

OVERVIEW

THE AUDITOR
STATE OF HAWAII

Sunset Evaluation of the Forfeiture Program

Summary

Chapter 712A, Hawaii Revised Statutes, the Hawaii Omnibus Criminal Forfeiture Act, provides for the seizure and forfeiture of property associated with certain unlawful activities and for the distribution of the property, or its proceeds, to state and county law enforcement agencies for their use.

The forfeiture law is scheduled for repeal on July 1, 1996. Act 196, 1993 Session Laws of Hawaii, directed the State Auditor to assess whether the public interest requires the forfeiture program to be modified or repealed. The act also directed us to make recommendations for future policies, practices, and procedures for the forfeiture program.

Our evaluation focused on the impact of forfeiture, the provisions of the forfeiture law, and the activities of the Department of the Attorney General in implementing it. We did not evaluate the performance of the county prosecuting attorneys' offices and county police departments, although we did contact officials of these offices for information and their views.

Our evaluation concluded that the public interest does not require repeal of the forfeiture law and that the Department of the Attorney General appears to have implemented the law properly. We also concluded that some improvements in the law would be appropriate.

We found that the impact of the forfeiture program is uncertain. The program seems to have captured some of the profits of crime, but the evidence that it deters crime is inconclusive. On the one hand, well over \$1 million in property is being forfeited each year, and law enforcement authorities generally believe that forfeiture has deterred crime. On the other hand, the impact of forfeiture in deterring crime is difficult to measure because many factors affect trends in crime.

We also found that the forfeiture law could be made more fair by incorporating certain provisions of the *Uniform Controlled Substances Act (1994)* issued by the National Conference of Commissioners on Uniform State Laws as a model for states to consider.

This conclusion does not reflect any evidence of abuse in Hawaii. However, forfeiture is a controversial concept. Civil and administrative forfeiture—the procedures favored by law enforcement—can occur without a criminal conviction or even a criminal charge and without the “beyond a reasonable doubt” protections that would otherwise apply. In addition, forfeiture requires property owners to bear the burden of proving that their interest in the property is exempt from forfeiture once the government establishes a likelihood that the property is forfeitable.



Under these circumstances, additional safeguards proposed in the 1994 model act, such as raising the government's burden of proof from probable cause to preponderance of the evidence in civil judicial forfeiture cases, may be desirable.

We also found that the Criminal Forfeiture Fund administered by the Department of the Attorney General does not clearly link benefits and charges, escapes the normal process of legislative appropriations, and is not necessary. Repealing the fund would direct some of the proceeds from asset forfeiture into the state general fund and improve accountability and legislative oversight of expenditures of these proceeds. The 1994 model act favors the general fund approach.

Recommendations and Response

We recommend that the Legislature consider amending Chapter 712A, the Hawaii Omnibus Criminal Forfeiture Act, as follows: (a) require the government in civil judicial forfeiture cases to prove by a "preponderance of the evidence" that the property is subject to forfeiture; (b) require courts to limit the scope of a forfeiture to the extent that they find the effect of the forfeiture grossly disproportionate to the nature and severity of the crime; and (c) repeal the Criminal Forfeiture Fund so that some forfeiture proceeds can be deposited into the state general fund for legislative appropriation.

In her comments on our preliminary draft report, Hawaii's attorney general said she was deeply disappointed by our recommendations. Despite our positive assessment of her department's operation of the forfeiture program, the attorney general suggests that the State Auditor has a "persistent anti-law enforcement bias." This is not the case. We believe that our evaluation of the forfeiture program is fair and objective.

For example, our proposal to change the burden of proof in civil forfeiture cases is found not only in the 1994 model act but also in the 1993 report of the President's Commission on Model State Drug Laws, of which Honolulu prosecuting attorney Keith Kaneshiro and many other top law enforcement officials from across the nation were members.

The attorney general also argues that our suggestions for modifying the forfeiture law address "a nonexistent problem." However, our report simply responds to the Legislature's request for policy recommendations. Our suggestions are preventive in nature. They are based on the conclusions of respected national authorities, and are intended to contribute to rational discussion of important issues in law enforcement.

While we stand by our position that the forfeiture law could be made more fair, we found some of the attorney general's comments helpful in finalizing our report. We made a number of changes for the sake of clarity or to accommodate arguments of the attorney general that we found persuasive.

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