



# Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 13, 2017

The Honorable Jeff Barker, Chair  
House Judiciary Committee, Members

**RE: House Bill 2613, testimony in opposition**

Dear Chair Barker and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and parents in juvenile dependency proceedings, juvenile delinquency proceedings, adult criminal prosecutions and appeals, and civil commitment proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to House Bill 2613.

House Bill 2613 seeks to expand the definition of “intoxicants” in Oregon’s implied consent laws to include “any other drug, as defined in ORS 475.005, that adversely affects a person’s physical or mental faculties to a noticeable or perceptible degree.” OCDLA has the following concerns about the bill.

**HB 2613 constitutes a large expansion of criminal liability with lack of clear meaning of its terms:**

Under current law the general public is apprised of the inherent risks in operating a motor vehicle after consuming alcohol or a controlled substance; the public knows that alcohol and controlled substances can impair the person’s faculties to drive, and therefore criminal liability is appropriately placed upon those who assume and abuse that risk.

House Bill 2613 does not provide corresponding notice to the public as to what conduct is prohibited in regards to over the counter or non-controlled drugs. HB 2613 defines “drug” so broadly under the definition of ORS 475.005 such that the only disqualified substance is food. ORS 175.005 (13) provides:

(13) “Drug” means:

(c) Substances (other than food) intended to affect the structure or any function of the body of humans or animals;

Many substances that we ingest are intended to affect the function of the human body. Caffeine and nicotine would be one such example. Consumption of a Starbucks 20 ounce “clover brewed coffee” can have up to 415 mg of caffeine, enough to affect the heart-rate and hand-steadiness of most consumers.<sup>1</sup> In fact, caffeine-based DUII arrests have occurred in Washington and California under an expansive definition of intoxicant.

There is no standardized format for warnings associated with over-the-counter medications. Many products state that they “may cause drowsiness;” others simply state that a person should “use caution” when operating a vehicle; others contain explicit warnings. Whereas a medical professional typically instructs a patient as to dosage and driver safety with a “controlled substance,” typically no health care professional dispenses an over-the-counter substance. HB 2613 criminalizes persons who engage in good faith conduct associated with driving, which cannot be said for those who consume alcohol or controlled substances.

### **The affirmative defense is problematic:**

Several aspects of the affirmative defense in the Dash 1 amendment cause concerns:

Requires admission of guilt: The Dash 1 amendment requires that when filing a notice of intent to rely upon an affirmative defense, it is necessary for the person to first admit to guilt of the underlying charge of impaired driving. This requirement in admitting guilt is not present in other affirmative defenses in Oregon’s criminal laws.

Release of all medical records underlying the prescription: In the event of prescribed medication, the Dash 1 amendment requires that the person must consent to the “full release to the prosecuting attorney of the defendant’s medical records that relate to the defendant’s consumption of the drugs.” It is difficult to understand the need for this provision except to intimidate those who wish to avail themselves of the defense, imposing an invasion of privacy so onerous that some persons would elect to not assert this defense. An individual who can prove she has a valid prescription from a qualified medical provider to treat an anxiety disorder or depression ought not have to authorize a “full release” for every treatment record related to the underlying condition.

### **HB 2613 dispenses with the state’s obligation to provide notice of its theory of prosecution:**

HB 2613 Section 3 on lines 23-26 removes the state’s existing obligation to plead and provide the defense with notice of its theory of prosecution: i.e., whether the defendant is impaired due to alcohol, an inhalant or a controlled substance. It is difficult to understand the legitimacy of eliminating this requirement of notice. An accused is entitled to what he is being charged with and what entails the state’s theory of prosecution. Inefficiencies will occur at trial if the state presents testimony that the defendant could not foresee because

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<sup>1</sup> “Starbucks Caffeine Contents: How Much Caffeine in Starbucks Coffee Drinks?”  
<http://coffeetea.about.com>.

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of the lack of this notice, thereby requiring the defense additional time to contact expert witness testimony.

**HB 2613 will have unintended consequences:**

Finally, the bulk of the population that will be affected by the reach of HB 2613 will be the frail, aging and elderly, as they consume the most over-the-counter and prescribed drugs.

OCDLA respectfully urges your “nay” vote on HB 2613.

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