state Schedule I controlled substance, state law requires that marijuana have the "highest degree of danger" [1]. However, the Administrator of the Drug Enforcement Administration (DEA) has already informed us, by way of his denial of the Rhode Island-Washington Rescheduling Petition, that marijuana is not as dangerous as other controlled substances in lower schedules [2]. Furthermore, over the past sixteen (16) years, there have been on average about 6,300 patients a year who have engaged in the medical use of marijuana in Hawaii [3-4]. That's over 100,000 patient-years of medical use without a single marijuana-related death. And yet, the Hawaii State Department of Health (DOH) has reported that prescription opioid pain relievers, which are scheduled lower than marijuana, have caused about 50 patient deaths a year in Hawaii over nearly the same time period [5-6]. These facts confirm that marijuana does not qualify as a Hawaii state Schedule I controlled substance.

To be classified as a federal Schedule I controlled substance, federal law requires that marijuana have "no currently accepted medical use in treatment in the United States" [7]. However, Hawaii has already accepted the medical use of marijuana, by way of its authority to accept the medical use of controlled substances, and the only thing holding marijuana in federal Schedule I is an outdated federal regulation that continues to be mistaken for law [8-9]. Furthermore, FDA approval is just one form of accepted medical use, and the DEA does not have the authority to declare illegitimate a standard of medical care that is accepted under state law, which was confirmed in the supreme court case Gonzales v. Oregon [10-11]. These facts confirm that marijuana does not qualify as a federal Schedule I controlled substance.

It's time to put aside the false belief that Hawaii's Medical Use of Marijuana Program is violating federal law. Federal law says that marijuana cannot be in federal Schedule I if it has accepted medical use, and the State of Hawaii has already accepted the medical use of marijuana under state law. There is no need to invoke federal preemption, since state and federal law actually complement each other in this regard. In fact, this is a perfect example of how state law trumps federal regulation.

This false belief persists because the U.S. Department of Justice (DOJ), by way of the DEA, continues to ignore the accepted medical use of marijuana that exists in Hawaii. This false belief also persists because Hawaii is allowing the DEA to maintain this position by failing to recognize that state-accepted medical use is accepted medical use in treatment in the United States, and that an invalid federal regulation does not apply to a lawful state medical use of marijuana program.

THE CON

Somewhere along the way, the State of Hawaii lost its political will to stand up for the state-accepted medical use of marijuana. Maybe it started at the very beginning, when Hawaii's Medical Use of Marijuana Program was created and placed under the administration of the Department of Public Safety (PSD), rather than DOH, as was originally intended [12]. Or maybe it was the result of the supreme court case Gonzales v. Raich, which popularized the notion that federal law trumps state law, even when the real issue at hand is federal regulation, not federal law, and even though this case never addressed the impact that California's Compassionate Use Act has on the federal classification of marijuana [13].

In addition, without a state that's willing to stand up for its own state-accepted medical use of marijuana, it's easy to understand why the DEA continues to apply an outdated interpretative rule to these rescheduling petitions that keep asking for a determination that the DEA is not able to make [14]. The DEA should no longer be asked to evaluate whether marijuana has accepted medical use [15]. This is something that has already been established by the states.

THE CONSEQUENCES

The current situation has created an unnecessary conflict between the state and federal regulation of marijuana, which in turn has created a host of unintended consequences:

1. In order to engage in the state-accepted medical use of marijuana in Hawaii, patients must violate the federal regulation that still has marijuana in federal Schedule I, creating the appearance of violating federal law, which exposes patients to criminal prosecution under the federal Controlled Substances Act (CSA) [16-17]. Fear of violating federal law is keeping many law-abiding patients, including those with terminal cancer, from enrolling in Hawaii's Medical Use of Marijuana Program.

2. In order to engage in the state-licensed production and dispensing of marijuana for medical use in Hawaii, Dispensaries must violate the same federal regulation, creating the appearance of violating federal law, which also exposes Dispensaries to criminal prosecution under the federal CSA. This puts Dispensaries at risk of property confiscation and forfeiture, even when funding to the DEA for investigating state-licensed operations is being restricted. This is because the High Intensity Drug Trafficking Areas Program (HIDTA), a branch of the Office of National Drug Control Policy (ONDCP), and not the DOJ, can still coordinate the investigation of operations that it believes are violating federal regulation [18].

3. Local banks cannot create accounts with or receive cash from Dispensaries because of the perceived conflict with federal banking laws [19].

4. Physicians cannot be associated with Dispensaries without appearing to be aiding and abetting patients in gaining access to a Schedule I controlled substance, which means that their DEA controlled substance prescribing license can be revoked, which would trigger revocation of their state controlled substance registration, as well as suspension of their state medical license [20-21].

5. Veterans cannot be certified by VA Physicians to enroll in Hawaii's Medical Use of Marijuana Program [22].

6. Certain local Healthcare Organizations forbid their Physicians from certifying patients to enroll in Hawaii's Medical Use of Marijuana Program.

7. Local Hospice Organizations forbid their terminally ill patients from engaging in the medical use of marijuana on-site for fear of losing Medicare Part B reimbursements.

8. The University of Hawaii, including the UH Cancer Center, is unable to engage in direct research on the medical use of marijuana for fear of violating federal regulation and losing federal funding.

THE SOLUTION

Aside from a Congressional bill such as the Compassionate Access Act, the solution for the current situation regarding the conflict between the state-accepted medical use and the federal scheduling of marijuana rests with the state [23]. Hawaii needs to stand up for its right to accept the medical use of marijuana, not only to change the attitude of our state and local law enforcement agencies, but also to recognize the impact that state-accepted medical use has upon federal scheduling and to ultimately allow patients and legitimate businesses to engage in the medical use of marijuana in Hawaii without the threat of federal interference.

The problem is that we don't have time to wait for Congress or our new President to act on this issue. In the very near future, Dispensaries in Hawaii will be crossing that fateful line of commercial sale of a so-called Schedule I controlled substance, which goes far beyond patients cultivating small amounts of marijuana for their own personal use in the privacy of their own home. The state needs to take action to protect the accepted medical use of marijuana in Hawaii before the first Dispensary opens its doors to patients, which could be as soon as the fall of 2017.

Standing up for the accepted medical use of marijuana in Hawaii means amending Hawaii's Medical Use of Marijuana Act to specifically recognize that the state-accepted medical use of marijuana in Hawaii is accepted medical use in treatment in the United States, and that the current federal classification of marijuana does not apply to Hawaii's Medical Use of Marijuana Program. Standing up for the accepted medical use of marijuana in Hawaii also means recognizing that marijuana cannot be in a state schedule that requires the highest degree of danger.

One would think that our state Attorney General would be willing to alert PSD of its administrative duty to notify the Legislature that marijuana cannot be in Hawaii state Schedule I [24]. Unfortunately, federal scheduling continues to be placed above state law in Hawaii, and the mantra that federal law trumps state law continues to suppress a recognition of how state-accepted medical use impacts the state and federal regulation of marijuana [25].

REFERENCES

[1] HRS 329-13 - Schedule I tests.

[2] DEA Administrator Rosenberg's RI-WA Rescheduling Petition denial letter.

[3] Department of Public Safety Annual Reports.

[4] Department of Health, Medical Marijuana Registry Program statistics.

[5] Hawaii State Department of Health Drug Overdose Report - 1999 to 2014.

[6] HRS 329-16 - Schedule II.

[7] 21 USC 812: Schedules of controlled substances.

[8] HRS 329-121, Part IX: Medical Use of Marijuana.

[9] 21 CFR 1308.11 - Schedule I.

[10] Medical Jane - Accepted Medical Use - Clifton Otto.

[11] Gonzales v. Oregon, 546 U.S. 243 (2006).

[12] Narcotics Enforcement Division, a branch of the Department of Public Safety.

[13] Gonzales v. Raich, 545 U.S. 1 (2005).

[14] The DEA's Five-Part Test.

[15] 21 USC 811 - Authority and criteria for classification of substances.

[16] 21 CFR 1308.11 - Schedule I.

[17] 21 USC 841 - Prohibited acts A.

[18] High Intensity Drug Trafficking Areas Program.

[19] The Colorado Bankers Association Marijuana Banking Report.

[20] Conant v. Walters (2002) - Ninth Circuit Court of Appeals.

[21] Federation of State Medical Boards: Guidelines for patient care.

[22] VHA Directive 2011-004.

[23] H.R.715 - Compassionate Access Act.

[24] HRS 329-11 - Authority to schedule controlled substances.

[25] Reply from the Department of Public Safety regarding scheduling.

TESTIMONY ON SENATE BILL 997
RELATING TO CONTROLLED SUBSTANCE ACT
by
Keith Kamita

COMMITTEE ON JUDICAIARY AND LABOR
Senator Gilbert S.C. Keith-Agaran, Chair
Senator Karl Rhoads, Vice Chair

Monday, February 27, 2017, 10:00 AM
State Capitol, Conference Room 016

Chair Keith-Agaran, Vice Chair Rhoads and Members of the Committee:

I strongly support passage of Senate Bill 997 which is the Department of Public Safety's Narcotics Enforcement Division's vehicle for proposing updates to Hawaii's Uniform Controlled Substance Act, Chapter 329, Hawaii Revised Statutes, to be consistent with changes in Federal law, as required by Section 329-11, HRS and deletes definitions no longer utilized under federal law. HRS Section 329-11(d) states that if a substance is added, deleted or rescheduled under Federal law and notice of the designation is given to PSD, then the Department shall recommend that a corresponding change in Hawaii law be made. SB 997 adds new controlled substances to Hawaii's Uniform Controlled Substance Act that was scheduled by the Federal government in 2016.

SB 997 protects the citizens of Hawaii by placing these new opioids and synthetic drugs into their appropriate schedules and therefore allowing State and County law enforcement the ability to investigate and apprehend individuals abusing or trafficking in these new drugs.

Thank you for the opportunity to testify on this important bill.