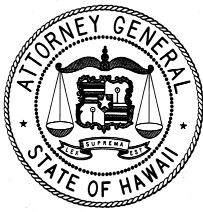


WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018

LATE

ON THE FOLLOWING MEASURE:
H.B. NO. 2729, H.D. 2, S.D. 1, RELATING TO CANNABIS FOR MEDICAL USE.

BEFORE THE:
SENATE COMMITTEE ON WAYS AND MEANS

DATE: Thursday, March 29, 2018 **TIME:** 10:50 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Jill T. Nagamine,
Deputy Attorney General, at 587-3050)

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General provides the following comments on this bill.

This bill would (1) amend chapter 329, Hawaii Revised Statutes (HRS), to allow qualifying out-of-state patients to register for the medical use of cannabis in Hawaii; (2) clarify that the fee to register to use medical cannabis is an annual fee; (3) provide for the Department of Health to allow a certification to use cannabis for medical purposes to be valid for up to three years when the medical provider states that the patient's debilitating medical condition is chronic; (4) provide registration requirements for out-of-state patients; (5) allow the Department of Health to permit registration of up to two primary caregivers for a minor qualifying patient if both of the caregivers are the parent, guardian, or custodian of the minor; (6) add protections for employees who are registered qualifying patients who test positive for the presence of cannabis, with some exceptions; (7) provide that qualifying out-of-state patients, and their caregivers if they are minors, may only obtain cannabis for medical use from retail dispensing locations of dispensaries licensed pursuant to chapter 329D, HRS; (8) provide for retesting of cannabis or manufactured cannabis products at the same or a different laboratory, and in the event of different results it would allow the Department of Health to determine which result controls; (9) prohibit a qualified out-of-state patient from cultivating

cannabis; (10) allow a bona-fide physician-patient relationship or advanced practice registered nurse-patient relationship to be established via teleheatlh only after an in-person consultation; (11) redefine manufactured cannabis products to include edible cannabis products and devices that provide safe pulmonary administration; (12) allow persons convicted of certain felonies to work in licensed cannabis dispensaries; and (13) conform wording in chapters 329, HRS, and 329D, HRS, to include qualifying out-of-state patients.

Recommendations for substantive changes.

(1) Definitions (section 4, page 7, line 9, through page 9, line 9)

The bill needs a new definition for "adequate supply for a qualifying out-of-state patient," or it needs to amend the definition of "adequate supply" to include the amount of cannabis that a qualified out-of-state patient is allowed to possess. While section 18 of the bill would amend section 329D-13, HRS, to allow a qualifying out-of-state patient to purchase the same amount of cannabis that a qualifying Hawaii patient is allowed to purchase (page 46, line 10, though page 47, line 10), nowhere in the bill is there a limit on the amount of cannabis that a qualifying out-of-state patient is entitled to possess at any given time. That limitation for Hawaii patients comes in the definition of "adequate supply," and the bill should be amended to include a limitation for qualifying out-of-state patients too. We recommend the following definition be added to the definitions of section 329-121, HRS:

> "Adequate supply for a qualifying out-of-state patient" means an amount of cannabis individually possessed by a qualifying out-of-state patient or jointly possessed by a qualifying out-of-state patient and the caregiver of a qualifying out-of-state patient that is not more than is reasonably necessary to ensure the uninterrupted availability of cannabis for the purpose of alleviating the symptoms or effects of the qualifying out-of-state patient's debilitating medical condition; provided that an "adequate supply for a qualifying out-of-state patient" shall not exceed four ounces of usable cannabis at any given time and shall not include live plants. The four ounces of usable cannabis shall include any combination of usable cannabis and manufactured cannabis products, as provided in chapter 329D, with the cannabis in the manufactured cannabis products being calculated using information provided pursuant to section 329D-9(c).

To be consistent with the requirements of registration for Hawaii's qualifying patients, the new definition of "qualifying out-of-state patient" or "registered qualifying out-of-state patient" at page 7, lines 16-19, needs additional wording to ensure that the step of registration in Hawaii is required for out-of-state patients to be able to use cannabis for medical purposes in Hawaii, just as it is for Hawaii qualifying patients. The definition should read:

> "Qualifying out-of-state patient" or "registered qualifying out-of-state patient" means a person who is registered for the medical use of cannabis in another state, a United States territory, or the District of Columbia[~~.~~]<u>, who has registered with the department of health to use cannabis for medical purposes.</u>

The new definition of "written certification" at page 8, line 15, through page 9, line 9, would allow for some certifications to be valid for up to three years. A word change at page 9, line 8, from "states" to "certifies" is needed to ensure that the information from the certifying medical provider is part of the "certification" on which the registration is based, rather than information that is merely "stated." The amended proviso at page 9, lines 5-9, should read:

> provided that the department of health may allow any certification to be valid for up to three years when the qualifying patient's physician or advanced practice registered nurse [~~states~~] <u>certifies</u> that the debilitating medical condition is chronic in nature.

(2) <u>Employee protections</u> (section 8, page 21, line 1, through page 24, line 2, and section 23, page 51, line 3, through page 53, line 21)

Sections 8 and 23 of the bill add protections for employees who are qualifying patients and who test positive for the presence of cannabis. There are exclusions for some employees, and we would like to clarify that one of those exclusions should be for an employee whose employer would be in violation of any federal law or regulation or who would risk losing a monetary or licensing-related benefit under federal law or regulation by having an employee who tested positive. We suggest adding the wording "or who would risk losing a monetary or licensing-related benefit under federal law or regulation" to page 23, line 15, and page 53, line 19, as follows:

> An employee whose employer would be in violation of any federal law or regulation <u>or who would risk losing a monetary or licensing-related benefit under</u>

federal law or regulation by having an employee who tested positive for the presence of cannabis as set forth above.

Recommendations for clarifications and technical changes

(1) Section 5 (page 9, line 10, though page 17, line 4)

Section 329-122(c)(4) at page 12, lines 4-5, should be clarified that the required fee for out-of-state registration must be paid to the department of health. That paragraph should be amended to read:

> Pays the required fee to the department of health for out-of-state registration to use cannabis for medical purposes;

(2) Section 6 (page 17, line 5, through page 19, line 19)

Page 19, line 7, has a missing word; "to" should be included at page 19, line 7, so that the sentence reads:

> The department of health may permit registration of up to two primary caregivers for a minor qualifying patient; provided that both primary caregivers are the parent, guardian, or person having legal custody of the minor qualifying patient.

(3) Section 7 (page 20, lines 1-21)

Page 20, line 7, has an extraneous "the" before "primary caregiver." It should be stricken in the Ramseyer format.

(4) Section 29 (page 59, lines 3-12)

To clarify the new definition of "manufactured cannabis product," we suggest adding the wording: "as an ingredient" at page 59, line 11. The definition would read:

> "Manufactured cannabis product" means any product that has been manufactured using cannabis as an ingredient pursuant to section 329D-10.

(5) Section 30 (page 59, line 13, though page 60, line 7)

For clarity and consistency in the amendments to section 329D-9(b), HRS, the new paragraphs (2) and (3) should refer to "manufactured cannabis products," rather than to "cannabis products," which are not defined. Paragraphs (2) and (3) should read:

> (2) Manufactured cannabis products shall not be manufactured in any facility permitted by the department of health as a food establishment; and

(3) Manufactured cannabis products shall not be manufactured in any home kitchen.

Thank you for considering our written comments.

HAWAIʻI CIVIL RIGHTS COMMISSION

830 PUNCHBOWL STREET, ROOM 411 HONOLULU, HI 96813 · PHONE: 586-8636 FAX: 586-8655 TDD: 568-8692

March 29, 2018
Rm. 211, 10:50 a.m.

To: The Honorable Donovan M. Dela Cruz , Chair
Members of the Senate Committee on Ways and Means

LATE

From: Linda Hamilton Krieger, Chair
and Commissioners of the Hawaiʻi Civil Rights Commission

Re: H.B. No. 2729, H.D.2, S.D.1

The Hawaiʻi Civil Rights Commission (HCRC) has enforcement jurisdiction over Hawaiʻi's laws prohibiting discrimination in employment, housing, public accommodations, and access to state and state funded services (on the basis of disability). The HCRC carries out the Hawaiʻi constitutional mandate that no person shall be discriminated against in the exercise of their civil rights. Art. I, Sec. 5.

The primary focus of H.B. No. 2729, H.D.2, S.D.1 is to amend H.R.S. chapter 329, governing medical cannabis. Section 23 of the S.D.1 also amends H.R.S. chapter 378, part III, prohibiting unlawful suspension and discharge, by amending H.R.S. § 378-32(a) to prohibit the suspension, bar, discharge, withholding of pay, demotion, or discriminatory treatment of an employee who is a registered qualifying patient authorized for the medical use of cannabis pursuant to H.R.S. §§ 329-122 and 329-123, based on a positive drug test conducted pursuant to H.R.S. § 329B-5.5

On review of the bill, the HCRC notes that there may be an error in Section 23 of the S.D.1 that will cause confusion and undermine the effectiveness of the intended statutory protection for employees who are registered qualifying patients who are users of medical cannabis. This issue, which is tangential to the HCRC' testimony, will be discussed at the end of this written testimony, with a suggested corrective amendment.

The HCRC supports the intent of H.B. No. 2729, H.D.2, S.D.1, with three points of clarification:

1. The new protection for registered medical cannabis users is placed in H.R.S. chapter 378, part III, enforced by the Department of Labor and Industrial Relations (DLIR). It is not under the jurisdiction of the HCRC, which limited to chapter 378, part I. This is consistent with the statutory recognition that the HCRC does not enforce the rights of registered medical cannabis users generally. The HCRC's interest is focused on the rights of persons with a disability. The

H.R.S. § 329-122 definition of "debilitating medical condition" is not identical to the H.R.S. § 378-1 and H.A.R. § 12-46-182 definition of "disability," so not every registered qualifying medical cannabis patient will necessarily be a person with a disability entitled to a reasonable accommodation.

2. The HCRC has a civil rights interest in protecting the rights of persons with disabilities against discrimination in employment, including the right to a reasonable accommodation required to enable a person with a disability to be considered for a job, to perform the essential functions of a job, or to enjoy the same or equal benefits of employment as are enjoyed by similarly situated employees without disabilities. A person with a disability who is a registered qualified medical cannabis patient can request a reasonable accommodation in employment if they test positive for the use of (medical) cannabis; such reasonable accommodation does not include cannabis use or intoxication at work.
3. In the past, HCRC testimonies have stated that we were unable to find any jurisdiction that had enacted a medical cannabis law that had recognized the right of a person with a disability to a reasonable accommodation for the use of medical cannabis, except where there was an express provision for employment-related protections in their medical cannabis laws. That has changed, with the Supreme Court of Massachusetts ruling in *Barbuto v. Advantage Sales and Marketing LLC*, 477 Mass. 456 (2017). In *Barbuto*, the Massachusetts Court held that the use of medical marijuana could be a required reasonable accommodation under the state's handicap discrimination law, even without an express provision of employment-related protections in the Massachusetts medical marijuana law. In the wake of *Barbuto*, we anticipate a trend of developing jurisprudence recognizing the use of medical cannabis as a reasonable accommodation under state fair employment laws.

The HCRC supports the intent of H.B. No. 2729, H.D.2, S.D.1, but notes that it does not specifically address or affect the rights of persons with disabilities to a reasonable accommodation under H.R.S. § 378-2 and H.A.R. § 12-46-187. Whether H.B. No. 2729, H.D.2, S.D.1, is enacted or not, it will not affect the jurisdiction and authority of the HCRC to make determinations or issue decisions on complaints raising reasonable accommodation claims, or engage in rulemaking on the use of medical cannabis as a reasonable accommodation, and will not affect the authority and jurisdiction of the state courts to review and decide cases raising these issues. We anticipate that the Commission and the courts will consider and address the issue in the near future.

Note of possible error in S.D.1 and suggested amendment to correct:

Section 23 of the S.D.1 amends H.R.S. § 378-32 by adding a new paragraph (a)(5), prohibiting adverse employment actions against an employee who is a registered qualifying patient authorized for the medical use of cannabis, based on a positive on-site screening test result for the presence of cannabis.

On its face, the new paragraph (a)(5) is confusingly duplicative of the broader prohibition against adverse employment action based on a positive on-site screening test, provided by the existing paragraph (a)(4).

The S.D.1 amendment adds a duplicative prohibition against adverse employment actions based on an ***on-site screening test*** result, for a test conducted under H.R.S. § 329B-5.5(2). In order to have the intended effect, the amendment should prohibit adverse employment actions based on a ***laboratory substance abuse test*** result, for a test conducted under H.R.S. § 329B-5.5(3).

Suggested draft language:

SECTION 23. Section 378-32, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) It shall be unlawful for any employer to suspend, discharge, or discriminate against any of the employer's employees:

* * * * *

(4) Because an employee tested positive for the presence of drugs, alcohol, or the metabolites of drugs in a substance abuse on-site screening test conducted in accordance with section 329B-5.5; provided that this [provision] paragraph shall not apply to an employee who fails or refuses to report to a laboratory for a substance abuse test pursuant to section 329B-5.5[.]; or

(5) Solely because an employee, who is a registered qualifying patient authorized for the medical use of cannabis pursuant to sections 329-122 and 329-123, tested positive for the presence of cannabis in a substance abuse ~~on-site screening~~ **laboratory** test conducted in accordance with section 329B-5.5; provided that this paragraph shall not apply to:

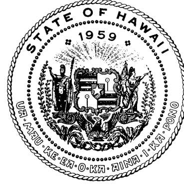
(A) An employee who fails or refuses to report to a laboratory for a substance abuse test pursuant to section 329B-5.5;

(B) An employee who is in violation of section 329-122(c)(2)(B);

(C) An employee whose job requires the employee to not be under the influence of substances, such as a bus driver, a heavy machinery operator, a construction worker, or other employee with a job that has safety issues; or

(D) An employee whose employer would be in violation of any federal law or regulation by having an employee who tested positive for the presence of cannabis as set forth in this paragraph."

DAVID Y. IGE
GOVERNOR OF HAWAII



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LATE

Testimony COMMENTING on H.B. 2729, HD2, SD1
RELATING TO CANNABIS FOR MEDICAL USE.

SENATOR DONOVAN M. DELA CRUZ, CHAIR
SENATE COMMITTEE ON WAYS AND MEANS
Hearing Date: Thursday, March 29, 2018 Room Number: 211

1 **Fiscal Implications:** None determined.

2 **Department Testimony:** Thank you for the opportunity to COMMENT on this bill. The
3 Department SUPPORTS some provisions with clarifications, definitions, and recommended
4 language changes, and OPPOSES other provisions.

5 In summary, the bill:

6 1. Establishes a reciprocity process for medical cannabis patients, which requires the
7 Department, under certain conditions, to register qualifying out-of-state patients
8 and parents, guardians or persons having legal custody of out-of-state patients
9 who are under eighteen years of age;.

10 2. Allows but does not require the Department to accept written certifications of
11 debilitating medical condition for up to three (3) years if the condition is chronic
12 in nature;

13 3. Clarifies that dispensaries may retest their failed batches of cannabis or
14 manufactured products; and

15 4. Prohibits employers from taking certain actions against employees for testing
16 positive for cannabis is the patient is a registered medical cannabis patient.

Regarding reciprocity, the Department SUPPORTS the proposed system with the following amendment:

On page 5, beginning at line 16:

"(d) In the case of qualifying out-of-state patients who are under eighteen years of age, the department shall register the qualifying out-of-state patient and the caregiver of a qualifying out-of-state patient and may register two caregivers for a minor qualifying out-of-state patient; provided that both caregivers are the parent, guardian, or person having legal custody of the minor qualifying out-of-state patient."

The Department wishes to underscore that the requirement for out-of-state patients to have government-issued photo identification from the same state that issued their medical cannabis card may prevent some out-of-state patients from qualifying in Hawaii. An out-of-state patient who has a medical cannabis card and identification from two different states would not be eligible to register as an out-of-state patient in Hawaii. The Department supports this restriction because it would prevent individuals who do not qualify for medical use of cannabis in their home state from using a card obtained in some state where it is particularly easy to qualify, and using that card to gain access to medical cannabis in Hawaii.

The Department OPPOSES adding "edible cannabis products" as an allowed product. Notwithstanding the limitations expressed in the measure, edibles are more susceptible to overdosing due to delayed effects on persons resulting from differences of ingestion rates. Delayed effects may lead persons to consume more edibles and could cause overdosing.

1
2 Regarding multi-dose packs, the Department SUPPORTS this as cost beneficial to
3 dispensaries and patients as long as dispensing limits are not exceeded. Department inspections
4 will determine compliance.
5
6 The Department respectfully requests an amendment on the exempt status of the
7 dispensary licensing supervisor position and inspector positions be made permanent to aid in the
8 Department's recruitment and retention efforts. Without permanence, the exempt status requires
9 the positions to be renewed annually and makes it difficult for qualified persons in other
10 permanent positions to want to apply.
11
12 Thank you for the opportunity to testify on this bill.

LATE

HAWAII EDUCATIONAL ASSOCIATION FOR LICENSED THERAPEUTIC HEALTHCARE

To: Senator Donovan Dela Cruz, Chair Ways and Means (WAM)
Senator Gilbert Keith-Agaran, Vice-Chair WAM
Members of the WAM Committee

Fr: Blake Oshiro, Esq. on behalf of the HEALTH Assn.

Re: Testimony **In Strong Support** on **House Bills (HB) 2729, HD2, SD1**
RELATING TO CANNABIS FOR MEDICAL USE -

Dear Chair Dela Cruz, Vice-Chair Keith-Agaran, Members of the Committee:

HEALTH is the trade association made up of the eight (8) licensed medical cannabis dispensaries under Haw. Rev. Stat. (HRS) Chapter 329D. We **support HB2729, HD2, SD1** as an important bill for the dispensary industry in order to enhance the medical cannabis dispensary program with additional patient access, product controls and safety, and provide improvements to the administration of the program.

The bill before you covers a range of issues, some of which were we are the product of recent discussions with the Department of Health (DOH) to find compromises on reciprocity, pulmonary devices, telehealth and laboratory testing. We the other issues in the bill will provide more access to qualified patients and protect their rights to use medical cannabis.

1) Reciprocity program – PART I

The current law, Haw. Rev. Statutes (HRS) 329D-13, provided for a start date of January 1, 2018 for a program where patients from other states would be able to legally purchase medical cannabis from dispensaries. Unfortunately, that program has yet to be implemented and it is our understanding that it is highly unlikely for the Department of Health (DOH) to implement the program at any time in the foreseeable future.

As such, the bill proposes to allow the DOH to register out-of-state patients, and out-of-state patient parents, under certain conditions where the DOH maintains its authority to uphold a rigorous system, and provides the DOH the authority to ensure that Hawaii residents are not adversely affected. As Hawaii is a state known for welcoming visitors, we believe that it is important for Hawaii to allow patients with debilitating conditions to come here and still have access to their medical cannabis, which they would not be able to legally transport here.

2) Extend possible validity of a qualifying patient's written certification from 1 to 3 years

The current law authorizes a qualified patient’s written certification to be valid for up to one year. However, because most, if not all, of the qualifying conditions under HRS

329-121 are chronic debilitating diseases and conditions by definition, these conditions will likely be with the patient for a significant and ongoing time. While their condition could be approached with many different types of treatment, the underlying condition will likely still remain with the patient, and we believe that medical cannabis should always remain as part of, it not an option for, their ongoing treatment.

Please note, that the bill already contains this change in the definition of "written certification" under Haw. Rev. Stat. 329-121, but our proposed amendments changes to the reciprocity system affects the same definitions of "written certification" so it is included in that attachment.

3) Telehealth – PART II

The bill expands the use of telehealth to create a bona fide physician/patient or advance practice registered nurse/patient relationship. This is especially important in rural areas where provider access is difficult and also critical for patients suffering from a debilitating condition which would preclude their ability to go to a face-to-face traditional visit with a provider. Therefore, we support this approach as we believe it will help increase and ease patient access.

4) Allowed Products – PART III

The bill expands the list of approved products that a licensed dispensary would be able to sell to a qualified patient.

a. Add safe pulmonary administration to the list of medical cannabis products

We support this addition to possible product offerings because of the ability for more precise dosage administration, safe inhalation of certain patients and their conditions, and the possible stigma associated with "smoking" cannabis.

Our research has shown that administration through pulmonary inhalation, can be more effective for certain patients who have a low tolerance for, or resistance to, smoking the cannabis. It is more readily absorbed, and its effects felt more quickly, so that the potential for taking too large a dose, is minimized.

The language ensures that the device's heating element would be made of inert materials, and there is a temperature control, so that there is additional safety against a device becoming unsafe and combustible.

We have been in fruitful discussions with the DOH and believe we are getting closer to reaching some proposed compromise language. As such, we respectfully request that you leave this section in the bill so that we can continue our discussions.

b. THC limit per pack or container

Because edibles are not an authorized cannabis product, there is little need for any package or container limit. Should that product list ever change, then this provision should likely be revisited.

c. Edible products

While we do not oppose this additional inclusion of allowing edible products, we are not advocating for these types of products at this time. As such, our position is neutral on this issue.

5) Appeal process for laboratory testing

The bill also includes a provision for a process for appealing a failed batch from a laboratory test. The current DOH administrative rule implies only testing by the same laboratory, we are in discussions to see if we can find an administrative or implementation work-around on this issue.

We support the language in the bill to clarify the ability to re-test an initially failed batch. We believe that this is an important issue because there are certain tests that we understand are more likely to result in “false positives,” and there is no recourse under the current system when that conclusion is reached. The costs for the retesting is borne by the licensed dispensaries, and we believe that even this additional cost is still more reasonable than the cost of an entire lost “failed” batch, which in the end, directly affects the patient’s cost and access to their desired cannabis or products.

Thank you for your consideration.