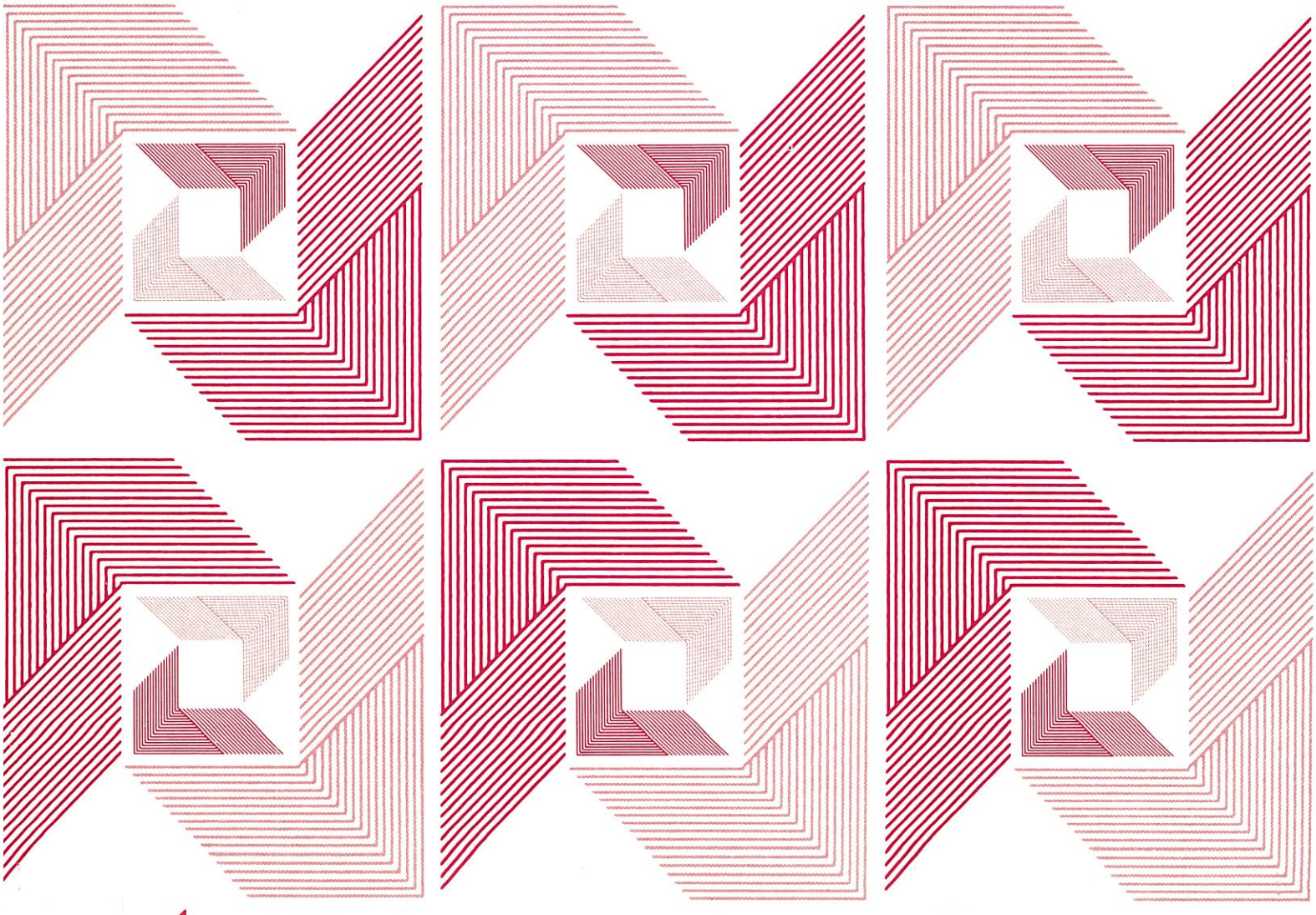
Report No. 90-6
January 1990

MANAGEMENT AUDIT OF THE NARCOTICS ENFORCEMENT DIVISION AND THE INVESTIGATION DIVISION OF THE DEPARTMENT OF THE ATTORNEY GENERAL

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



SUBMITTED BY THE LEGISLATIVE AUDITOR OF THE STATE OF HAWAII

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

Submitted by

Legislative Auditor of the State of Hawaii
Honolulu, Hawaii

Report No. 90-6
January 1990

FOREWORD

This audit responds to the Legislature's request for an assessment of the appropriateness of the duties of the Narcotics Enforcement Division and the Investigation Division in the Department of the Attorney General.

Our assessment of the activities of the narcotics division began by focusing narrowly on the division. But it soon led us into broad questions about the state's drug abuse and enforcement planning, a subject inextricably linked to the future of the division. The audit of the investigation division focused on internal management, organization, and operations.

As requested by the Legislature, we included a financial audit on the monies forfeited to the attorney general's department through the narcotics division. We incorporated the financial audit into a brief examination of the management of asset forfeiture under Hawaii law.

We wish to thank the Department of the Attorney General and the federal, state, and county officials who provided information and ideas during the audit.

Newton Sue
Acting Legislative Auditor
State of Hawaii

January 1990

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Chapter 1

INTRODUCTION

This is a report on our management audit of the Narcotics Enforcement Division and the Investigation Division of the Department of the Attorney General.

In Section 217 of the General Appropriations Act of 1989 (Act 316), the Legislature directed the auditor to conduct: (1) a "report and analysis" concerning the Narcotics Enforcement Division and the Investigation Division and (2) a financial audit on the monies forfeited to the department through the narcotics division.

The purpose of this request was "to determine if appropriated funds are appropriately being expended." The Legislature also asked for findings and recommendations on "the appropriateness of each division's duties."

Objectives of the Audit

The objectives for the audit were:

1. To identify the missions, duties, and powers of the two divisions as set forth by statutes, rules, regulations, and the department.

2. To examine and assess the policies, goals, priorities, and structure of drug enforcement and attorney general investigative activity in Hawaii and to recommend changes where appropriate.

3. To determine whether the two divisions are carrying out their mandates efficiently, effectively, and in accordance with applicable laws, rules, policies, and procedures; to identify problem areas; and to recommend solutions.

4. To determine the efficiency and effectiveness of forfeiture management in the narcotics division.

Scope of the Audit

The audit scope was limited in some respects and broad in others. The narcotics enforcement and investigation divisions are both relatively small units within the department. The narcotics division was in the Department of Health until July 1, 1988 when it was transferred to the Department of the Attorney General. The audit covered only the period that the narcotics division has been in the department. The division is to be transferred on July 1, 1990 to the new Department of Public Safety.

The mandate to assess appropriateness was broad. This meant exploring the histories of the divisions and the network of policies and programs--national, state, and local--within which they function.

The review of the narcotics division raised particularly broad questions that went beyond the internal functioning of the division. These included the status of the federal "war on drugs"; the State's approach to drug abuse; the adequacy of Hawaii's drug enforcement policy and plan; the rationality and attainability of goals, objectives, and priorities for drug enforcement; the clarity of the roles of federal, state, and county enforcement agencies; the extent to which these agencies have an integrated, intergovernmental program of drug enforcement; and finally, the appropriate role of the narcotics division in this context.

Conduct of the Audit

Fieldwork for this audit took place during the latter half of 1989, as did the writing of this report. Besides the examination of many documents and records, the audit involved extensive interviewing of department and division personnel and other persons concerned with drug abuse control, including drug enforcement, in Hawaii and the nation. This included interviews with the police chiefs and public prosecutors of all the counties; officials of the U.S. Department of Justice, including the Drug Enforcement Administration; and officials of other national organizations. Contact was also made with law enforcement officials from other states.

Organization of the Report

This report has six chapters. Chapter 1 contains this introduction. Chapter 2 provides an orientation to the attorney general's department, the public safety department, and the two divisions. Chapter 3 gives some background on drug policy. Chapter 4 assesses the management of the Narcotics Enforcement Division. Forfeiture management and the financial audit of forfeited monies is in Chapter 5. Chapter 6 reviews the Investigation Division and its management.

Chapter 2

ORIENTATION TO THE DEPARTMENT OF THE ATTORNEY GENERAL AND THE DEPARTMENT OF PUBLIC SAFETY

This chapter provides background on the Department of the Attorney General, including the Narcotics Enforcement Division and the Investigation Division. It also gives background on the newly established Department of Public Safety, to which the narcotics division soon will be moving.

Mission of the Department of the Attorney General

The attorney general's department has a wide range of functions, duties, and powers that are spelled out in the revised statutes, the session laws, and the case law of Hawaii and that are summarized in the department's General Office Manual. In Chapter I of the manual, the department describes itself as follows:

> The Department of the Attorney General is the chief legal services agency of the State and provides representation in civil actions and legal services to the State, including the agencies, officers, and employees of the Executive Branch, the Judiciary, and the Legislature. Generally, legal services are provided pursuant to section 26-7 ["Department of the attorney general"] and chapter 28 ["Attorney General"], Hawaii Revised Statutes. In addition, the Department is the chief law enforcement agency of the State and prosecutes civil and criminal violations of the law.[1]

It is important to understand the distribution of prosecutorial responsibility in the State. The Hawaii Supreme Court has ruled that while the attorney general is the chief legal officer of the State and has the ultimate responsibility for enforcing Hawaii penal laws that apply statewide, the public prosecutors of the counties have been delegated the primary responsibility for initiating and conducting criminal prosecutions within their respective county jurisdictions. Most criminal prosecution rests with the county prosecutors, but under certain circumstances the attorney general can supersede them.[2]

Generally speaking, the attorney general prosecutes those criminal matters that cut across two or more counties, those where the county prosecutor's office has a conflict of interest, those that the county prosecutor persuades the attorney general to handle, and those where the public at large, rather than an individual, is the victim, such as welfare fraud.

Organization of the Department of the Attorney General

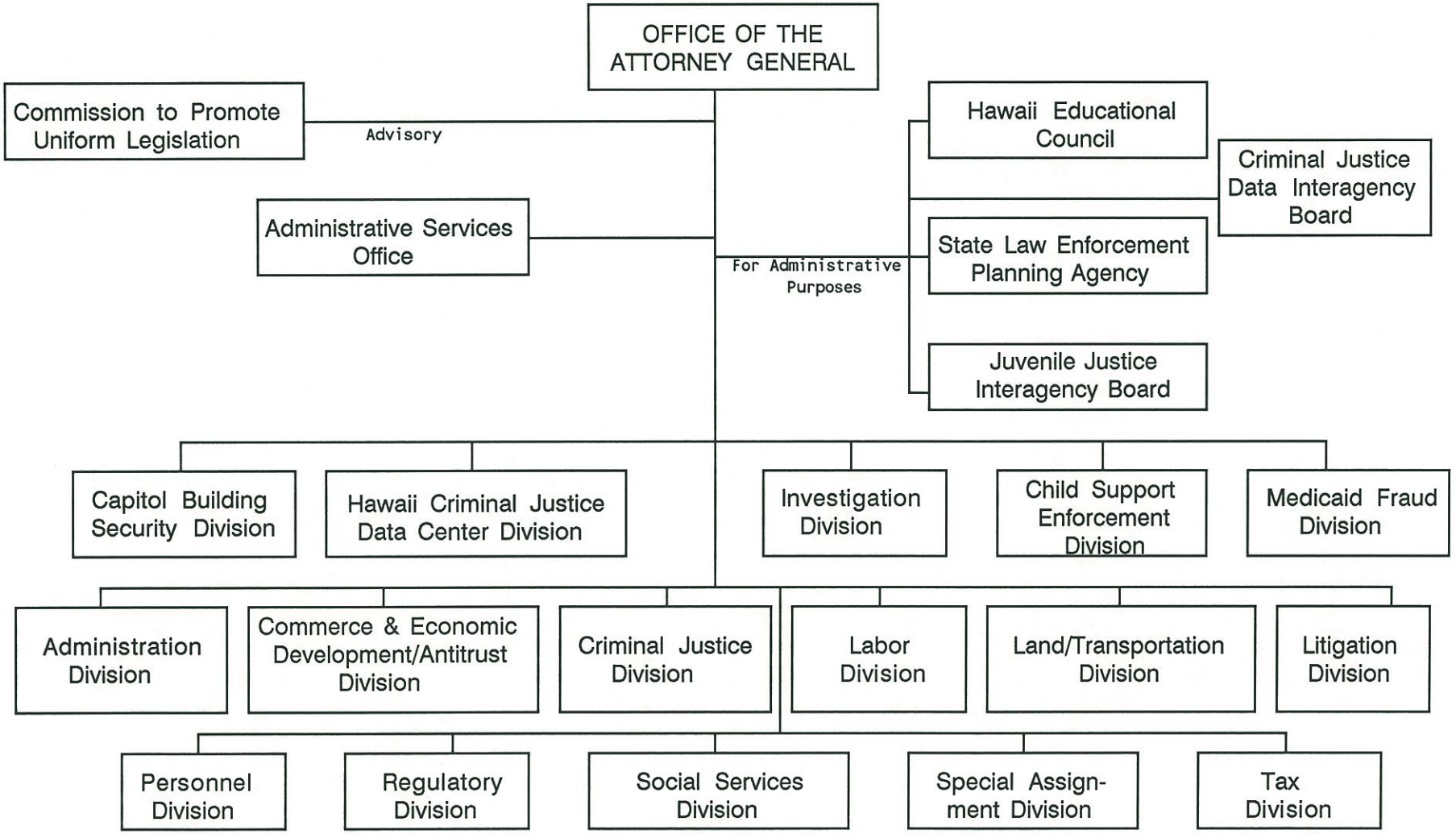
Figure 2.1 is the official organization chart of the department. The organization chart shows the investigation division but not the narcotics division. The department does not plan to change its chart since the division will be moving to the new public safety department on July 1, 1990.

Both the narcotics division and the investigation division are included in the department's General Office Manual. The manual describes the department as being divided into four parts:

1. The executive office of the attorney general (the attorney general, the first deputy attorney general, the administrative services manager, and the executive assistant).

Figure 2.1

State of Hawaii
Department of the Attorney General
Plan of Organization



2. The attorney divisions (administration, commerce-economic development-antitrust, criminal justice, labor, land and transportation, litigation, medicaid fraud, employment relations, regulatory, social services, special assignment, and tax).

3. The non-attorney support divisions (capitol building security, *investigation*, *narcotics enforcement*, resource coordination, child support administrative process, child support enforcement, Hawaii Criminal Justice Data Center, and administrative services).

4. Administratively attached agencies (Hawaii Criminal Justice Commission, Hawaii Criminal Justice Interagency Board, Commission to Promote Uniform Legislation, Hawaii Education Council, and Juvenile Justice Interagency Board).

Overview of the Narcotics Enforcement Division

Despite its name, the Narcotics Enforcement Division is not a classic law enforcement agency. It is a hybrid that blends administrative, licensing, regulatory, educational, and law enforcement functions.

The division registers physicians, pharmacies, and others who handle controlled substances. It monitors their activities and educates them in order to encourage voluntary compliance. It carries out investigations, arrests, and related activities to prevent diversion of controlled pharmaceuticals from legitimate channels and to enforce the drug provisions of the Hawaii Penal Code.

Authority and mission of the narcotics division. The narcotics division is in transition, traveling from the health department to the attorney general's department to the public safety department now being formed. Prior to July 1, 1988, the division was known as the Office of Narcotics Enforcement (ONE) and was part of the health department. Originating in territorial days, as the Territorial Section of Narcotics Control, ONE eventually became the mechanism through which the health department met its statutory responsibility to administer and enforce Chapter 329, *Hawaii Revised Statutes*, the Uniform Controlled Substances Act, which complements the federal controlled substances act.

Chapter 329 was enacted in 1972 and has been amended several times since.[3] It created under the health department:

- the Hawaii Advisory Commission on Drug Abuse and Controlled Substances (HACDACS);
- a procedure for listing certain drugs as "controlled substances" and classifying them into Schedules I, II, III, IV, and V according to their supposed level of dangerousness (I is highest);
- a system to register (and, when appropriate, to deny, revoke, or suspend registrations of) individuals and other entities that legitimately manufacture, distribute, prescribe, or dispense scheduled substances;
- recordkeeping, filing, prescribing, and labeling requirements for registrants;
- a system of crimes and penalties;
- a system of enforcement and administration, including forfeiture provisions; and
- requirements that the health department enter cooperative arrangements with appropriate federal and state agencies, and conduct educational programs.

The act thus creates a "closed system," from manufacture to consumption, for legally manufactured pharmaceuticals that need tight

control because of their abuse potential. The act lists drugs subject to this pharmaceutical control. It also lists drugs not legally manufactured as pharmaceuticals which are subject to regulation under Chapter 712, Part IV of the Penal Code ("Offenses Related to Drugs and Intoxicating Compounds").

Initially, Chapter 329 authorized the health department to designate officers or employees who had the authority to:

- carry firearms;
- execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses;
- make arrests without warrant for any offense under the chapter committed in their presence or where they have probable cause to believe that the person arrested has committed or is committing a felony violation of the chapter;
- make seizures of property pursuant to the chapter; and
- perform other law enforcement duties as instructed by the director of health.

In 1979, Chapter 329 was amended to expand the division's arrest powers to include the crimes listed in Chapter 712, Part IV of the Penal Code.[4] These crimes include promoting dangerous, detrimental, and harmful drugs by possession, distribution, or sale.

A brief historical review explains this amendment. In 1972, when the Controlled Substances Act was enacted, the State was also revising its Penal Code. For drugs, the Legislature omitted "street crimes" from the Controlled Substances Act in favor of "street crimes" provisions of the Penal Code (Chapter 712, Part IV).[5] Committee reports from 1979 say that the addition of Penal Code powers to the Controlled Substances Act was to provide for the proper performance of the duties of the health department's narcotics agents.[6]

Recent amendments to Chapter 329 added provisions on drug paraphernalia and on anabolic steroids and revised the forfeiture provisions.[7]

According to the attorney general's department, agents of the narcotics division (ONE's successor) can go beyond the scope of Chapter 329 and Chapter 712 and arrest law violators under HRS Section 803-3, "citizen's arrest."[8]

Act 235, Regular Session of 1987, transferred from the health department to the attorney general's department all of ONE's "rights, powers, functions, and duties"; ONE's employees and positions; and all health department appropriations and property related to ONE's functions. The attorney general's department renamed ONE as the Narcotics Enforcement Division.

The 1987 functional statement issued by the health department, which is still viewed as reasonably accurate, describes the division as "the primary state agency responsible for overall development of drug enforcement strategy, programs, planning, and evaluation in Hawaii."

Staffing and budget of the narcotics division. The legislature has authorized 14 positions for the division. Two of these positions--one investigator (or agent) and one clerical--have not yet been released. Another position is vacant. Currently, the division has nine agents, a secretary, and a clerk typist. The division's operating costs for fiscal year 1988-89 were about $375,000.

Location, structure, and functions of the narcotics division. The narcotics division is located in Honolulu. It has no offices on the neighbor islands, but its agents travel to the islands as necesssary.

The narcotics division is divided into two sections, compliance (five agents) and enforcement (four agents). Each section is headed by a supervising agent who reports to the supervising agent for the division.

The compliance section is responsible for promoting voluntary compliance with the Uniform Controlled Substances Act and for preventing drug diversion by:

- registering all handlers of controlled substances, including physicians, dentists, osteopaths, veterinarians, pharmacies, and researchers;
- monitoring prescriptions for controlled drugs, order forms, dispensing records, and other reports relating to inventory control, theft, and patient receipt of drugs;
- performing routine inspection and compliance audits of practitioners and pharmacies, and counseling and suggesting corrective measures where violations are determined;
- conducting educational programs designed to inform health professionals of state laws and rules and the ramifications in professional practices;
- disposing of outdated, contaminated, or adulterated controlled substances, and reviewing security systems to prevent theft or loss of such drugs; and
- investigating prescription fraud or forgery and such other violations of Chapter 329 as may arise out of improper practices under the state drug laws.

The enforcement section is responsible for enforcing the drug laws of the State of Hawaii by:

- performing undercover operations, including the use of agents in long- or short-term undercover projects to gather evidence of violations;
- using informants, cooperating defendants, and other persons to provide information about drug trafficking;
- using surveillance (physical, electronic, video, and photographic) to document violations and corroborate undercover agent or informant testimony in court;
- conducting search, seizure, and apprehension of violators, including the execution of search warrants, and the collection of physical evidence from persons and places;
- reviewing records relating to financial transactions and the tracing of proceeds of drug transactions; and
- handling various aspects of forfeiture administration, such as preparation of legal notices for publication and custody of forfeited assets.

Mission and Functions of the Department of Public Safety

Act 211, SLH 1989, establishes a Department of Public Safety to "consolidate all public safety functions and employees of state government" in order to "ensure better organization and coordination of public safety functions, allow for standardized training, and establish a 'career ladder' for public safety employees." "Public safety employees" is not specifically defined in the act.

Effective July 1, 1990, the act transfers to the new department the functions and employees of the Narcotics Enforcement Division along with the Department of Corrections; the Office of the Sheriff and Security Personnel in the Judiciary; and the State Law Enforcement Office (except for executive security functions and

employees). The Hawaii Paroling Authority and the Criminal Injuries Compensation Commission are placed within the new department for administrative purposes only. Effective July 1, 1991, the employees and the law enforcement and security functions of the Department of Transportation are transferred to the public safety department.

The act requires the governor to select a management team to develop transitional plans, rework position descriptions, review personnel classifications, develop an organizational structure, and attend to other administrative details so as to make the department operational on July 1, 1990.

The new department is to be headed by a director of public safety. The department will formulate and implement state policies and objectives for correctional, security, law enforcement, and public safety programs and functions; administer all correctional facilities and services; serve process; and be responsible for the security of state buildings.

Overview of the Investigation Division

The law requires the attorney general to investigate alleged violations of the law when so directed by the governor or when the attorney general deems that it is in the public interest. The attorney general is authorized to appoint investigators who have all the powers and authority of a police officer or of a deputy sheriff. The attorney general also has the power to subpoena witnesses and documentary evidence.

The investigation division is headed by a chief investigator who oversees two units: the investigation services unit and the security services unit. Investigation services has 12 permanent investigator positions and four temporary investigator positions. Security services is authorized three security officer positions.

In practice, the chief investigator directly supervises only nine special investigators and a clerk stenographer. Three permanent investigators and four temporary investigators are assigned to the Medicaid Fraud Division (now referred to as the Medicaid Investigations Division) and report to its director. The three security officer positions are assigned to the State Law Enforcement Office. Although permitted by the law, individuals in these positions do not perform any investigatory functions, but provide security services for the State Capitol, Washington Place, and various state buildings.

Investigation services. The mission of the investigation services unit is to conduct investigations as directed by the attorney general. The types of investigative services fall into three categories: administrative, civil, and criminal.

Administrative investigations involve the executive, legislative, and judicial branches; other state departments or agencies; the federal government; county governments; other states; and business organizations. They include violations of rules and regulations by state and local agencies, wrongdoing by state employees, and pardon requests and commutations of criminal sentences. Civil investigations generally relate to tort complaints, such as claims of negligence against the state. Criminal investigations concern allegations of criminal activities; for example, fraud, theft, contraband smuggling on state properties, sabotage, and subversive activities.

Investigators also provide services in accordance with the Uniform Criminal Extradition Act. Attorneys who rely most on investigative services are those in the Criminal Justice Division, Litigation Division, and Medicaid Investigations Division.

Occasionally, investigators are used to perform security and protection services when state officials, state witnesses, or other dignitaries are threatened with physical harm. They lend technical and security support to the executive

branch when there are organized demonstrations or other disturbances at the State Capitol or other state buildings. Investigators are expected to be proficient in the use of firearms and to requalify annually.

In 1981, because of similarities in duties and functions, the Legislature gave investigators the same retirement benefits and privileges as police officers.[9]

Security services. Personnel who perform security functions for the governor's office were added to the department in 1973 and now compose the division's other unit, security services.[10] According to the law, the unit's primary function is to provide security for the governor and other public officials. Persons working in such a capacity are designated as security investigators and like their counterparts, are appointed by the attorney general. They have all of the powers and authority of a police officer or of a deputy sheriff. Security investigators do not, however, receive the same retirement benefits as police officers. When not providing security services, the law directs that they be used to conduct investigations.

Chapter 3

DRUG ENFORCEMENT POLICY

This chapter highlights issues and trends that form the policy background for evaluating the Narcotics Enforcement Division.

For purposes of this report, the word "drug" is intended to cover a broad range of substances, except where the context indicates otherwise. Hawaii's Controlled Substances Act defines "drugs" as follows:

1. Substances recognized as drugs in the offical United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them.

2. Substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals.

3. Substances (other than food) intended to affect the structure or any function of the body of man or animals.

4. Substances intended for use as a component of any of the above substances, but not including devices or their components, parts, or accessories.[1]

Issues in Drug Abuse Policy

Drug abuse policy, which gives form and direction to drug enforcement policy, debates complex issues relating to:

1. The kinds of drug activity that harm individuals or society and how and to what extent this occurs;

2. The kinds of harmful drug activity that should be controlled or ameliorated and how this can be done; and

3. The level of society's resources that should be devoted to controlling or ameliorating harmful drug activity and how these should be allocated.

Growing concern over drug abuse has spurred government to attempt a more unified, focused, and formal policy. For example, in October 1986, the governor of New Jersey issued his *Blueprint for a Drug-Free New Jersey*.[2] The document covered both sides of the illegal-drug problem: *supply* (defined as drug distribution) and *demand* (defined as drug use). The primary solution to the drug problem, said the report, is demand reduction through prevention, intervention, and treatment. Supply reduction through law enforcement is a necessary protective measure to allow demand strategies to succeed. The report proclaimed that the primary focus of demand reduction should be "the education, and, when necessary, the treatment and rehabilitation, of young people"[3]--with both alcohol abuse and drug abuse included.

For another example, the *National Drug Control Strategy*, issued in September 1989 by the President of the United States, calls for an integrated approach to reducing the supply of and demand for illegal drugs. Supply has been traditionally approached through overseas crop eradication, border interdiction, and domestic law enforcement whereas demand has been traditionally approached through drug treatment, drug education, and community prevention. The strategy argues that law enforcement can affect demand and that treatment and education can

affect supply. Any rigid separation of the concepts reflects neither the complexities of the drug market nor the impact of various anti-drug initiatives.[4]

Issues in Drug Enforcement Policy

Drug enforcement policy, one aspect of drug abuse policy, focuses on how to allocate police, prosecution, and correction resources to the enforcement of drug laws. The problems are complex. There is a developing consensus that to be effective, drug enforcement must be realistic--derived from goals that can be attained with the resources likely to be available. The benefits of drug enforcement strategies must be weighed against the costs.

Mark Kleiman and Kerry Smith, specialists in drug enforcement policy and management, describe the challenge of framing goals:

> As drug enforcement grows, decision-makers must at least implicitly make a complicated series of choices. How much effort should be put into drug enforcement? Which drugs should receive the most attention? How should enforcement effort be divided among high-level dealers, retailers, and drug users? Should enforcement be concentrated, or spread throughout a city? What is the role of police and corrections agencies in the prevention and treatment of drug abuse? . . .
>
> A mayor, police chief, or district attorney wanting to allocate drug enforcement resources to achieve socially valuable results would confront four distinct and sometimes competing sets of goals: first, limiting the number of persons who use various illicit drugs and the physical, psychological, behavioral, and moral damage they suffer as a result; second, reducing the violence connected with drug dealing and the property and violent crimes committed by users, whether to obtain money for drugs or as a result of intoxication; third, preventing the growth of stable, wealthy, powerful criminal organizations; and fourth, protecting the civility of neighborhoods, and thus their attractiveness as places to live, work, shop, and raise children, from the disorder caused by open drug dealing.[5]

Kleiman and Smith label these drug enforcement goals as *drug abuse control, crime control, organized crime control*, and *neighborhood protection*. They suggest a fifth goal, *control of communicable disease*, saying that heroin addiction is linked to AIDS and that drugs-for-sex in crack houses is linked to syphilis. But this public health goal "carries little weight among law-enforcement decision-makers."[6]

Often, they point out, the goals of drug enforcement compete with each other. For example, drug enforcement could raise the price of drugs on the street, decreasing drug abuse but increasing crime by drug users who need more income to pay for their drugs.[7] Kleiman quotes the phrase: "The drug squad makes work for the burglary squad."[8] Moreover, allocating increased resources to drug enforcement can decrease resources to fight nondrug crimes.

Leading authorities on drug enforcement--and the enforcers themselves--know that drug enforcement policy must set priorities. John Vialet and Ronald Viereck, specialists in criminal justice and drug enforcement, comment on the anti-drug strategies published by the federal government from 1973 to early 1989:

> [Those strategies] have all had a fundamental flaw: They have failed to make realistic choices, both about what the federal government can and should achieve and about where the nation's limited resources can be most effectively applied. . . .

> A . . . fundamental obstacle to dealing effectively with America's drug problem is the overall scarcity of resources--not only in federal programs, but also in state and local criminal justice and public health systems.[9]

Local crackdowns on drug abuse, such as intensive "clean sweep operations," while impressive in terms of arrests, tend to fail overall due to lack of sufficent prosecutors, judges, courtrooms, jails, and treatment centers. Vialet and Viereck point out that clean sweep operations take resources away from other drug initiatives.[10] They argue that the overall aim of recent federal policy--a drug-free America--"makes *everything* a priority, and therefore provides no basis for deciding where scarce resources should be focused."[11]

The Nation's "War on Drugs"

The federal government has declared, has legislated, and is struggling to implement a "war on drugs." Federal, state, and local activity against drugs is sufficiently intense and widespread that some say there is a national war on drugs. On the other hand, as a recent article in *The Wall Street Journal* observed, the federal war on drugs "isn't so much a war as a free-for-all."[12]

The war on drugs seeks to (1) control those forms of drug production, distribution, and use defined by policy makers as harmful and therefore largely illegal, and (2) control the drug abuse that both causes and results from illegal drug activity.

Several features and trends have become associated with the war on drugs, such as the approach to alcohol and tobacco, the use of prescription drugs, and the increasing dangers from drug abuse.

Exclusion of alcohol and tobacco. Traditionally, American policy makers and the public have not targeted the drugs alcohol and tobacco in the war on drugs. Yet public and private programs and activities often combine both alcohol and drug abuse, sometimes under the rubric "substance abuse."

Recreational use of alcohol and tobacco, although causing high morbidity and mortality, is treated permissively by society's laws and is "pushed" through advertising. This permissive approach to alcohol and tobacco contrasts with society's restrictive approach to recreational use of other drugs.

Exclusion of prescription drugs. Society strongly encourages the use of prescription and over-the-counter drugs to treat a wide range of real or perceived discomforts, illnesses, and injuries. The notion of feeling better by ingesting drugs is deeply rooted in our culture. The legitimate drug industry is large, profitable, and powerful.

Discussions of the war on drugs tend not to focus on prescription drugs. The focus seems to be on heroin, cocaine and crack, methamphetamine, and marijuana. Yet major drug problems surround the diversion of prescription drugs from their legal flow and the harmful, though not necessarily illegal, prescription and use of addictive pharmaceuticals, such as certain tranquilizers.[13]

Growing dangers from drug use. Illegal drug activities and drug abuse have been linked to physical and psychological addiction; to severe health problems such as AIDS; to death; to violence and property crimes; to the growth of powerful criminal organizations, such as youth gangs and crime syndicates; to poverty; to family disintegration; to the destruction of neighborhoods and communities; and to general moral decline. Some observers believe that a failure to win the war on drugs will destroy society as we know it.

There is a widely held view in both lay and professional circles that despite a range of efforts

in the public and private sectors, the national war on drugs is in fact being lost. In support of this view, it is pointed out that neither the supply of, or the demand for, illegal drugs is under control. These drugs pour into the nation from foreign countries and are produced domestically as well. Drugs legally produced for medical uses continue to be diverted to illegal use. Illegal drugs are readily transported and trafficked throughout the nation. They are easily obtained by all segments of the population, including schoolchildren. Drug trafficking and drug gangs are destroying neighborhoods and spreading mayhem and death in places like Washington, D.C. and Los Angeles.

Whether the current trend is one of improvement or decline in the national drug situation is murky at best. What seems to be emerging from recent surveys and less formal observations is a picture of an overall decrease in the use of illegal drugs nationally, but a worsening picture for certain drugs, types of users, and geographical locations.

A recent editorial in *The Wall Street Journal* concluded that although overall use of illegal drugs is down, America's drug problem is probably worsening, not improving. Among other things, said the *Journal*, the drug problem among high school dropouts and the long-term unemployed appears to be worsening; people who get hooked on drugs are more likely to stay hooked; powerful and violence-associated drugs like crack, a highly addictive form of cocaine, are strengthening their foothold, particularly in the inner cities; and women are more often becoming heroin and cocaine addicts, resulting in a huge increase of "crack babies" in urban hospitals.[14]

In 1988, the U.S. General Accounting Office summarized the federal war on drugs as follows:

> Despite enhanced federal anti-drug efforts--increased funding, new supply and demand reduction initiatives, and increased drug seizures and arrests--the nation's drug problem persists. Opinions vary about what the federal government should do to control drug abuse. Experts disagree about which anti-drug programs work best, the proper mix of anti-drug programs, and the level of resources needed to make anti-drug efforts successful. While we cannot quantify the impact of federal efforts on drug abuse and trafficking, it seems likely that the problem would be more serious had anti-drug efforts not increased.
>
> Some experts believe that devoting more resources--money, personnel, and equipment--to anti-smuggling efforts will reduce the supply of drugs available for use. Others say we must increase our efforts to eradicate drug production in foreign countries and shut off supplies at their source. An increasing number of experts believe that a higher priority and increased resources must be assigned to reducing the demand for drugs through programs aimed at preventing drug abuse, treating drug abusers, and conducting research on the causes and cures of drug abuse. Regardless of their views on the appropriate strategy and level of resources for anti-drug efforts, some experts believe that substantial reductions in drug abuse will not occur unless there are fundamental changes in cultural attitudes and values which decrease society's demand for illegal drugs.[15]

Proposed initiatives. Growing frustration with the war on drugs has spawned numerous proposals and initiatives, such as:

- designation of a "drug czar" (a *fait accompli* with the appointment of William Bennett as Director of the newly created Office of National Drug Control Policy);

- rapid growth of drug awareness programs, such as "Just Say No";

- "zero tolerance" of drug offenses;

- targeting for special enforcement efforts those locations where drug activity is particularly intense;

- stricter penalties against dealers, including the death penalty in certain cases;

- more realistic drug-war goals and tougher priorities for allocating scarce enforcement resources (those resources include law enforcement personnel, judges, prisons, treatment programs, and education programs, all of which are widely viewed as insufficient, overloaded, and unlikely--given government budget constraints--to receive adequate funding);

- stepped-up border interdiction and pressure on foreign nations to control production of drugs within, and export of drugs beyond, their borders;

- increased use of employee drug testing; and

- outright legalization of one or more of the prohibited drugs against which war is currently being waged.

Some of the proposed initiatives, such as expanded drug testing, have met stiff resistance from proponents of civil liberties. Some arguments for legalization are similar to those that toppled prohibition: laws routinely broken by a major part of the population are undesirable, and a restrictive approach to drugs creates a drug underworld and a level of crime unacceptable to society. It is also argued that at least some of the drugs are far less harmful than alcohol or tobacco. On the subject of scarce resources, crowded court dockets and lack of prison space often make a sham of efforts to get tough with drug traffickers.

Many observers view the very notion of a "war on drugs," or at least the current priorities, strategies, and activities of that war, as fundamentally misguided and wasteful of the billions of dollars being spent. Major controversies have arisen over whether to attack supply or demand. There are reports of confusion as to who is in charge, huge gaps between rhetoric and reality, agonizing delays in the distribution of appropriated funds, lack of focus, and inadequate knowledge about and evaluation of alternative approaches.[16]

The war on drugs is complex and multifaceted. Witness, for example, the many applicable statutes, rules, and regulations; the mixture of public and private sector activity; the multiple levels of international, federal, state, and local effort; the diverse institutions, such as churches, schools, and the media; and the continuum from prevention through treatment.

The Emergence of Asset Forfeiture

Law enforcement officials are placing increasing emphasis on financial investigation and forfeiture of assets used in, or obtained from, the illegal drug trade.[17]

In legal parlance, forfeiture usually refers to the legal process by which government can take property that was illegally used or acquired, without compensating the owner. Forfeiture is an ancient legal doctrine that in recent years has been revived as a weapon in law enforcement, particularly drug enforcement. Federal, state, and local drug enforcement officials are using forfeiture to take away a critical element of every criminal organization: "the illegally accumulated assets of its members."[18]

This strategy is part of the U.S. Drug Enforcement Administration's "integrated enforcement program," which has three elements: trafficker arrests, drug removal, and asset removal/financial investigation. Asset

removal/financial investigation is valued as a means of taking the quick, large profit out of the drug trade; focusing juries' attention on the luxurious lifestyles of accused drug traffickers; and flushing out the leaders of drug-trafficking organizations. The seizure of boats, autos, planes, real estate, bank accounts, and cash deprives traffickers of the working capital necessary to continue their operations. Without forfeiture, even incarceration of key traffickers may be inadequate to terminate the criminal organization, and without forfeiture, traffickers may view incarceration as an acceptable risk, since they will still have assets when released from prison. Financial information is prized because it is largely document-based, and thus generally more reliable than human informants.[19]

Forfeiture also can generate income for law enforcement agencies that can be plowed back into the war on drugs.[20]

Basic types of forfeiture. There are several categories of forfeiture. First, forfeiture can be categorized as *summary*, *administrative*, or *judicial*.

In summary forfeiture, the property in question can be seized and forfeited to the government without any administrative or judicial proceedings. An example under Hawaii law is wild growths of marijuana.[21]

In administrative forfeiture, an official of an administrative agency makes the final decision on whether the property in question will be forfeited. No court of law is involved, except where the statute provides for recourse to the courts. Under Hawaii law, for example, motor vehicles and other vehicles can be forfeited administratively; the attorney general is the "judge."[22]

In judicial forfeiture, the proceedings take place in a court of law, and a judge makes the decision as to forfeiture. In Hawaii, for example, real property forfeitures, and forfeitures of personal property (other than motor vehicles and other conveyances) valued at more than $100,000, must be pursued in the courts.[23]

Second, forfeitures can be categorized as *civil* or *criminal*. Unlike criminal forfeiture, the success of civil forfeiture does not depend upon convicting the property owner of a crime, in which case the government would have the burden of proving the crime "beyond a reasonable doubt." In civil forfeiture, property connected with criminal activity can be forfeited even if the owner is not convicted of a related crime, providing statutory requirements are met. This makes civil forfeiture very attractive to law enforcement officials.

Third, forfeitures can be categorized as *in rem* or *in personam*. In the former, the forfeiture proceeding is directed only against the property; the property is the defendant in the case. The forfeiture decision determines the ownership of that property and affects the whole world, including anyone who might have a claim to the property. The decision cannot impose personal obligations or liabilities on any person. The court can issue an *in rem* decision without having jurisdiction over anyone.

But with *in personam* forfeiture, the proceedings are directed against a person; a person is the defendant. The forfeiture decision affects only the parties to the proceeding and can impose personal obligations on them. The court must have jurisdiction over them in order to do this.

Forfeiture statutes provide for one or more of these categories of forfeiture and establish the criteria and procedures for each. Hawaii's statutes include all of the categories. The decision as to which type of forfeiture to pursue in a particular drug case should weigh legal, practical, and strategic considerations.

Hawaii's new forfeiture statute. In 1988, the State enacted Act 260 which includes the temporary Hawaii Omnibus Criminal Forfeiture Act and related provisions.[24] Although Act 260

is aimed at criminals, it authorizes a variety of procedural types of forfeiture, including summary, administrative, civil, and criminal. The act took effect on June 9, 1988 and will terminate on June 30, 1990 unless extended.

The purpose of Act 260 was to consolidate and clarify the subjectivity of, procedures for, and disposition of forfeiture of property, with the intent of making crime unprofitable by taking away the criminal's profits.[25] It inserted a new forfeiture chapter in the Hawaii Penal Code, now designated Chapter 712A; deleted Section 701-119 of the Penal Code, the procedure for forfeiture section; amended Section 842-3, HRS, the forfeiture penalty in the organized crime chapter; and amended Section 329-55, HRS, the forfeiture provision of Hawaii's Controlled Substances Act.

If Act 260 is not reenacted, anything it added will be deleted and anything it deleted or amended will be restored.

Chapter 4

MANAGEMENT OF THE NARCOTICS ENFORCEMENT DIVISION

The Narcotics Enforcement Division of the Department of the Attorney General has broad functions, limited resources, and an uncertain future. In these respects, the division exhibits in microcosm the dilemmas of the wider "war on drugs."

This chapter evaluates broadly the management of the division. It focuses on the state administration's overall approach to drug abuse control, including drug enforcement, and on the implications of this approach for the narcotics division.

Summary of Findings

1. *The state administration has not provided leadership in developing a state plan for drug abuse. Planning has been unsystematic, with little analysis of the relative dangers presented by various substances and of the costs and benefits of various control stategies.*

2. *The state administration does not yet have a statewide strategy for drug enforcement and prosecution. Without a strategy, Hawaii's drug enforcement and prosecutorial network has been unable to frame well-defined goals, objectives, priorities, roles, and relationships.*

3. *The Narcotics Enforcement Division has received no guidance and direction as to its role and function. Its limited resources are scattered.*

Lack of a State Plan for Drug Abuse

The size and complexity of the drug abuse problem demands a state plan covering the full range of abused drugs--alcohol and tobacco included--and spanning prevention, education, treatment, law enforcement, and regulation. The state administration does not have a plan, nor has it engaged in the analysis a plan requires. Among other things, this has left unclear the role of the Narcotics Enforcement Division.

Leadership and direction in planning. In drug abuse planning, the administration lacks leadership and direction. Many advisory groups, departments, and parts of departments vie for influence and funds, yet few resources are dedicated to planning. No one department has been held accountable for developing a plan.

Act 190, SLH 1975 (now Part XVI of the health statutes) required the health department to establish a coordinated and comprehensive program in substance abuse treatment and prevention, including a state plan. It has not done so. The requirement still exists.

In 1988, the Office of State Planning (OSP) tried unsuccessfully to get the health department moving on a master plan for substance abuse. Now OSP is trying to publish at least a "strategic directions" document by spring of 1990. According to OSP, the document will crystallize a philosophy of alcohol and drug abuse control. It will deal with prevention, education, treatment,

and law enforcement. A more detailed program plan will follow, with objectives and budget proposals.

But the process for plan development remains loose and unstructured. It is not clear who is in charge, the health department or OSP. Representatives of OSP, the health department, the attorney general, and the Department of Education participate in the planning effort, with OSP calling meetings. However, documentation of the process--plans, minutes, schedules--is hard to come by.

Although the attorney general's department takes part in plan development, the narcotics division of the department does not. Yet the narcotics division was described in the attorney general's 1989 *Report to the Legislature* as being "responsible for the statewide enforcement program involving narcotics and dangerous drugs."[1]

By statute, the public safety department soon will include the narcotics division and will be responsible for developing state policies and objectives for law enforcement.[2] Yet there has been little, if any, contact between the plan developers and the transition team for the public safety department.

Hawaii needs ongoing, systematic planning based on analysis of available intelligence on drug abuse. Instead, planning efforts are sporadic and fragmented, driven principally by the search for federal funds. This is true of the treatment and prevention side and the law enforcement side alike.

Analysis in planning. A plan should be the product of analysis. By analysis we mean a systematic comparison of alternative means of attaining desired objectives. In drug abuse, the State appears not to have conducted such comparisons.

Drug abuse in America revolves chiefly around the following: alcohol; tobacco; cocaine, including crack; opium products, such as heroin; marijuana; and a variety of other dangerous drugs, such as amphetamine, methamphetamine (including the powerful crystal meth, or ice), barbiturates, tranquilizers, and "designer drugs." An analytical approach to controlling drug abuse defines the threat posed by each drug, specifies the objectives of control, identifies alternative supply-side and demand-side means of reaching the objectives, and compares the alternatives in light of the associated costs, benefits, assumptions, risks, and uncertainties. This analysis is largely missing from the State's approach.

The only recent document outlining the State's approach to drug abuse is a report, *A Survey of Hawaii's War on Drugs*, issued by the attorney general in February 1989.[3] The report is limited in what it examines and what it proposes.

The *Survey* contains little data and analysis to support its conclusions. It called for an all-out assault on marijuana by means of border interdiction at Hawaii's airports and harbors and by field surveillance and enforcement, all to be supported by a major infusion of federal funds. It claimed that Hawaii's marijuana industry had overwhelmed enforcement; that efforts to eradicate marijuana by pulling or spraying plants had failed; that Hawaii's unique geography means interdiction can succeed; and that interdiction could dry up Hawaii's marijuana industry and lay the groundwork for interdicting other drugs. The *Survey* sought federal designation of Hawaii as a high-intensity drug trafficking area, based on the argument that Hawaii supplies as much as 25 percent of the nation's marijuana.

The *Survey* focused almost exclusively on marijuana without comparative analysis of the threat posed by other substances, and of the costs, benefits, and risks of a major assault on marijuana. It cast marijuana as Hawaii's most serious drug trafficking problem, with an estimated volume as large as $10 billion annually. It concluded that Hawaii-grown marijuana was being used as barter for importing mainland

cocaine and was providing the capital base for a growing cocaine-trafficking industry in the state. The *Survey* did not document this conclusion, or provide evidence to support its other statements. It reported widespread marijuana use among schoolchildren and adults, but did not describe marijuana's effects on either. It noted deaths from cocaine, but not from marijuana. It explicitly postponed discussion of alcohol and of drug treatment to later documents.

The *Survey* said that "the population of heroin users in Hawaii is not considered to be major for the state (4,000 estimated addicts)."[4] But it did not explain why the presence of 4,000 heroin addicts in a population of slightly over a million is not considered a major problem. The *Survey* did not assess the negative impact of reducing the marijuana supply, such as driving users toward more dangerous drugs. Already, newspaper accounts have suggested that decreases in marijuana availability in Hawaii have led to increased use of the vastly more dangerous crystal methamphetamine (ice).[5]

The approach in the report was too narrow in that it did not assess the relative degree of danger posed by marijuana compared with other drugs and the relative costs and benefits of a major enforcement push.

In the absence of planning, the tendency is to react. Since the publication of the *Survey*, the rapid emergence of ice as an abused drug has captured public and official attention. A range of Hawaii lawmakers and enforcement officials have been seeking designation of Hawaii as a high-intensity drug trafficking area, but this time because of ice.

Responsibility for planning. To be solid, a master plan should be based on information covering the many aspects of drug abuse. It should include "street drugs," diverted pharmaceuticals, and other drugs such as alcohol and tobacco. It should be based on analysis of the problems posed by particular drugs, and the costs and benefits of alternative approaches to controlling supply or demand. Finally, it should be developed through a well-organized, clearly understood planning process.

To provide leadership and direction in drug abuse planning, the state administration might follow the lead of the federal administration and appoint a drug czar. This, however, would simply add another layer of government, unnecessarily.

OSP should be made responsible for analyzing the drug abuse issue and writing a state plan. It is the agency best positioned to bring together the health, education, law enforcement, and regulatory elements needed for the plan. Its specialty is planning. Other state agencies should be asked both to contribute to plan development, and to implement the plan, in their particular area of statutory responsibility and expertise.

Lack of a Statewide Strategy for Drug Enforcement

A statewide drug enforcement strategy is an action plan that says how to mobilize resources to achieve the goals of drug enforcement and prosecution. It is systematic, thoughtful, and comprehensive. It defines state and county agency roles and sets tactical priorities.

Hawaii does not have such a plan. Enforcement and prosecutorial goals, objectives, priorities, roles, and relationships are insufficiently defined. The lack of a strategy has weakened two potentially powerful weapons in the war on drugs: (1) the Narcotics Enforcement Division and (2) the state asset forfeiture program, in which the division, the attorney general, and the county police and prosecutors take part.

Leadership in planning a drug enforcement strategy. The attorney general has been the administration's point man for the war on drugs. He has been energetic, dedicated, and visible.

The attorney general's activities have included: (1) coordinating state and county enforcement officials behind drug bills; (2) chairing the Governor's Committee on Crime, which advises on the distribution of drug enforcement funds; (3) issuing departmental reports on the drug problem and on public and private responses to it; (4) channeling federal funds to state and county criminal justice agencies through his Resource Coordination Division; (5) seeking federal designation of Hawaii as a high-intensity drug trafficking area in marijuana; and (6) meeting with federal, state, and county drug enforcement officials.

The attorney general, then, has pulled together a wealth of information on the drug problem and on the drug enforcement network. He has marshalled legislative, financial, and enforcement resources to fight the "war on drugs."

These activities, however, have occurred without a comprehensive, well-analyzed drug enforcement strategy. Instead of systematic, ongoing planning that calculates the value of various enforcement tactics, there is unsystematic, intermittent planning geared to federal funding.

There are many signs of the absence of systematic, comprehensive planning for drug enforcement and prosecution. Perhaps the most obvious are that no one has been assigned to do such planning and that no *written* strategy exists. Some of the groundwork for a strategy has been laid by the department's Resource Coordination Division in its processing of federal grant applications. But this work is not the result of a comprehensive planning process.

Interviews with law enforcement officers and prosecutors revealed differing views as to the seriousness of various drug problems, the value of various strategies, and the role of the State. There was concern that the State lacks a drug enforcement policy and a coordinated strategy, and there was confusion about the role of the narcotics division. State-county roles and relationships generally are informal, lacking the permanence and continuity that written plans and memoranda of understanding could provide. There are no statewide goals and objectives to provide motivation, assess progress, and force accountability. Overall, the process of setting priorities is weak, with no consensus of what works and what doesn't, or where enforcement dollars can do the most good for the state.

Issues in planning a statewide strategy. A formal statewide strategy for drug enforcement would require centralized leadership and coordination. The concept is not without controversy.

One argument against such an approach is that a formal statewide strategy would compromise the counties' ability to tailor drug enforcement to their own needs. But the statewide strategy could explicitly address and accommodate counties' needs.

Another argument is that a formal strategy would require documents and memoranda of understanding, and that this level of formality is less desirable than an informal, unstructured approach. But written commitments that institutionalize roles and relationships could be extremely valuable, particularly in complex areas such as forfeiture. Furthermore, written plans enhance accountability.

Another objection is that state coordination would reduce healthy competition between agencies. Competition, some say, brings out the best in people; centralized control stifles initiative. But a statewide strategy could address competition explicitly. If desired, competition in certain functions could be specified in the plan.

Yet another objection is that neither the attorney general nor the public safety director has the legal authority to tell the counties what to do. The State, then, should simply act as a

catalyst, facilitating communication among drug enforcement agencies and providing guidance and direction to them. But the legal limitations on the State's power do not prevent it from pushing for a strategy. The strategy would, of course, be a cooperative effort with the counties, not a product of state fiat.

An additional argument is that a formal statewide strategy would be inflexible. It would be difficult, that is, to change the plan once in place, even in the face of a rapidly changing drug problem (such as the recent emergence of crystal meth). But even a formal plan could be amended without undue strain.

Finally, there are arguments more fundamental in nature: law enforcement is useless in the drug war, so coordination is irrelevant; drug enforcement has reached its limits and further efforts at coordination are not likely to make a noticeable difference; coordination has reached its limits given the natural desire of drug agencies to carve out their own domain; calls for coordination are simply reflex responses resulting from frustration at what seems to be an insoluble social problem; and so on. To these we can only respond that in our view, if an enforcement *war* is to be waged, there should be a strategy, and that a more systematic approach could help.

Responsibility for producing a drug enforcement strategy. As stated earlier in this chapter, the state administration should develop a drug abuse master plan. The drug enforcement strategy should be linked tightly to that plan. The written strategy could be part of a drug abuse master plan document, but probably it would be more feasible to include the core elements of the strategy in the master plan, with details presented in a separate enforcement document.

An example of the latter approach comes from New Jersey's 1986 *Blueprint for a Drug-Free New Jersey*, which sets policy priorities for prevention, intervention, treatment, and law enforcement.[6] In 1988, the New Jersey attorney general followed with the *Statewide Action Plan for Narcotics Enforcement*.[7] The action plan was described as the official policy of the state for controlled-substances enforcement and was designed to guide state, county, and local enforcement agencies. It designated various agencies as "principal participants" in implementing the plan. It established strategic objectives, tactical objectives, directives, and guidelines, covering a range of activities such as patrol and investigation, interdiction, asset forfeiture, training, and evaluation.

In New Jersey, the attorney general has supervisory powers over the 21 county prosecutors and 460 local police departments. Because New Jersey law gives the attorney general much greater control over local law enforcement agencies than Hawaii law gives to its state enforcement officials, including the attorney general and the director of public safety, the New Jersey approach would have to be modified for Hawaii.

With the creation of the new public safety department in Hawaii, there is a policy question as to which official--the public safety director or the attorney general--should be responsible for developing and implementing a statewide drug enforcement strategy. The attorney general apparently still is the chief law enforcement officer of the State. Yet under Act 211, the public safety director will be responsible for formulating and implementing state goals and objectives for correctional, security, law enforcement, and public safety programs.

In our view, the responsibility for developing a drug enforcement strategy should remain with the Department of the Attorney General. The attorney general himself has already taken an active role in the drug war. He has built good relationships with the county police and prosecutors and consequently enjoys wide influence. The department has extensive legal expertise, controls federal and forfeiture funds that can provide political leverage, and has

legal responsibility for administrative forfeiture. The department also has some experience in drug enforcement planning, though primarily to gain federal funding.

Unclear Role of the Narcotics Enforcement Division

The Narcotics Enforcement Division is the only enforcement agency in the state-county system that combines a locus in state government, an exclusive focus on abused drugs, statewide jurisdiction, and a mixture of regulatory and criminal authority. With these advantages, the division might appear well-positioned to play a central role in Hawaii's war on drugs.

But the division has been buffeted in the past few years. It has moved from the health department to the attorney general's department, and will soon move to the public safety department. It has been subjected to continual questions as to its role, by both supporters and detractors.

The absence of a state master plan for drug abuse has been one factor contributing to the division's dilemma. Another has been the lack of a statewide drug enforcement strategy. The division combines educational, regulatory, and law enforcement functions in drug control. Defining the appropriate mix and establishing the division's role, goals, and objectives is difficult without a drug abuse plan and without a more specific drug enforcement strategy.

Insufficient objectives and priorities. The state administration has not made it clear how it sees the role of the division and what it expects the division to achieve.

The division's functions are broad. The attorney general's 1989 *Report to the Legislature* stated that the division is "responsible for the statewide enforcement program involving narcotics and dangerous drugs." The 1989 report also listed basic activities of the division, such as controlling drug diversion through inspection and enforcement, investigating other violations of drug laws, administering the Hawaii Omnibus Criminal Forfeiture Act, and pursuing drug dealers' assets through complex financial investigations. The division is also described as "the primary state agency responsible for overall development of drug enforcement strategy, programs, planning, and evaluation in Hawaii."

More focus and precision is needed. Because the division has many functions; because the drug problem is large, complex, and obstinate; and because the division is very small, precise objectives and priorities are needed to foster rational and realistic choices concerning allocation of the division's resources.

While still in the health department, the narcotics division did set objectives and priorities. For example, the division manual stated that its first priority is to enforce statutes relating to individuals registered to manufacture, prescribe, dispense, administer, or possess controlled substances; then assist county police departments and other law enforcement agencies in detecting and apprehending controlled substance violators; administer all forfeiture provisions; and cooperate with other agencies and offices in training and educating law enforcement officers in matters relating to controlled substances.

These objectives and priorities have several weaknesses. First, they are not current and authoritative. The division supervisor has not updated the division manual pending direction from the administration. The attorney general is responsible for providing goals, objectives, and directives to the division, but he has not issued instructions. Second, the priorities and objectives do not reflect an assessment of the state's drug problems and alternative responses to them. Third, the priorities and objectives are not precise. For example, they do not contain specific tasks and time frames.

Hybrid nature of the division. The division's role is also unclear because it is a hybrid of

regulatory pharmaceutical functions and "street" drug functions. The administration should analyze the division's hybrid nature and decide whether it is an asset or a liability. There are strong arguments for combining pharmaceutical and street drug functions in one agency: often the drug trail leads from one to the other; pharmaceuticals are sometimes converted into street drugs by traffickers; integration of drug control is philosophically desirable and cost-effective.

There are also good arguments against: pharmaceuticals and street drugs are substantially different subjects; agents will be drawn away from their duties regarding pharmaceuticals to the area of street drugs; public health departments may be uncomfortable with police-type functions, and attorneys general and public safety directors may be uncomfortable with pharmaceutical functions; and a hybrid agency by nature suffers from internal and external confusion as to its role.

Again, there are persuasive arguments for and against combining regulation and enforcement in a single agency. In favor, it can be argued that the two functions reinforce each other: physicians may be more likely to cooperate in investigations when the investigating agency is also a regulatory agency that controls their controlled substances registration; leads developed in regulatory inspections can be passed on to the enforcement agent down the hall.

In opposition, it can be argued that regulators and enforcers are two different breeds not easily housed under the same roof; that the hybrid agency inevitably will favor one mode to the detriment of the other; and that if a regulator switches hats from time to time, he or she loses the ability to foster voluntary compliance by registrants. (Note that this situation can be avoided by not allowing individual agents to carry out both functions. Given its small size, however, the narcotics division would find this difficult to do; often its enforcement agents require an assist from its regulatory agents.)

The hybrid issue cannot be examined without considering the small size of the division. There is a fundamental question of whether a unit of nine agents can effectively perform the wide range of functions it has been assigned. If the public safety department chooses to narrow the division's focus, it should staff the division with the kinds of agents best suited to that focus.

Scattered efforts of the division. In not developing official, precise objectives and priorities for the division, the administration has left unresolved a range of issues that press for attention. A review of case assignments for fiscal year 1988-89 showed that the nine agents cover a wide spectrum of functions. Some key questions that emerge are (1) the extent to which the division should use inspections to enforce the Controlled Substances Act, (2) the extent to which it should conduct educational programs against drug abuse, (3) the extent to which it should rely on local police to investigate and arrest cases of forged and altered prescriptions, (4) the extent to which the division should enforce the Penal Code provisions of the state drug laws, and (5) whether it should administer and investigate forfeiture.

Inspections. According to the division manual, an inspection consists of on-site monitoring of a registrant to check for voluntary compliance, to hear and rectify problems or complaints, and to provide information to the registrant about the requirements of the Controlled Substances Act. Violation notices are to be issued only for flagrant or repeated violations of controlled substances regulations. The manual states that agents are to conduct such inspections as time and manpower allow. The supervisor is to prepare a schedule for inspecting annually a percentage of the total number of registrants. The compliance section is to conduct the inspections, but other activities, not specified, are to take precedence.

In FY 1988-89, the division assigned only 56 inspections, all pharmacies, out of approximately 4,500 registrants. There is currently no schedule

for inspections. Certain division personnel say the division is not on top of the drug diversion problem on the neighbor islands. This gap in coverage is generally attributed to lack of resources.

To determine the priority the division should give to inspections, the administration should scrutinize the scope of the diversion problem, and the costs and benefits to the drug enforcement system of using inspections to fight diversion.

Education. Under the Controlled Substances Act, it is optional to conduct inspections,[8] but mandatory to conduct educational programs to prevent misuse and abuse of controlled substances.[9] The act suggests a variety of educational activities, including promoting better recognition of abuse within the regulated industry and interested organizations, evaluating educational programs, disseminating controlled substances research to the public, and helping train state and local law enforcement officials in controlled substances.[10]

The division is not very active in education. Registrant education is said to occur in connection with inspections and other encounters with registrants. But as already noted, inspections have not been given high priority. In FY 1988-89, only five lecture assignments and two training assignments were made. Paradoxically, the division seems more active in enforcing the Penal Code, an optional activity, then in education, a required activity.

The administration should examine the division's role in education. This is particularly appropriate in light of the growing belief in prevention to fight drug abuse.

Fraudulent obtaining of controlled substances. Examples of fraudulent obtaining are forged prescriptions (the drug abuser forges the physician's signature on a prescription slip) and altered prescriptions (the abuser changes a physician's prescription, perhaps by adding a zero to the quantity prescribed). Commonly, the division gets a call from a pharmacist who spots the fraud, and agents go straight to the pharmacy to arrest the suspect. If they catch the suspect in the act, they make an arrest on the spot for the crime. If the suspect has disappeared, they try to find the suspect and make an arrest. In either case, the investigation is usually short and straightforward.

The division's investigative report is reviewed by the department's Criminal Justice Division and normally is submitted to the appropriate county prosecutor. The narcotics division assigned 47 of these cases in FY 1988-89. Occasionally these cases are also pursued by county police.

The administration should analyze the costs and benefits of having the division, rather than the county police, pursue most of these cases. Good arguments can be made for and against state-level investigating and arresting. In favor, an argument might be that such a state agency can develop expertise and interest in pharmaceuticals that a local police department cannot, and that this focus is useful in dealing with prescription-related crimes. An argument in opposition might be that these cases are not complicated and can be handled more easily by local police who are in close proximity to the pharmacies where the crimes are committed than by the more distant state agency (except in the city or cities where the state agency has offices).

Penal Code enforcement. In FY 1988-89, the division assigned 17 cases involving enforcement of the drug provisions in the Penal Code that prohibit promoting dangerous, harmful, or detrimental drugs. These cases typically are more complex and require more time to pursue than cases of fraudulent obtaining. Like the latter, the division's completed investigative reports on alleged Penal Code crimes normally are submitted to the county prosecutor. Occasionally the Criminal Justice Division handles the prosecution.

Whether the narcotics division should continue to make a substantial commitment to enforcing the Penal Code provisions of the state drug laws or leave this matter to the county police has been the most controversial issue surrounding the narcotics division. The debate is over the extent of state police powers. The division has characteristics that provide sound justification for this activity. As a part of state government, it can, or ought to, feed into and get direction from drug policy makers and planners at the highest levels. It is well positioned to track statewide patterns of drug trafficking. It can enhance checks and balances among the county, state, and federal governments, as well as contribute to healthy competition in the drug enforcement network.

Moreover, the narcotics division can investigate and enforce on all of the islands. True, the police from a particular county can be designated by the attorney general to enforce statewide. Also, under section 52-17, HRS, police from a particular county pursuing a drug investigation that began in their county can enforce in another county, with the permission of the other county's police chief. But these are special arrangements, and can be complicated by political and logistical considerations. In contrast, the narcotics division can enforce the drug laws in any county without special arrangements or justifications. Also, the division can provide undercover assistance to neighbor island police departments whose narcotics officers become too well-known on the island.

These justifications for continued Penal Code duties are, however, vulnerable. There is no proof that without the division Penal Code enforcement would be substantially damaged. Furthermore, there is a weak tradition of Penal Code enforcement at the state level in Hawaii. On the mainland, enforcement is more evenly split between federal, state, county, and municipal authorities. In contrast, Hawaii's law enforcement structure has been mostly county and federal. The police and prosecutors of the state's island counties have resisted efforts to alter this system.

What is crucial is that the division's role in Penal Code enforcement should result from systematic analysis. For example, some in the division see it pursuing upper- and mid-level traffickers, such as those who head trafficking organizations and finance the drug trade, and those who act as the industry's couriers and money handlers. But first, the State must decide whether it is desirable to pursue these levels of trafficking. It needs to determine whether this strategy pays off, as opposed, for example, to going after the low-level drug peddlers who work the streets. Nothing can be assumed.

Regardless of which level of trafficking is pursued, the State must determine whether the pursuit can be handled adequately by the counties and the federal government without the State. If they cannot handle it alone, then there may be reason for the narcotics division to help handle it. Even if the counties and the federal government can handle it, there may be value in involving the narcotics division, to enhance the pursuit of cases that cross county lines, to improve statewide intelligence needed both for effective drug enforcement and for sound allocation of drug abuse resources, or to create healthy competition with the counties and the federal government. The pros and cons of involving the narcotics division may differ from drug to drug.

Forfeiture. Analysis is needed of whether it is appropriate for the division to be engaged in forfeiture administration, complex forfeiture investigations, both, or neither. The attorney general has delegated his department's forfeiture administrative duties under chapter 712A to the narcotics division. An agent in the enforcement section handles all aspects of forfeiture administration in consultation with the deputy attorney general in the Criminal Justice Division who is assigned to narcotics. This responsibility includes managing forfeited property, drafting forfeiture documents, and publishing legal notices. In FY 1988-89, the agent was assigned to administer 64 forfeiture cases.

On balance, forfeiture administration is a questionable use of the division's time. The assigned agent becomes largely unavailable for other enforcement duties. This is a major loss in such a small division. The State should explore whether publication of notices and other law-oriented aspects of forfeiture administration could be assigned to the Criminal Justice Division and property custodial functions to the Administrative Services Office of the attorney general. In any event, under Chapter 712A, forfeiture administration is the responsibility of the attorney general's department. When the narcotics division moves to the public safety department, forfeiture administration will no longer be within its authority.

Other questions exist concerning the division's role in forfeiture. Tracing the proceeds of drug trafficking, searching public records to find hidden assets, preparing financial search warrants, tracing money flows through financial institutions, uncovering assets laundered through a business--these are the sophisticated techniques that could make forfeiture a formidable weapon. Hawaii's drug enforcement system appears not to have developed the capacity to consistently and expertly perform these complex forfeiture investigations. Because of this, it can be argued that the full potential of Chapter 712A is not being realized.

In place of forfeiture administration, some might argue, the narcotics division could focus on conducting complex forfeiture investigations, both pursuing its own cases and acting as a technical advisor to county police departments that wish to develop expertise. If so, additional staff would be needed, particularly persons with strong financial investigative skills.

But before moving in this direction, the State must decide what it wants out of forfeiture. This is an issue for strategic planning. As in other areas, no assumptions should be made. Complex forfeitures may or may not have the potential to reduce drug abuse.

Lack of management measures. Closely related to the lack of objectives and priorities is the administration's lack of measures for meaningfully managing and assessing the effectiveness of the division. This is not surprising since the administration has not decided what the division should be doing.

It is very difficult to assess the effectiveness of a drug enforcement agency. Such agencies commonly publicize the number of arrests, conviction rates, and amounts of drugs seized as evidence of effectiveness. But complex variables and data limitations make it difficult to compare agencies with one another or to link the efforts of an agency to changes in drug availability and drug abuse.

Nevertheless, the administration should work to develop effectiveness measures for the narcotics division. One measure could be the timeliness with which complaints received by the division concerning drug diversion and street trafficking are being processed. Another measure could be the degree of familiarity and satisfaction by the medical and pharmaceutical communities with the work of the division. Yet another measure could be the number of inspections or educational programs performed per year. It is important that the measures bear a rational relationship to the goals, objectives, and priorities of whatever drug abuse and drug enforcement plans the State should develop.

Among other things, the new Department of Public Safety will have statutory responsibility for formulating and implementing state policies and objectives for law enforcement and public safety programs and functions. When the narcotics division moves to public safety, the new department should exercise this responsibility by giving the division specific goals, objectives, and directives. It should also develop effectiveness measures for the division.

Unclear authority over controlled substances. In the process of transferring the

narcotics division from the health department to the attorney general's department, authority for the Controlled Substances Act has become unclear. Act 235, SLH 1987, may not have adequately transferred authority for controlled substances from the health department to the attorney general's department. The pertinent language of the Act follows:

> SECTION 1. The purpose of this Act is to transfer the office of narcotics enforcement to the department of the attorney general.
>
> SECTION 2. All rights, powers, functions, and duties of the office of narcotics enforcement of the department of public health are transferred to the department of the attorney general.
>
> All officers and employees and their positions, whose functions are transferred by this Act, shall be transferred with their functions and positions and shall continue to perform their regular duties upon their transfer, subject to the state personnel laws and this Act. . . .
>
> SECTION 3. All appropriations, positions, records, equipment, machines, files, supplies, contracts, books, papers, documents, maps, and other personal property heretofore made, used, acquired, or held by the department of health relating to the functions transferred to the department of the attorney general shall be transferred with the functions to which they relate.

Act 235 did not explicitly transfer the health department's authority in controlled substances to the attorney general's department. In addition, the narcotics division has no explicit statutory responsibility for the Controlled Substances Act. Because of this, the attorney general's department became concerned that the authority might remain in the health department. To deal with this problem, the attorney general's department and the health department executed an "agreement to transfer power and authority."

However, the legal situation still is unclear. Transfer of the statutory authority by means of this agreement between agencies appears vulnerable to legal challenge.

A similar flaw may afflict Act 211, SLH 1989. Its preamble states that it transfers the "functions and employees" of the narcotics division to the public safety department. Section 2 specifies that the "functions and authority" of the narcotics division shall be transferred to the public safety department.

Legislation is needed explicitly identifying the controlled substances functions that are being transferred to the public safety department.

Recommendations

1. *The Office of State Planning should write a state master plan for the control of drug abuse through prevention, education, treatment, law enforcement, and regulation. The plan should cover alcohol, tobacco, illegally produced drugs, and legally produced pharmaceuticals. It should contain objectives, policies, and priorities for action. It should be based on systematic analysis that compares the dangers posed by various substances and the costs, risks, benefits, and assumptions associated with alternative approaches for control. In developing the plan, the office should have a process for obtaining ideas and information from the Department of Health and other state agencies, the counties, the federal government, and the community.*

2. *The Department of the Attorney General should prepare and implement a formal, systematic strategy for drug enforcement and prosecution that would apply statewide. The strategy should be a written document that:*

   - *orchestrates state and local drug enforcement efforts to achieve the enforcement priorities and objectives of the master drug abuse plan;*
   - *defines the roles of all state and county law enforcement and prosecuting agencies; and*
   - *establishes tactical priorities to ensure that resources will be mobilized and allocated in the most cost-effective way.*

   The strategy should include the narcotics division and asset forfeiture. It should be developed cooperatively with the Department of Public Safety and other state and county agencies involved in drug enforcement.

3. *The Department of Public Safety should provide strong direction to the narcotics division. The department should work with the narcotics division to develop precise and achievable objectives and priorities consistent with a master plan for drug abuse and a statewide strategy for drug enforcement. It should define the functions of the division, including the extent to which the division should pursue inspections, education, fraudulent obtaining of controlled prescription drugs, Penal Code enforcement, and forfeiture. It should develop management measures for the division.*

4. *The attorney general's department should develop legislation explicitly defining the public safety department's authority under the Controlled Substances Act.*

Chapter 5

FORFEITURE MANAGEMENT AND FINANCIAL AUDIT OF FORFEITED MONIES

The Department of the Attorney General is the coordinating agency for Hawaii's new Omnibus Criminal Forfeiture Act. This chapter focuses on the department's forfeiture program and presents the results of a financial audit on the monies forfeited to the department through the Narcotics Enforcement Division, as requested by Section 217, Act 316, SLH 1989.

Summary of Findings

1. *The Department of the Attorney General has not planned or developed an adequate forfeiture program. There are no explicit objectives or priorities; roles and relationships are uncertain; and there is a dearth of rules, policies, and procedures.*

2. *The department does not have formal policies and procedures for the processing of forfeited property--both cash and other assets--by the Narcotics Enforcement Division. This has resulted in delays, inconsistencies, and accounting deficiencies.*

3. *The scheduled July 1, 1990, expiration of the Omnibus Forfeiture Act would deprive Hawaii of the opportunity to develop forfeiture.*

Inadequate Plan and Program for Forfeiture

The Department of the Attorney General is the coordinating agency under the Hawaii Omnibus Criminal Forfeiture Act (hereafter the Omnibus Forfeiture Act).[1] The department has not yet framed explicit forfeiture objectives and priorities. State and county roles and responsibilities in forfeiture need definition. There is a dearth of rules, policies, and procedures for forfeiture.

Lack of explicit objectives and priorities for forfeiture. The Legislature made it clear that the intent of the Omnibus Forfeiture Act was to make crime unprofitable by taking away the criminal's profits.[2] A secondary benefit of forfeiture is to raise money to help fund law enforcement activities. But Hawaii's forfeiture system lacks explicitly stated objectives and priorities geared toward achieving these benefits.

Forfeiture can proceed in several possible directions. For example, decisions must be made about the relative emphasis to be placed on routine forfeiture of vehicles versus complex forfeitures of real property and other major assets. So far, the explicitness is missing in Hawaii. In February 1989 the Criminal Justice Division of the Department of the Attorney General made this observation:

> Experience has already shown that administrative forfeiture is the most streamlined and least burdensome procedure by which law enforcement officers can seize, forfeit and make use

> of the assets of criminal enterprises, thereby making it the preferred method of asset forfeiture.[3]

However, the division has yet to delineate a plan concerning forfeiture that addresses the many issues implicit in the above statement, such as whether and when judicial forfeiture is to be used.

Uncertain roles and relationships in forfeiture. There is a good deal of uncertainty as to the roles and relationships of various state and county enforcement and prosecutorial agencies, particularly for the more advanced types of forfeitures.

Some forfeitures are relatively straightforward. An example is seizure and administrative forfeiture--with minimal investigation or analysis--of cash and vehicles found at the arrest of a low-level street trafficker. In this area, roles and relationships are relatively clear. But other forfeitures are more complex. An example is judicial forfeiture--after a far-reaching financial investigation--of millions of dollars in real estate held by the leaders of a major drug trafficking network.

Achieving the more complex forfeitures requires sophisticated investigation, prosecution, and coordination. The capacity to pursue complex forfeitures is little developed at the state and county levels in Hawaii. Still to be resolved is whether complex forfeiture prosecutions will be pursued primarily by the attorney general's department, or by the county prosecutors (perhaps using standardized pleadings developed by the attorney general), or by both.

It is not clear which agencies will pursue complex forfeitures, how they will develop the needed knowledge and expertise, and how they will relate to other agencies. Missing are plans for how agencies will meet common needs, such as funding, training, intelligence, pleadings, case tracking, review of cases for forfeiture potential, and assessment of relevant case law.

Dearth of rules, policies, and procedures for forfeiture. The department should have moved faster to draw up appropriate documents covering forfeiture investigation, prosecution, and management and disposition of seized and forfeited property. The array of manuals on forfeiture produced by the U.S. Department of Justice over the past few years provides suitable models.

There has been some activity. In February 1989, the Criminal Justice Division published an outline titled *Administrative Asset Forfeiture Under the Hawaii Omnibus Criminal Forfeiture Act.* This guide was designed to "assist law enforcement agencies, particularly the county police and prosecutors, in making efficient use of the administrative provisions of the [Omnibus Forfeiture Act]."[4] The manual identified agencies authorized to seize property for administrative forfeiture; property subject to forfeiture; action required of seizing agencies, prosecuting attorneys, and the attorney general; legal relief available to persons claiming an interest in the seized property; and disposition of forfeited property. Appendixes included models for seized property reports, notice of seizure, petitions, and other legal documents.

The manual is useful as far as it goes. But it is only a bare outline of the statutory provisions concerning administrative forfeiture. It does not cover judicial forfeiture. It does not delve into legal and tactical issues. It does not deal with the complexities of managing seized property prior to the forfeiture decision (to prevent it from deteriorating while its fate is determined), or of processing and disposing of assets once forfeited.

Rules have been delayed. Many months ago, the Criminal Justice Division was assigned the task of developing rules for administrative forfeiture. The task has not been completed.

Low priority for forfeiture. The lack of an adequate forfeiture program appears due to a lack of priority and direction. The tasks involved--

setting objectives and priorities, defining roles and relationships, and developing rules, policies, and procedures--seem not to have been given a high priority by the department. The deputy attorney general in the Criminal Justice Division who works on drug issues is bogged down in monitoring and advising the narcotics division on investigations and forfeiture administration, as well as in trial work and legislative matters, some not related to narcotics. He apparently has little time to address forfeiture policy and planning.

Given the complexities of forfeiture, it is advisable that the attorney general assign a deputy to work full-time on forfeiture. This deputy could also develop necessary forfeiture rules, policies, and procedures that are badly needed in processing forfeited property.

Lack of Policies and Procedures for Processing Forfeited Property

This section presents the results of the financial audit on the monies forfeited to the Department of the Attorney General through the Narcotics Enforcement Division under the Omnibus Forfeiture Act.

The audit was limited to those forfeiture proceedings completed at September 7, 1989. Because of the lack of formal accounting records, the examination was limited to the receipt and location of forfeited monies. Table 5.1 shows the amount of monies forfeited according to the Narcotics Enforcement Division and where the monies are physically located.

Table 5.1. Amounts and Locations of Forfeited Monies.

Funds held in State Treasury	
Existing Forfeiture Fund, account T-904N[1]	$ 50,500
Criminal Forfeiture Revolving Fund, account S-320N	153,442
Total State Treasury	203,942
Funds held by Kauai Police Department	3,751
Funds held by Maui Police Department	6,890
Funds held by Honolulu Police Department	64,749
Funds held by Narcotics Enforcement Division[2]	9,000
TOTAL FORFEITED MONIES	$ 288,332

[1]This amount was deposited to this account before the revolving fund was established.

[2]Cash held in the Narcotics Enforcement Division vault in a sealed evidence bag.

To date, no expenditures have been charged to the forfeited funds. Some funds have been expended by the division for newspaper notification of forfeiture proceedings and some travel which may be chargeable to the forfeited funds. Additional obligations for newspaper notifications have been incurred by the division, but have not yet been processed for payment.

There is an absence of formal procedures for processing of forfeited property--both cash and other assets--by the narcotics division. This has resulted in delays, inconsistencies, and accounting deficiencies. Examples are presented below.

Delays in depositing forfeited monies. Forfeited monies are retrieved by the division from the seizing agencies, principally the Honolulu Police Department (HPD) and deposited when narcotics division personnel feel it is warranted. There have been delays in retrieving and depositing forfeited monies. For example, $9,000 in cash forfeited on June 16, 1989, was still in the division's safe three months later. Delays by the division in retrieving forfeited cash from the HPD extended from two to three months. A timely schedule for retrieving and depositing cash should be set up.

Inconsistencies in accounting schedules. There have been inconsistencies between schedules of forfeited assets prepared by the narcotics division and those of the Criminal Justice Division. The divisions do not compare their schedules for consistency. The schedule prepared by the Criminal Justice Division combined cash with other forfeited assets to arrive at a dollar value of forfeitures for each case listed. The schedule prepared by the narcotics division segregated cash from other assets and clearly listed the type and value of each asset. Sometimes the totals on the two lists did not agree.

A control list should be prepared by the attorney general's department at the time of forfeiture, and that document should be used by staff responsible for processing forfeitures.

Lack of formal disbursement procedures. There are no formal disbursement procedures. No payments for newspaper ads have been charged to the forfeited moneys, yet the narcotics division has incurred those costs. No disbursement procedures for distributing the balance of funds as statutorily provided have been developed.[5]

No formal accounting period or format. There is no formal accounting period or format. The Omnibus Forfeiture Act requires that a criminal forfeiture revolving fund be established in the attorney general's department.[6] An account has been established in the Department of Accounting and General Services, but financial statements of the revolving fund are needed. These should include both a balance sheet showing assets, liabilities, and fund balance, and a statement of revenue, expenditures, and change in fund balance. The attorney general's department should set a formal accounting period, such as the fiscal year, and adopt governmental accounting standards for report presentation.

No procedures for disposing of forfeited property. There are no formal procedures or timetables for auctioning or otherwise disposing of other (noncash) forfeited assets. The narcotics division currently is holding some forfeited assets that should be auctioned off or otherwise disposed of. The department should develop procedures for disposing of forfeited property.

No procedures for depositing forfeited cash. There are no formal procedures for depositing forfeited cash in the bank. The division currently retrieves forfeited monies from the "seizing" agency for several cases at one time. The seizing agency requires the division staff to verify and sign for the amount retrieved. Later, at the narcotics division offices, the deposit slip is prepared. Because of the large amounts of

cash in varying denominations, and because cash is counted and recounted by two persons, preparing the deposit slips takes quite a bit of time.

An alternative approach might be for narcotics division staff to prepare a deposit slip at the time the money is verified, retrieved, and signed for. This procedure would eliminate the double counting and transporting of monies back to the division's offices. Deposits could be taken directly to the bank from the police station. In any case, the department should develop written procedures detailing deposit methods and responsibilities.

Threat to Forfeiture from Statutory "Drop Dead" Provision

The Omnibus Forfeiture Act took effect on June 9, 1988, and will be repealed as of July 1, 1990.[7] Because it is well-designed, but will take time and experience to develop, the act should be extended for two years.

Good design of forfeiture statute. The Omnibus Forfeiture Act is designed to be strong, fair, and abuse-resistant. For strength, it allows forfeiture of a wide range of property, such as property used or intended for use in a covered crime, proceeds from the crime, and property derived from the proceeds. It creates a process for administrative forfeiture in certain circumstances and adds the power to forfeit real property.[8] For fairness, it contains provisions to protect innocent property owners and good-faith purchasers of the property.[9] To head off abuse, it sets an annual $3 million cap on forfeited property and sale proceeds that can be distributed among state and local law enforcement officials, prosecuting attorneys, and the attorney general's forfeiture revolving fund according to the formula laid out in the statute.[10] Amounts in excess of the cap must instead go into the State's general fund.[11]

Time and experience needed. Solving the forfeiture problems identified in this report, and educating the public and the courts about forfeiture, will take time and experience. It is largely time and experience that has put the U.S. Justice Department in the prominent position in forfeiture in Hawaii. Forfeiture is generally perceived by county police as more effective and efficient when handled by federal authorities under federal law than when handled by state authorities under state law. For these reasons, and because the federal formula for sharing the proceeds of forfeiture seems more favorable to the police than does the state formula, the police have tended to "go federal" with forfeitures.[12]

More time is needed for the State to develop forfeiture. The Legislature should extend the Omnibus Forfeiture Act and the related provisions of Act 260, SLH 1988, for another two years.

Recommendations

1. *The Department of the Attorney General should develop an improved forfeiture program. There should be a written plan containing goals, objectives, and priorities and defining agency roles and relationships. The forfeiture plan should be consistent with a state master plan for drug abuse and a statewide strategy for drug enforcement. Its fundamental elements should be incorporated into the drug abuse plan and the enforcement strategy.*

2. *The department should make the development of forfeiture rules, policies, and procedures a top priority. Needed rules should be*

completed. Policy and procedure manuals dealing with forfeiture administration, investigation, and prosecution should be prepared.

3. *As part of this process, the department should develop formal policies and procedures for its processing of forfeited property. These policies and procedures should include:*

   a. *a timely schedule for retrieving and depositing forfeited cash;*

   b. *a process for developing a control list of assets at the time of their forfeiture;*

   c. *disbursement procedures for forfeiture administration expenses and distribution of forfeited cash;*

   d. *a formal accounting period and financial statements for the criminal forfeiture revolving fund;*

   e. *procedures and timetables for auctioning or otherwise disposing of forfeited noncash assets; and*

   f. *procedures for depositing forfeited cash in the bank.*

4. *The attorney general's department should assign a deputy attorney general to work full-time on forteiture, to include developing a program, plan, rules, policies, and procedures for forfeiture.*

5. *Hawaii's new forfeiture statute, which is to be repealed as of July 1, 1990, should be extended for another two years to allow the attorney general's department additional time to implement it.*

Chapter 6

MANAGEMENT OF THE INVESTIGATION DIVISION

The Investigation Division conducts administrative, civil, and criminal investigations for the Department of the Attorney General. It also provides security and protection services for the State. This chapter assesses the management of the division.

Summary of Findings

The operations of the Investigation Division can be strengthened by:

- *developing a policy and procedures manual,*
- *establishing a formal training program for incoming personnel,*
- *holding regular meetings to discuss active cases, and*
- *formally assigning the division's Medicaid investigators to the Medicaid Investigations Division of the department.*

Operations of the Division

The division is discharging its duties and responsibilities in a capable and effective manner. Investigations vary in purpose, breadth, depth, and scope. Cases range from confiscating animals entering the state illegally to investigating drug related cases. The division also conducts background checks on the suitability of persons for employment; serves legal documents (subpoenas, search warrants, and warrants of arrest); investigates bomb and telephone threats; and assists local, state, and federal law enforcement agencies.

The chief investigator screens all requests for investigative services made by deputy attorneys general and other officials. Requests for police reports from county law enforcement agencies pass through him. He assigns cases, monitors them, and oversees a library of completed case reports.

Under normal circumstances, all requests for investigative services must be submitted in writing. Assignments are typically made on a rotating basis to enhance the proficiency of investigators and to expose them to a variety of cases. Some investigators may specialize in such areas as risk management, prisons, and bomb threats. The chief investigator maintains a master log to direct and control the flow of paperwork. Each request is logged by the date received, the date assigned, the investigator assigned to, and the disposition.

The division's workload in number of assignments has been increasing over the last decade. The investigators spend about half of their time on criminal assignments, slightly more than a quarter of their time on civil assignments, and the remainder on administrative assignments and clerical work.

Users of the division's investigative services, which include deputy attorneys general and other state, federal, and local officials, report that they are satisfied with the work done by investigators.

Operational Concerns

While the division is run effectively, operations could be improved if (1) the division completes its policy and procedures manual; (2) a training program for incoming personnel is developed; (3) investigators meet on a regular basis to discuss ongoing cases; and (4) division investigators working for the Medicaid Investigations Division are officially reassigned to that division.

Policies and procedures manual. Investigators report that there are few policies and no written procedures on casework, investigative duties, and operations. As of September 14, 1989 only 8 of 40 planned policies, called general orders, had been finalized. Currently, there are no policies on arrests of juveniles, booking procedures, debriefing of officers after shooting incidents, investigation of bomb threats, and so on. No projected completion date for general orders had been set. General orders prepared thus far include policies and procedures on uniforms and equipment, polygraph examinations, arrests and arrested persons, firearms, and investigative services requests.

Policies are needed to diminish liability concerns, provide some measure of control, inform employees of standards and requirements, and lend support in labor and grievance matters. Policies give direction, bring about more consistent decisions, and enhance freedom of action.[1] The department's own *Report to the Legislature, January, 1988* noted that "division manuals were necessary to produce consistency and efficiency" and reported that each division was developing its own manual.[2]

Most of the investigators have law enforcement backgrounds and rely for guidance on their police experience and on supervisory practice and precedent. This practice does not, however, diminish the need for written procedures. Experience or previous training alone will not prepare investigators to recognize legal limitations or to respond appropriately to situations. For example, unless clear guidelines are given for collecting information, investigators may not always know how far they can go both legally and ethically. In an investigation, lapses or errors in judgment could have serious consequences.

Training program. The division does not have a formal training program for new employees. The division says that the small staff and the heavy caseload require new employees to start work immediately, and that this can be done without an initial training program because investigators hired are already seasoned.

Most of the investigators have a background in police work, but this does not fully prepare them for work at the attorney general's department. At the very least, investigators should be given an orientation covering the division's mission, programs, policies, procedures, rules and regulations. Considering the division's wide range of investigations, getting to know all the standards and requirements can be imposing.

A formal training program and a complete set of general orders would go a long way to develop the employee. The program should include familiarization with the various legal specialties (criminal, civil, administration) or be targeted to areas where the investigator might lack experience, such as white collar crime or traffic reconstruction. A successful orientation program can make investigators more knowledgeable, motivated, and efficient, thereby increasing productivity and lowering operating costs.

The division currently relies heavily on outside consultants for specialized investigative and support services in areas such as white collar crime. Since October 1985, the department has spent approximately $550,000 for outside investigative and accounting services related to white collar crime.[3] Most of the division's

investigators believe that white collar crime is becoming more prominent and sophisticated. Investigating white collar crime often means reviewing business and financial records, analyzing complex financial transactions, tracing the assets and proceeds of the criminal enterprise, and performing formal statistical analyses. With proper training, the department's reliance on outside consultants could be significantly reduced.

Better communication. The division's investigators normally work on cases independently and are often unaware of cases being pursued by other investigators. Periodic staff meetings are primarily informational in nature and do not include a review of ongoing cases.

Much can be gained through the sharing of ideas, thoughts, and investigative techniques. Regularly scheduled sessions on open cases could expedite investigations. Investigators could share insights and pass on information and make suggestions to those with less experience.

Organization of investigators in the Medicaid Investigations Division. Investigators assigned to the Medicaid Investigations Division are organizationally part of the Investigation Division but for administrative purposes only. They are independent of the Investigation Division both operationally and fiscally. They report to and are supervised by the director of the Medicaid Investigations Division. Their positions are financed 75 percent by the federal government, and their activities are therefore bound by federal rules and regulations.

Title 42, Code of Federal Regulations, requires that the funds be used only for activities related to Medicaid. Medicaid investigators cannot be used by the Investigation Division to work on other cases. Federal regulations require a Medicaid fraud control unit to be "a single identifiable entity of the State government."[4] The unit must include attorneys, auditors, and investigators of sufficient number to effectively carry out its duties and responsibilities. Similar language concerning the unit's composition is found in state statutes.[5]

Medicaid attorneys, auditors, and supporting staff are formally assigned to the unit; only the investigators are not. Investigators should be officially incorporated in the unit to be consistent with federal requirements, state law, and actual operations.

Organization of Investigators Within the Department

The issue of placing investigators within the department came to the forefront when the Child Support Enforcement Agency and the Office of Narcotics Enforcement (now known as the Narcotics Enforcement Division) joined the department. The question was how best to organize investigators in these agencies with those investigators already in the department.

Two options were considered. The first was to consolidate all investigative and law enforcement personnel under one division broken down into functional branches; for example, child support, narcotics, Medicaid, general, and security. The second option was to assign investigative personnel to the legal divisions requiring their services.

Organization in other states. Organizational models for attorney general offices differ widely. Illinois, with approximately 30 investigators, has a centrally administered investigations division headed by a director of investigations. In Minnesota, 28 investigators are assigned to seven divisions. Nineteen of the investigators are supervised by non-attorneys and are located in three divisions: licensing, criminal, and consumer.

In California, most special agents are assigned to two bureaus within the Department of Justice. California's Bureau of Investigations parallels Hawaii's Investigation Division. The bureau

conducts criminal investigations for local law enforcement agencies on request; provides state-level support for polygraph examinations; and is responsible for conducting civil, criminal, and special investigations. The other bureau, the Bureau of Narcotic Enforcement, is a counterpart to Hawaii's Narcotics Enforcement Division.

Arizona has experimented with a variety of models in the last 25 years. At first, investigators were placed in their own unit working directly for the attorney general, then they were assigned to the different enforcement divisions. Later, they were again set off in their own division, supervised by a non-attorney. Currently, they are in their own division supervised by an attorney.

Delaware has two kinds of investigators, state detectives and special investigators. Both report to the chief deputy attorney general. In addition, the state has a security frauds investigator who reports to a deputy attorney general designated as the securities commissioner. Two other investigators are assigned to the Medicaid Fraud Control Unit.

By and large in other states, how investigators are organized seems to be a function of size, duties, evolution, and personal preference. No one model exists. The supervisor of investigators in one state put it best by suggesting that the system chosen is probably a matter of personality as much as organization.

Organization in Hawaii. Opinions in Hawaii are mixed as to the best model to use. Some want investigators assigned to major legal divisions in the department. Others are satisfied with the status quo. Supporters of reorganization argue that it would enable attorneys to determine case priorities and supervise investigations. They contend that efficiency would improve because caseload would become more manageable and investigators would become more accessible.

Supporters of the current organization also talk of greater efficiency. They say that centralization promotes an even distribution of workload among the investigative staff. They add that under the present system, investigators become experienced and skilled at working a wide variety of cases. One strong argument for retaining the status quo is consistency of supervision.

Regardless of the method of organization, effective supervision is central. Reassigning investigators could give rise to larger problems if they are supervised by several different attorneys.

Since the investigation division appears to be performing well, reorganization does not appear necessary. It might bring improvements, but it could also bring problems. Where and how investigators should be placed and utilized is the prerogative of the attorney general. More specifically, it depends on his vision of the investigators' role and his perception of how they can be most effective.

Recommendations

1. *The Investigation Division should complete its policy and procedures manual to inform and instruct investigative staff on protocols relative to specific situations. The manual should be comprehensive, detailed, and clear enough to provide for fair and consistent administration of the division's policies.*

2. *The division should establish a formal training program for incoming personnel. The program should include an orientation to the department and to the division's mission, programs, policies, rules, and protocols.*

3. *Staff meetings should be conducted on a regular basis to discuss the status of ongoing cases and the issues of common concern.*

4. *Investigators working in the Medicaid Investigations Division should be formally assigned to that division, consistent with federal requirements, state law, and actual operations.*

NOTES

Chapter 2

1. Hawaii, Department of the Attorney General, *General Office Manual*, Honolulu, undated, p. I-1.

2. See *Amemiya v. Sapienza*, 63 Hawaii 424 (1981).

3. Act 10, SLH 1972.

4. Section 6, Act 194, SLH 1979.

5. House Standing Committee Report No. 81-72 on Senate Bill No. 310, Regular Session of 1972.

6. House Standing Committee Report No. 585 on House Bill No. 1658, Regular Session of 1979; Senate Standing Committee Report No. 705 on House Bill No. 1658, Regular Session of 1979; Senate Standing Committee Report No. 887 on House Bill No. 1658, Regular Session of 1979.

7. Act 259, SLH 1988 (drug paraphernalia); Act 293, SLH 1989 (anabolic steroids); Section 3, Act 260, SLH 1988 (forfeiture).

8. Attorney General, *Office Manual*, p. II-9.

9. Act 161, SLH 1981.

10. Act 48, SLH 1973.

Chapter 3

1. Section 329-1, HRS.

2. New Jersey, Thomas H. Kean, Governor, *Blueprint for a Drug-Free New Jersey*, Trenton, New Jersey, October 1986.

3. *Ibid.*, p. 6.

4. U.S., The White House, *National Drug Control Strategy*, Washington, D.C., 1989, introduction, pp. 12-13.

5. Mark A.R. Kleiman and Kerry D. Smith, *State and Local Drug Enforcement: In Search of a Strategy*, Harvard University, John F. Kennedy School of Government, Working Paper #89-01-06, January 31, 1989, pp. 1-3. Quoted with permission. A version of this working paper is scheduled to appear in spring 1990 in a special issue of *Crime and Justice*, a publication of the University of Chicago Press, to be edited by Michael Tonry and James Q. Wilson.

6. *Ibid.*, p. 3.

7. *Ibid.*, pp. 3-4.

8. Mark A.R. Kleiman, *Crackdowns: The Effects of Intensive Enforcement on Retail Heroin Dealing*, Harvard University, John F. Kennedy School of Government, Working Paper #88-01-11, February 9, 1988, p. 12.

9. John L. Vialet and Ronald G. Viereck, "Toward a Realistic Anti-Drug Strategy," *The GAO Journal*, Spring 1989, pp. 23-24.

10. *Ibid.*

11. *Ibid.*, p. 23.

12. "Federal War on Drugs Is Scattershot Affair, with Dubious Progress," *The Wall Street Journal*, August 10, 1989, p. 1.

13. See U.S., General Accounting Office, *Comprehensive Approach Needed to Help Control Prescription Drug Abuse*, GAO/

GGD-83-2, Washington, D.C., 1982; see U.S., General Accounting Office, *Controlling Drug Abuse: A Status Report*, GAO/GGD-88-39, Washington, D.C., 1988, pp. 17-18.

14. "Drug Ups, and Downs," *The Wall Street Journal*, July 19, 1989, p. A14.

15. General Accounting Office, *Controlling Drug Abuse*, p. 33.

16. See "Scattershot Affair," The Wall Street Journal.

17. General Accounting Office, *Controlling Drug Abuse*, p. 30.

18. U.S., Department of Justice, Drug Enforcement Administration, *Drug Agents' Guide to Forfeiture of Assets (1987 Revision)*, pp. 1-2.

19. *Ibid.*, pp. 283-285.

20. National Association of Attorneys General and National District Attorneys Association, The Executive Working Group for Federal-State-Local Prosecutorial Relations, *Toward a Drug-Free America: A Nationwide Blueprint for State and Local Drug Control Strategies*, 1988, p. 17.

21. Section 329-55(d), HRS.

22. Section 712A-10, HRS.

23. Sections 712A-10 through 712A-14, HRS.

24. Act 260, SLH 1988.

25. Senate Standing Committee Report No. 2636 and House Conference Committee Report No. 160-88 on House Bill No. 2080, Regular Session of 1988.

Chapter 4

1. Hawaii, Department of the Attorney General, *A Report to the Legislature*, January 1989, p. 68.

2. Act 211, SLH 1989.

3. Hawaii, Department of the Attorney General, *A Survey of Hawaii's War on Drugs*, Honolulu, February 1989.

4. *Ibid.*, p. 4.

5. "Scarcity of marijuana here now has users just saying 'yes' to ice," *The Honolulu Advertiser*, October 12, 1989, p. 1.

6. New Jersey, Thomas H. Kean, Governor, *Blueprint for a Drug-Free New Jersey*, Trenton, New Jersey, October 1986.

7. New Jersey, Department of Law and Public Safety, Attorney General W. Cary Edwards, *Attorney General's Statewide Action Plan for Narcotics Enforcement*, Trenton, New Jersey, January 1988.

8. Section 329-32(f), HRS.

9. Section 329-58, HRS.

10. *Ibid.*

Chapter 5

1. Hawaii, Department of the Attorney General, *A Survey of Hawaii's War on Drugs*, Honolulu, February 1989, p. 14.

2. See Senate Standing Committee Report No. 2636 on House Bill No. 2080, Regular Session of 1988; House Conference

Committee Report No. 160-88 on House Bill 2080, Regular Session of 1988.

3. Hawaii, Department of the Attorney General, Criminal Justice Division, *Administrative Asset Forfeiture Under the Hawaii Omnibus Criminal Forfeiture Act*, Honolulu, February 1989, foreword.

4. *Ibid*.

5. The statutory provision for disposition is Section 712A-16, HRS.

6. Section 712A-16(4), HRS.

7. Section 7, Act 260, SLH 1988.

8. Sections 712A-5 and 712A-10, HRS.

9. Section 712A-5, HRS.

10. Section 712A-16, HRS.

11. House Conference Committee Report No. 160 on House Bill No. 2080, Regular Session of 1988.

12. Under Section 712A-16(2), HRS, forfeited property and proceeds not transferred or destroyed by the attorney general under other subsections must, after payment of administrative costs, be distributed by the attorney general under the following formula: 25 percent to the unit or units of state or local government that conducted the investigation and caused the arrest of the person whose property was forfeited or seizure of the property for forfeiture; 25 percent to the prosecuting attorney who instituted the action producing the forfeiture; and 50 percent to the attorney general's criminal forfeiture revolving fund. Other subsections allow for additional distributions to the counties at the attorney general's discretion. The county police and other parties interviewed report that the federal formula allows the police to receive up to 90 percent in forfeitures they initiate that "go federal."

Chapter 6

1. Joseph J. Famularo, *Organization Planning Manual*, New York, New York, American Management Associations, 1979, pp. 317-318.

2. Hawaii, The Department of the Attorney General, *A Report to the Legislature, January, 1988*, 1988, p. 20.

3. Information received from the Administrative Services Office, Department of the Attorney General, October 2, 1989.

4. Title 42, *Code of Federal Regulations (CFR)*, Section 1002.305, "Basic requirement," October 1, 1988.

5. Section 28-91, HRS.

RESPONSES OF THE AFFECTED AGENCIES

COMMENTS ON AGENCY RESPONSES

On December 20, 1989, we transmitted copies of a preliminary draft of this report to the Department of the Attorney General, the Department of Health, and the Office of State Planning. A copy of the transmittal letter to the Attorney General is included as Attachment 1. Similar letters were sent to the Department of Health and the Office of State Planning. As is our practice, we invited the agencies to comment on the recommendations made in the report.

The original deadline for submission of agency comments was January 4, 1990. However, at the request of the three agencies, the deadline was extended to January 18, 1990. The agencies' responses are included respectively as Attachments 2, 3, and 4.

The attorney general states that in assessing the Narcotics Enforcement Division we should not have looked into state drug abuse and enforcement planning as well. With respect to the recommendations, the attorney general does not agree with us that a statewide strategy document for drug enforcement is needed. But he acknowledges the need to further develop procedures for the processing of forfeited property. The attorney general agrees that the forfeiture statute should be extended, but favors extension without a time limitation.

Concerning the Investigation Division, the attorney general disagrees with us that a formal training program is needed and says that the heavy caseload precludes implementing our recommendation to have regular meetings to review active cases.

The Department of Health supports the development of a "strategic directions" document for substance abuse. The department says that although the State lacks a comprehensive plan at this time, it is developing in cooperation with the Governor's Office a plan for prevention, treatment, and training.

The Office of State Planning concurs that a more systematic approach is needed to guide activities against substance abuse, but does not agree that the office should be responsible for a master plan. It says that the health department is the proper agency for this.

ATTACHMENT 1

STATE OF HAWAII
OFFICE OF THE AUDITOR
465 S. King Street, Room 500
Honolulu, Hawaii 96813

(808) 548-2450
FAX: (808) 548-2693

December 20, 1989

C O P Y

The Honorable Warren Price, III
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

Dear Attorney General Price:

Enclosed are three copies, Nos. 6 to 8 of our draft report on *Management Audit of the Narcotics Enforcement Division and the Investigation Division of the Department of the Attorney General*. This report was prepared pursuant to Part III, Section 217 of Act 316, SLH 1989.

If you have any comments on our recommendations, please submit them in writing to us by January 4, 1990, so that they can be included in the final report.

Since the report is not in final form and there could be changes to the report, access to it should be restricted to those persons whom you might wish to call upon to assist you in reviewing the report. The only other parties who have been provided with copies of this draft report are the Governor, the President of the Senate, the Speaker of the House of Representatives, the Director of the Department of Health, and the Director of State Planning. Public release of the report will be made solely by our office and only after the report is published in its final form and submitted to the Legislature.

We appreciate the assistance and cooperation extended to us during the course of the audit.

Sincerely,

Newton Sue
Acting Legislative Auditor

Enclosures

ATTACHMENT 2

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
STATE CAPITOL
HONOLULU, HAWAII 96813
(808) 548-4740
FAX (808) 523-0814

January 18, 1990

RECEIVED
JAN 18 4 16 PM '90
OFC. OF THE AUDITOR
STATE OF HAWAII

Mr. Newton Sue
Acting Legislative Auditor
Office of the Auditor
465 South King Street, Room 500
Honolulu, Hawaii 96813

Dear Mr. Sue:

This will acknowledge receipt of your recent audit entitled Management Audit of the Narcotics Enforcement Division and the Investigation Division of the Department of the Attorney General.

In response, we find your "audit" filled with naive, uninformed and totally unacceptable personal opinions on the issues of drugs and Hawaii's war on drugs, personal opinions that clearly have no place in a "management audit"; we find your audit generally non-responsive to the question posed, and equivocal in the few areas where it deals with the question posed (we asked for this audit for guidance on how to define the "role" of our Narotics Enforcement Division, your response was to criticize us for not having a clear "role!")

Further, we find numerous misstatements and inaccuracies of fact which in some cases rise to the level of professional dishonesty, and not just inadvertence (you lift two sentences out of two contexts, join them, then argue your point); and we generally find it irresponsible that your office has apparently read some academic articles about the drug issue, and from these you profess to have the competency to make judgments about the professional county and state efforts in Hawaii against drugs. Your statement which implies that your audit findings, presumably including your opinions about our drug war, were based upon "extensive interviews" with the four county police chiefs and prosecutors, the United States Attorney and my office is an out and out falsehood. None of these people support the conclusions you have apparently attributed to them in this audit, and I for one, during a three hour interview, was never even asked about the strategy for our

state's drug war, or about whether such a strategy was "written." Your simplistic solution to our drug problem ("we need a written blueprint") reflects a lack of understanding about law enforcement in general, and specifically about law enforcement in Hawaii, as well as in other jurisdictions. You apparently do not even understand the relationship between the state and the counties in Hawaii, or the legal mandates under which they operate.

It is truly unfortunate that this audit, that we needed for "management" advice, has been used as a platform for your apparent personal opinions in the area of drugs, including a discussion on the legalization of drugs! You are certainly entitled to your opinions, but they should not be expressed under the color of your office and in the inapproriate vehicle of a "management" audit. They also should not be expressed without a better understanding of the subject matter. Your reference to newspaper headlines (which had you checked with United States Attorney Dan Bent you would have found to be innacurate) to support major contentions is inexcusable in a professional legislative audit; your uninformed and biased statements about the law enforcement community in this state are unconscionable.

The following is a summary of some of the major concerns we have with your opinions, followed by a more detailed analysis of your specific findings.

SUMMARY OF MAJOR CONCERNS

1. The Auditor's Discussion Concerning the Legalization of Illegal Drugs is Both Inappropriate and Outrageous in this "Management Audit."

   The auditor has used this "management audit" as a platform to express his personal, and very uninformed, views about law enforcement and drugs in general. To discuss, as a public official under the title of his public office in a public document, arguments supporting the legalization of illegal drugs is far beyond the auditor's official duties. If the auditor wants to enlighten the public and the Legislature on the arguments supporting the legalization of drugs, he should do so as a private citizen, not as a public official. This has nothing whatsoever to do with the audit he was suppose to perform.

2. The Auditor Apparently Even Questions Whether Law Enforcement Should Fight a War on Drugs!

Unbelievably, the auditor cites arguments questioning whether law enforcement is "useless" in the war on drugs, and raises the issue of whether law enforcement should even be involved in the war! Again, the auditor has used this "management audit" as a personal platform to, apparently, argue for easing up on law enforcement's war on drugs. We can assure the auditor and the Legislature that law enforcement will continue to employ every possible resource against drug dealers in Hawaii, notwithstanding the view of some who would like to see a more "liberal" climate for drug use and dealing in Hawaii.

3. The Auditor Also Argues that to Keep Street Crime Down, Law Enforcement Should Not be too Agressive so as to Raise the Price of Drugs!

We will, despite the apparent opinion of the auditor, continue the war on drugs at all levels, and do our best to reduce supply. The whole objective of law enforcement's crack down on drugs is to make the price go up! Fear of increased property crimes should not back this state away from the war on drugs, and this is ridiculous and inappropriate for the auditor to suggest. This is a very common argument for those supporting the legalization of drugs.

4. The Auditor's Use of this "Audit" to Express his Opinion that Marijuana is not as "Dangerous" as Other Drugs is a Clear Misuse of his Office.

Besides the clear and undeniable medical evidence to the contrary, the auditor has again used this audit to express his personal opinion, this time that marijuana is not as "dangerous" as other drugs. Again, this "audit" should not be used as a public forum by the auditor to express his non-medical, non-professional opinion, which is flat wrong. Marijuana is perhaps the most dangerous drug to the people of Hawaii, as it has provided the capital base for the trafficking of other drugs, such as "ice." It is grossly irresponsible that the auditor attempts to downplay the dangerousness of this drug.

5. The Use of this Audit by the Auditor to Express his Opinion that we Should Discontinue our Attack on the Marijuana Industry Until there is Further Study is Another Misuse of his Office.

We will continue, the auditor's opinion notwithstanding, to employ every possible method to eliminate the marijuana industry in Hawaii. To suggest that this should be "studied" for any reason is outrageous and irresponsible. Those who seek to legalize marijuana have been arguing for years that we should "study" the legalization of marijuana because it is better than other illegal drugs, and cracking down on marijuana has an "impact" on the use of other durgs. It is unbelievable that the legislative auditor is apparently adopting this philosophy.

6. The Auditor's Attempt to Downplay the Size of the Marijuana Industry in Hawaii is Unconscionable.

The auditor claims that the multi-billion dollar estimates of the marijuana industry are not supported, yet offers nothing but his apparrent "opinion" in support of this. Indeed, there is an abundance of documentation and intelligence that confirms the marijuana industy is indeed a multi-billion dollar industry. To question the size of the industry is to deny the evidence, which the auditor has apparently chosen to do. Our questions is why? Those supporting the legalization of marijuana have for years disputed the size of the marijuana industry in Hawaii. The auditor is now doing the same thing.

7. The Auditor's Suggestion that Rules be Adopted for the State Forfeiture Program will Help Drug Dealers.

The state forfeiture program, still in its early stages, provides an enormous weapon against drug dealers in Hawaii. The act creating the program specifies that rules may be drafted. They purposely have not been drafted because the program is being designed to run efficiently without them, and the presence of rules will simply give drug dealers and their lawyers a method by which to try and defeat forfeitures. Yet, the auditor would have these rules drafted, which will then become the focal point of litigation for years to come. This opinion of the auditor points out the real problem of expressing opinions in fields he apparently knows nothing about.

8. Despite the Severe Criticism of Law Enforcement Planning in this Audit, the Legislative Auditor will not be Given Access to Law Enforcement Planning and Intelligence Information.

The legislative auditor never even asked the top law enforcement officials in Hawaii about law enforcement plans and strategies; there may have been some discussions about this with staff personnel, but they obviously do not speak for their agencies. There are, indeed, plans and strategies guiding the state and the county law enforcement agencies in Hawaii's war on drugs, but we are certainly not going to provide them to the drug dealers by making them public! For the auditor to concluded that because there is no "public" plan in the area of law enforcement, one does not exist, is irresponsible. If the purpose of this attack by the auditor on law enforcement is designed to force various plans to be made public, it has failed. Further, the state will not, and legally cannot, dictate to the mayors and county law enforcement officials how to combat the particular drug problem in their unique counties. The state has and will continue to coordinate these efforts, facilitate the strategies and to seek support for the county programs. For the auditor to suggest this is not the role of the state, or that the state has not been performing this role, denies the facts. The bottom line is that Hawaii's war on drugs will not be derailed by any person or agency, public or private.

DETAILED DISCUSSION

As mentioned above, it was pursuant to my request that the Legislature directed the Office of the Auditor to determine whether the duties to which the Narcotics Enforcement and Investigation Divisions are assigned were appropriate for their respective divisions. My request was prompted by the fact that we have two law enforcement agencies attached to what is essentially a law office and we were, and continue to be, in need of advice as to how to define the proper roles of these divisions. For example, we needed to know what realistic role the Narcotics Enforcement Division (NED) could/should play in law enforcement in light of its small size and its history at the Department of Health: Should it be merged into our Investigations Division (or vice versa)? Was its "street" work duplicative of other law enforcement work? Where should NED fit organizationally, and to whom should they directly report?

Regarding the Investigation Division, we needed to know where they overlapped with other law enforcement agencies, including NED; how they should best be operationally organized; and what role they should play vis a vis our attorneys who prosecute criminal cases.

Regarding the asset forfeiture fund, we had questions as to how and by whom it could best be managed, given our assurances to the Legislature that the fund would be self-sufficient and not require positions and funding. We also wanted suggestions on the transition from the old forfeiture statute to the new one in terms of "lessons learned" and logistics, all of which we know little about, thus requiring your professional assessment. We needed answers to all of these management questions in our effort to improve the operation of our department. I specifically raised these questions with your staff when I met with them for approximately two to three hours.

The draft report you have submitted for our review succeeds to the extent that it makes some valid criticisms and recommends solutions that we will or have already begun to implement. In our view, however, the remaining parts of the draft fails quite dramatically due to four very fundamental flaws. First, the report is clearly not responsive to the proviso in Section 217, in spirit or in letter. Also, where specific recommendations were requested, only general options are discussed. Frequently, the report fails to reach any conclusions, merely restating the questions and arguments which prompted the request for the report in the first place!

Second, the report is almost completely lacking in historical perspective on the primary role of the counties in law enforcement and criminal prosecution in Hawaii. Although the report does briefly discuss this role, it suggests that prosecutors are subordinate to the Attorney General. The fact is that, while the Attorney General is deemed the chief legal officer of the State pursuant to statutory and case law, as a practical matter, the Attorney General can exercise only very limited authority over the conduct of criminal investigations and prosecutions and the policies which they seek to promote. Therefore, unlike the New Jersey model to which the report so favorably refers, Hawaii's drug control policy is in the hands of four counties whose efforts the Attorney General can only try to coordinate and facilitate. If your audit has concluded that Hawaii should follow some version of the New Jersey model, then the report should say so and recommend that the

Legislature adopt it. For your information, we have very definite views on the value of both the national and New Jersey "drug control strategies," and had this audit involved these types of issues, or even if we had been asked, we would have been glad to share them with you, as well as some other information on the success of these "strategies" and the political and practical realities that led to their creation. Again, we were never even asked about this or, for that matter, anything about planning, priority setting, etc.

Third, the report is replete with errors and quotations which are incomplete and misattributed. For example, the introduction to the report does not accurately quote the language of Section 217, but rather rearranges partial quotations of it, and thereby completely rewrites the objectives and scope of the audit, all of which were never disclosed to anyone in the administration. In another example, it simply is not true that no forfeiture monies have been disbursed for legal notices published in the newspaper or that there are no procedures for disbursement of forfeiture property to the appropriate agencies. As explained below, more than $11,000 have been disbursed for publication costs, and disbursement of the balance of forfeited moneys has been by consensus of the county police and prosecutors, the agencies for whose benefit the forfeiture fund exists. In our view, these types of errors, and numerous others like them, obscure the many otherwise accurate observations and appropriate recommendations made by the report.

More important, however, is the fact that this report contains errors which I believe borders on intellectual and professional dishonesty, not just negligence. Quoting the first sentence on page 68 of our 1989 Report to the Legislature, without quoting the second sentence which clearly demonstrates the role of NED is limited to ensuring "that these drugs remain in the proper hands, and are only used for legitimate medical purposes," represents the worst form of professional dishonesty. The draft does it twice, at pages 20 and 24, and proceeds to hinge its major argument about NED on this half-quote. Following this half-quote on page 24 with a Department of Health (DOH) "functional statement," clearly implying that our report "also described" NED as "the primary state agency responsible for overall development of drug enforcement strategy, programs, planning, and evaluation in Hawaii" is likewise untrue and equally dishonest. Indeed, the very reason we asked for this audit was to try and develop what the "functional statement" of NED should be, what its role

should be. Since this division was now with our department and would soon be moving to the new Department of Public Safety, we needed to develop a proper function, notwithstanding its "paper" function which it had with the Department of Health and which had never been functional in reality. What could, and should, this small unit do was our question. But your staff wrongfully characterized its function as the major statewide law enforcement planning and education agency by cleverly combining one sentence from our report with the DOH "functional statement," and then faulted it for not performing its function! Clearly, the worst kind of unprofessional auditing. But, tragically, this report, as more fully discussed below, falls to this level in several other areas and, in the process, does a great disservice to many, many people.

The fourth flaw is the most fatal. As alluded to above, and as discussed below, the fact that this audit went into general areas of drug planning on the "national" level, etc., without giving my office or other key people the opportunity to respond is inexcusable, and is done so blatantly in this report that it was obviously calculated. It is the classic punch below the belt.

Having made these general observations, our specific responses to the report are as follows:

CHAPTER 2: ORIENTATION TO THE DEPARTMENT OF THE ATTORNEY GENERAL AND THE DEPARTMENT OF PUBLIC SAFETY

This chapter generally provides a good overall view of the structure and purpose of the Department of the Attorney General, our Narcotics Enforcement and Investigation Divisions, and the Department of Public Safety. However, as noted above, it ignores the practical reality of the legal role which the Department is given in the enforcement of criminal laws. This is important because the report makes many recommendations on the assumption that the Attorney General possesses much broader powers than is actually the case. This portion of the report also generally gives a correct account of the history and purpose of NED, but there are two major failures which lead to incorrect conclusions.

First, the report does not fully recognize the effect of the rapid transitions which NED is undergoing. It does note at page 5 that NED had been with the Department of Health until July 1, 1988, that it has "traveled" to the Department of the Attorney General, and that it will be "traveling" to the new

Department of Public Safety. But it is not until page 7 that the report reveals that NED will reach its next destination on July 1, 1990. The upshot of this is that, at the time of the field work for this audit, NED had been with our department a little over a year, and that it was with us only a few months before we asked the 1989 Legislature for a management audit to help answer some of the questions, discussed above, about this small, unique unit that had been existing essentially without supervision for years at the Department of Health. Virtually nothing was ever mentioned in this report about what, in reality, had been happening with this unit before it came to our department. In light of the role ascribed to the unit by your report, this is dramatically misleading. I can tell you that I personally told your staff when they interviewed me that the chief reason we wanted an audit was to have an outside view of what role NED had been playing in reality, not on paper, and what its role should be, in reality, not on paper. Nowhere, however, is this even mentioned. Indeed, one of your major "findings" was that NED's role was unclear!

Second, the very nature of NED's role and how it should operate is a matter of considerable dispute, as the report recognizes in Chapter 4. But the report does nothing to resolve this dispute here or in Chapter 4, which is discussed below. In fact, as discussed above, the report jumps from a description of the narrowly defined statutory powers of NED to the 1987 "functional statement" of the Department of Health, which describes the division as "the primary state agency responsible for overall development of drug enforcement strategy, programs, planning, and evaluation in Hawaii." Given the specifics of NED's narrowly defined statutory role, how can anyone in good conscience possibly characterize the latter global definition in the "functional statement," which incidentally has no basis in law whatsoever, as "reasonably accurate"? p. 6. It is no wonder that, using this erroneous assumption that NED is supposed to be doing all the drug planning in the State, the report later concludes that the State lacks a "state-wide strategy for drug enforcement and prosecution" and that NED's efforts are "scattered." Again, you literally create your own definition of NED's role, then, because it has never had that role in reality, fault it for not performing it!

This tendency to make these types of unsupported assumptions is also revealed in a more minor way in this chapter by the report's reference to cocaine at page 6 as one of the "drugs not legally manufactured as pharmaceuticals."

This is obviously wrong because Chapter 329 lists cocaine as a Schedule II drug which, like the drugs listed in Schedule III through V, may be legally manufactured and prescribed. It is the Schedule I drugs, such as heroin, methamphetamine and LSD, which are the subject of illicit trade. This type of erroneous assumption is, as discussed later, typical of many aspects of this report, including the major conclusions that this audit reached.

CHAPTER 3: DRUG ENFORCEMENT POLICY

This chapter provides a general discussion of some issues involved in the formulation and execution of drug abuse and drug enforcement policies, which are academic in nature and have nothing to do with this audit. In addition, some basic errors are made. First, the audit misapprehends the role which "clean sweep" operations play in marijuana enforcement policy. The report concludes that such crackdowns "tend to fail" because they produce more arrests than the criminal justice system can handle and take resources away from other initiatives. For one thing, such operations have not historically been designed to produce arrests in Hawaii. Given the clandestine nature of marijuana cultivation, it is frequently impossible to identify or apprehend the cultivators. Instead, the purpose is to eradicate the marijuana and thereby reduce supply. For another thing, these operations frequently employ resources, such as those supplied by the Department of Land and Natural Resources or the National Guard, which could not ordinarily be devoted to, and therefore detracted from, other drug initiatives. This lack of understanding by your staff of law enforcement in Hawaii is inexcusable. They could have asked. Instead, they relied on mainland "experts" and their articles.

Second, this chapter makes it a point to mention the irony that our society permits and even encourages the recreational use of alcohol and tobacco while condemning similar use of other drugs. What good is making this observation unless it is accompanied by specific recommendations that address and attempt to resolve this contradiction? Given the largely self-determined scope of the report, it can hardly be said that this issue is beyond its reach.

But the real problem with this chapter is its very inclusion in this audit as a rather transparent "set up" for the next chapter. To be very blunt, your discussion of the "War on Drugs," and what follows, is academic in nature, to say

the least. Certainly, no one would disagree that planning and priority setting is important in drug enforcement. From this premise, the report launches into the next chapter to bring home Hawaii's shortcomings. We were never asked about any of the matters outlined in this chapter, or the next. Your staff assumed, apparently, that, because there was no written master plan or document setting out priorities that it could access, none existed. They apparently never even considered that there would be levels of planning and priority setting, the details of which must remain confidential. The fact is, they never even asked if such planning and priorities existed.

CHAPTER 4: MANAGEMENT OF THE NARCOTICS ENFORCEMENT DIVISION

The issue of a statewide plan is directly discussed in this chapter, along with approving references to the federal and New Jersey "strategies." It is truly unfortunate that we were never asked about these strategies, or that your staff failed to check the facts and circumstances of both the national and New Jersey "blueprints." I can say that I have discussed both of these with the highest officials in the United States Department of Justice and the New Jersey Attorney General's office, and to point to these as models without looking into the motivations for their creation, and how they have "worked," is simply inexcusable, particularly when Hawaii is faulted for not following suit.

Your staff, using these two "models," has equated the absence of a statewide strategy "document" to the absence of priority setting and planning, which is simply wrong. And, it appears that your staff never explored the host of problems caused by "strategies," or their real political and lobbying origins. There are indeed several levels of planning and priority setting for drug law enforcement in Hawaii, some of which your staff may know about, some of which they clearly do not. The bottom line is that the counties in Hawaii, who have the primary responsibility for law enforcement in this state, unlike New Jersey, are responsible for their own planning. However, the State has, in recent years, offered them help at various levels. This had not occurred anytime in the preceding three decades. To say the State has fallen down on the job of planning is ludicrous.

We also take very strong exception to the report's incomplete quotation from our 1989 Report to the Legislature. As discussed above, had the report bothered to include the

sentence immediately following the passage quoted, it would be clear that the passage referred only to drug enforcement in the area of what you call "pharmaceutical control." In fact, our report entitled A Survey of Hawaii's War on Drugs specifically describes NED's role, yet this was "overlooked" as your staff struggled to create the role that NED was "supposed" to play. The Survey observed that:

> The Narcotics Enforcement Division (NED) of the Department of the Attorney General (formerly the State Office of Narcotics Enforcement of the State Department of Health which was transferred to the Department of the Attorney General in July, 1988) registers doctors and pharmacists, participates in law enforcement information sharing with other agencies, issues an annual report of enforcement of the Uniform Controlled Substances Act, and is empowered with law enforcement functions and responsibilities in the areas of drug abuse and trafficking.

We also take strong exception to the many unfair and inaccurate conclusions drawn about the Survey. On page 20, the report states that:

> An analytical approach to controlling drug abuse defines the threat posed by each drug, specifies the objectives of control, identifies alternative supply-side and demand-side means of reaching the objectives, and compares the alternatives in light of the associated costs, benefits, assumptions, risks, and uncertainties.

The report then measures our Survey against this standard, an exercise which amounts to a comparison between the proverbial "apples" and "oranges."

First, the report obviously ascribes to the Survey a purpose for which it was expressly not intended. As the Foreword makes clear, the Survey was intended primarily as a response to Congressman Charles B. Rangel who drew various conclusions about the drug problems in Hawaii during a short trip here in 1987. Among these conclusions were that there was evidence of a lack of cooperation in Hawaii, as well as

political corruption within the state legislature because of the marijuana industry. This Survey was designed to refute those conclusions and to gain federal support in our efforts to address what was, and is, our major drug problem: marijuana.

Second, the Foreword made it clear that the Survey was a "survey" of what was being done, and that it was "not intended to be an end, but only a beginning" to "further discussions on both a state and federal level." Indeed, before we published this Survey, no one in the history of Hawaii had ever attempted to outline efforts in this area of law enforcement, or to propose specific approaches such as interdiction. One of the primary stated objectives of this Survey was to let people in the field know which other agencies were involved in the war on drugs and what their roles were, again a fact not mentioned by your staff.

Third, the report faults our Survey for its emphasis on marijuana, complaining, among other things, about a lack of citations to support our conclusions about the primacy of the marijuana problem. However, the report does not and, we know it, cannot refute these conclusions, thus rendering its criticism clearly for criticism's sake. Even worse, it cites such notoriously unscientific sources as newspaper articles which are often intended to generate revenues as much as to report facts. In particular, a newspaper article was cited as authority for the proposition that, to the extent we are succeeding in the battle against marijuana, we are contributing to the methamphetamine or "ice" problem. The implication that we should reduce our efforts to control marijuana because it encourages the use of "ice" is ludicrous. In our view, drug demand must be reduced through drug education and treatment, as well as through enforcement policies designed to reduce the supply of all drugs, not just certain ones. That is why we are continuing our efforts to obtain a "high intensity drug trafficking area" designation for Hawaii, and the federal funds that go with it.

Fourth, the report seems to criticize the effort to obtain this "high intensity" designation as merely a "reaction" to the problem, rather than an anticipation. For one thing, obtaining the designation requires us to meet certain criteria based on past experience, necessarily making it a reaction to an existing problem! And, to conclude from the attempt to obtain this designation that law enforcement has not anticipated problems such as "ice" ignores the fact that law enforcement successfully persuaded the Legislature in 1988 to provide class

A and B felony penalties for methamphetamine, long before it became the fashionable topic of newspaper articles. Again, a fact overlooked by your staff while pontificating on the War on Drugs.

In a nutshell, the criticism of our Survey is unfounded and is simply irrelevant to the mission of the audit. If there has been a failure to achieve a purpose in a report, it is clearly in yours. The second objective stated at your page 1 is "[t]o examine and assess the policies, goals, priorities and structure of drug enforcement ... activity in Hawaii and to recommend changes where appropriate." If a state plan is so sorely lacking, where is the plan you set out to recommend? It is of no use to denigrate existing efforts if nothing specific is recommended to replace it. To paraphrase the observation quoted above, the "required analysis" is largely missing from your report. Where our Survey succeeded in the mission it set for itself, your report clearly fails to achieve its own. This, of course, assumes that any of this has the slightest relevance to the management audit involved. Again, if all of this philosophy about the War on Drugs was to be a part of this audit, that should have been specified so that the proper questions could be posed to the subjects of the report and responses obtained.

Unfortunately, our difficulties with this portion of your report do not end with its criticism of the state drug abuse plan or lack thereof. Yet, again staking out territory not allocated to it by the Legislature, the report also concludes that Hawaii lacks a statewide strategy for drug enforcement and states that:

> A statewide drug enforcement strategy is an action plan that says how to mobilize resources to achieve the goals of drug enforcement and prosecution. It is systematic, thoughtful, and comprehensive. It defines state and county agency roles and sets tactical priorities.

Although this is the place, if any there is, to analyze the specific plan to combine interdiction and eradication efforts proposed by our Survey, the report completely ignores the proposal. Even worse, the report relegates to the status of theoretical abstraction the very real fact that, as discussed above, the unique relationship between the State and the counties in the law enforcement arena does not easily permit development and implementation of a statewide drug

enforcement strategy. And to suppose that this problem can be overcome by formalizing a strategy and committing it to paper is incredibly naive. This issue goes to the core of two much larger problems and helps to magnify them. One is that the public tends to overestimate what law enforcement can do to solve our drug problem. The other is that coordinating law enforcement efforts in this area will require the Legislature to rethink the fundamental relationship between the State and the counties. Until these issues are addressed, a statewide "strategy" will not be worth the paper it is written on. To honestly think otherwise demonstrates a lack of research and the acceptance of rather transparent concepts involving law enforcement. It also reflects the assumption that your staff would have access to all levels of criminal law planning, another naive assumption.

The audit, almost as an aside, acknowledges the need to resolve these issues to some extent when it discusses the New Jersey approach to the drug problem. The report states on page 23 that:

> Because New Jersey law gives the attorney general much greater control over local law enforcement agencies than Hawaii law gives to its state enforcement officials, including the attorney general and the director of public safety, the New Jersey approach would have to be modified for Hawaii.

However, in doing this, it leads us to the trough without letting us drink, because the report never gives us the specifics of a plan modified to operate successfully in Hawaii. Again, this assumes that this audit was supposed to critique the war on drugs and then propose solutions. Also, to say that the organization of law enforcement in New Jersey is different than that which exists in Hawaii is perhaps the understatement of the year.

At page 24, the report <u>finally</u> begins to address the first of two questions for which we sought an answer from the audit: What is the proper role of NED? However, the report fails to answer this basic question, in large part because it continues to inaccurately report the existing statements of its mission. As previously noted, the report again incompletely quotes the statement in our 1989 <u>Report</u> and and then outrageously closes a paragraph analyzing the 1989 <u>Report</u> with the previously quoted

passage from the "functional statement" without ascribing it to the Department of Health. It is little wonder that the report concludes that NED has not been given guidance as to its role, when the audit cannot even accurately define that role in general terms.

The report also does nothing to define the role of NED in specific terms. It discusses at length the competing arguments with which we were struggling when we tried to determine whether NED should confine its efforts to compliance, or whether it should also play a role in enforcement. We already know what the arguments are. What we needed, and did not get, was an answer. Instead, the report concludes that the division's efforts are "scattered," the symptom of a problem whose solution remains unknown even after your audit. It appears that the lack of a "written statewide strategy" like the national one or the one in New Jersey is used by your staff as an excuse for not coming to at least some conclusions.

As for the question concerning the future of NED, the report does a good job of restating the issues which the transition team and, ultimately, the director of the Department of Public Safety will have to answer, but again fails to offer even the slightest insight into what the role of NED should be. It should be noted that our Criminal Justice Division has already begun to assume responsibility for many of the administrative aspects of forfeiture which the report, in one of its few substantive responses to the mandate of the Legislature, concludes are not an appropriate duty of NED personnel. At the same time, however, the report ignores the fact that we have already reached this conclusion and have taken steps to begin the transition. This will be discussed further in our response to Chapter 5 below. Finally, we will reexamine Act 211, SLH 1989, to determine if further legislation is needed to clearly establish the authority of the Department of Public Safety over the Controlled Substances Act, something we were never asked about but for which we were criticized.

CHAPTER 5: FORFEITURE MANAGEMENT AND FINANCIAL AUDIT OF FORFEITED MONIES

This chapter identifies problems which we know exist and which we are trying to address but which, to a significant extent, are also a reflection of the issues discussed above.

Inadequate Plan and Program for Forfeiture

The report observes that our department has not formed explicit forfeiture objectives and priorities. While this is true in large part, the lack of objectives and priorities is again a function of the fact that forfeitures are a by-product of the criminal investigations and prosecutions for which the counties have primary responsibility. Whether a particular county wishes to pursue routine or complex forfeitures, and whether they are processed administratively or judicially, is a decision dictated by the priorities and resources of the county police departments and prosecutors.

The report also observes that the roles of state and county agencies in forfeiture are uncertain. This is only partly true. In fact, we proposed a plan in which NED would assist in forfeiture investigations and the Criminal Justice Division would assist in administrative and judicial forfeiture proceedings. However, the counties declined because of the understandable belief that criminal prosecution and asset forfeiture are complementary enforcement weapons which should be wielded by the same authority. For this reason, we have agreed that the best plan is for the Attorney General to provide training in the technical aspects of forfeiture to the county police and prosecutors who will then use forfeiture to promote the objectives and priorities they have established. None of this information was elicited by your staff.

Further, to perform the roles allocated in this relationship will require considerable resources which we do not currently possess. At the investigative level, expertise in financial analysis must be acquired. At the legal level, expertise in proving forfeitures in the judicial forum will be necessary. However, passage of the Hawaii Criminal Omnibus Forfeiture Act placed us in somewhat of a dilemma. In 1987, legislation to establish and fund a forfeiture pilot project to acquire and employ these skills did not gain passage. Then, in 1988, passage of the Act was gained only at the expense of a pledge that we would not return to the Legislature for the funds and, especially, personnel needed to quickly make use of its provisions. In addition, the counties have been extremely cautious in their use of the Act in order to avoid the appearance that they have abused the powers accorded to them. As a result, there have been insufficient resources thus far to make the Act generate enough funds to bring it to full utilization and to make it self-sufficient, another issue either ignored or not looked into by your staff.

It is for these reasons that our department's activities have been somewhat limited to date. As the report notes, the Criminal Justice Division authored a guide to administrative forfeiture, the only area other than property disposition for which the Attorney General is given specific responsibility by the Act. It was not intended to cover judicial forfeiture for two reasons. First, our department has not historically played a role in prosecuting forfeitures and does not yet possess and, for the reasons described above, does not yet have the means to acquire the type of expertise which such a manual would require. Second, practice and procedure varies to some extent from one judicial circuit to another, leaving the respective prosecutors with the best perspective on handling such proceedings.

It is also true that the division has not yet completed the rules for administrative forfeiture which the Act authorizes, but does not require. However, several observations are in order here. First, such rules must reflect and respond to the dictates of experience and, given the novelty of the procedure, the requirements are only starting to come into focus. In any event, draft rules, the substance of which are being followed, have been developed and are being expanded and revised. Second, rules are invariably the subject of protracted litigation intended to defeat, on technical grounds, the merits of a particular proceeding. This report nowhere cites any evidence that the absence of rules has, in any way, adversely affected proceedings under the Act. The fact is that total annual forfeitures after enactment of Chapter 712A approximate those of the previous long-standing statutory provisions, despite a comparatively short history.

Further, we are troubled by the conclusion that "[t]he lack of an adequate forfeiture program appears to be due to a lack of priority and direction." Given that total forfeitures have indeed kept pace even in the infancy of the new law, the meaning of the word "adequate" is unclear. Additionally, the limited resources we have been able to devote to forfeiture should not be equated to the priority to which we attach it. In contrast, for example, to the nearly 100 attorneys in the Honolulu Prosecutor's office, we have only recently been able to add a sixth to our Criminal Justice Division. It is for these reasons that forfeiture has largely been administered by NED, the entity with the most experience because of its long history of processing forfeitures under Chapter 329. Given the limitations placed on us by the legislative process leading to the enactment of the law, our success speaks for itself.

Nonetheless, in view of your recommendation, we will explore a return to the Legislature for additional positions.

Lack of Procedures for Processing Forfeited Property

We acknowledge that there is a need to further develop procedures for handling and accounting for forfeited property. Clearly, forfeited money needs to be more expeditiously retrieved and deposited. We concur with your suggestion that a deposit slip should be prepared at the time the money is retrieved from the seizing agency in order to accomplish this. While they are not yet written, there are operating procedures for disbursement of forfeiture funds. All such disbursements, whether payments to vendors or distributions to law enforcement agencies, must have the specific approval of the Attorney General and are processed only through our administrative services/fiscal office according to accepted accounting principles and procedures. We also utilize the State's fiscal year as the accounting period for forfeiture funds and prepare annual balance sheets showing assets, liabilities and fund balance, and a statement of revenue, expenditure and charges in fund balance.

Two specific observations should be made here. First, a total of $11,654.56 has been charged for payment of newspaper publication costs to forfeited funds. This amount was originally paid out of the existing forfeiture account established for deposit of forfeited monies pursuant to Chapter 329, Trust Account T89-904N. This account has since been credited with this payment and the new Revolving Fund Account, S89-3209N, has been debited accordingly. Second, we believe that any inconsistencies between the accounting schedules of the Criminal Justice Division and NED are due to use of a different format. While both divisions do segregate assets by type, the same categories have not been used. As well, inconsistencies sometimes arise between accounting based on the date the forfeiture action is filed and the date the order granting forfeiture is filed. We concur that only one accounting should be used and we are moving this responsibility to the Criminal Justice Division in anticipation of the departure of NED from our department.

Threat to Forfeiture from Statutory "Drop Dead" Provision

We concur with your observations regarding the strength, fairness, and abuse resistant qualities of Chapter 712A. As well, we agree that the problems identified by the report and

acknowledged by us can be resolved with additional time and experience. We also feel compelled to reiterate the correllary of that statement: the problems to date are the product of a lack of time and experience. And you correctly point out that the federal prominence in this area is due to the time and experience involved in their efforts: nearly 20 years. But none of these observations explain why you suggest that the Act should be extended for only two years. In our view, it should simply be reenacted, without limitation, because it can be reviewed, modified, or repealed by the Legislature at any time, should that ever become necessary.

CHAPTER 6: MANAGEMENT OF THE INVESTIGATION DIVISION

This chapter accurately describes the role and operation of the Investigation Division. We are pleased by your conclusion that the "division is discharging its duties and responsibilities in a capable and efficient manner." We also concur with your observations regarding the organization of the Medicaid Investigations Division. What follows is our response to the recommendations which the report proposes to improve operations further.

Policy and Procedures Manual

We agree that the operations of the division could be improved somewhat if the division completes its policies and procedures manual. This manual was originally scheduled for completion by December 1989. However, as your staff is aware from having spent 30 hours at the division, the tremendous caseload, combined with the lack of adequate clerical support, have prevented us from completing more than eight of the 40 planned policies.

To put this in perspective, the division received over 1,200 investigative requests in fiscal year 1988-1989. However, the division is comprised of only one chief investigator, nine investigators, and one clerk stenographer. As a result, both the chief investigator and the investigators have had to request overtime to complete their assignments in addition to performing much of the clerical duties themselves.

We also generally agree that such a manual could, among other things, diminish liability concerns, provide some measure of control, and inform employees of standards and requirements. However, we do not agree that only written guidelines for collecting information will suffice to define the legal and

ethical limits of an investigation. The division often performs investigations which are unpredictable and which require the investigator to make quick decisions. No guidelines, no matter how detailed, could begin to account for all the varied situations these investigators encounter. And there is no indication that the absence of such guidelines has diminished the effectiveness of the division or that problems of the type they are intended to avert have arisen.

Training Programs

In theory, a formal training program is an essential element of any professional endeavor. However, we do not believe such a program is necessary for "new" investigators in our division for the following reasons. First, all investigators hired for this division are classified at the superjourneyman level or Level V of the civil service system. Minimum qualifications at this level include graduation from an accredited college or university with a baccalaureate or its equivalent and three and one-half years of progressively responsible investigative experience. Historically, investigators who join this division have work experience far in excess of the minimum required. Indeed, the high civil service rating accorded to these positions is a reflection of the fact that, from the beginning, the investigators must already be able to perform complex investigations relating to a broad variety of program areas covering a correspondingly wide range of laws, rules and regulations.

Second, turnover in the division has only occurred with the retirement of an investigator, usually after long service with the department. When an opening is filled, the new investigator is assisted by the veteran investigators. Upon completion of an assignment, the new investigator's work product is closely scrutinized by both a senior investigator and the chief investigator. Given the level of training and experience possessed by new investigators and the manner in which they are supervised, a formal training program would be largely redundant. And it is unrealistic to think that such a program could anticipate and prepare the investigator for the unique assignments we handle. In this field, new problems require new methods of providing solutions.

Third, we believe the report's suggestion that a "successful orientation program can make investigators more knowledgeable, motivated, and efficient thereby increasing productivity and lowering operating costs," does not reflect

practical reality. For one thing, each new investigator is given an orientation covering the mission and programs of the division and the department as a whole, and in this connection, our office has produced a video providing a detailed orientation to all divisions of our department, the existence of which was not looked into by your staff. Further, the new investigator is required to read and become familiar with the department's policies and procedures manual. Questions are referred to the appropriate authority. For another thing, motivation is a function of productivity and efficiency, not orientation. As long as our investigators are bogged down with clerical tasks, productivity and efficiency will be less than optimal and motivation will suffer as a result. The real answer to this problem is the addition of clerical positions, a solution to which your staff concurred during its inquiry, but which the report itself omits to mention. Quite frankly, we were looking to see what recommendations your staff would make concerning the need for more clerical help after reviewing the overtime and timesheets of our investigators in doing clerical work. Your report apparently concludes there are no problems in this area, despite the fact that the data reviewed by your staff showed that the investigators were collectively spending hundreds of hours a year doing clerical work!

Finally, the report's suggestion that specialized training will obviate the need for outside investigative and accounting services demonstrates that your staff did not closely examine why the $550,000 spent since 1985 was necessary. The majority of that amount was expended in connection with three extraordinarily complex suits of the type we rarely encounter, all of which would have been disclosed to your staff had they asked. Training our investigators in the type of financial analysis needed in those cases would not be cost effective because the expertise acquired would be used only infrequently. The use of outside consultants in these cases was clearly the best use of the money spent. The fact that your staff never even apparently asked or understood how and why this money was being spent, yet used the figure to criticize our department is, unfortunately, typical of their conduct in this report.

Better Communications

We also take exception with the conclusion that the division's investigators are often unaware of cases being pursued by other investigators. If a case is routine in nature and is of a type previously handled by the division, the

investigator unfamiliar with the particular type of investigation is paired off with an investigator who has prior experience in that area. At the time an assignment is made, it is stressed that the expertise of the chief investigator is always available and the investigator is encouraged to discuss problems and solutions with his peers. The division does hold meetings as scheduling permits but its caseload precludes holding meetings of the length required to review pending cases on a systematic basis.

CONCLUSION

Had the Legislature wanted to do an audit of the state administration, including my department, on our planning efforts relating to drug abuse and drug enforcement, we would have welcomed it. In the setting of such an audit, we could have discussed how we believe the state administration (which for decades has never even been particularly involved in drug law enforcement) and the State as a whole (whose counties have been competing unproductively for years) could best be moved toward a more organized approach to the total drug problem, and what indeed has been done in the last three years to facilitate this. We could have also discussed the experience of other states, and expressed why they would, or would not, work among the four counties and the state administration in Hawaii. We could have also shared with you information about the formation of our Statewide Narcotics Task Force in Hawaii (something never mentioned in this "audit"), and how it has been setting priorities and focusing efforts and resources on very specific objectives. Lastly, if the topic of this audit has been whether we need statewide planning, I would have shared with you the real background of both the federal and New Jersey "plans," how they were both politically motivated, how they were used for political leverage by one branch of government against another to extort funding, and all of the other realities that are beneath the superficial level of such "plans."

After such a discussion, you could have disregarded everything we had to say, but at least we would have had an opportunity to try and dissuade you from the simplistic, academic and rather naive view held by your staff of planning in drug enforcement and about law enforcement and the war on drugs in general. Obviously, there always can be improvement in planning and in the area of priority setting, and we are painfully aware that our rebuttal to these seemingly undeniably good conclusions you have reached will sound like sour grapes.

How can one deny apple pie and motherhood? Indeed, your simplistic "audit" results will sound great to many people who will never read this response or appreciate the unfairness of what your audit has done. In light of the fact that your staff never indicated to me or my staff that the subject of planning was even going to be involved, we can only conclude that this unfairness was not entirely accidental.

To insure that the public is not misled, however, I hereby respectfully request that we have a full public hearing on the issue of Hawaii's War on Drugs, at which we could both have the opportunity to present our sides of the issue and a chance to rebut the other. If you believe your staff handled this matter fair and square and did not engage in a distortion of the facts involved, I would think a public hearing on this issue would be in everyone's best interest. In the meantime, we would certainly appreciate more concrete advice on the management questions that were posed, and which remain unanswered.

I look forward to hearing from you about a public hearing on the overall drug issue, if this is indeed what the Legislature really wanted with this audit. If not, then in all fairness the audit should be confined to its original purpose: "A report and analysis ... on the appropriateness of each division's duties" (Act 316, sec. 217). Quite clearly, this simple mandate did not require a treatise on the "Status of the federal 'war on drugs'..." p. 1

Very truly yours,

Warren Price, III
Attorney General

ELB/WP:jmy
cc: News Media

8525I

ATTACHMENT 3

JOHN WAIHEE
GOVERNOR OF HAWAII

JOHN C. LEWIN, M.D.
DIRECTOR OF HEALTH

STATE OF HAWAII
DEPARTMENT OF HEALTH
P. O. BOX 3378
HONOLULU, HAWAII 96801

In reply, please refer to:
File:

January 18, 1990

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OFC. OF THE AUDITOR
STATE OF HAWAII

Newton Sue
Acting Legislative Auditor
Office of the Auditor
465 S. King Street, Room 500
Honolulu, Hawaii 96813

Subject: Review and Comments on Draft of Management Audit of the Narcotics Enforcement Division and the Investigation of the Department of the Attorney General

Dear Mr. Sue:

This will acknowledge receipt of the above-referenced report and serves to respond to that portion which is within our expertise. However, we are unable to respond to most of the report because it addresses issues clearly beyond the scope of the legislative mandate, including a discussion of the overall structure adaptation of law enforcement in the State of Hawaii.

To the extent that it can possibly be viewed as properly within the scope of the audit the report appropriately emphasizes the need to control drug abuse through a plan of education, treatment, law enforcement, and cooperation designed to integrate the various elements of such a plan.

Gaining cooperation between agencies located within different governmental jurisdictions does take a "neutral" party, or at least an entity centrally located within the government structure with the specifically stated authority and support to accomplish those ends. Without such specific authority (e.g. statutory) it would be difficult, if not impossible for any one department to take on responsibility for planning and allocation of resources to other departments. For this reason, the Department of Health has been supportive of and is working with the Office of State Planning (OSP) which is preparing a document on "Strategic Directions for the Prevention and Control of Substance Abuse".

However, since OSP is not an implementing agency per se, some other cabinet level structure, such as a proposed inter-departmental council for the prevention and control of substance abuse, will be necessary to assure inter-agency cooperation and coordination in formulation of the various departmental plans which feed into the overall Strategic Directions and in implementing the planned activities. This approach would allow each of the departments to remain focused in their particular areas of expertise and responsibility while working together to make maximum use of available resources. Thus, the health related plan for drug abuse control becomes an element of the overall strategy, just as would the other executive branch department plans.

We do not think that this approach is inconsistent with Part XVI of the health statutes, which calls for the department to prepare and administer a state plan for substance abuse which may include alcohol prevention and drug abuse prevention, and coordinate drug abuse programs. Other sections of Title 19, Chapter 321, Health, made similar references to the preparation of statewide plans as found in subsection 321-193, but clearly the intent of such plans is to focus on statewide issues within the scope of the department's mission and responsibilities. The department can and should provide leadership in raising issues and identifying needs which impact on other elements of the system but the actual setting of state philosophy and direction is more appropriately placed with the Governor as represented by OSP.

For the record, we would like to clarify one section of the historical background on leadership and direction in planning. The statement is made that in 1988, the Office of State Planning "tried unsuccessfully to get the health department moving on a master plan for substance abuse" (Pg. 19). In reality, the attempt was directed at the then Alcohol and Drug Abuse Branch, a part of the Department's Mental Health Division, at a time when the Branch was authorized only six professional staff, including the Branch Chief. The small staff was attempting to manage a variety of purchase of service contracts, as well as carry out other coordinative and quality assurance duties and responsibilities required under Part XVI. The branch clearly lacked the resources to take on a major inter-agency planning process such as that envisioned by OSP, and there was mutual agreement that the effort be delayed.

More importantly, although the State lacks a comprehensive plan at this time, the Department of Health in cooperation with the Governor's Office is developing a plan for prevention, treatment, and training. It is now in the position to do this because there has been a reorganization of the Department with the establishment of a Behavioral Health Services Administration, and specifically, the new Alcohol and Drug Abuse Division. The Office of State Planning is clear in its delineation that the new Alcohol and Drug Abuse Division in the Department of Health has the lead responsibility for the planning efforts for training, prevention, and treatment in the state.

During the past three months, the Office of State Planning and the new Deputy Director for Behavioral Health Services Administration have collaborated in the development of strategic directions for the State in the areas of drugs and alcohol. This new division has the potential of acquiring additional staff resources over the next two years to meet more adequately the requirements of Part XVI.

Another issue which is only lightly touched on is the relationship of the Hawaii Advisory Commission on Drug Abuse and Controlled Substances (HACDACS) to the Narcotics Enforcement Division and the scheduling of controlled substances (Pg. 5). HACDACS is charged with advising the Department of Health, and when appropriate, the Governor and other departments, on the scheduling of controlled substances, as well as encouraging research and assisting the Department in carrying out educational programs to prevent and deter abuse of controlled substances (subsection 329-4).

Clearly, if Narcotics Enforcement functions and related departmental authority are shifted to other departments, revisions in HACDACS's statutory responsibilities will have to be made. However, shifting educational activity of HACDACS and the Department of Health (subsection 329-4(4), 58(a) to another department, such as Public Safety, is not appropriate, given the health related concerns involved. More discussion of the potential impact of this area would be helpful in determining effective policy.

Thank you for the opportunity to comment on this draft.

Very truly yours,

JOHN C. LEWIN, M.D.
Director of Health

ATTACHMENT 4

OFFICE OF STATE PLANNING
Office of the Governor
STATE CAPITOL, HONOLULU, HAWAII 96813 TELEPHONE (808) 548-5893
JOHN WAIHEE, Governor

January 18, 1990

RECEIVED
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OFC. OF THE AUDITOR
STATE OF HAWAII

MEMORANDUM

TO: The Honorable Newton Sue
Acting Legislative Auditor

SUBJECT: DRAFT REPORT ON "MANAGEMENT AUDIT OF THE NARCOTICS ENFORCEMENT DIVISION AND THE INVESTIGATION DIVISION OF THE DEPARTMENT OF THE ATTORNEY GENERAL"

Thank you for sending OSP a copy of your draft report on "Management Audit of the Narcotics Enforcement Division and the Investigation Division of the Department of the Attorney General."

Your draft report states that the Legislature (in Section 217 of the General Appropriations Act of 1989) directed you to conduct (1) a "report and analysis" concerning the Narcotics Enforcement Division and the Investigation Division and (2) a financial audit on the monies forfeited to the Department of the Attorney General through the Narcotics Division. The purpose of the Legislative request was "to determine if appropriated funds are appropriately being expended."

Your draft report approaches the management audit of the two divisions as part of a broader discussion of the State Administration's overall approach to drug abuse control. Your "review of the narcotics division raised particularly broad questions that went beyond the internal functioning of the division." Raising broad questions is useful and appropriate to the degree that it facilitates the exploration of the "network of policies and programs--national, state, and local--within which they (the narcotics enforcement and investigations divisions) function." But the extent and detail to which your draft report focuses

on a State master plan for drug abuse is clearly disproportionate to the original intent and particular purpose for which you were directed to conduct the management audit. In any case, some of your proposed planning solutions to the broad questions are inappropriate to the complexities and realities of the drug abuse problem.

In Chapter 4, entitled, "Management of the Narcotics Enforcement Division," your findings and recommendations center on the need to develop a master plan on substance abuse and what the plan should "cover," "contain" and "be based on." Your draft report also recommends that "OSP should be made responsible for analyzing the drug abuse issue and writing a state plan."

OSP does not agree with your recommendation that OSP should be responsible for developing a State master plan. The Department of Health (DOH) is the proper agency to develop a State plan on substance abuse.

Your draft report quoted from a report of the U.S. General Accounting Office that "An increasing number of experts believe that a higher priority and increased resources must be assigned to reducing the demand for drugs through programs aimed at preventing drug abuse, treating drug abusers, and conducting research on the causes and cures of drug abuse." As your draft report also noted, DOH has the statutory responsibilities (HRS 321-193) for a comprehensive substance abuse program. DOH responsibilities include the preparation of a state plan for substance abuse and the supervision of its implementation; the coordination of public and private agencies in assessing substance abuse problems, needs and resources; and coordination of all substance abuse programs including rehabilitation, treatment, education, research and prevention activities. Also, the State Health Functional Plan specifies DOH as the lead agency to develop a substance abuse master plan. In addition, as part of DOH's continuing community-based project on Hawaii's Health Objectives for 1990 and Beyond, statewide objectives have been developed to address the misuse of alcohol and other drugs as well as the reduction and prevention of tobacco use. Ongoing activities of the 1990s Health Objectives Project include the refinement, prioritization, implementation and assessment of objectives.

Other agencies have already developed and are implementing plans to address substance abuse problems through their respective jurisdictions. The Department of Education has conducted statewide substance abuse surveys among public school students in 1987 and 1989, that have provided the basis for the development, ongoing implementation and evaluation of substance abuse plans required of all public schools. The Department of Corrections has recently developed a comprehensive criminal justice substance abuse implementation and management plan.

OSP agrees, however, with the need for a more systematic approach to guide the numerous efforts and activities against substance abuse. We also agree that appointing a drug czar would not be the most effective and efficient approach for Hawaii's situation and would simply result in another unnecessary layer of government.

Thus, to address the need for overall direction, OSP is currently preparing, in cooperation with DOH and the Department of the Attorney General, a report on strategic directions for the prevention and control of substance abuse in Hawaii. Your draft report mentioned this document, the purpose of which is to identify the major issues that should be addressed in the prevention and control of substance abuse and to provide a broad conceptual framework, initial policy guidance and planning directions to address those issues. DOH, the Department of the Attorney General and OSP will also propose forming a cabinet-level interdepartmental policy committee as the mechanism for an integrated approach for the State Administration's efforts in substance abuse prevention and control. The proposed interdepartmental committee would address policy formulation and priority setting needs, and facilitate the coordination of plans, activities and resources among government agencies. Existing community advisory groups and private agencies will be used to provide consultation and community-wide input. Further details of this proposal still need to be worked out. For example, additional resources would be needed to staff the proposed interdepartmental committee. But we feel this approach would provide the flexibility needed to respond to rapidly changing situations associated with substance abuse.

Given these current efforts, your recommendation that OSP be made responsible to analyze the drug abuse issue and write a master plan is not advisable and should be reassessed. For OSP to further conduct the kind of planning and extensive analysis that your draft report recommends would duplicate recent and ongoing planning efforts. Moreover, making OSP responsible for developing a substance abuse master plan would be inconsistent with the need to ensure effective implementation of the plan. Comprehensive substance abuse planning responsibility should lie with the organizations that can provide a long-term commitment with ongoing implementation responsibilities, authority, activities and resources.

While there is need for improved planning, the "analytical approach to controlling drug abuse" that your draft report recommends is neither the most meaningful or necessary approach to address the problems and needs of drug abuse. Your recommended analytical approach includes defining the threat posed by each drug, identifying alternative "supply-side and demand-side" approaches, and conducting extensive cost-benefit analyses. Your approach is not necessary when there exists policies, goals and objectives that have taken into account such analytical considerations. National and state policies, goals and efforts have been guided by the 1986 and 1988 Anti-Drug Abuse Acts, as well as by the policies, objectives, regulations and guidelines that Federal agencies impose upon states. Locally, priority needs already have been identified by State and private agencies and community groups at legislative hearings and community hearings over many years. Ongoing coordination and strategic planning are "musts", but action and not more extensive analyses is needed to address pressing problems such as the critical shortage of treatment services, trained workers and facilities.

Thank you for the opportunity to comment on your draft report.

Harold S. Masumoto
Director

cc: Hon. Warren Price, III
Hon. John C. Lewin