

AUDIT REPORT
NO. 72-1
JANUARY, 1972

AUDIT
OF THE
OFFICE OF THE
PUBLIC DEFENDER

A REPORT TO THE GOVERNOR
AND THE LEGISLATURE
OF THE STATE OF HAWAII

**THE OFFICE
OF THE LEGISLATIVE AUDITOR**

The office of the legislative auditor is a public agency attached to the Hawaii State legislature. It is established by Article VI, Section 7, of the Constitution of the State of Hawaii. The expenses of the office are financed through appropriations made by the legislature.

The primary function of this office is to strengthen the legislature's capabilities in making rational decisions with respect to authorizing public programs, setting program levels, and establishing fiscal policies and in conducting an effective review and appraisal of the performance of public agencies.

The office of the legislative auditor endeavors to fulfill this responsibility by carrying on the following activities.

1. Conducting examinations and tests of state agencies' planning, programming, and budgeting processes to determine the quality of these processes and thus the pertinence of the actions requested of the legislature by these agencies.
2. Conducting examinations and tests of state agencies' implementation processes to determine whether the laws, policies, and programs of the State are being carried out in an effective, efficient and economical manner.
3. Conducting systematic and periodic examinations of all financial statements prepared by and for all state and county agencies to attest to their substantial accuracy and reliability.
4. Conducting tests of all internal control systems of state and local agencies to ensure that such systems are properly designed to safeguard the agencies' assets against loss from waste, fraud, error, etc.; to ensure the legality, accuracy and reliability of the agencies' financial transaction records and statements; to promote efficient operations; and to encourage adherence to prescribed management policies.
5. Conducting special studies and investigations as may be directed by the legislature.

Hawaii's laws provide the legislative auditor with broad powers to examine and inspect all books, records, statements, documents and all financial affairs of every state and local agency. However, the office exercises no control functions and is restricted to reviewing, evaluating, and reporting its findings and recommendations to the legislature and the governor. The independent, objective, and impartial manner in which the legislative auditor is required to conduct his examinations provides the basis for placing reliance on his findings and recommendations.



**LEGISLATIVE AUDITOR
STATE CAPITOL
HONOLULU, HAWAII 96813**

AUDIT OF THE OFFICE OF THE PUBLIC DEFENDER

**A Report to the
Governor and the Legislature of the State of Hawaii**

**Submitted by the
Legislative Auditor of the State of Hawaii**

**Audit Report No. 72-1
January 1972**

FOREWORD

This audit report is the result of our examination of the administration, operational controls, and financial management of the public defender program and the financial transactions of the office of the public defender. The audit was conducted pursuant to a request by the presiding officers of both houses of the State legislature.

As is our normal practice, we requested the agencies affected by our examination to submit in writing their comments on our findings and recommendations and to indicate what action they have taken or intend to take on our recommendations. The responses that we have received are appended in Part III, Responses of Affected Agencies.

We wish to express our sincere appreciation for the excellent assistance and cooperation extended to our representatives by the management and staff of the State judiciary, the Legal Aid Society of Hawaii and the office of the public defender.

Clinton T. Tanimura
Legislative Auditor

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PART I
INTRODUCTION AND SOME BACKGROUND

Chapter 1

INTRODUCTION

On May 26, 1971, the President of the Senate and the Speaker of the House of Representatives, Sixth State Legislature, requested this office, by joint letter, to conduct an audit of the office of the public defender. This is a report on that audit.

Objectives of the Audit

Our audit had the following objectives:

1. To determine the adequacy of the administration of and the operational controls exercised over the public defender program.
2. To ascertain the legality and propriety of the financial transactions of the office of the public defender.
3. To recommend actions as appropriate to correct any deficiencies as may exist.

Scope of Audit

The public defender program consists of those activities whereby a defendant in a criminal case who is financially unable to secure the services of a private defense counsel is furnished counsel at State expense. A counsel at State expense is appointed by the court. The court may appoint either the office of the public defender or an attorney in private practice.

The focus of our audit was the office of the public defender and those portions of the operations of the State Judiciary and the Legal Aid Society of Hawaii which bear upon the activities of the office of the public defender. That part of the public defender program relating to court-appointed, private attorneys was excluded, except to the extent of obtaining data for information purposes. This is not to mean, of course, that matters contained in this report are not applicable to the practice of appointing private attorneys; in certain instances they are.

Under the restricted definition of the "public defender program" adopted for the audit, those defender programs funded by the federal Model Cities program were excluded from the purview of the examination.

The audit examined the practices and financial transactions and records relating to the office of the public defender during the period February 2, 1970 to June 30, 1971. The practices and financial transactions and records were examined for the purpose of satisfying the objectives of the audit, and not for the purpose of attesting to the reasonableness and accuracy of the financial statements or determining the effectiveness of the public defender program or assessing the efficiency with which the program has been carried out.

Various allegations regarding the operations of the office of the public defender were made both publicly and privately. Generally these allegations charged the office with: (1) irregularities in administrative and operational practices and (2) questionable expenditures. Our audit considered all of these allegations. Most were found to be without merit. Our findings with respect to those allegations having some substance are included in this report.

Organization of the Report

This report is organized into two parts as follows: Part I (chapters 1 and 2) - Introduction and Background; Part II (chapters 3 and 4) - Findings and Recommendations.

Definition of Terms

There are certain terms which are used throughout this report. The terms and their definitions or references are as follows:

Appointed private counsel refers to an attorney in private practice (as distinguished from the public defender) who is appointed by a court to provide legal services at State expense to an indigent defendant in a criminal or related case.

Public defender program refers to that program by which an attorney in private practice or the public defender is appointed by a court to provide legal services at State expense to an indigent defendant in a criminal or related case.

Indigent refers to a person who is without financial means to pay for competent legal advice and representation.

Felony means an offense that is punishable with imprisonment for life not subject to parole or for a longer period than one year.

Misdemeanor means every offense not a felony.

Appropriation means authorization granted by the legislature to make expenditures and to incur obligations for specific purposes.

Encumbrances means obligations in the form of purchase orders, contracts, or salary

commitments which are chargeable to an appropriation and for which a part of the appropriation is reserved. They cease to be encumbrances when paid or when they become actually due and payable.

Expenditures means actual cash disbursements for goods delivered or services rendered, including expenses and capital outlays.

Chapter 2

SOME BACKGROUND

Prior to November 1968, by statute, an indigent person charged with the commission of a felony, but not a misdemeanor, was furnished counsel at State expense. A counsel in each case was appointed by the court from among attorneys in private practice.

In November of 1968, Article I, Section 11 of the Constitution of the State of Hawaii was amended to include the following provision:

"... The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days."

This amendment has extended the indigent's right to counsel to misdemeanor as well as felony cases. It has in effect necessitated the appointment of counsel in almost all criminal cases involving indigent defendants.

To implement the constitutional provision, Act 223 was enacted by the legislature in 1969. That act has been subsequently amended by Act 185, SLH 1971.

Act 223, SLH 1969

Act 223 required the State Supreme Court to "contract with a non-profit organization which, for at least the past five years, has been providing administrative support to lawyers who are duly licensed by the Supreme Court of the State of Hawaii to provide legal services to indigents." The act provided that the "non-profit organization or division within the non-profit organization which provides the services ... shall be named the office of the public defender."

The act required the by-laws of the non-profit organization to provide for an eleven-member defender council to serve as the governing committee of the office of the public defender. It provided that five members shall be appointed by the board of directors of the non-profit organization, two members by the governor, two by the president of the senate and two by the speaker of the house of representatives. Although the act provided for contracting by the Supreme Court with a

non-profit organization, it also retained in the courts the authority to appoint private counsel in any situation in which the courts determined such appointment advisable.

Act 223 took effect on July 1, 1969. However, the appointments to the defender council were not completed until December 1969. Shortly thereafter in January 1970, the council selected the first public defender. The office of the public defender was created as a division of the Legal Aid Society of Hawaii, a non-profit organization. The State Supreme Court entered into a contract with the Legal Aid Society for the services of the office of the public defender, and the office became operational on February 2, 1970.

Act 185, SLH 1971

Act 185 became effective on July 1, 1971. Under this act, an office of the State public defender is created within the office of the

governor. The governor is to appoint a five-member defender council (replacing the eleven-member council formed under Act 223). At least one member of the council is to be named from each county. The council is empowered to appoint the State public defender. The act also authorizes the governor to contract with a non-profit organization to provide legal services to indigent defendants.

As has been the practice under Act 223, SLH 1969, the general appropriations act of 1971 appropriated moneys for legal services for indigents to the Judiciary. Act 185, however, provides that this appropriation may be transferred to the office of the governor to carry out the purposes of the act.

As of this writing, the five-member council has been appointed. Pending the appointment of the public defender by the council and the full implementation of Act 185, the State Judiciary has contracted with the Legal Aid Society of Hawaii to continue to provide on a temporary basis legal services to indigent defendants.

PART II

FINDINGS AND RECOMMENDATIONS

Chapter 3

ADMINISTRATION AND OPERATIONAL CONTROLS

The public defender program has a number of administrative problems. They all revolve around the question of "indigency." Specifically, they concern (1) the standards of eligibility for counsel at State expense; (2) the procedure of determining the fact of indigency; (3) the extent of inquiry and verification of a defendant's financial ability; and (4) recovery of costs from defendants furnished counsel at State expense.

In the matter of operations, our audit found that the office of the public defender deviated from those rules (which govern the office) relating to (1) outside employment and (2) maintenance of time sheets.

Each of the administrative problems and operational deficiencies is explained in detail below. The explanations are preceded by a brief description of the manner in which an indigent defendant is provided counsel. The description provides a backdrop for the discussion of the four administrative problems.

Counsel Appointment Process

Counsel for an indigent defendant is, in every case, appointed by the court. Under both Act 223 and Act 185, the court may appoint either the public defender or an attorney in private practice. The general practice, since the institution of the public defender system, has been for the court to appoint the public defender, except in those instances where for some reason, such as a conflict of interest, the public defender cannot properly serve as counsel for the indigent.

Appointment of counsel is generally made in the following manner. *First*, a request for counsel is made by the indigent defendant to the court or the public defender. When a request is made to the court it is generally after arrest and at the time of arraignment when the court explains to the defendant his right to counsel. When a request is made directly to the public defender, it usually occurs sometime between the time of arrest and arraignment. *Second*, upon the request for counsel, an inquiry is made by the court or the public defender's office into the financial condition of the defendant for the purpose of determining indigency. *Third*, if the defendant is determined to be an indigent, the court appoints either a private attorney or the public defender as counsel for the defendant.

Standards of Eligibility

Under both Act 223, SLH 1969, and Act 185, SLH 1971, the question of whether or not a defendant is "indigent" is required to be determined "according to standards of eligibility established by the Supreme Court." To date, the Supreme Court has not formally established any set of standards, and the courts are currently determining eligibility on a case-by-case basis.

The reasons why the Supreme Court has not established any set of standards appear to be as follows. *First*, indigency is a factual question, and the factual financial situations of defendants vary from case to case and are not easily susceptible to standardization. Indigency is defined by both Act 223 and Act 185 as financial inability to pay for private counsel. The time when the defendant is in need of counsel is the critical point in determining financial ability. Many factors influence the financial ability of a defendant to pay for counsel at the time he needs one; his current assets and income are not the sole determinants. The liquidity of the defendant's assets, his borrowing power and his financial obligations are examples of the kinds of factors which are relevant in ascertaining financial ability. The diversity of factors to be considered in any given case makes it extremely difficult to establish any set of specific standards, such as income level, which can be applied uniformly in all cases. To do so would run the risk of creating a class of defendants who, although not eligible under such specific standards, are nevertheless in fact financially unable to engage private counsel due

to certain circumstances. To create such class of defendants would be discriminatory and contrary to the constitutional right to counsel in criminal cases. It appears that, if established at all, the standards can provide but only general guidelines enumerating examples of the kinds of factors which must be considered in determining eligibility—the kinds of factors which the various courts are already, as a practical matter, considering.

Second, the establishment of standards, particularly specific standards, by the Supreme Court poses potential impediments to the full exercise of the right of an indigent defendant to a State-financed counsel. The question of the propriety of a lower court's denial of a defendant's request for counsel paid for by the State is appealable to the State Supreme Court. If the denial of counsel by the lower court is based upon the standards established by the Supreme Court, the appeal may be for naught. It may well be that by establishing standards, the Supreme Court has pre-judged the right of the defendant to State-paid counsel.

Determination of Indigency

Under both Act 223, SLH 1969, and Act 185, SLH 1971, the responsibility for determining whether or not a defendant is financially able to pay for private counsel rests in the courts. However, in several jurisdictions, this responsibility has been delegated to the office of the public defender. These jurisdictions include the district courts on Oahu and both the circuit and district courts on Maui and Hawaii.

In the district courts on Oahu, the circuit courts on Maui and the district courts on Maui and Hawaii, when a defendant requests the court for a counsel at State expense, the court, without any inquiry into the defendant's ability to pay for private counsel, immediately refers the defendant to the office of the public defender. The office of the public defender then proceeds to inquire into the defendant's financial ability. In the circuit and district courts on Maui and Hawaii, when a defendant makes a request for representation directly to the office of the public defender rather than petitioning the court, the office of the public defender, without referring the defendant to the court, proceeds to determine the defendant's financial capability. In those cases where the office of the public defender finds that the defendant referred to it by the court is not eligible for counsel at State expense or that the office is in doubt as to the defendant's eligibility or that, even if the defendant is eligible, the office cannot properly represent him for one reason or another, the office of the public defender makes a report to that effect to the court. In all other cases, however, the public defender makes no report to the court on its findings (except on occasions when requested to do so by the courts) as to defendant's eligibility. Rather, if it determines that the defendant is financially unable to secure private counsel and that the office can properly act as counsel, the office of the public defender, without formal court appointment, proceeds to represent the defendant. The court's approval of the findings of the public defender and appointment of the public defender to act as defendant's counsel

can only be implied from those portions of the minutes of the court's proceedings which note the defendant's initial referral to the office of the public defender or which note that the defendant was represented in court by the public defender.

The foregoing procedure is markedly different from the one followed in the circuit court on Oahu. There all requests for counsel at State expense are channeled through the court. If a defendant makes a direct application for representation to the office of the public defender, the office advises the defendant to make a request for counsel to the court. In all cases, the court turns the matter of ascertaining the facts regarding defendant's financial status to the adult probation office which makes a report to the court. The court reviews the adult probation office's report and enters its findings as to indigency into the court records. As appropriate, the court then formally appoints the office of the public defender to represent the defendant.

We think that in light of the requirements of statute, the district courts on Oahu and the circuit and district courts on Maui and Hawaii should follow the procedure in force in the circuit court on Oahu. This is not to say that where a court lacks staff—the district courts, for example—the office of the public defender cannot be called upon to assist in gathering facts about a defendant's financial condition. The court should, however, review the facts gathered by the public defender and enter its own findings into the records and formally appoint

the public defender, if appropriate, as counsel for the defendant.

Recommendation. We recommend that each court review the financial condition of a defendant and enter its findings into the court's records and formally appoint the public defender, if appropriate, as counsel for the defendant.

Financial Inquiry and Verification

The extent of inquiry into and verification of a defendant's financial condition varies from court to court and from branch to branch within the office of the public defender and between the courts and the office of the public defender. These differences are as follows.

1. The form used by the office of the public defender requires less financial and other personal data about a defendant than the form used by the courts.

2. The Honolulu branch of the office of the public defender does not completely fill out the financial and personal data form as do the branches on the neighbor islands (Hawaii, Maui and Kauai). This practice raises questions about the completeness of inquiry by the Honolulu branch in determining indigency.

3. Except for the branch on Hawaii, the office of the public defender does not require a defendant to submit financial and other information under oath or affirmation, although the courts so require.

4. The probation office of the First Circuit Court conducts a limited investigation of the financial representation of a defendant, but neither the other courts nor the office of the public defender makes any attempt to verify the financial information supplied by a defendant.

We believe that there should be some uniformity in the degree to which financial inquiry is had and verification of representations is made. In this connection, we note that an extensive examination into a defendant's financial condition might be more costly than it is worth. Further, verification of any depth might be time-consuming and affect adversely the right of the defendant to a speedy trial.

Recommendation. We recommend that the Judiciary review the current practices relating to inquiry into defendants' financial conditions and verification of defendants' representations and prescribe such guidelines as necessary to insure some degree of uniformity in the extent to which financial inquiry shall be had and verification made.

Recovery of Costs

Act 223, SLH 1969, provided that "[t]he Supreme Court may adopt rules under which the person on whose behalf counsel was provided . . . may be required to contribute towards or reimburse, at such times and upon such terms as may be appropriate, all or part of the counsel fees and expenses paid on his behalf."

The Supreme Court has not adopted any rules pursuant to this provision. Thus, the courts have not required reimbursements from any defendant but have accepted payments on a voluntary basis. It appears that the reason for not adopting rules requiring reimbursements from persons furnished counsel is the doubtful constitutionality of such rules. Rules requiring reimbursements in effect condition the exercise of the right to counsel on the defendant's promise to pay for the costs of counsel at a later date. A defendant may well decide not to seek or accept counsel, although he is entitled to one under the Constitution, because of the obligation to reimburse.

The provision authorizing the Supreme Court to adopt rules for the recovery of costs does not appear in Act 185, SLH 1971. The only mention of recovery of costs contained in Act 185 is as follows:

"If at any time after counsel is appointed, the court having jurisdiction in the matter is satisfied that the defendant is financially able to obtain counsel or to make partial payment for the representation, the court may terminate the appointment of counsel, unless the person so represented is willing to pay therefor. If appointed counsel continues the representation, the court shall direct payment for such representation as the interests of justice may dictate If at any time after his

appointment counsel should have reason to believe that a defendant is financially able to obtain counsel or to make partial payment for counsel, it shall be his duty to so advise the court so that appropriate action may be taken."

This provision appears to be concerned only with the question of whether or not a defendant is in fact indigent and thus entitled to counsel at State expense. Thus, no constitutional question regarding recovery of costs appears to arise under Act 185.

Violation of Rules

The defender council adopted the manual of the Legal Aid Society of Hawaii as rules to govern the operations and procedures of the office of the public defender. Our examination revealed violations of the manual as follows.

1. Outside employment. In 1970, a staff attorney acted as counsel for a non-profit organization, of which he is a member. This service to the organization was rendered outside the scope of the attorney's employment as a member of the staff of the office of the public defender. He received no compensation, and he provided services on his own time. However, he failed to secure prior written approval before acting as counsel for the organization as required by section 21-15(b) of the manual, to-wit:

“A staff lawyer who wishes to represent a client or otherwise act as counsel for a person or group who or which does not qualify for legal assistance by the society and who or which has not asked for the society to represent him or it (whether or not a fee is involved) must have the prior written consent of the general counsel before he may do so.”

2. Time sheets. The professional staff members of the office of the public defender have not kept time sheets as required by section 27-15(b) of the manual which states:

“Each attorney shall fill out a daily time sheet each day, and the following day give the time sheet to the directing legal secretary in his office”

Time sheets are valuable in controlling performance and cost, assessing past performance, and estimating future program resource requirements.

Recommendation. We recommend that the new office of the public defender, either under rules prescribed by the new defender council to govern the operations and procedures of the office or on its own volition, require its professional staff to maintain time sheets for the purposes of controlling performance and cost, assessing past performance and estimating future resource requirements.

Chapter 4

FINANCIAL TRANSACTIONS AND MANAGEMENT

Table 4.1 notes the resources which were available for and the expenditures made on account of the public defender program during fiscal years 1969-70 and 1970-71. This chapter discusses (1) the major items noted in table 4.1, (2) the funding problems for the fiscal period 1971-73, and (3) the need for budgetary and expenditure controls.

Resources and Expenditures

Resources. In both fiscal years (1969-70 and 1970-71), the State legislature appropriated \$308,000 to cover the costs of (1) operating the office of the public defender and (2) attorney fees for court-appointed, private counsel. In addition to State funds, the public defender program had available \$72,339 and \$81,513, respectively, in fiscal years 1969-70 and 1970-71, from other sources. These sources are noted in table 4.2.

“National Defender” is a Ford Foundation project. The sums noted as having been received from this source represent portions of the \$90,000 total grant made to the Legal Aid Society of Hawaii to assist in establishing a

**TABLE 4.1
STATEMENT OF RESOURCES,
EXPENDITURES, AND UNENCUMBERED BALANCE
FISCAL YEARS 1969-70 AND 1970-71**

	1969-70	1970-71
Resources:		
State funds	\$308,000	\$308,000
Other funds	72,339	81,513
Total resources	380,339	389,513
Expenditures (including encumbrances):		
Office of the public defender	178,883	352,031
Appointed counsel	157,087	161,663
Total expenditures	335,970	513,694
Unencumbered balance or (deficit)	44,369	[124,181]
Intra-Judiciary transfers		124,181
Unencumbered balance	\$ 44,369	\$ -

**TABLE 4.2
OTHER FUNDS**

	1969-70	1970-71
National Defender Project	\$35,000	\$30,000
Honolulu Community Action Program ...	12,000	
Interest income	820	
Funds from prior year	23,834	44,357
Recovery of cost	685	7,156
Total other funds	\$72,339	\$81,513

comprehensive statewide defender program. \$25,000 of the total grant was received by the Legal Aid Society in December 1968, \$35,000 in fiscal year 1969-70 and \$30,000 in 1970-71. Of the \$25,000 received in 1968, \$23,834 was carried over into fiscal year 1969-70; and of the total \$60,000 received in 1968 and fiscal year 1969-70, \$44,357 was carried over into fiscal year 1970-71. These carry-overs are noted in table 4.2 as "funds from prior year." Funds received from the "Honolulu Community Action Program" in 1969-70 were also for the purpose of assisting in establishing the public defender program. The funds from these two sources (National Defender Project and Honolulu Community Action Program) were intended to provide only initial support to the defender program. Thus, no additional funds from these sources will be forthcoming in subsequent years.

In both fiscal years, the defender program recovered a portion of its costs, either voluntarily or on order of the court, from defendants who received services of the public defender or court-appointed, private attorneys. In fiscal year 1970-71, an additional source of recovery was the federal government. The federal government reimbursed the program for services provided by the public defender at the request of the U. S. District Court (Hawaii) in federal criminal cases. The entire amount, \$685, recovered in fiscal year 1969-70, consisted of reimbursements from defendants; and \$5,896 of the total \$7,156 recovered in fiscal year 1970-71 consisted of payments by the federal government.

Expenditures. Expenditures totaled \$335,970 in fiscal year 1969-70 and \$513,694 in fiscal year 1970-71. The two major classes of expenditures were (1) expenses of the office of the public defender and (2) fees paid by the State Judiciary to court-appointed, private counsel.

The office of the public defender expended \$178,883 in fiscal year 1969-70¹ and \$352,031 in 1970-71. A detailed breakdown of these expenditures is presented in table 4.3.

The large increase in total expenditure in fiscal year 1970-71 over that of 1969-70 is due largely to an increase in work load and expansion of the staff of the office of the public defender. Work load increased from 1,467 cases² in 1969-70 to 3,161 in 1970-71. The defender office staff increased from an average³

¹The office of the public defender did not become operational until February 1970. Up to that time, limited public defender services were provided by the Legal Aid Society of Hawaii through its then criminal division. The sum of \$178,883 includes approximately \$50,500 expended by this criminal division during the period July 1969 through January 1970.

²The term "cases" as used in this report to denote work load or program size refers to instances of services rendered defendants by the office of the public defender or court-appointed, private counsel, as appropriate. Thus, if in a given court case there were two defendants, there were two "cases" of services rendered, and also if one individual was a defendant in two completely different court cases within a given period, there were two "cases" of services rendered during that period.

³The numbers reflect an average at any given time within the fiscal year.

TABLE 4.3

STATEMENT OF EXPENDITURES
OF THE OFFICE OF THE PUBLIC DEFENDER
FISCAL YEARS 1969-70 AND 1970-71

	1969-70	1970-71
Salaries	\$115,394	\$271,767
Office rental	7,322	20,661
Payroll taxes	5,695	15,384
Fee for service	2,484	11,501
Telephone	2,551	7,384
Equipment rental	535	4,256
Office supplies	2,051	3,634
Car mileage	1,210	2,008
Insurance	1,745	2,484
Subscription	408	808
Postage	212	1,180
Repairs and maintenance	12	447
Travel and subsistence	945	1,599
Other expenses	594	2,175
Office furniture, fixtures and equipment ..	28,500	2,944
Reference books	9,225	3,799
	<u>\$178,883</u>	<u>\$352,031</u>

of five attorneys, one investigator, one law clerk, two secretaries and two part-time employees⁴ in 1969-70 to an average of eleven attorneys, one investigator, two law clerks, seven secretaries and three part-time employees. The expenditures for office furniture, fixtures and equipment and reference books in fiscal year 1969-70 were made primarily to furnish the defender's office and to establish a law library.

Fees paid to court-appointed, private counsel totaled \$157,087 in fiscal year 1969-70 and \$161,663 in fiscal year 1970-71. Private attorneys were appointed by the courts primarily for defendants charged with felonies. The number of cases in which defendants were represented by private attorneys totaled 444 in fiscal year 1969-70 and 507 in fiscal year 1970-71. Although the number of cases in which private attorneys were appointed was more in fiscal year 1970-71 than in the prior fiscal year, the rate of referrals to private attorneys declined and the rate of referrals to the public defender increased. For example, the circuit court on Oahu in each month of the six-month period July to December 1970, on the average, appointed private attorneys in 53% and the public defender in 47% of the cases requiring counsel at State expense; however, in each month of the six-month period January to June 1971, on the average, it appointed private attorneys in 22% and the public defender in 78%

⁴Part-time employees are employees who, in addition to performing services with the public defender's office, serve other programs of the Legal Aid Society of Hawaii.

of the cases. This shift away from appointing private attorneys is the result of the expansion of the staff of the public defender's office to handle more cases. Currently, the appointment of private attorneys is generally limited to those instances where an appointment of the public defender may raise conflict of interest questions, such as in those situations where a number of defendants are charged with crimes arising from the same transaction and each is entitled to State-financed counsel.

Balance. Fiscal year 1969-70 closed with an unencumbered balance of \$44,369 (table 4.1). This sum included \$12 State funds (which lapsed and reverted to the State general fund) and \$44,357 of the funds received from the Ford Foundation through its National Defender Project. The carrying-over of this \$44,357 private source money into fiscal year 1969-70 means that State funds, rather than private funds, were used first to defray the expenses of the defender program in 1969-70, contrary to the provisions of section 9, Act 223, SLH 1969, to-wit:

“... funds from other sources which may be available to the non-profit organization shall be used first to the maximum extent possible, including any funds made available by the National Defender Project of the National Legal Aid and Defender Association...”

It should be noted, however, that the entire sum of \$44,357 was expended in fiscal year

1970-71, and that 1970-71 ended in a deficit. If the \$44,357 had consisted of State funds, the sum would have lapsed as of June 30, 1970 and, thus, given the appropriations made, fiscal year 1970-71 would have had a larger deficit.

The deficit in fiscal year 1970-71 was \$124,181 (table 4.1). The deficit was financed by a transfer of funds from other Judiciary programs. Several factors contributed to the deficit condition.

(1) As noted earlier, the program size increased significantly from 2,000 cases of representation of defendants by the public defender in fiscal year 1969-70 to approximately 3,700 in fiscal year 1970-71.

(2) To meet the demands of increased work load, an expansion of the staff of the office of the public defender was necessary.

(3) At the time the budget for fiscal year 1970-71 was prepared (about October 1969), the office of the public defender was not yet in operation, and there was no statistical basis for projecting the demand on the office, particularly the demand by those charged with misdemeanors to whom the right to counsel at State expense was extended by the 1968 State constitutional amendment. The State's experience up to the time of the establishment of the public defender's office was only with respect to felony cases. Under these circumstances, the Judiciary requested an amount (\$308,000) equal to that appropriated in the previous year.

Funding for 1971-73 Biennium

For the 1971-73 biennium, the legislature appropriated \$662,970 to the State Supreme Court and \$150,000 to the office of the governor, for a total of \$812,970 for the public defender program. The sum of \$662,970 appropriated to the Supreme Court was \$607,015 less than the \$1,269,985 which the Supreme Court originally recommended to the governor. The Supreme Court's initial request, the governor's recommendation and the final appropriation by the legislature for each year of the fiscal biennium are as follows:

Year	Request	Executive Budget Recommendation	Legislative Appropriation
Supreme Court			
1971-72	\$ 625,215	\$323,400	\$323,400
1972-73	644,770	339,570	339,570
	<u>\$1,269,985</u>	<u>\$662,970</u>	<u>\$662,970</u>
Governor			
1971-72	\$ -	\$ -	\$ 75,000
1972-73	-	-	75,000
Total	<u>\$1,269,985</u>	<u>\$662,970</u>	<u>\$812,970</u>

We make two observations regarding the appropriations. *First*, given the same program size and operational efficiency that prevailed in fiscal year 1970-71, the amounts appropriated for each year of the biennium will not be

sufficient to finance the cost of the defender program. Note that the total expenditure in fiscal year 1970-71 was \$513,694 (table 4.1). The total amount appropriated for each year of the 1971-73 biennium is \$398,400 and \$398,570, respectively.

Second, there is a need to clarify responsibility for the administration of the program's funds. Under Act 185, a new office of the public defender is created in the office of the governor. Pending the actual establishment of the office by the appointment of a new defender council and a new public defender, the Judiciary has continued to administer the defender program by contracting with the Legal Aid Society of Hawaii and the existing public defender office for interim defender services. Upon the establishment of the new office of public defender on an operational basis, it is assumed that the moneys appropriated to the Judiciary for the defender program would be transferred to the office of the public defender. However, there appear to be two issues which may pose some difficulty in accomplishing this transfer of funds.

(1) Should a deficit occur during the period between July 1, 1971 and the time the new office of the public defender becomes operational, will the Judiciary be responsible for finding means to finance the deficit, or will the responsibility be upon the new office of the public defender?

(2) In light of the fact that the appropriation to the Judiciary (\$662,970 for the

biennium) includes amounts to defray the cost of court-appointed, private counsel in those cases where the public defender is not the appropriate person to represent the defendant, how much of the appropriation should be transferred to the new office of the public defender; and if the entire amount is to be transferred, under what operational arrangement between the Judiciary and the office of the public defender?

While these problems are not insurmountable, we think that an early resolution is desirable so as not to hamper the operations of the program.

Budgetary and Expenditure Controls

The general management practice of any agency is to develop at the commencement of each fiscal year an expenditure plan based on the resources available (appropriations and funds from other sources) to the agency for that fiscal year. Such a plan outlines for each program the expected program level and the amount of the available resources to be used during the different periods (generally quarterly) in the fiscal year. The purpose of an expenditure plan is to insure that expenditures during the year are kept within the available resources. In cases where the size of the program is not within the control of the agency (such as in the case of the defender program where every indigent defendant must be supplied counsel at State expense and the number of defendants requiring

counsel is beyond the control of the Judiciary or the office of the public defender) an expenditure plan provides a means of estimating early the deficit, if any, likely to arise during the fiscal year.

In both fiscal years 1969-70 and 1970-71, no expenditure plan was ever developed. The Judiciary made no allocation of the resources available between the cost of the office of the public defender and the cost of court-appointed, private counsel. It paid out funds on an "as requested" basis throughout the year—that is to say, requests for payments were made of the Judiciary by the office of the public defender as it incurred costs.

As of the conclusion of our audit field work, there was no expenditure plan as yet developed for the current fiscal year (1971-72). We think that such a plan should be developed forthwith. An early development of the plan would enable an estimate to be made of the amount of the deficit (which is likely to occur) to be expected and, as appropriate, a request for additional funds to be formulated for presentation to the legislature at the next session.

Recommendation. We recommend that the Judiciary and the new public defender council formulate as quickly as possible an expenditure plan based upon the appropriations made by the legislature at its 1971 session.

**PART III
RESPONSES OF AFFECTED AGENCIES**

The preliminary draft of this report on the audit of the office of the public defender was completed in September 1971. In accordance with our normal practice, copies of the preliminary draft were transmitted on September 22, 1971 to the chairman of the newly created defender council (created under Act 185, SLH 1971); the chief justice of the State supreme court; president of the board of directors and the executive director of the legal aid society of Hawaii; the former chairman of the defender council (created under Act 223, SLH 1969); and the public defender. Copies of our transmittal letters to the present and former chairmen of the defender councils are attached as attachment nos. 1 and 2, respectively.

Responses were received from the former chairman of the defender council (attachment no. 3), the administrative director of the courts (attachment no. 4) and the public defender (attachment no. 5). They concurred with our findings and recommendations, except for certain matters on which the public defender presented his viewpoints. Our comments on the public defender's response follow.

Recovery of Costs

Our report noted the doubtful constitutionality of that provision contained in Act 223, SLH 1969, relating to the establishment of rules of the supreme court for the recovery of costs from the defendant to whom State-financed counsel is provided. We concluded that this problem appears to have been eliminated by Act 185, SLH 1971, which does not provide for adoption of rules to recover costs. We noted that Act 185 provides that the court having jurisdiction may terminate appointment of counsel if it finds at any time after counsel is appointed that the defendant is financially able to obtain counsel. We said that this provision "appears to be concerned only with the question of whether or not a defendant is in fact indigent and thus entitled to counsel at State expense." With this conclusion, the public defender has disagreed. He responded thus:

The basic question really has two parts, the first is whether or not the defendant is, in fact, indigent; the second is *when* shall such an inquiry be made? Because the Statute permits such inquiry to be continuously made, ("if at any time after counsel is appointed"), the defendant is constantly subject to a review of his financial condition with the result that the Court may at any time require that he make partial payment for the services of his attorney or else suffer termination of the attorney's appointment. Even the attorney is duty-bound by the Statute to advise the Court "at any time after his appointment" of a change in the defendant's financial circumstances. The defect of this section of the Statute, then, is its failure to specify *when* it is that we are concerned with the defendant's indigency. In such a situation it is entirely likely that a defendant whose financial condition is constantly subject to review by both his attorney and the Court will be reluctant to seek employment during the period of his representation and if, for some reason, he should acquire some unspecified sum of money or other asset, he may suffer the termination of his attorney's appointment, without even being a party to the arrangements made by the Court and the attorney employed to represent him. The Statute does not give any opportunity to the defendant to negotiate the amount of such "partial payment," and there is no maximum limit imposed. As the Supreme Court of California has observed, "the issuance of such a 'blank check' might add to the deterring effect of a defendant accepting the appointment of counsel under such circumstances." See *In Re Allen* 78 Cal. Rptr. 207, 210; 455 P. 2d, 143, 146 (1969).

Our comments. We think the public defender has a point. In an earlier discussion in our report, we commented: "the time when the defendant is in need of counsel is the critical point in determining financial ability."

Time Sheets

Regarding time sheets, our audit revealed that the professional staff members of the office of the public defender were not maintaining time sheets as required by section 27-15(b) of the manual of the legal aid society of Hawaii which the defender council adopted to govern the operation and procedures of the public defender's office. The public defender disagreed with our recommendation that time sheets be maintained. He responded thus: "... that the 'old' Public Defender Council determined after discussion

that that part of the manual requiring daily time sheets for attorneys did not apply to the Office of the Public Defender. There were several reasons for this. First, the attorneys on the Civil side of the Legal Aid Society did not, and do not, keep time sheets. (To our knowledge, neither do the Prosecutors.) Second, the volume of paperwork in the office was growing considerably and it was the Council's judgment that additional paperwork and time-consuming accounting was unnecessary. Finally, each attorney's daily diary and calendar would suffice to indicate the attorney's activities when assessing his performance and estimating future program requirements."

Our Comments. Our review of the minutes of the public defender council revealed no mention or formal action taken by the council granting an exception to the manual which would not require the maintaining of time sheets for attorneys of the public defender's office.

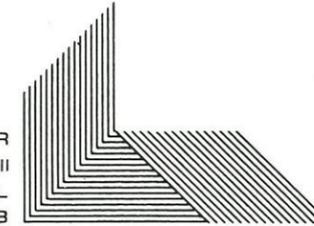
The public defender contends that the maintaining of time sheets is unnecessary. We do not believe that the reasons given are sufficient to forego the maintaining of time sheets which we believe serves as a valuable tool for management in controlling performance and cost, assessing past performance, and estimating future program resource requirements.

Determination of Indigency

Our report describes the procedures followed by several jurisdictions of the courts in the determination of indigency. The public defender in his response clarified some of the details contained in our preliminary draft in describing the procedure. Our report has been changed to reflect this clarification. However, these changes have not in any way affected our conclusion and recommendations contained in our preliminary draft.

COPY

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813



ATTACHMENT NO. 1

CLINTON T. TANIMURA
AUDITOR
YUKIO NAITO
DEPUTY AUDITOR

September 22, 1971

Mr. Herbert Minn, Chairman
Defender Council
State of Hawaii
State Capitol
Honolulu, Hawaii

Dear Mr. Minn:

Enclosed are six copies of our preliminary on the *Audit of the Office of the Public Defender*, for you and your council members. The term, "preliminary," indicates that the report has not been released for general distribution. However, copies of the report have been transmitted to the Governor, the presiding officers of both houses of the State Legislature, and the affected agencies.

The purpose of the limited distribution at this time is to provide the agencies affected an opportunity to study and discuss the report before it is finalized. Because the report is still in preliminary form, I suggest that its discussion be limited to council members only.

The report contains a number of recommendations. Although the recommendations arise from transactions had under the old council, you will find them appropriate to the new Defender Council. I would appreciate receiving from you, as chairman of the Defender Council, written comments as you might have on the recommendations, including information as to the specific action the council intends to take with respect to any of them. Please transmit your reply by October 15, 1971. The report will be finalized and released very shortly thereafter.

If you wish to discuss the preliminary report with us, we will be pleased to meet with you. We await a call from you to fix an appointment. A "no call" will be assumed to mean that a meeting is not required.

Sincerely,

/s/ Yukio Naito

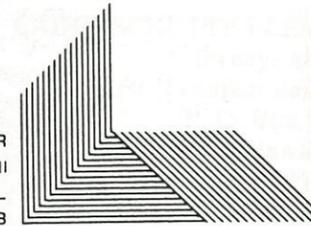
Yukio Naito
Deputy Legislative Auditor

Encl.

COPY

ATTACHMENT NO. 2

THE OFFICE OF THE AUDITOR
STATE OF HAWAII
STATE CAPITOL
HONOLULU, HAWAII 96813



CLINTON T. TANIMURA
AUDITOR
YUKIO NAITO
DEPUTY AUDITOR

September 22, 1971

Mr. James S. Campbell
c/o Cades, Schutte, Fleming and Wright
First Hawaiian Bank Building
Honolulu, Hawaii 96813

Dear Mr. Campbell:

Enclosed is a copy of our preliminary report on the *Audit of the Office of the Public Defender*.

The term, "preliminary," indicates that the report has not been released for general distribution. However, copies of this report have been forwarded to the Governor and the presiding officers of both houses of the State Legislature. In addition, we have forwarded copies of the report to the agencies affected by the audit.

The purpose of the limited distribution at this time is to provide the agencies affected an opportunity to study and discuss the report before it is finalized. Because the report is still in preliminary form, I suggest that discussion of its contents, if any, be limited to the members of the former defender council within the Legal Aid Society.

The report contains a number of recommendations. We have requested the present council chairman to submit his comments on the findings and recommendations. If you have any comments on the report, please submit them to us by October 15, 1971.

We appreciate the assistance and cooperation extended by you to our auditors during the course of the audit.

Sincerely,

/s/ Yukio Naito

Yukio Naito
Deputy Legislative Auditor

Encl.

cc: Mr. Brook Hart

COPY

ATTACHMENT NO. 3

CADES SCHUTTE FLEMING & WRIGHT

Attorneys at Law
First Hawaiian Bank Building
P. O. Box 939
Honolulu, Hawaii 96808
Telephone 531-7232

Arthur G. Smith (1882-1966)
Urban E. Wild (1891-1952)
Eugene H. Beebe (1889-1966)

J. Russel Cades
Charles A. Gregory
Milton Cades
William L. Fleming
Harold S. Wright
C. Frederick Schutte
James S. Campbell
A. Singleton Cagle
Richard L. Griffith
Robert B. Bunn
William M. Swope
Donald A. Beck
Douglas E. Prior
E. Gunner Schull

September 29, 1971

Thomas P. Huber
Hale H. Hitchcock
Peter C.-P. Char
Andrew O. Egseth, Jr.
Harvey E. Henderson, Jr.
Larry L. Myers
Donald E. Searce
Edward A. Jaffe

Mr. Yukio Naito
Deputy Legislative Auditor
The Office of the Auditor
State Capitol Building
Honolulu, Hawaii 96813

Re: Audit of the Office of the Public Defender

Dear Mr. Naito:

I have read your preliminary report with care and find it fair and objective. We appreciate the many courtesies of your staff in this matter, and if we can be of further assistance to you in any way, please feel free to call upon us.

Very truly yours,

/s/ James S. Campbell

James S. Campbell

COPY

THE JUDICIARY
OFFICE OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS
POST OFFICE BOX 2560 HONOLULU, HAWAII 96804

October 14, 1971

LESTER E. CINGCADE
Administrative Director

TOM OKUDA
Director, Adm. Services
District Courts

ROBERT I. UEOKA
Director, Adm. Services
Circuit Courts

THOMAS T. YOSHIDA
Personnel Officer

Mr. Clinton Tanimura
Auditor
Legislative Auditor
State Capitol
Honolulu, Hawaii

Dear Mr. Tanimura:

Thank you for furnishing the Judiciary with a copy of the preliminary report of the Public Defender's Office.

I am sure that the recommendations contained in the report will prove to be most helpful to the newly created Defender Council in determining its future policies.

Sincerely yours,

/s/ Lester E. Cingcade

Lester E. Cingcade

COPY

OFFICE OF THE PUBLIC DEFENDER
Legal Aid Society of Hawaii

Suite 200
200 N. Vineyard Boulevard
Honolulu, Hawaii 96817
Telephones 521-1411, 536-4302

October 12, 1971

BROOK HART
Public Defender

MAUI OFFICE

Philip LOWENTHAL
Deputy Public Defender
2287 Main Street
Wailuku, Hawaii 96793
Telephone: 244-5356

HAWAII OFFICE

Steven K. CHRISTENSEN
Deputy Public Defender
Suite 208-Hilo Plaza Bldg.
180 Kinoole Street
Hilo, Hawaii 96720
Telephone: 935-6465

KAUAI OFFICE

Max W. J. GRAHAM, JR.
Deputy Public Defender
3059 Umi Street
Lihue, Kauai 96766
Telephone: 245-2781

Mr. Yukio Naito
Deputy Legislative Auditor
The Office of the Auditor
State Capitol, State of Hawaii
Honolulu, Hawaii 96813

Dear Mr. Naito:

I have returned from my vacation to find a copy of your preliminary report on the Audit of the Office of the Public Defender. I appreciate your furnishing me with this report; I would like to take this opportunity to respond to certain points and conclusions which are found in it. For purposes of clarity and reference I will direct my comments to the sections of the Audit Report in the chronological order in which they appear in the report.

PART II

FINDINGS AND RECOMMENDATIONS

Chapter 3

ADMINISTRATION AND OPERATIONAL CONTROLS

Standards of Eligibility (page 6)

The report discusses the reasons why the Supreme Court has not established a set of standards to determine indigency. In so doing, the report states: "the time when the defendant is in need of counsel is the critical point

in determining financial ability." This is quite correct. The problem I see is that the defendant is in need of counsel at all stages of every case; this need arises at the earliest point when the defendant is arrested and continues through the trial and up to and including any appeal or application for Writ of Habeas Corpus which a client might pursue following conviction. The key question as I see it is this: What point on the continuum will be chosen to determine whether, for purposes of assigning counsel, the defendant is indigent? Is it at the moment of arrest? At the time of appearance before an interrogating police officer? In the District Court? Circuit Court? Supreme Court? In other words, is the Court constitutionally permitted to re-evaluate at every point along the way the defendant's allegation that he is indigent and entitled to appointed counsel? This matter will be discussed in the discussion relating to recovery of costs. (see below).

Determination of Indigency (page 6)

The report seeks to describe the procedure that has been followed in the District Courts on Oahu and the Circuit and District Courts on Maui and Hawaii when a defendant makes application for counsel. The report indicates that, in these named jurisdictions "where a defendant makes a request for representation directly to the Office of the Public Defender rather than petitioning the court, the Office of the Public Defender, without referring the defendant to the court, proceeds to determine the defendant's financial capability." This is clearly incorrect as to the District Courts on the island of Oahu. When a defendant comes to our office and is charged with a misdemeanor violation, and he has not received a referral slip from the District Court, it is our policy to refer the defendant to the District Court immediately. The defendant is required to obtain the necessary court referral slip before we will interview him or determine his financial eligibility. The report also states that, in the above named jurisdictions, in cases where the Public Defender interviews a defendant and finds that he or she is eligible for Public Defender service, "the Public Defender renders no report to the court on its findings as to defendant's eligibility." This is not correct as to the island of Oahu where the Public Defender renders a report to the District Court as to defendant's eligibility whenever requested to do so, and thereafter retains records indicating the eligibility of the defendant for Public Defender services. The Maui procedure, (both past and present) is carefully outlined with respect to both the Circuit and District Courts in the attached memorandum from Deputy Public Defender Philip Lowenthal of Maui

County. As to the island of Hawaii, it is incorrect to state that, in the Circuit Court, the court makes no inquiry into the defendant's financial condition at the time of request for counsel. According to Deputy Public Defender Steven Christensen, where a defendant in the Hawaii Circuit Court requests counsel, the court often asks the defendant to produce financial information and affidavits, and these are used to determine whether the defendant should then be referred to the Public Defender.

The suggestion on page 7 of your report that the Office of the Public Defender "be called upon to assist in gathering facts about a defendant's financial condition," is unobjectionable. However, the report suggests that the court should review the facts gathered by the Public Defender and enter its "own findings into the record and formally appoint the Public Defender, if appropriate, as counsel for the defendant." This suggestion poses a significant problem. If the duty of gathering facts pertaining to a defendant's financial condition is delegated to the Public Defender and after such delegation he determines that the defendant qualifies, he proceeds to prepare the defense in the case. Subsequently, he prepares for trial, interviews witnesses, writes his memoranda, and does all those things necessary to represent the defendant fully and properly. All this work will be wasted if, on the day of the trial (which is usually the next appearance in court for a misdemeanor-defendant who has been referred to the Public Defender at the time of his arraignment), the court, upon its review of the defendant's financial condition, decides not to appoint the Public Defender because the Court disagrees with the Public Defender's judgment as to the indigency of the defendant. The question posed is, "when should the court review the financial condition of the defendant . . . ?" It certainly should not be at the next court appearance as the Public Defender has prepared for trial and done all those things necessary to represent the defendant in the time between referral to the Defender and appearance in Court.

We recommend the following procedure: That the District Court, in both felonies and misdemeanors, be responsible for the appointment of counsel at the time when the initial request is made for counsel. Such responsibility should attach regardless of whether the defendant has actually appeared before the court. Under such a procedure, the defendant would be provided with application forms for counsel immediately upon his arrest. These forms would be forwarded to the District Court as soon as possible after completion and after a request for counsel had been made. The forms would be before the arraigning judge at the time the defendant appeared, and then the judge would immediately make a

decision based upon the information appearing in the forms and his oral examination, if any, of the defendant. In questionable cases, or where it appeared that further verification of information was necessary, the eligibility forms could be forwarded to the probation personnel (or to the Public Defender, as an officer of the Court) to assist the Court by gathering the necessary additional financial information and immediately reporting back to the Court. This method, which is in use in other states with a far heavier caseload (New York, for example) would insure that the Court made the initial determination of eligibility as well as providing for assignment of counsel at the earliest possible time. At present, at least in felony matters on Oahu, the procedure for obtaining counsel for indigents is so time-consuming that we have experienced numerous cases where the appointment of counsel is made several days or perhaps weeks after the defendant has completed the forms for eligibility and there are many instances where we have been appointed as counsel either on the day of the preliminary hearing or even after the scheduled date of the preliminary hearing. The present procedure, unfortunately, serves to deprive numerous defendants of the right to counsel at the preliminary hearing stage of the case. The Supreme Court has held that the preliminary hearing is a critical stage in the prosecution, requiring the State to provide counsel to persons not able to afford their own and, in some cases, resulting in a reversal of a defendant's conviction where the State has failed to do so.

Of course, to the extent that the Public Defender as an officer of the Court, is called upon to gather financial information about the defendant, and determine his eligibility, such determination should not be subject to reversal by the Court except in the most extreme circumstances. The Public Defender has no reason to represent persons other than those who clearly qualify for Public Defender services. The greater our case load the more likely the possibility for inadequate representation; therefore, where the Public Defender informs the Court that the defendant "qualifies", the Court should accept the representation as reliable. Where the Court delegates to the Public Defender the duty to gather financial information, subject to the Court's "review", unwieldy situations may develop where there is a disagreement between the Court and the Public Defender pertaining to the representation of a particular defendant. So, for example, in California, where the statute provided that the Public Defender shall defend a person charged with contempt or a criminal offense, who is not financially able to employ counsel "upon request of the defendant or upon order of the Court," the Supreme Court held that the trial Court cannot review the Public Defender's determination that a person is financially unable to employ counsel. Ingram V. Justice Court, 447 P. 2d 650 (1968).

Financial Inquiry and Verification (page 8)

Your report notes that the form used by the Public Defender for recruiting financial information requires less financial and other personal data about a defendant than the form used by the courts. This is true; however, the information secured from a defendant and recorded on our form is clearly sufficient to make an accurate and thorough determination of financial eligibility. We would be in favor of a uniform form pertaining to the financial condition of a defendant, and it would be our recommendation that the Defender Council adopt a form that is identical to the form provided by the State.

Your report states that, "the Honolulu Branch of the Office of the Public Defender does not completely fill out the financial and personal data form . . ." I have recently examined a representative number of these forms along with the files in which they appear and I am satisfied that there is no need to question the completeness of inquiry by the Honolulu Branch in determining indigency of defendants. In each of the numerous cases I examined, where particular information was not recorded specifically on the form, it was found in the notes appearing in the files relating to the case. In any event it should be emphasized that the Public Defender has no interest in representing people who can afford their own attorneys.

Your report notes that, (with the exception of the branch on Hawaii), "the Public Defender does not require a defendant to submit financial or other information under oath or affirmation." This is correct. However, it should be pointed out that the reason for the absence of such requirement is simply that we do not have a sufficient number of notaries public in the office to set up such a function. In the Honolulu branch there is one attorney who is a notary, but he is often in court or otherwise unavailable to notarize a statement of a defendant. (One Secretary became a Notary last week.) We have no facilities or other personnel available to verify the financial information supplied by a defendant. I do agree with the recommendation (page 8) that the Judiciary review and prescribe guidelines in this area so as to assure some degree of uniformity.

Recovery of Costs (pages 8-9)

The report discusses this matter in some detail but, I believe, arrives at an erroneous conclusion with respect to the constitutionality of Section 1-6 of Act 185, the new Public Defender Statute. This

section is analyzed in detail in an article recently published in the Hawaii Bar Journal. See Hart and Blanchfield, A Study in Legislative Overkill: An analysis of Hawaii's New Public Defender Legislation, 8 Hawaii Bar Journal 53, 60-63, (1971). Your conclusion that the provision permitting a termination of appointment of counsel in the absence of partial payment is that such a section "appears to be concerned only with the question of whether or not a defendant is in fact indigent and thus entitled to counsel at State expense."

With such conclusion we respectfully disagree. The basic question really has two parts, the first is whether or not the defendant is, in fact, indigent; the second is when shall such an inquiry be made? Because the Statute permits such inquiry to be continuously made, ("if at any time after counsel is appointed"), the defendant is constantly subject to a review of his financial condition with the result that the Court may at any time require that he make partial payment for the services of his attorney or else suffer termination of the attorney's appointment. Even the attorney is duty-bound by the Statute to advise the Court "at any time after his appointment" of a change in the defendant's financial circumstances. The defect of this section of the Statute, then, is its failure to specify when it is that we are concerned with the defendant's indigency. In such a situation it is entirely likely that a defendant whose financial condition is constantly subject to review by both his attorney and the Court will be reluctant to seek employment during the period of his representation and if, for some reason, he should acquire some unspecified sum of money or other asset, he may suffer the termination of his attorney's appointment, without even being a party to the arrangements made by the Court and the attorney employed to represent him. The Statute does not give any opportunity to the defendant to negotiate the amount of such "partial payment," and there is no maximum limit imposed. As the Supreme Court of California has observed, "the issuance of such a 'blank check' might add to the deterring effect of a defendant accepting the appointment of counsel under such circumstances." See In Re Allen 78 Cal. Rptr. 207, 210; 455 P. 2d, 143, 146 (1969).

Violation of Rules (page 9)

The report notes that the original "Defender Council" adopted the manual of the Legal Aid Society as rules to govern the operations and procedures of the Office of the Public Defender. This adoption

occurred on February 4, 1970 and is found in a document entitled "Operating Guidelines for the Chief Defender." Section 10 of those Guidelines state: "until otherwise changed by the Defender Council, wherever applicable, the office manual of the Legal Aid Society shall be followed for all office procedure."

1. Outside Employment. Your office notes representation of a non-profit organization by one of our attorneys who received no compensation for his efforts and provided services on his own time. The situation was similar to that, perhaps, of a carpenter employed by the State who performed free carpentry services for a church on Sundays without having secured approval for such activities. Please be assured that the matter of outside employment has been discussed with the attorney involved and with the entire staff and that, in the future, the necessary written approval will be secured before any attorney undertakes outside representation.

2. Time Sheets. First it should be noted that the "old" Public Defender Council determined after discussion that that part of the manual requiring daily time sheets for attorneys did not apply to the Office of the Public Defender. There were several reasons for this. First, the attorneys on the Civil side of the Legal Aid Society did not, and do not, keep time sheets. (To our knowledge, neither do the Prosecutors.) Second, the volume of paperwork in the office was growing considerably and it was the Council's judgment that additional paperwork and time-consuming accounting was unnecessary. Finally, each attorney's daily diary and calendar would suffice to indicate the attorney's activities when assessing his performance and estimating future program requirements. For these reasons I respectfully disagree with the recommendation contained in your report which would require this office to maintain time sheets in the future. It is interesting to note that the local U. S. Attorney's office was required by the Federal Government to keep extensive time sheets between March 1970 and February 1971. It is the unofficial opinion of representatives of that office that the exercise of keeping time sheets (which often consumed up to a half-hour a day per attorney) was wasteful and inefficient, encouraged fabrication, and reduced the time available to work on substantive matters in the office. It is understandable that some private firms would keep time sheets in order to accurately bill their clients. In an operation such as ours, such a practice is unnecessary.

Mr. Yukio Naito
Deputy Legislative Auditor

Page 8
October 12, 1971

Chapter 4

FINANCIAL TRANSACTIONS AND MANAGEMENT

Resources and Expenditures

Your report states that, in the Fiscal Year 1970-71, \$5,896 of a total of \$7,156 consisted of payments by the Federal Government reimbursing the Public Defender for his services in Federal criminal cases. These revenues from the Federal Government are no longer available due to the necessity of discontinuing representation in the Federal Court; this discontinuance was necessary as a result of the reduction in our budget for the 1971-73 biennium and an increased workload due to an increase in State cases. It is unfortunate that the Public Defender has had to withdraw from representation of defendants in the Federal Court. Federal Court representation would provide a healthy source of supplementary funds for the program if representation in this court continued. The Federal Government has recently doubled the hourly rate for both in-court and out-of-court attorney time (the rate of compensation for representation is now \$20 per hour out-of-court and \$30 per hour in-court). Often defendants in our State cases have additional Federal charges arising out of the same transaction or occurrence; the community lacks a sufficient number of qualified private criminal practitioners to adequately handle the burden of indigent cases in the Federal Court.

Balance (pages 14-15)

Your report says "that State funds rather than private funds were used first to defray expenses of the Defender Program in 1969-1970, contrary to the provision of Section 9, Act 223, SLH 1969." The conditions of the Ford Foundation grant provided a classic "chicken and egg" situation for the Public Defender Council when they sought to comply with Section 9 of Act 223. The Ford Foundation monies would be forthcoming, contingent upon the appropriation of local matching funds. As I understand it, the provision of the Act required expenditure of "funds from other sources" before the use of State funds. This condition is detailed in a letter of December 5, 1968 from John Cleary of NLADA to Charles Key, the then President of the Legal Aid Society Board of Directors.

Mr. Yukio Naito
Deputy Legislative Auditor

Page 9
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Additionally, you list several factors which contributed to the deficit condition the office experienced in the Fiscal Year 1970-71. In our opinion, an additional factor should be mentioned. This is our inability to predict the number of cases in which representation had to be provided by an appointed attorney other than the Public Defender. As your report notes, the actual expenditures of the office of the Public Defender in 1970-71 (\$352,031) was within the total monies available to the program for that year. As we see it, the underlying cause of the deficit arose from the failure to separate the Public Defender's budget from the fund available to pay appointed private counsel.

The amounts appropriated for the 1971-73 biennium are sufficient to finance the operations of the Office of the Public Defender itself. They are insufficient insofar as they fail to finance what will undoubtedly be a growing expense in the program, namely, the increased use of appointed, non-Public Defender attorneys. This increase, it is predicted, will, in part, occur as a result of operation of the office under the new Statute which places additional burdens on the time of Public Defenders and is likely to reduce the efficiency of the office.

Budgetary and Expenditure Controls (page 16)

The report indicates that in 1970-71 "no expenditure plan was ever developed." This is true primarily because of the impossibility of predicting a caseload which would in turn directly affect personnel, material and other needs of the program. However, an effort was made early in 1970 to seek an additional appropriation from the Legislature for what, at that time, was predicted to be a possible future deficit in the budget. This supplementary budget request, prepared and transmitted by the undersigned to the Legislature in March of 1970, contained an expenditure flow chart which sought to predict the cost of the program during the 1970-71 Fiscal Year. Unfortunately, this request was ignored by the Legislature and the resulting deficit occurred. We are in complete agreement with your recommendation that the Judiciary and the new Public Defender Council formulate as quickly as possible an expenditure plan so as to provide a basis for a request for additional funds.

Sincerely yours,

/s/Brook Hart

BROOK HART, PUBLIC DEFENDER

TO: BROOK HART, ESQ.
PUBLIC DEFENDER

MEMORANDUM DESCRIBING PAST AND CURRENT PROCEDURE TO OBTAIN
PUBLIC DEFENDER SERVICES IN MAUI COUNTY

I.

PROCEDURE FROM MAY 18, 1970 TO JULY 1, 1971

The Office of the Public Defender began providing counsel for indigent defendants in Maui County on May 18, 1970. From that date to July 1, 1971, both the Circuit and District Courts used generally the same procedure to insure that indigent defendants were represented by counsel.

If a counselless defendant appeared in court and requested counsel, generally the court would either ask some questions regarding the accused's financial situation or would require the accused to file financial questionnaire and accompanying affidavit. The court, if it felt the defendant was (or might be) indigent, would refer the accused to the Maui County Deputy Defender. The Deputy Defender would again examine the defendant as to financial eligibility. If the defendant was then found eligible he would be accepted as a client. If the defendant did not qualify financially, the Deputy Defender would report to the court and not accept the client, unless otherwise ordered.

If a counselless defendant contacted the Public Defender's Office before going to court, the Deputy Defender made the initial determination as to financial eligibility. If the defendant qualified, he was accepted as a client and represented by the Deputy Defender without formal court determination or appointment. Only "close" questions of financial eligibility were brought to the judges for determination.

The above system entailed no formal court-appointments, relatively little paperwork, and elicited almost no complaints from the bench or private bar. This procedure was in effect until the State Auditor came in June, 1971.

II.

CIRCUIT COURT PROCEDURE FROM JULY 1, 1971

After the visit from the State Auditor, the Defender's Office was supplied three forms to be filed for each client appearing in Circuit Court: (1), Affidavit of Defendant; (2), Financial Questionnaire ("Defendant's Statement to the Court of Financial Condition and Status in Connection with Application for Counsel"); and (3), Order Appointing Counsel for Defendant.

The affidavit and questionnaire are executed by the defendant at the request of either the court or the Deputy Defender, depending on who is contacted first. The Circuit Judge presumably reviews the financial questionnaire before signing the order appointing counsel. He may refer the questionnaire to his Probation Department for further investigation; however it is not the general practice. The Judge knows that the Defender's Office will not knowingly represent a non-qualifying defendant and that close cases will be brought to his attention by the Deputy Defender; therefore he usually relies on the affidavit without further investigation.

III.

DISTRICT COURT PROCEDURE AFTER OCTOBER 6, 1971

After the initial report of the State Auditor was received by presiding Magistrate Richard Komo of the Wailuku District Court, the procedure was changed, now requiring every applicant for Defender services to file with the District Court the same financial questionnaire required by the Circuit Court. However, neither the affidavit nor the order need be filed. The financial questionnaire is supplied to the client by either the court or the Deputy Defender, depending on where and when the defendant first claims indigency and requests court-appointed counsel.

Whenever a defendant appears in court and is represented by the Defender's Office, the court reporter as instructed by the judge, automatically makes an entry in the record to the effect that counsel was court-appointed. This obviates the need for unnecessary ritual and paperwork.

IV.

CONCLUSION

While the Circuit Court procedure is reasonable, it is unnecessarily cumbersome to require an executed financial questionnaire for every client appearing in District Court.

Our "good faith" practice before this latest "reform" was both effective and efficient in providing counsel to the poor. The possibility that the old system occasionally provided free counsel to someone, not indigent, charged with Expired Safety Sticker, does not seem to justify the extra time and paperwork now required.

/s/ Philip H. Lowenthal

PHILIP H. LOWENTHAL
DEPUTY PUBLIC DEFENDER
MAUI COUNTY

M E M O

October 12, 1971

TO: MR. BROOK HART

FROM: STEVEN K. CHRISTENSEN

RE: APPOINTMENT OF PUBLIC DEFENDER IN HAWAII COUNTY

At the present time, the practice of the courts is to inquire of a defendant at arraignment as to whether he desires counsel. If the defendant indicates that he wants an attorney but is unable to retain a private lawyer, the court furnishes the defendant with a financial disclosure form and affidavit which the defendant is instructed to prepare and submit to the court.

The practice in the pre-arraignment stages seems to be informal. The defendant in a Miranda or line-up context is advised (by the police) that if he is unable to afford counsel the public defender would be telephoned and asked to represent the defendant. Moreover, the jail guards and administrators at the county jail refer a large number of defendants in the pre-arraignment stage. The present system (which in the District Courts is of very recent origin) seems to be adequate in the majority of cases. However, the crucial pre-arraignment right to counsel is guaranteed on a haphazard, informal basis.

I would suggest that by a court rule or order similar to that establishing the bail schedule, the chief judge of the Third Circuit Court direct that the defendant who desires counsel at the pre-arraignment stages of interrogations, line-ups or other proceedings requiring counsel, who represents to the police that he is unable to pay for a lawyer, be represented by the public defender at these initial stages, subject to review upon the first appearance at the district or circuit court levels.

/s/Steven K. Christensen

STEVEN K. CHRISTENSEN

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- 1967 1. Overtime in the State Government, 107 pp.
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6. Financial Audit of the Honokaa Hospital for the Fiscal Year Ended June 30, 1968, 41 pp.
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8. Financial Audit of the Kona Hospital for the Fiscal Year Ended June 30, 1968, 44 pp.

9. Financial Audit of the Kauai Veterans Memorial Hospital for the Fiscal Year Ended June 30, 1968, 30 pp.

10. An Overview of the Audits of the Act 97 Hospitals, 18 pp.

- 1970 1. Management Audit of the Department of Water County of Kauai, 65 pp.
2. Audit of the Kamehameha Day Celebration Commission, 47 pp.
3. Audit of the Medical Assistance Program of the State of Hawaii, 392 pp.
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