Akamai Cannabis Clinic
3615 Harding Ave, Suite 304
Honolulu, HI 96816

TESTIMONY ON HOUSE BILL 1383 HOUSE DRAFT 2
RELATING TO MARIJUANA
By
Clifton Otto, MD

Senate Committee on Public Safety, Intergovernmental, and Military Affairs
Senator Clarence K. Nishihara, Chair
Senator Glenn Wakai, Vice Chair

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Glenn Wakai, Vice Chair

Tuesday, March 19, 2019; 10:30 AM
State Capitol, Conference Room 016

Thank you for the opportunity to provide testimony on this measure, which should include furthering the decriminalization of our Medical Use of Cannabis Program.

Please stop telling our patients and dispensaries that they must violate federal law in order to engage in the medical use of cannabis in Hawaii.

This is exactly what the Legislature is doing when it accepts the medical use of cannabis under state law in order to create a state-regulated medical use of cannabis program, and then fails to recognize the impact that such medical use has upon the state and federal scheduling of cannabis.

Let's be very clear here: we are not suggesting that cannabis be re-scheduled.

We are talking about the finding that state medical use of a Schedule I controlled substance is "currently accepted medical use in treatment in the United States", which means that the medical use of cannabis in Hawaii does not satisfy the criteria for a federal Schedule I controlled substance. The medical use of cannabis in Hawaii also does not satisfy the criteria for a Hawaii State Schedule I controlled substance, because a controlled substance with medical use cannot have the "highest degree of danger".

One way to solve this dilemma is to formally recognize the scheduling exemptions for the medical use of cannabis that already exist by way of the impact that such medical use has upon state and federal law. This can be accomplished by employing the phrase "does not apply", for which we already have several notable examples:

Exempt from federal Schedule I:
21 CFR 1307.31 - Native American Church.
"The listing of peyote as a controlled substance in Schedule I **does not apply** to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."

Exempt from Guam Schedule I:
Section 2. The following *new* subsection (g) is added to Appendix A of Chapter 67 of Title 9 Guam Code Annotated, to read as follows:
"(g) The enumeration of marihuana, tetrahydrocannabinols or chemical derivatives of these as Schedule I controlled substances **does not apply** to the medical use of cannabis pursuant to the Joaquin Concepcion Compassionate Cannabis Use Act of 2013."

Exempt from the federal restriction on carriage aboard aircraft:
14 CFR 91.19 Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.
"(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft.
(b) Paragraph (a) of this section **does not apply** to any carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances authorized by or under any Federal or State statute or by any Federal or State agency."

The work of substantiating the finding that Hawaii's Medical Use of Cannabis Program does not violate federal law has already been done:

Hawaii's State Medical Use Argument:

Point #1 - The federal Controlled Substances Act (CSA) says that a substance cannot be in federal Schedule I if it has "currently accepted medical use in treatment in the United States". (See 21 U.S.C. 812. Schedules of Controlled Substances, (b) Placement on schedules; findings required, (1) Schedule I, (B) The drug or other substance has no currently accepted medical use in treatment in the United States.)

Point #2 - The courts have acknowledged that Congress never defined the term "currently accepted medical use", which leaves it to the states to determine what constitutes accepted medical use in their state. (See ACT v. DEA, 930 F.2d 936,936 (D.C. Cir. 1991): Neither the statute nor its legislative history precisely defines the term "currently accepted medical use.)

Point #3 - The courts have acknowledged that having medical use in just one state is sufficient for there to be medical use in the United States. (See Grinspoon v. DEA, 828 F.2d 881,886 (1st Cir. 1987): Congress did not intend "accepted medical use in treatment in the United States" to require a finding of recognized medical use in every state.)

Point #4 - The Supreme Court has acknowledged that the decision-making authority to accept the medical use of controlled substances is reserved to the states. (See Gonzales v. Oregon (2006): The Attorney General has rulemaking power to fulfill his duties under the CSA. The specific respects in which he is authorized to make rules, however, instruct us that he is not authorized to make a rule declaring illegitimate a medical standard of care and treatment of patients that is specifically authorized under state law.)

Point #5 - The State of Hawaii exercised its authority to accept the medical use of a controlled substance when it established that cannabis has medical use by enacting Hawaii's Medical Use of Cannabis Act in 2000, thereby creating a state-regulated medical use of cannabis program. (See Hawaii's Uniform Controlled Substances Act, HRS 329, Part IX. Medical Use of Cannabis.)

Point #6 - Federal preemption is not relevant to the medical use of cannabis in Hawaii because there is no direct conflict between state and federal law when it comes to the state-accepted medical use of a Schedule I controlled substance. State law says that cannabis has accepted medical use, and federal law says that a substance cannot be in Schedule I if it has accepted medical use.

Point #7 - The federal regulation that still has marijuana listed as a Schedule I controlled substance does not apply to the accepted medical use of cannabis in Hawaii, because the application of this regulation to the state-accepted medical use of cannabis goes against federal law. (See 21 CFR 1308.11 Schedule I. (d) Hallucinogenic substances. (23) Marihuana and (31) Tetrahydrocannabinols.)

Therefore, in order to re-harmonize the state and federal regulation of the medical use of cannabis in Hawaii, the following amendment to Hawaii's Uniform Controlled Substances Act (UCSA) first needs to be made:

Section 329-14, Hawaii Revised Statutes, is amended by adding the following subsection:
(f) The enumeration of cannabis, tetrahydrocannabinols or chemical derivatives of these as Schedule I controlled substances does not apply to the medical use of cannabis pursuant to Section 329, Part IX, and Section 329D, Hawaii Revised Statutes.

For the sake of our patients, please do not allow this bill to pass out of your committees until this issue has been addressed.