



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



**Testimony of the Office of the Public Defender
to the House Committee on Transportation**

February 5, 2018

H.B. No. 2399: RELATING TO HIGHWAY SAFETY.

Chair Henry J.C. Aquino and Members of the Committee:

The Office of the Public Defender opposes passage of H.B. No. 2399. This Bill expands the definition of “drug” for offenses under Hawaii Revised Statutes Chapter 291E. 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. Specifically, our concerns are with the proposed definition – *“any substance that, when taken into the human body, can impair the ability of a person to operate a vehicle safely”*. 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 phrase *“can impair the ability of a person to operate a vehicle safely”* does not provide enough context or clarification to give citizens a clear idea of what “impairment” means in the context of operating a vehicle. Does it mean a person who swerves within his or her lane of traffic one time while feeling extra hyper from the third cup of coffee he or she consumed 20 minutes earlier is therefore impaired and in violation of the law? Does it mean a person who is tired from a long day at work who has an extra energy drink to get home is impaired if he or she is in a fender-bender during rush hour traffic and automatically in violation of the law? We submit these hypotheticals to illustrate the problems with the proposed definition and how it can be misconstrued in its current form. We encourage revision.

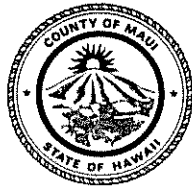
In addition, we are concerned that a simple traffic lane violation would be treated as an impairment issue for substances like kava, or other natural food or drink products,

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 impair operation of a vehicle is not the same as proof of impairment.

For these reasons, we oppose H.B. No. 2399.

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

ALAN M. ARAKAWA
Mayor



JOHN D. KIM
Prosecuting Attorney
ROBERT D. RIVERA
First Deputy Prosecuting Attorney

DEPARTMENT OF THE PROSECUTING ATTORNEY
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CONTACT: RICHARD K. MINATOYA
Deputy Prosecuting Attorney
Supervisor - Appellate, Asset Forfeiture and Administrative Services Division

TESTIMONY
ON
HB 2399 - RELATING TO HIGHWAY SAFETY

February 7, 2018
10:00 A.M.

The Honorable Henry J.C. Aquino
Chair
The Honorable Sean Quinlan
Vice Chair
and Members
House Committee on Transportation

Chair Aquino, Vice Chair Quinlan, and Members of the Committee:

The Department of the Prosecuting Attorney, County of Maui SUPPORTS the intent of HB 2399 - Relating to Highway Safety. This measure 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 agree with the intent of this measure, we do not agree with the wording of the proposed amendment to the "drug" definition. The proposed definition states, in part, "can impair the ability of a person to operate a vehicle safely." This add an undefined subjective element of "safely." We believe that this will cause unintended problems in prosecution. Impairing a "person's ability to operate a vehicle in a careful and prudent manner" is already set forth in HRS § 291E-61(a)(2), and the current language of this measure will add an additional element of proof that is clearly not the intent of this measure.

We propose that Section 2, Page3, Lines 3-7 be amended to read:

““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.”

We believe that this change more clearly reflects the intent of this measure.

The Department of the Prosecuting Attorney, County of Maui, requests that this measure be PASSED AS AMENDED with our proposed amendment. Thank you very much for the opportunity to provide this testimony.

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

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THE HONORABLE HENRY J.C. AQUINO, CHAIR
HOUSE COMMITTEE ON TRANSPORTATION
Twenty-Ninth State Legislature
Regular Session of 2018
State of Hawai'i

February 7, 2018

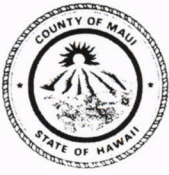
Chair Aquino, Vice Chair Quinlan, and Members of the Committees:

The County of Kaua'i Office of the Prosecuting Attorney offers testimony in **STRONG SUPPORT** of HB 2399, 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.



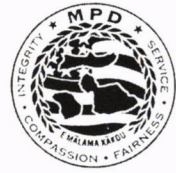
ALAN M. ARAKAWA
MAYOR

OUR REFERENCE
YOUR REFERENCE

POLICE DEPARTMENT

COUNTY OF MAUI

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TIVOLI S. FAAUMU
CHIEF OF POLICE

DEAN M. RICKARD
DEPUTY CHIEF OF POLICE

February 5, 2018

Representative Scott Saiki
Hawaii State Capitol, Room 431
Honolulu, Hawaii 96813

RE: House Bill No. 2399, RELATING TO HIGHWAY SAFETY

Dear Representative Saiki:

The Maui Police Department SUPPORTS the passage of H.B. No. 2399.

The passage of this bill enhancing the definition of an “drug” under Hawaii Revised Statute Chapter 291E supports law enforcement’s stance for pursuing convictions under Hawaii Revised Statute Chapter 291E 61(a)(2) Operating a Vehicle Under the Influence of an Intoxicant (OVUII) when the intoxicant is a drug.

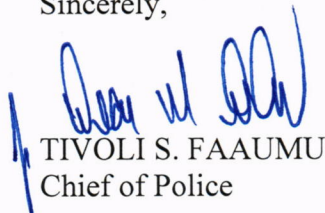
As technologies evolve, drugs/intoxicants become more advanced in composition and synthetics and need to be included in the definition as they do inhibit a vehicle operators’ ability to operate a vehicle in a safe manner.

The ability to provide proof beyond a reasonable doubt is crucial in prosecution. By amending the definition under this chapter it reinforces the State & County’s position of increasing public safety through enforcement, prosecution and accountability of the offender(s).

The Maui Police Department asks that you SUPPORT the passage of H.B. No. 2399.

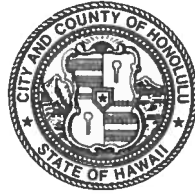
Thank you for the opportunity to testify.

Sincerely,


TIVOLI S. FAAUMU
Chief of Police

POLICE DEPARTMENT
CITY AND COUNTY OF HONOLULU

801 SOUTH BERETANIA STREET · HONOLULU, HAWAII 96813
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KIRK CALDWELL
MAYOR

SUSAN BALLARD
CHIEF

JOHN D. McCARTHY
JONATHAN GREMS
DEPUTY CHIEFS

OUR REFERENCE **BM-GR**

February 7, 2018

The Honorable Henry J. C. Aquino, Chair
and Members
Committee on Transportation
House of Representatives
Hawaii State Capitol
415 South Beretania Street, Room 423
Honolulu, Hawaii 96813

Dear Chair Aquino and Members:

SUBJECT: House Bill No. 2399, Relating to Highway Safety

I am Benjamin Moszkowicz, Acting Captain of the Traffic Division of the Honolulu Police Department (HPD), City and County of Honolulu.

The HPD supports the passage of House Bill No. 2399, Relating to Highway Safety.

Currently, when an impaired driver is stopped and arrested for Operating a Vehicle Under the Influence of an Intoxicant (OVUII), he or she is taken to a police station and asked to submit a breath or blood sample to be tested for alcohol concentration. Drivers suspected of being under the influence of a substance other than alcohol are asked to participate in a Drug Influence Evaluation. These evaluations are conducted by officers with specialized training and experience in detecting signs and symptoms associated with drug use and impairment. Following an evaluation, a driver who is still suspected of being under the influence of drugs is requested to submit a sample of his or her blood or urine to determine its drug content.

In order to convict a drug-impaired driver of OVUII, the prosecution must prove that he or she was under the influence of a "drug" that impaired him or her. Hawaii Revised Statutes, Section 291E-1, Definitions, defines a "drug" as a scheduled substance or its metabolite. In cases where suspects refuse to take a blood or urine test, it is extremely difficult to prove it was "a scheduled substance" that caused his or

The Honorable Henry J. C. Aquino, Chair
and Members
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February 7, 2018

her impairment. A driver impaired by or under the influence of kawa or Seroquel (a potentially impairing drug prescribed to treat bipolar disorder) would not have a scheduled substance or metabolite in his or her blood. Similarly, a driver impaired by the influence of only synthetic drugs, such as "spice" or "bath salts," would not have a scheduled substance or metabolite in his or her blood.

Failure to prove that particular element would result in a suspect being found not guilty by the court. As the prosecution must prove beyond a reasonable doubt that the suspect is under the influence of a scheduled substance, it is nearly impossible to convict a suspect who refuses to consent to a drug test for OVUII.

This change would not alter the current practice of law enforcement officers arresting suspected alcohol and drug impaired drivers; to establish probable cause to support an arrest, drivers would still have to be impaired. Rather, it would allow impaired drivers to be convicted of OVUII if they refuse to be tested for drugs or test positive for nonscheduled impairing substances.

The HPD urges you to support House Bill No. 2399, Relating to Highway Safety.

Thank you for the opportunity to testify.

Sincerely,



Benjamin Moszkowicz, Acting Captain
Traffic Division

APPROVED:



Susan Ballard
Chief of Police



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

TO: House Committee on Transportation
FROM: Carl Bergquist, Executive Director
HEARING DATE: 7 February 2018, 10AM
RE: HB2399, RELATING TO HIGHWAY SAFETY, **OPPOSE**

Dear Chair Aquino, Vice Chair Quinlan, Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **opposes** this measure to expand the definition of “drug” in order 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 can also cause impairment. The movement to add kava to the definition of “drugs” is over two decades old, and to date, there is little evidence for the need to do so. [To the contrary, recent research shows that reaction times after kava consumption are actually better than for non kava consumers.](#) Moreover, this bill is also preemptory in that it anticipates that cannabis may be descheduled at some point in the future.

Rather than this sweeping change, we suggest that *if* specific substances like kava currently, or cannabis if it is descheduled, actually pose a threat to the public, then the Department of Transportation should furnish evidence to that effect, and add specific language listing that particular substance alongside “drugs”. Further, when it comes to substances such as cannabis, when there is no demonstrable blood level test that shows impairment, it is imperative that no arbitrary limit be set that would pretend to indicate impairment.

Thank you for the opportunity to testify.



Mothers Against Drunk Driving HAWAII
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February 7, 2018

To: Representative Henry Aquino, Chair, House Committee on Transportation;
Rep. Sean Quinlan, Vice Chair; and members of the Committee

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

Re: House Bill 2399 – Relating to Highway Safety

I am Carol McNamee, offering testimony on behalf of the Hawaii Chapter of Mothers Against Drunk Driving in strong support of House Bill 2399, 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 only 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 had 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 Honolulu Police Department. We are quite sure that the neighbor island police departments, having received the same training, are equally capable.

Therefore, because of our long history of advocating for solid legislation to keep our roads free of drug-impaired driving, we support measures that give law enforcement (police and prosecutors) more tools or improved methods of doing 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. MADD does not have knowledge of all the names of new synthetic drugs that are not part of Schedules one through four but we have heard about some “non-scheduled” impairing substances that are ingested – like Kava or Nutmeg.

HB 2399’s proposed language is the same as that used in DRE training and therefore makes good sense as the standard to use for the needed broadening of the drug definition in our statutes as it related to impaired operation of a vehicle.

This bill will be a significant help to law enforcement officers and prosecutors who are working to keep our roads safe from impaired drivers. MADD strongly encourages this committee to pass HB 2399.

Thank you for this opportunity to testify.

HB-2399

Submitted on: 2/5/2018 8:58:46 AM

Testimony for TRN on 2/7/2018 10:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Victor K. Ramos	Maui Police Department	Support	No

Comments:

Committee on Transportation
Representative Henry J.C. Aquino, Chair
Representative Sean Quinlan, Vice Chair

Hearing Date: Wednesday, February 7th, 2018 10:00 am
Measure: **HB 2399**

Dear Chair Aquino, Vice Chair Quinlan, and members of the House Committee on Transportation,

My name is Kari Benes and I am the current chair of the Hawaii Strategic Highway Safety Plan (SHSP) asking for your **support of HB 2399**, which provides clarity to the definition of a “drug” within the impaired driving statute. The definition of a “drug” as stated in HB 2399, is one of the life saving priorities outlined by the Hawaii SHSP Core Committee.

Providing clarity to the definition of drug within the impaired driving statute will help our trained police officers properly remove dangerous drug-impaired drivers from our roadways. With the ever-changing trends in chemical compositions of illicit drugs and experimentation with things like “tide pods”, it is important to be a step ahead of what is listed as a controlled substance. This measure sends a clear message that we don’t want individuals to be driving under the influence of any type of substance that impairs their ability to drive.

Please support HB 2399 and SHSP's vision that all of Hawaii's road users arrive safely at their destinations.

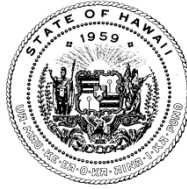
To view the Hawaii Strategic Highway Safety Plan go to www.hawaiishsp.com.

Thank you for your time.

Sincerely,

Kari Benes -Chair

Hawaii Strategic Highway Safety Plan



Testimony by:
JADE T. BUTAY
INTERIM DIRECTOR

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

IN REPLY REFER TO:

LATE

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

February 7, 2018
10:00 a.m.
State Capitol, Room 423

H.B. 2399
RELATING TO HIGHWAY SAFETY

House Committee on Transportation

The Department of Transportation (DOT) **supports** H.B. 2399 relating to highway safety. The bill clarifies the definition of “drug” in chapter 291E, Hawaii Revised Statutes, 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, Hawaii Revised Statutes. 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.

DOT 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. DOT 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.