



Testimony by:

JADE T. BUTAY  
DIRECTOR

Deputy Directors  
ROY CATALANI  
ROSS M. HIGASHI  
EDWIN H. SNIFFEN  
DARRELL T. YOUNG

IN REPLY REFER TO:

STATE OF HAWAII  
DEPARTMENT OF TRANSPORTATION  
869 PUNCHBOWL STREET  
HONOLULU, HAWAII 96813-5097

March 14, 2018  
1:15 p.m.  
State Capitol, Room 225

**H.B. 2399, H.D. 1  
RELATING TO HIGHWAY SAFETY**

Senate Committee on Transportation and Energy

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The Department of Transportation (DOT) **supports** H.B. 2399, H.D. 1 relating to highway safety. The bill clarifies the definition of “drug” in chapter 291E, Hawaii Revised Statutes (HRS), regarding the use of intoxicants while operating a vehicle.

Under Hawaii’s current Operating a Vehicle Under the Influence of an Intoxicant (OVUII) statute, a “drug” is defined as any controlled substance listed in schedules I through IV of chapter 329, HRS. With this definition, law enforcement and prosecutors are limited in keeping our roads safe from impaired drivers. Many substances that are being abused are not listed as schedule I through IV drugs, including kava, kratom, toluene, certain muscle relaxants, and over-the-counter cough syrup and anti-diarrheal medicines. Yet they still have the capability to impair drivers. Even adding new drugs to the schedule is not sufficient because changing just one molecule in the substance changes its chemical makeup, thus making it an entirely new drug that is now excluded from the schedule. In this manner, designer and synthetic drugs like “spice” and “bath salts” evade the scheduling process.

This is further exacerbated by the internet, which rapidly spreads the newest drug trends and offers opportunities for the public to learn how to manufacture, obtain and abuse substances.

In addition, there have been recent attempts at the federal and state levels to remove marijuana and tetrahydrocannabinols from the schedule of controlled substances. If these were to succeed, persons found to be driving while impaired by marijuana could not be prosecuted under Hawaii’s current OVUII statute.

HDOT is primarily concerned about improving highway safety and protecting the lives of our community members and visitors. In order to protect our public from impaired drivers, law enforcement and adjudicators should not be forced to rely solely on the controlled substance schedules for OVUII offenses. HDOT coordinates specialized training and certifies law enforcement officers to recognize impairment in drivers under

the influence of drugs through its Drug Recognition Expert (DRE) program to combat this issue.

Thank you for the opportunity to provide testimony.



**Office of the Public Defender  
State of Hawaii**



**Testimony of the Office of the Public Defender  
to the Senate Committee on Transportation and Energy**

March 12, 2018

HB No. 2399, HD1: RELATING TO HIGHWAY SAFETY.

Chair Lorraine R. Inouye and Members of the Committee:

The Office of the Public Defender strongly opposes passage of HB No. 2399, HD1. This Bill greatly expands the definition of “drug” for offenses under Hawaii Revised Statutes Chapter 291E – the Operation of a Vehicle Under the Influence of an Intoxicant (OVUII). We understand why there is need to expand the definition of a “drug” in light of the synthetic drugs being manufactured to evade the Schedule I – IV definitions. However, our specific concerns are with the proposed definition – “*or any substance that impairs a person*”. We have serious concerns that this proposed definition is simply too vague and ambiguous and that it would violate established case law, the Hawaii State Constitution and the Constitution of the United States.

First, the term “*any substance*” could include things like caffeine from consuming too many cups of coffee, energy drinks or soda. It could include substances like too much sugar or too much tobacco. It could include common food and drinks that may help you feel more energy or help you relax. We submit that this phrase is too vague, subject to wide interpretation and is simply too problematic and needs revision.

Second, the term “*that impairs a person*” does not provide enough context or clarification to give citizens a clear idea of what “impairment” means in the context of operating a vehicle. We are concerned that the revisions to the original bill by the House Committee on Judiciary are a step in the wrong direction as this revised proposed definition is even more broad and more open to interpretation than the original definition proposed. Are you impaired just because you have taken an over-the-counter drug for a headache getting into your car to run errands? Are you impaired because you chose to drink an extra cup of coffee before heading home after a long day of work? Are you impaired if you have an energy drink or have some ginseng tea before driving? We submit these questions to illustrate the problems with the proposed definition and how it can be so broadly interpreted in its current form. We are concerned that citizens involved in a simple fender bender or a simple traffic lane violation will be cited for OVUII because they consumed a substance like caffeine or an energy drink and that they were

under the influence of the caffeine or an energy drink while driving. Because this definition can be interpreted so broadly, we strongly encourage revision.

In addition, we are concerned that a simple traffic lane violation would be treated as an impairment issue for substances like kava, or other natural food or drink products, without appropriate scientific confirmation or verification as to what amount or concentration of the substance would or could cause impairment. An assumption that a substance can or may impair operation of a vehicle is not the same as proof of impairment.

For these reasons, we strongly oppose HB No. 2399, HD1.

Thank you for the opportunity to provide testimony in this matter.











**Justin F. Kollar**  
Prosecuting Attorney



**Rebecca Vogt Like**  
Second Deputy

**Jennifer S. Winn**  
First Deputy

**Diana Gausepohl-White**  
Victim/Witness Program Director

**OFFICE OF THE PROSECUTING ATTORNEY**

**County of Kaua'i, State of Hawai'i**

3990 Ka'ana Street, Suite 210, Līhu'e, Hawai'i 96766  
808-241-1888 ~ FAX 808-241-1758  
Victim/Witness Program 808-241-1898 or 800-668-5734

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THE HONORABLE LORRAINE R. INOUYE, CHAIR  
SENATE COMMITTEE ON TRANSPORTATION  
Twenty-Ninth State Legislature  
Regular Session of 2018  
State of Hawai'i

March 14, 2018

Chair Inouye, Vice Chair Espero, and Members of the Committees:

The County of Kaua'i Office of the Prosecuting Attorney offers testimony in **STRONG SUPPORT** of HB 2399 HD 1, RELATING TO HIGHWAY SAFETY. This bill clarifies the definition of drug in Chapter 291 of the Hawai'i Revised Statutes in meaningful ways that would allow law enforcement to be more effective at detecting and deterring drug-impaired driving in Hawai'i.

Current statutes addressing driving under the influence of drugs (HRS 291E-61) provide that in order to convict someone of the offense, it must be proven that the person is under the influence of a substance that is a scheduled drug. This excludes many pharmacological substances that are capable of impairing a person but may not be scheduled substances because of their newness (i.e. designer drugs, "bath salts", etc.). This amendment would provide for prosecution in these situations.

Accordingly, the Office of the Prosecuting Attorney, County of Kaua'i, requests that this measure be **PASSED**.

Thank you very much for the opportunity to testify.

**TESTIMONY OF THE HAWAI`I POLICE DEPARTMENT**

**HOUSE BILL 2399 H.D. 1**

**(HSCR1083-18)**

**RELATING TO HIGHWAY SAFETY**

**BEFORE THE COMMITTEE ON TRANSPORTATION AND ENERGY**

**DATE : Thursday, March 14, 2018**

**TIME : 1:15 P.M.**

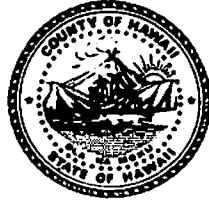
**PLACE : Conference Room 225  
State Capitol  
415 South Beretania Street**

**PERSON TESTIFYING:**

**Police Chief Paul K. Ferreira  
Hawai`i Police Department  
County of Hawai`i**

**(Written Testimony Only)**

Harry Kim  
Mayor



Paul K. Ferreira  
Police Chief

Kenneth Bugado Jr.  
Deputy Police Chief

## County of Hawai`i

### POLICE DEPARTMENT

349 Kapi`olani Street • Hilo, Hawai`i 96720-3998  
(808) 935-3311 • Fax (808) 961-2389

March 12, 2018

Senator Loraine R. Inouye  
Chairperson and Committee Members  
Committee On Transportation And Energy  
415 South Beretania Street, Room 225  
Honolulu, Hawai`i 96813

### **Re: House Bill 2399 H. D. 1 RELATING TO HIGHWAY SAFETY**

Dear Senator Inouye:

The Hawai`i Police Department strongly supports the passage of House Bill 2399, Relating to Highway Safety. The purpose of this measure is to clarify the definition of "drug" for purposes of the offense of operating a vehicle under the influence of an intoxicant. This measure specifies that a drug for these purposes includes any substance that can impair the ability of a person to operate a vehicle safely.

The Hawai`i Police Department believes it is necessary to clearly define the term drug for this section as a means of overcoming a "loop hole" in the current existing law. The use of any drug which impairs the ability of a person to operate a vehicle safely creates a substantial risk to the motoring community.

For these reasons we urge this committee to approve this legislation. Thank you for allowing the Hawai`i Police Department to provide comments relating to House Bill 2399.

Sincerely,

PAUL K. FERREIRA  
POLICE CHIEF

**HB-2399-HD-1**

Submitted on: 3/12/2018 4:38:18 PM

Testimony for TRE on 3/14/2018 1:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Richard K. Minatoya	Testifying for Maui Department of the Prosecuting Attorney	Support	No

Comments:

The Department of the Prosecuting Attorney, County of Maui, **STRONGLY SUPPORTS** the intent of HB 2399, HD 1 - Relating to Highway Safety. This clarifies the definition of "drug" in HRS Chapter 291E to include any substance that impairs a person, in addition to scheduled controlled substances and their metabolites. This measure will help address the problem of people driving under the influence of substances that cause impairment, but are not alcohol or scheduled controlled substances. Examples of these are kava and certain muscle relaxants.

While we strongly support this measure, we need to request a technical amendment. Sections 2 and 3 of the measure should be amended to read as follows, with the numbering of current Sections 3, 4, and 5 being renumbered accordingly:

SECTION 2. Section 291E-1, Hawaii Revised Statutes, is amended by amending the definition of "drug" to read as follows:

““Drug” means any controlled substance, as defined and enumerated in schedules I through IV of chapter 329, or its metabolites[.], or any substance that impairs a person.”

SECTION 3. Section 291E-1, Hawaii revised Statutes, is amended by amending the definition of "substance" and "substance abuse" to read as follows:

“[“Substance” and “substance] “Substance abuse” [have] has the same [meanings] meaning as provided in section 321-191.”

The Department requests that this measure be **PASSED AS AMENDED** with our proposed amendment. Thank you very much for the opportunity to provide this testimony.



Toxicology Dept.  
99-193 Aiea Heights Drive  
Aiea, HI 96701  
808-834-5141  
March 14, 2018

Senate Committee on Transportation/Energy  
Senator L. Inouye, Chair  
Senator W. Espero, Vice Chair

Re: HB2399, HD1 Relating to Highway Safety

Dear Sirs:

I am a board-certified forensic toxicologist (ABFT), and am currently employed at Clinical Labs of Hawaii, the private clinical laboratory that conducts the toxicology analysis of blood and urine specimens submitted for DUI testing in the state of Hawaii. I also serve as the toxicology consultant for the State Impaired Driving Task Force and for the state-wide County Traffic Commanders meetings.

I wish to add my support to this proposed legislation to broaden the list of drugs that can be used to charge as a DUI offense. Currently, only drugs listed as part of the state/federal Schedules of Controlled Substances can be used to support a DUI prosecution. Unfortunately, there are other drugs not listed, that can cause driving impairment. We have encountered occasions where the drugs detected were not controlled substances, but nevertheless, would have been designated the primary agent as an intoxicant in the arrest.

I wish to bring your attention to some examples found in our state in DUI and postmortem cases of drugs used that were not listed as controlled substances, but have caused intoxication or impairment of driving here as well as on the mainland:

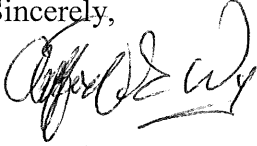
- 1) Dextromethorphan – OTC cough suppressant (“DMX”)
- 2) Diphenhydramine – common OTC antihistamine which causes drowsiness
- 3) Chlorpheniramine – common OTC antihistamine which causes drowsiness
- 4) Cyclobenzaprine (Flexeril) – used as a muscle relaxant for back pain
- 5) Kavain (Kava root constituent)- used in Polynesian cultural events which causes CNS depressant activities similar to alcohol
- 6) Mitragynine (Kratom) – stimulant/analgesic from leaves of a Southeast Asian tree

HB2399 HD1 will provide law enforcement agencies the opportunity to prosecute drivers who can be impaired by such drugs, or by future designer-type drugs that are not currently listed as controlled substances. Passage of the bill will not automatically open a deluge of new DUI cases as the predicates of DUI arrest must include observed impaired driving and impaired behaviors/symptoms of the arrestee. The burden of proof must still

also fall on the prosecutors to prove that the identified drugs can cause impairment at the blood/urine concentrations measured in the arrestee.

I wish to thank all of you for your attention to my oral support regarding this proposed bill, and hope that you will all support its passage in its final hearing.

Sincerely,

A handwritten signature in black ink, appearing to read "Clifford G Wong". The signature is fluid and cursive, with a prominent loop at the end.

Clifford G Wong, Ph.D., DABFT-FT  
Toxicology Technical Director  
Clinical Labs of Hawaii



Mothers Against Drunk Driving HAWAII  
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March 14, 2018

To: Senator Lorraine R. Inouye, Chair, Senate Committee on Transportation and Energy; Senator Will Espero, Vice Chair; and members of the Committee

From: Arkie Koehl and Carol McNamee, Public Policy Committee - MADD Hawaii

Re: House Bill 2399, HD 1 – Relating to Highway Safety

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I am Carol McNamee, offering testimony on behalf of the Hawaii Chapter of Mothers Against Drunk Driving in strong support of House Bill 2399, HD 1, relating to Highway Safety.

Approximately three years ago, the National MADD organization amended its mission by inserting the phrase, “to help stop *drugged* driving” along with the original “to end *drunk* driving.” This was a major step taken after over 10 years of evaluating the problem of impairment caused by substances other than – or in addition to – alcohol. MADD Hawaii applauded this amendment, largely because our chapter has worked on Hawaii statutes relating to drugs and driving since 1986. We have witnessed the beginning of the DRE (Drug Recognition Expert) program from its inception and have always been extremely impressed with the knowledge and capabilities of this specialized sector of the County Police Departments.

Our state annual fatality statistics are showing an increasing number of highway deaths connected to the presence of drugs. In 2016, the number significantly exceeded alcohol-related fatalities. MADD supports measures that give law enforcement (police and prosecutors) the necessary tools to do their jobs. In the case of HB 2399 which amends the definition of “drugs”, MADD believes that changing times necessitates this amendment to our current statutes. Although Chapter 329 lists scores of drugs in schedules one through four, clever underground chemists are now able to create new drugs at too swift a rate for our statutes to keep pace. This problem results in fewer arrests and more impaired drivers threatening the safety of our roads.

MADD supported HB 2399’s initial proposed definition of “drug” because it was the same as that used in DRE training. We understand the reason for the amendment made in the HD1 and give our support to this version which simply adds the words “or any substance that impairs a person” to the lists of controlled substances found in schedules I through IV of Chapter 329.

MADD strongly encourages this committee to pass HB 2399, HD 1.

Thank you for this opportunity to testify.



*Dedicated to safe, responsible, humane and effective drug policies since 1993*

TO: Senate Committee on Transportation and Energy  
FROM: Carl Bergquist, Executive Director  
HEARING DATE: 14 March 2018, 1:15PM  
RE: HB2399 HD1, RELATING TO HIGHWAY SAFETY, **OPPOSE**

Dear Chair Inouye, Vice Chair Espero, Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **opposes** this measure to expand the definition of “drug” in order to attempt to obtain convictions for operating vehicles under the influence of an intoxicant. This bill purports to address the danger of non-scheduled drugs such as kava or muscle relaxants causing impairment. The movement to add kava, e.g., to the definition of “drugs” is over two decades old, and to date, there is little evidence for the need to do so. Kava related prosecutions in California, where the drug definition is similar to the one proposed in this bill, have not been successful due to lack of evidence. [To the contrary, recent research shows that reaction times after kava consumption are actually better than for non kava consumers.](#)

Rather than this sweeping change, we suggest that *if* specific substances actually pose a threat to the public, then the Department of Transportation (DOT) should furnish evidence to that effect, and add specific language listing that particular substance alongside “drugs”. It is worth highlighting that the Administrator of the Narcotics Enforcement Division (NED) at the Department of Public Safety already has emergency scheduling powers, per HRS §329-11(e), in case new substances such as synthetics appear in Hawai'i.

Further, when it comes to cannabis, which the bill anticipates being descheduled, there is no demonstrable blood level test that proves impairment. It is imperative that no arbitrary limit be set that would claim to indicate impairment. Again, rather than broadening the “drug” definition, should cannabis be descheduled, the legislature can simply specifically list “cannabis” in the HRS definition.

Finally, as the testimony from the Office of the Public Defender notes, there are not necessarily any scientific verification methods for proving impairment resulting from some of the substances informing this bill. In other words, the bill puts the cart before the horse, and we respectfully ask that you defer it.

Thank you for the opportunity to testify.





**HB-2399-HD-1**

Submitted on: 3/13/2018 11:12:04 PM

Testimony for TRE on 3/14/2018 1:15:00 PM

<b>Submitted By</b>	<b>Organization</b>	<b>Testifier Position</b>	<b>Present at Hearing</b>
Karen K.	Individual	Support	No

Comments:

I strongly support HB2399 HD1. People know how to work the system to either refuse to submit to blood or urine testing, or they take advantage of loopholes to drive while impaired on non-scheduled substances. Impairment is impairment. We need to stop being hung up on the exact substance, and instead, focus on the impairment. When people (kids and adults) are ingesting Tide Pods, making cocktails out of cough syrup, and snorting nutmeg to get high, it doesn't make sense to use the schedule of controlled substances to determine if someone is "impaired or not."