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# **Sunset Evaluation of the Forfeiture Program**

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

Report No. 95-22  
October 1995

**THE AUDITOR**  
STATE OF HAWAII

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## Foreword

Act 196 of the Regular Session of 1993 directed the State Auditor to perform a sunset evaluation of the forfeiture program established by Act 260, SLH 1988 (now Chapter 712A, Hawaii Revised Statutes). The program is scheduled for repeal on July 1, 1996. Act 196 asked us to assess whether the public interest requires repeal or modification of the forfeiture program and to make recommendations for future policies, practices, and procedures. This report presents our findings and recommendations.

We acknowledge the cooperation of the Department of the Attorney General, state and county law enforcement agencies, and others whom we contacted during the course of our evaluation.

Marion M. Higa  
State Auditor

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# Chapter 1

## Introduction

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

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directs the State Auditor to assess whether the public interest requires the forfeiture program to be modified or repealed.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

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### Background on the Forfeiture Program

Forfeiture is a legal mechanism whereby the government may take, without compensation, property that is used for or acquired through certain illegal activities. Various kinds of property connected with the activity may be forfeited, for example boats, cars, planes, real estate, bank accounts, homes, and cash.

Forfeiture is an ancient legal doctrine based upon the fiction that property itself can be “guilty.” In recent years the doctrine has been revived and expanded as a weapon against crime, particularly drug crimes, but also other criminal activity such as racketeering and illegal gambling. Federal, state, and local enforcement agencies are using forfeiture in an effort to take away a critical element of criminal organizations: the illegally accumulated assets of their members. This is intended to remove both the profit incentive and the tools for crime.

While forfeiture is aimed at criminals, forfeiture proceedings may be criminal or civil in nature. Criminal forfeiture is an action by government against a person who must be convicted of a crime before the property can be forfeited. Civil forfeiture is an action by government against a person or property and can occur regardless of whether the alleged criminal is acquitted or convicted in a criminal proceeding. All states and the District of Columbia have some type of civil or criminal forfeiture statute, or both.

### History of Chapter 712A

Before 1988, the State of Hawaii did not have a uniform forfeiture law. Forfeiture provisions of various types were found in different parts of the Hawaii Revised Statutes such as the Uniform Controlled Substances Act (in Section 329-55, HRS), the Organized Crime statute (in Section 842-3, HRS), and the Penal Code (in Section 701-119, HRS).

Acting on a proposal initiated by a coalition of law enforcement groups, the Legislature in 1988 passed Act 260, which became Chapter 712A, HRS, sometimes known as the Hawaii Omnibus Criminal Forfeiture Act. The purpose of this temporary law as stated in committee reports was to consolidate forfeiture under a single statute and clarify forfeiture offenses, property subject to forfeiture, procedures, and disposition of forfeiture proceeds, with the intent of making crime unprofitable by taking away the criminal's profits.

Chapter 712A was modeled after federal forfeiture law and a forfeiture law adopted by Arizona in 1986. It includes both criminal and civil forfeiture and covers a wide range of offenses including murder, kidnapping, gambling, money laundering, various drug crimes, and others.

Under Chapter 712A, law enforcement officers have broad authority to seize property and initiate forfeiture proceedings if they believe the property is "subject to forfeiture" because of its connection with crime. The burden then falls on anyone claiming ownership or other interest in the property to stop the forfeiture by proving some exemption. For example, if a piece of real estate is about to be forfeited because of probable cause that illegal drugs are being sold there, the landowner may challenge the forfeiture by proving that the activities took place without his or her knowledge and consent.

The law was amended each year from 1990 through 1994. For example, one amendment clarified the obligation of prosecutors to give notice of pending forfeitures. Another amendment required the attorney general to submit annual reports to keep the Legislature fully informed of forfeiture activities.

Initially, Chapter 712A was scheduled for repeal on July 1, 1990. This was subsequently extended to July 1, 1993. Act 196 of 1993 further extended the repeal date to July 1, 1996, and directed the State Auditor to assess the forfeiture program.

If Act 260 is not reenacted, anything it added to the Hawaii Revised Statutes will be deleted and anything it deleted or amended will be restored. Forfeiture laws would still exist in Hawaii but in a more limited and fragmented form.

### ***Highlights of the law***

Under Chapter 712A, law enforcement officials may pursue forfeiture judicially or administratively. Judicial forfeiture requires court proceedings. Forfeiture actions involving real property of any value or personal property valued at \$100,000 or more (except for vehicles or conveyances) must be adjudicated in the courts. Forfeiture actions

involving personal property valued at less than \$100,000, and vehicles or conveyances, may be pursued administratively.

Administrative forfeiture, which was not available in the forfeiture laws prior to the enactment of Chapter 712A, is an expedited procedure in which the attorney general receives a forfeiture petition from a prosecuting attorney and orders forfeiture unless it is contested. Administrative forfeiture is limited to actions involving personal property valued at less than \$100,000, or any vehicle or conveyance regardless of value.

Contraband—property whose mere possession is illegal—is forfeited summarily to the State without the need for legal proceedings.

Upon a determination by a court, or by the attorney general in an administrative proceeding, that property or its proceeds is forfeited to the State, it is transferred to the Department of the Attorney General for management and distribution. Among the attorney general's options are transferring forfeited property, other than currency, such as automobiles, to state and county law enforcement agencies or disposing of the property by public sale. The law requires that after paying forfeiture-related expenses, the attorney general must distribute forfeited currency and sale proceeds of forfeited property as follows: 25 percent each to the involved seizing agency and the prosecuting attorney, and 50 percent to the department's Criminal Forfeiture Fund to be expended for various purposes such as supplemental amounts to state and county law enforcement agencies and training and education in law enforcement.

The department is required to submit an annual report to the Legislature on administrative and judicial forfeitures filed and their disposition; property seized, forfeited, and distributed to law enforcement; and deposits into and expenditures from the Criminal Forfeiture Fund.

### ***Participating agencies***

Forfeiture under Chapter 712A is a statewide operation involving the following agencies: the Department of the Attorney General; the county prosecuting attorneys' offices; and the seizing agencies.

The *Department of the Attorney General* receives petitions for administrative forfeiture submitted by prosecuting attorneys. It processes administrative forfeiture cases and the attorney general makes the final decision. The department also manages and distributes forfeited property, and administers the Criminal Forfeiture Fund.

The Asset Forfeiture Unit, which is part of the department's Criminal Justice Division, is assigned to carry out many of the department's duties under Chapter 712A. The Criminal Justice Division is led by a

supervising deputy attorney general. The forfeiture unit is staffed by one deputy attorney general, one seized-asset manager, one legal assistant (currently a vacant position), and one secretary. An auditor from the division assists the forfeiture unit staff as needed. The actual total personal services budget of the unit for FY1993-94 was \$146,726.

The *prosecuting attorneys*—who include the attorney general and her deputies and the prosecuting attorneys of each county—may file a petition with the attorney general to initiate an administrative forfeiture action or may proceed through the courts, depending on the circumstances. (They may also pursue forfeiture under federal law by working with federal law enforcement officials.)

The *seizing agencies* are any state or county agencies that employ law enforcement officers authorized to seize property for forfeiture. These include the police departments of all the counties, the Narcotics Enforcement Division of the Department of Public Safety, and others.

The *courts* have sole jurisdiction of real-property forfeitures of any value and personal-property forfeitures of \$100,000 or more. Courts also have jurisdiction of any forfeiture in which the prosecutor chooses the judicial route. Also, an administrative forfeiture proceeding may be removed (transferred) to the courts if a person claiming an interest in the property files a claim and bond to contest the forfeiture.

### **Recent activities**

In FY1993-94, 261 administrative forfeiture cases were processed by the Department of the Attorney General. Almost 90 percent of these petitions were uncontested, that is the person with an interest in the property did not respond to the notice of pending forfeiture. By default, such property is forfeited without further action. The remaining cases were handled either administratively or judicially.

The reported value of all forfeited property was approximately \$1.2 million in FY1993-94. About \$958,000 was deposited into the Criminal Forfeiture Fund during that year. Currency was by far the largest category of the total forfeited property (about 54 percent). Other types of forfeited property were vehicles (about 33 percent) and miscellaneous items such as watches and cameras (about 13 percent). Seizures by the Honolulu Police Department accounted for about 74 percent of the total forfeited property.

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### **Previous Reports**

Our office has conducted several reviews of the forfeiture program or the Criminal Forfeiture Fund. Our first evaluation was performed in 1989 pursuant to Section 217 of the General Appropriations Act of 1989 (Act 316). In our *Management Audit of the Narcotics Enforcement*

*Division and the Investigation Division of the Department of the Attorney General*, Report No. 90-6, we found that the department had not adequately developed a forfeiture program. We recommended that the department develop formal policies and procedures concerning the following:

- timely retrieval and deposit of forfeited cash;
- control list of assets;
- disbursement procedures for forfeiture administration expenses and distribution of forfeited cash;
- formal accounting period and financial statements for the Criminal Forfeiture Fund;
- procedures and timetable for auctioning or otherwise disposing of forfeited non-cash assets; and
- procedures for depositing forfeited cash in the bank.

We also recommended that the department assign a deputy attorney general to work full-time on forfeiture. Finally, we recommended extension of the repeal date of Chapter 712A, HRS, to allow additional time for program implementation.

In our *Financial Audit of the Department of the Attorney General*, Report No. 92-21, we found that the department had implemented many of our previous recommendations concerning forfeiture. But the department still needed procedures and a timetable for auctioning forfeited non-cash assets and needed to periodically reconcile the Criminal Justice Division's records of forfeited cash with the records of the department's Administrative Services Office.

In our recent *Follow-Up Report on a Financial Audit of the Department of the Attorney General and a Management Audit of the Child Support Enforcement Agency*, Report No. 95-18, we found that the department had implemented our recommendations concerning auctions and reconciling records.

Our office has also issued two reports that pertain to the Criminal Forfeiture Fund. They are our *Review of Special and Revolving Funds of the Judiciary and the Departments of the Attorney General, Labor and Industrial Relations, Land and Natural Resources, Personnel Services, Taxation, Transportation, and Public Safety*, Report No. 92-11, and *Review of Revolving and Trust Funds of the University of Hawaii and the Departments of the Attorney General and Business, Economic*

*Development and Tourism*, Report No. 94-19. In these reports, we recommended that the Criminal Forfeiture Fund be allowed to sunset and the fund balance transferred to the state general fund because the fund does not meet one of the criteria we use to review all state revolving funds: it does not reflect a clear link between the benefit sought and charges made upon the users of the program.

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## Objectives of the Evaluation

The objectives of this evaluation were to:

1. Determine whether the forfeiture program under Chapter 712A, HRS, is achieving its purpose of depriving criminals of the profits of their criminal activities;
  2. Determine whether the current legal provisions are sufficiently strong, fair, and abuse-resistant;
  3. Establish whether the program is being implemented lawfully, effectively, and efficiently; and
  4. Make recommendations based on findings in these areas.
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## Scope and Methodology

This evaluation examined whether the Chapter 712A forfeiture program is warranted and what improvements in policies, practices, and procedures may be needed. We included a follow-up of our previous audits of the forfeiture program.

The period under review was from 1989 to the present, but the focus was FY1992-93 and FY1993-94. In assessing program performance, our primary focus was the Department of the Attorney General. We did not evaluate the performance of the county prosecuting attorneys' offices, county police departments, or other law enforcement agencies.

We examined Chapter 712A in detail. To obtain relevant literature including information on forfeiture in other jurisdictions, we contacted organizations such as the National Conference of State Legislatures, the State Information Center, the U.S. General Accounting Office, the American Prosecutors Research Institute, and the National Conference of Commissioners on Uniform State Laws.

We examined correspondence, files, and records of the forfeiture program in the Department of the Attorney General and interviewed program personnel. We examined a systematic sample of 25 out of 261 administrative forfeiture cases decided in FY1993-94 to assess

compliance with Chapter 712A. We attended an auction of forfeited property conducted under the auspices of the department. We reviewed previous audits of the forfeiture program conducted by our office and other auditors.

We also interviewed officials of the county prosecutors, county police, and the Narcotics Enforcement Division of the Department of Public Safety. We included telephone interviews with national experts in law enforcement.

Our work was performed from January 1995 through September 1995 in accordance with generally accepted government auditing standards.



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# Chapter 2

## Findings and Recommendations

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In this chapter we evaluate the forfeiture program established by Chapter 712A, Hawaii Revised Statutes, to determine whether it should be modified or repealed. We conclude that the law could be modified.

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### Summary of Findings

1. The impact of the forfeiture program under Chapter 712A, HRS, is uncertain. The program may have deprived criminals of some of their profits, but its value in deterring crime has not been clearly demonstrated.
2. Chapter 712A could be amended in the interests of fairness by adopting certain provisions recommended by the National Conference of Commissioners on Uniform State Laws.
3. The Criminal Forfeiture Fund does not link charges and benefits and it escapes the process of legislative appropriations. The fund is not necessary and should be repealed.

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### Impact of Forfeiture Program on Crime Is Uncertain

The forfeiture program under Chapter 712A, HRS, seeks to deprive criminals of the profits and tools of their criminal activities. The ultimate goal of forfeiture programs is to deter crime.

In our evaluation, we found that the forfeiture program may have captured some of the profits of crime. However, it has not been demonstrated that the program actually deters crime.

### *Forfeiture may have captured some profits of crime*

Under Chapter 712A, HRS, about \$1.2 to \$1.3 million in property was forfeited in each of the years FY1991-92, FY1992-93, and FY1993-94 because of its alleged connection with crime. The forfeited property included currency, motor vehicles, and electronic pagers. In our sample of cases from FY1993-94, most of the alleged crimes involved drug dealing. Other crimes included gambling and burglary.

These data suggest that some of the profits of crime—particularly drug crimes—are being forfeited. However, this is not certain, because most forfeiture cases are civil in nature, do not require a criminal conviction, and rest only on “probable cause” that the items were connected with a crime, since most cases are uncontested. Furthermore, the attorney

general's department does not routinely document whether a criminal conviction for an associated offense was ever obtained.

In summary, the property forfeited under Chapter 712A was *probably* connected with crime but there is no *proof* of this.

### ***Evidence of deterrence is inconclusive***

The general aim of any forfeiture program is to help control crime. While Hawaii's program may have captured some of the profits of criminals, its impact on crime is not known. We found the evidence on deterrence inconclusive.

Most of the law enforcement officials whom we interviewed expressed a belief that forfeiture helps deter crime. One official observed that most crimes are committed for profit, especially drug crimes, and that forfeiture is a very effective tool in "depriving the profit motive." Officials also said the law succeeded in warning criminals that their illegal profits could be confiscated. Furthermore, property owners are put on notice that they could lose their property—such as a house or a car—if others are using the property for illegal activities.

One official said that forfeiture had slowed down large drug operations. Another said that forfeiture had reduced the "backyard" cultivation of marijuana.

However, these views appear to be based primarily on personal observation and opinion. We found no hard evidence that forfeiture has helped control crime in Hawaii. One key official acknowledged that the deterrent impact cannot be measured in crime statistics.

Furthermore, another official suggested that lawbreakers have learned to circumvent the forfeiture law. For example, criminals may conduct illegal activities on leased property or in rental vehicles. Or they maintain multiple residences in case one residence is forfeited. One official noted that criminals have learned to hide their illegal assets. Apparently, forfeiture has become a "cat and mouse" game.

One official observed that Hawaii's forfeiture law has had no deterrent effect in his county. Like others whom we interviewed, he pointed out that county authorities have little incentive to pursue forfeiture under Chapter 712A because the federal formula for distributing proceeds to law enforcement agencies is more favorable. Federal law distributes up to 80 percent of the proceeds of a forfeiture to the local law enforcement agencies that participated in the forfeiture. But Hawaii's formula requires only that 25 percent be distributed to the participating seizing agency and 25 percent to the participating prosecutor's office. The remainder is deposited into the Criminal Forfeiture Fund for expenditure by the attorney general.

Furthermore, some officials raised concerns about problems in the management of seized property. It was suggested that the federal program has more expertise in property management than the state program. Several officials observed that the smaller cases are pursued under Hawaii's law and the larger cases under federal law.

The Department of the Attorney General keeps records of the amounts of property forfeited under Chapter 712A, but does not systematically evaluate forfeiture's impact on crime.

### **Little evidence of deterrence nationally**

Nationally, we also found no systematic studies of the effects of forfeiture on crime. It appears that the success of forfeiture as a law enforcement weapon is unproven.

The U.S. General Accounting Office (GAO) has conducted many examinations of federal forfeiture. But the GAO has focused on the management of seized and forfeited property and how the laws are implemented, not on their impact. Law enforcement specialists on the mainland whom we contacted knew of no studies of forfeiture's impact and observed that this is hard to measure.

A perception may exist nationally that forfeiture is deterring crime because of the undeniable monetary benefits it brings to law enforcement. However, forfeiture's financial success is not necessarily linked to success as a crime deterrent.

Many factors affect trends in crime. Sorting them out is difficult. Considerable controversy exists as to what works best in the war on drugs, and a key issue is the value of law enforcement as compared with treatment, rehabilitation, and education. Therefore it is not surprising that the impact of forfeiture is also debatable.

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## **Statute Could Be Made More Fair**

The far-reaching powers of forfeiture and the assets it generates for crime-fighting make it popular among law enforcement officials and controversial among many observers.

Chapter 712A, HRS, seeks to balance the interests of law enforcers, criminals, property owners, and the public. The Department of the Attorney General appears to have implemented the law appropriately.

Nevertheless, we conclude that the law could be modified to improve its fairness. Our recommendations are based on certain proposals made in 1994 by the National Conference of Commissioners on Uniform State Laws.

### ***Forfeiture concept generates controversy***

Forfeiture is controversial for many reasons. Forfeiture involves the taking by government of property that was illegally used or acquired, without compensating the property owner. Civil and administrative forfeiture—the procedures favored by law enforcement—can occur without a criminal conviction or even a criminal charge and without the “beyond a reasonable doubt” protections that would otherwise apply. The government may pursue *civil* forfeiture of the instruments or proceeds of a person’s alleged criminal conduct even after acquittal or dismissal in a *criminal* proceeding. This may seem paradoxical, since the supposed purpose of forfeiture is to reduce *criminal* activity.

In addition, forfeiture requires property owners to bear the burden of proving that their interest in the property is exempt from forfeiture once the government establishes a likelihood that the property is forfeitable.

The media, particularly on the mainland, contain numerous reports of forfeiture laws causing major disruption in the lives of individuals who faced the loss of a home or other property under questionable circumstances, such as a friend bringing marijuana plants on a visit. An article in the January 4, 1993 issue of *Newsweek* was titled “Where the Innocent Lose: How Civil-Forfeiture Law Can Put Your Furniture in Jail.” The article stated:

To law-enforcement officials it is an H-bomb in the war on drugs. To civil libertarians it’s an outrageous abuse of police power. To [the individuals involved], an obscure provision of federal law known as “civil forfeiture” is just plain government thievery. The one thing everyone agrees on is that it makes crime pay—for the government.

Administrative forfeiture, an expedited version of forfeiture that does not require a lawsuit by the government, raises special concerns. During floor debates in the Legislature in 1991, it was suggested that administrative forfeiture under Chapter 712A, HRS, allows Hawaii’s attorney general to act as judge, jury, and executioner.

The National Conference of Commissioners on Uniform State Laws has also criticized asset sharing in forfeiture because it creates incentives for abuse. Law enforcement officials could become overzealous in pursuing forfeiture in order to generate assets for their agencies—possibly skewing their enforcement priorities in the process. One observer quipped that law enforcement agencies could become “addicted” to forfeiture as a source of revenues and other assets.

### **Forfeiture upheld, with limits**

While forfeiture is controversial in some quarters, the U.S. Supreme Court has upheld civil forfeiture as a tool against crime. However, the

courts have imposed some restrictions. For example, the Supreme Court has ruled that the excessive fines clause of the Eighth Amendment to the U.S. Constitution applies to forfeitures under certain federal laws.

For another example, the Ninth Circuit Court of Appeals recently held that pursuing both a criminal case and a civil forfeiture case for the same offense under federal forfeiture laws is “double jeopardy” and thus unconstitutional under the Fifth Amendment (*U.S. v. \$405,089.23*, 33 F.3d 1210 (9th Cir. 1994)). This ruling is being appealed to the Supreme Court. While other federal courts have held the opposite, Hawaii law enforcement officials are watching the Ninth Circuit case with interest.

### ***Modifications would better balance the law***

The Legislature in its request for this evaluation directed us to assess whether the public interest requires modification or repeal of the forfeiture program. We were also asked to recommend future policies, practices, and procedures for the program.

We do not find that the public interest requires repeal of Chapter 712A. The controversy surrounding forfeiture, and its questionable impact on crime, could justify repeal. But the Legislature has made a previous policy decision in favor of forfeiture. Furthermore, the existing forfeiture law contains numerous safeguards and has been implemented carefully by the Department of the Attorney General.

However, we believe that the law could contain additional protections to bring about greater fairness.

### **Considerable protections already exist**

In our *Management Audit of the Narcotics Enforcement Division and the Investigation Division of the Department of the Attorney General*, Report No. 90-6, we observed that Chapter 712A was designed to be strong, fair, and abuse resistant. Citing just a few of the pertinent provisions of the law, page 35 of our report said:

For strength, [Chapter 712A] 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. For fairness, it contains provisions to protect innocent property owners and good-faith purchasers of the property. 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. Amounts in excess of the cap must go instead into the State’s general fund.

Since 1990, the law has been amended to provide additional protections.

Various audits by us and an outside auditor since 1990 indicate that the Department of the Attorney General has carried out its forfeiture responsibilities with restraint and in compliance with the law. The department has implemented the program with increasing efficiency and effectiveness in many areas including staffing, handling of cash and other assets, accounting, and auctions.

We did not assess the counties' implementation of the law. But the boundaries established by the statute and the moderate approach of the attorney general's department appear to have set the tone for a restrained use of forfeiture by county authorities.

### **Model law could provide additional safeguards**

However, the law could be improved to reflect a significant national development that recently occurred. The *Uniform Controlled Substances Act (1994)*, which includes provisions on forfeiture, was issued by the National Conference of Commissioners on Uniform State Laws as a model for states to consider.<sup>1</sup> It updated previous model acts issued in 1970 and 1990.

The drafting committee for the 1994 model act had advisors from the American Bankers Association, the American Bar Association, the American College of Real Estate Lawyers, the National Association of Criminal Defense Lawyers, and the National Association of Realtors. Organizations such as the American Civil Liberties Union, Criminal Justice Policy Foundation, National Association of Attorneys General, and National District Attorneys Association were also represented.

The purpose of the model act is to promote uniformity among the laws of the states and those of the federal government. Among other things, its drafters comment that the act attempts "to set forth in statutory form all important aspects of reasonable and consistent forfeiture practice rather than relying on prosecutorial discretion to achieve similar results."<sup>2</sup> The drafters also comment that the model act shows that "effective law enforcement techniques need not . . . violate widely shared notions of fundamental fairness."<sup>3</sup>

While the model act covers only forfeiture relating to drug offenses, its basic principles can apply to Hawaii's forfeiture law which includes drug crimes and many other offenses.

Hawaii's forfeiture law already contains some protections similar to those in the model act. But we believe that amending Hawaii's law to include additional provisions from the model act would enhance the

fairness of forfeiture. Our recommendations do not reflect any evidence of abuse in Hawaii. Rather, the recommendations are to prevent abuse.

Based on the model act, we propose amendments concerning the burden of proof and excessive forfeiture.

### **Burden of proof**

Under Chapter 712A the forfeiture process begins when a law enforcement officer seizes property believed to be “subject to forfeiture” under the law (including property used or intended for use in a crime, or property that is the proceeds of a crime). The appropriate prosecuting attorney at the county or state level then determines whether it is “probable” that the property is indeed subject to forfeiture. If so, the prosecutor may initiate judicial or administrative proceedings against the property.

Under Sections 712A-12(8) and 712A-13(7)(d), HRS, the State in order to prevail in a judicial forfeiture has the initial burden of showing the existence of *probable cause* for seizure of the property. The party claiming the property, in order to prevail, then has the burden of showing by a *preponderance of the evidence* that the claimant’s interest in the property is *not* subject to forfeiture.

An important distinction exists between probable cause and preponderance of the evidence. Of the two, probable cause is the easier standard of proof in the law. It can be proved by showing a reasonable ground for belief of wrongdoing—more than mere suspicion but less than preponderance of the evidence. Preponderance of the evidence is a tougher standard. It requires evidence that is more convincing than the evidence offered to oppose it.

In contrast to the Hawaii law, the model act requires that the State, in order to prevail in a judicial forfeiture, must prove by a *preponderance of the evidence* that the property is subject to forfeiture. As in Hawaii, the claimant must then show by a preponderance of the evidence that the property is not subject to forfeiture.

The drafters of the model act note that imposing the standard of preponderance of the evidence on the government simply reflects the normal standard of evidence used in civil court cases. According to the drafters:

Though the State’s interest in forfeiture is legitimate, an owner should not lose property in a case where the factfinder cannot say that there is a better than 50-percent likelihood that the property is actually subject to forfeiture. The State’s interest in forfeiture is no greater than the interests of a private citizen who claims to have been injured by a defendant’s actions. If the

private citizen must prove a superior right to property by a preponderance of the evidence, it would be anomalous to permit a lesser showing to suffice for the government, which is better situated than the private plaintiff to bear the impact of an erroneous verdict against it.<sup>4</sup>

In 1993, the President's Commission on Model State Drug Laws had also supported the preponderance of the evidence standard. Many top law enforcement officials, including the Honolulu prosecuting attorney, served on that commission.

According to a recent survey by the American Prosecutors Research Institute, 21 states require the tougher standard, proof by a preponderance of the evidence, that property is subject to civil forfeiture in controlled substances cases.

We recommend that the Legislature consider adopting the preponderance of the evidence standard. This standard would apply in civil forfeiture cases that *begin* in the courts (judicial forfeitures). It would also apply when an administrative forfeiture case is *removed* to the courts at the request of the property claimant.

### **Excessive forfeiture**

The model act provides that a court shall limit the scope of forfeiture to the extent that it finds the effect of the forfeiture grossly disproportionate to the nature and severity of the owner's conduct. The drafters of the model act believe an excessive-forfeiture provision is appropriate because "forfeiture is a civil remedy that can be pursued without the heightened procedural safeguards attending the criminal process."<sup>5</sup>

In determining whether the forfeiture is grossly disproportionate, the model act authorizes the court to consider the following:

- the degree to which the property was used to facilitate the conduct that subjects the property to forfeiture and the importance of the property to the conduct;
- the gain received or expected by an owner from the conduct that subjects property to forfeiture and the value of the property subject to forfeiture;
- the nature and extent of the owner's culpability; and
- the owner's efforts to prevent the conduct or assist in prosecution.

The concern for excessive forfeiture has its origins in the Eighth Amendment of the U.S. Constitution. This amendment provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” In *Austin v. U.S.*, 113 S.Ct. 2801 (1993), the U.S. Supreme Court held that the Eighth Amendment excessive fines clause applies to certain civil forfeiture proceedings.

Hawaii’s law does not have a provision limiting excessive forfeiture in this manner. In addition to the authority to order remission of the forfeiture in certain situations involving administrative forfeiture, the attorney general can mitigate an administrative forfeiture based on extenuating circumstances which include limited or peripheral criminal culpability or cooperation with law enforcement authorities. However, both remission and mitigation are purely at the attorney general’s discretion; they involve the attorney general “pardoning the property” in whole or in part.

We recommend that the Legislature consider adding to Chapter 712A an excessive forfeiture provision similar to that in the model act. This would authorize a finding of excessive forfeiture in forfeiture proceedings that begin in or are removed to the courts. We believe that the factors incorporated into the model act provide a balanced approach to determining what is excessive forfeiture.

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## **Criminal Forfeiture Fund Should Be Repealed**

Chapter 712A establishes a Criminal Forfeiture Fund administered by the Department of the Attorney General. We assessed the necessity and accountability of the fund. We find that the fund does not clearly link benefits and charges and it escapes the normal process of legislative appropriations. The fund is not necessary to the forfeiture program. Repealing the fund would improve accountability and oversight of the expenditures of forfeiture’s proceeds.

### ***Background on the fund***

Section 712A-16, HRS, provides that after administrative expenses are paid, all forfeited property and its sale proceeds be distributed as follows: 25 percent to the seizing agency (police or other), 25 percent to the prosecuting attorney, and 50 percent to a fund called the Criminal Forfeiture Fund. Also deposited in the fund are penalties that the attorney general is authorized to impose on property claimants when mitigation of forfeiture occurs. Distribution of forfeited property and its sale proceeds is capped at \$3 million a year; amounts in excess of the cap must be deposited into the State’s general fund.

The attorney general is authorized discretionary use of moneys from the Criminal Forfeiture Fund to cover various expenses including those necessary to seize, appraise, maintain, advertise, or sell forfeited

property; reimbursement to federal, state, or county agencies for such expenses; payment for information and assistance leading to a civil or criminal proceeding; education and training programs for law enforcement officials; and supplemental payments to state and county agencies for law enforcement purposes.

The attorney general has spent fund moneys mostly for education and training deemed related to law enforcement. In FY1993-94, the attorney general spent \$336,645 out of \$404,040 on training. In FY1992-93, it was \$140,146 out of \$181,737. State and county law enforcement agencies submit training requests to the attorney general for approval and payment on a reimbursement basis. Reimbursement requests submitted to the attorney general from 1991 to 1994 indicate that the Honolulu Police Department received the most moneys from the fund.

As noted in Chapter 1 of this report, over the past few years, the Department of the Attorney General has made improvements in the administration of the Criminal Forfeiture Fund. Financial audits of the department conducted by Deloitte & Touche, certified public accountants, for FY1991-92 and FY1992-93 indicated no internal control or legal compliance problems in the administration of the fund.

***Fund does not link benefits to charges and escapes appropriation process***

Section 712A-16, HRS, established the Criminal Forfeiture Fund as a revolving fund. Section 37-62, HRS, defines a revolving fund as “a fund from which is paid the cost of goods and services rendered or furnished to or by a state agency and which is replenished through charges made for the goods or services or through transfers from other accounts or funds.”

Act 240, SLH 1990 and Act 280, SLH 1993 required that our office periodically review all revolving funds in state government. We examine the extent to which each fund: (1) continues to serve the purpose for which it was originally created; (2) reflects a clear link between the benefit sought and charges made upon the users or beneficiaries of the program, as opposed to serving primarily as a means to provide the program or users with an automatic means of support which is removed from the normal budget and appropriations process; and (3) whether the fund demonstrates the capacity to be financially self-sustaining. The first two criteria were established by the Legislature in Act 240, SLH 1990. The third criterion was established by our office.

We previously reviewed the Criminal Forfeiture Fund in two reports: *Review of Special and Revolving Funds of the Judiciary and the Departments of the Attorney General, Labor and Industrial Relations, Land and Natural Resources, Personnel Services, Taxation, Transportation, and Public Safety*, Report No. 92-11, and *Review of*

*Revolving and Trust Funds of the University of Hawaii and the Departments of the Attorney General and Business, Economic Development and Tourism, Report No. 94-19.*

In both reports, we recommended that the Criminal Forfeiture Fund be repealed because it did not meet the second criterion of linkage. Upon repeal, the fund's revenues would go to the State's general fund and be subject to the usual process of legislative appropriations. To date, however, the Criminal Forfeiture Fund has not been repealed.

As in our previous reviews, our current evaluation found that the Criminal Forfeiture Fund does not meet all three criteria for a revolving fund. The fund continues to *serve its purpose* including the training and educating of law enforcement officers. It is *financially self-sustaining* since it does not require appropriations from the general fund and expenditures cannot exceed available moneys. However, there is *no clear linkage* between the benefit sought and charges made upon the users or beneficiaries of the program. The fund derives its revenues from property forfeited, not from charges on the law enforcement officers who benefit from the fund.

The Criminal Forfeiture Fund escapes the usual process of legislative appropriations. The only fund revenues deposited to the State's general fund would be those exceeding \$3 million in a year, and this has never occurred. Thus the moneys are spent at the sole discretion of the attorney general without an appropriation.

**Model act favors  
general-fund approach**

The model *Uniform Controlled Substances Act (1994)* issued by the National Conference of Commissioners on Uniform State Laws provides that states deposit *all* the moneys generated by forfeiture into the State's general fund. The commissioners believe that earmarking forfeited property for law enforcement uses gives the seizing agencies direct financial incentives in forfeiture—an unsound policy that risks skewing law enforcement priorities. The money should instead be deposited into the general fund where it will be subject to ordinary appropriation requirements. This will enhance legislative oversight and control over the actual use of the forfeiture proceeds.

This broad approach in the model act has much merit. Nationally, 30 states deposit forfeiture proceeds in controlled substances cases into a state general or local fund.

However, the broad approach may not be necessary in Hawaii. In establishing the policy of directing forfeiture proceeds to law enforcement uses, the Legislature included in Chapter 712A certain limitations designed to prevent abuse. These limitations include the 25 percent limit on distribution of proceeds to the seizing and prosecuting

agencies respectively and the requirement that once the forfeited property and its sale proceeds reaches \$3 million, additional amounts go to the general fund. Another provision requires that the forfeiture proceeds “complement but not supplant the funds regularly appropriated for such purposes.”

Under these circumstances, it may be enough simply to repeal the Criminal Forfeiture Fund and subject the attorney general’s *discretionary* 50 percent of the forfeiture proceeds to the ordinary legislative process. Under this approach, the operating budget presented by the Department of the Attorney General for the Legislature’s approval could include, for example, training for county law enforcement agencies, accompanied by testimony as to the amounts of forfeiture moneys that had recently been deposited into the general fund. The Legislature would decide on the importance of the attorney general’s request relative to the many other requests coming before it.

This appropriations process could remove some of the taint of forfeiture, reduce the potential for abuses, and lend credence to the claim that forfeiture is not merely a revenue-generating device for law enforcement.

While splitting forfeiture moneys between law enforcement agencies and the state general fund may appear to be inconsistent, we believe that it strikes an appropriate balance. If abuses in the future require, or if greater legislative control is desired, the Legislature could amend the law further to channel all forfeiture moneys into the general fund.

***Accountability to other enforcement agencies***

Besides enhancing accountability to the Legislature, subjecting the 50 percent of forfeiture proceeds to the legislative process would foster better understanding of the forfeiture program among law enforcement agencies. By requesting support for certain programs, consulting with the attorney general, and reviewing the attorney general’s budget request, these agencies could learn more about the attorney general’s plans and testify in favor of them. This could help alleviate the concern of some law enforcement agencies, expressed during our evaluation, that the attorney general does not always keep them informed of the relative proportion of forfeited funds going to various agencies.

***Fund is not necessary***

The Criminal Forfeiture Fund is not necessary. If the fund is repealed, participating law enforcement agencies will continue to receive their statutory share of the forfeiture proceeds, which can be processed without the fund. Any further amounts will be appropriated by the Legislature.

In response to our previous reports, the Department of the Attorney General argued that ending the Criminal Forfeiture Fund would debilitate Hawaii's forfeiture program. Law enforcement agencies would choose federal forfeiture, in which the proceeds must go to law enforcement, over state forfeiture, in which—without the forfeiture fund—the proceeds will be used for non-law-enforcement purposes.

However, we should re-emphasize that even if the fund is repealed, the law enforcement agencies will still receive their statutory share of any state forfeiture in which they participate. The Legislature *might* not choose to appropriate additional moneys to law enforcement, which could indeed reduce law enforcement agencies' incentives to participate in state forfeiture. However, forfeiture should be pursued for its value as a law enforcement tool, not for its financial rewards. If repealing the fund leads to fewer state forfeitures, this could be an indication that forfeiture may have been oversold as a means of deterring crime, or that forfeiture under federal law is simply more attractive.

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## Recommendations

We recommend that the Legislature consider amending Chapter 712A, the Hawaii Omnibus Criminal Forfeiture Act, as follows:

- a. Require the government in civil judicial forfeiture cases to prove by a "preponderance of the evidence" that the property is subject to forfeiture.
- b. Require courts to limit the scope of a forfeiture to the extent that they find the effect of the forfeiture grossly disproportionate to the nature and severity of the crime.
- c. Repeal the Criminal Forfeiture Fund so that some forfeiture proceeds can be deposited into the state general fund for legislative appropriation.



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## Notes

### Chapter 2

1. National Conference of Commissioners on Uniform State Laws, *Uniform Controlled Substances Act (1994)*, approved and recommended for enactment in all the states at the conference's Annual Conference in Chicago, Illinois, July 29-August 5, 1994.
2. *Ibid.*, Prefatory Note, p. 4.
3. *Ibid.*, Prefatory Note, p. 6.
4. *Ibid.*, p. 162 (comment on Section 521).
5. *Ibid.*, p. 160 (comment on Section 520).



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## Responses of the Affected Agencies

### **Comments on Agency Responses**

We transmitted a draft of this report to the Department of the Attorney General and to the police chiefs and prosecuting attorneys of the City and County of Honolulu, County of Hawaii, County of Kauai, and County of Maui on October 2, 1995. A copy of the transmittal letter to the Department of the Attorney General is included as Attachment 1. Similar letters were sent to the police chiefs and prosecuting attorneys.

The Department of the Attorney General responded on behalf of the Law Enforcement Coalition, which consists of the attorney general, the police chiefs, and the prosecuting attorneys. The department's response is included as Attachment 2.

In her response, the attorney general says that she is deeply disappointed by our recommendations and the findings on which they are based. We stand by our basic position that the impact of the forfeiture law is uncertain and that the forfeiture statute could be improved.

### ***Mischaracterizations by attorney general***

Despite our favorable assessment of her department's implementation of the forfeiture program—which she finds “gratifying”—the attorney general accuses the State Auditor of an “anti-law enforcement agenda,” apparently because she disagrees with us on certain subjects. We are most certainly not against law enforcement. We believe that our analysis and conclusions are fair, objective, and will contribute to the rational discussion of issues in law enforcement and public policy.

The attorney general says that our recommendations address “a nonexistent problem” and are not needed. However, the Legislature *directed* us to make recommendations for future polices for forfeiture. To do so, we turned to various sources including national authorities for ideas. Our recommendations are preventive in nature.

The “burden of proof” issue illustrates the attorney general's mischaracterization of our motives and objectivity. We recommended raising government's burden of proof in civil forfeiture cases from probable cause to preponderance of the evidence. This is one of the recommendations that she feels are not needed and that are “at worst . . . the result of a persistent anti-law enforcement bias.”

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Yet our proposal concerning the burden of proof was recommended both by the President's Commission on Model State Drug Laws in 1993 and by the National Conference of Commissioners on Uniform State Laws in 1994. The Economic Remedies Task Force of the President's Commission, which worked on forfeiture policy, had five members including Honolulu prosecuting attorney Keith Kaneshiro, the attorney general of California, and a district attorney from San Diego. The full commission also includes other top law enforcement officials such as the First Vice President of the International Association of Chiefs of Police and the president of the National District Attorneys Association. The commission described its proposals as "preserving civil forfeiture's effectiveness while eliminating the risk of unfair forfeitures."

For us to make the same recommendation concerning burden of proof as did the President's Commission hardly demonstrates that we are addressing a nonexistent problem or that we are against law enforcement. We have revised our draft to point out that we follow the President's Commission on this issue.

Another illustration of the attorney general's mischaracterization of our motives is her criticism of our statement that forfeiture has in recent years been "revived and expanded as a weapon against crime." She says that forfeiture has "in no sense of the term laid dormant until 'recent' times" and she suggests that we are trying to portray forfeiture as a "draconian punishment dredged up from ancient times . . . ."

We wish to refer the attorney general to two sources that support our statement. One is the *Economic Remedies* report issued by the President's Commission on Model State Drug Laws in 1993, which states on page A-11:

For many years state and local law enforcement focused on apprehending and punishing street level criminals. These were the criminals they commonly faced at the time. Drug abuse had yet to reach epidemic proportions. *State civil forfeiture laws were dormant in many jurisdictions.* [emphasis added]

With the burgeoning of the drug problem came a new type of criminal—the mid-level dealer. The criminal who used drug money to expand a drug operation like any CEO. Criminal sanctions proved ineffective so law enforcement began to use civil forfeiture to fight the drug industry. Some states began to amend their forfeiture statutes to keep pace with the increasingly sophisticated and complex evasive techniques of drug dealers.

The other source is the *Drug Agents' Guide to Forfeiture of Assets (1987 Revision) with 1990 Supplement* published by the Drug Enforcement Administration of the U.S. Department of Justice. Page 1 of the guide states:

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Forfeiture is an ancient doctrine that has survived for thousands of years. It is now an established part of American law. Yet, until recently, it has played a very insignificant role in our struggle with crime . . . .

Over the last decade, several events have occurred which are changing this picture . . . . In 1970, Congress passed the first criminal forfeiture statutes in United States history . . . . In 1978, Congress amended the civil forfeiture sections of federal law to permit the seizure of all monies used in and all proceeds acquired from the illegal drug trade . . . . And, in 1974, the Supreme Court of the United States reviewed the law of forfeiture and upheld it against constitutional attack . . . . In 1984, Congress again amended the civil forfeiture provisions to allow forfeiture of real property used to facilitate drug violations; substantially expanded other civil forfeiture provisions; and added a criminal felony forfeiture provision . . . .

As a result, drug agents now have a very real, a very powerful, *new* weapon to strike at the profits of crime. [emphasis added]

In light of these sources we find it surprising that the attorney general would put so much effort into criticizing our brief historical note.

***Some points well taken***

Although the tone of the attorney general's response is accusatory, she made some observations that were useful in preparing our final report. To prevent misunderstandings and to acknowledge one of her arguments that we found persuasive, we have modified the draft as follows:

**Chapter 1**

We clarified that property is forfeited administratively only when the property claimant does not contest the forfeiture in court. We also clarified that our sample of administrative forfeiture cases was a systematic sample.

**Chapter 2**

To ensure that our readers focus on key controversies in forfeiture—such as the lack of “beyond a reasonable doubt” protections, burden of proof problems, and the risks of asset sharing—we deleted a reference to Fifth Amendment issues, which we did not explore in detail. We also clarified that the suggestion that the attorney general acts as “judge, jury, and executioner” in administrative forfeiture cases was voiced in floor debates concerning forfeiture in the state Legislature in 1991. (At the time, concern was expressed as to the advisability of giving the attorney general the power to confiscate property—with no right of appeal—from persons who might have been found innocent by a jury. Concern was also expressed that many defendants would not be able to find counsel to represent them. We were simply reporting a concern raised in the

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Legislature.) In addition, we clarified our summary of the *Austin v. U.S.* case and added a sentence on the balanced approach to excessive forfeiture provided by the 1994 model act.

Also, while we still feel that administrative forfeiture raises a number of policy concerns, we decided not to recommend a right to appeal from administrative forfeiture decisions, primarily because property claimants already have the right to contest the proposed forfeiture in court.

Finally, we made a few editorial changes.

STATE OF HAWAII  
OFFICE OF THE AUDITOR  
465 S. King Street, Room 500  
Honolulu, Hawaii 96813-2917



MARION M. HIGA  
State Auditor

(808) 587-0800  
FAX: (808) 587-0830

October 2, 1995

**COPY**

The Honorable Margery Bronster  
Attorney General  
Department of the Attorney General  
425 Queen Street  
Honolulu, Hawaii 96813

Dear Attorney General Bronster:

Enclosed for your information are three copies, numbered 6 to 8 of our draft report, *Sunset Evaluation of the Forfeiture Program*. We ask that you telephone us by Friday, October 6, 1995, on whether or not you intend to comment on our recommendations. If you wish your comments to be included in the report, please submit them no later than Monday, October 16, 1995.

The police chiefs and prosecuting attorneys of the City and County of Honolulu, County of Hawaii, County of Kauai, and County of Maui; Governor; and presiding officers of the two houses of the Legislature have also been provided copies of this draft report.

Since this report is not in final form and changes may be made to it, access to the report should be restricted to those assisting you in preparing your response. Public release of the report will be made solely by our office and only after the report is published in its final form.

Sincerely,

Marion M. Higa  
State Auditor

Enclosures

BENJAMIN J. CAYETANO  
GOVERNOR



MARGERY S. BRONSTER  
ATTORNEY GENERAL

STEVEN S. MICHAELS  
FIRST DEPUTY ATTORNEY GENERAL

**STATE OF HAWAII**  
DEPARTMENT OF THE ATTORNEY GENERAL  
425 QUEEN STREET  
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October 18, 1995

RECEIVED  
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STATE OF HAWAII

Ms. Marion Higa  
State Auditor  
Office of the Auditor  
465 South King Street, Room 500  
Honolulu, Hawaii 96813-2917

Dear Ms. Higa:

Re: Asset Forfeiture Program Sunset Evaluation Conducted Pursuant to Act 196, Session Laws of Hawaii 1993

We have received and reviewed the draft report prepared by your office entitled "Sunset Evaluation of the Forfeiture Program." On behalf of the Law Enforcement Coalition, which consists of the police chiefs and prosecutors of the four counties and myself, we submit the following remarks regarding the findings and recommendations made by the report. We ask that you reconsider your position in light of our remarks and that you include them in the final report.

I. SUMMARY

As part of legislation extending the date on which Haw. Rev. Stat. Chapter 712A was to be repealed, Act 196, Session Laws of Hawaii 1993, directed the Legislative Auditor to "submit a sunset evaluation report" which is to "assess whether the public interest requires that the forfeiture program be modified or repealed, and make recommendations for future policies, practices, and procedures for a forfeiture program."

In order to fulfill this mandate, you established four objectives:

1. Determine whether the forfeiture program under Chapter 712A, HRS, is achieving its purpose of depriving criminals of the profits of their criminal activities;
2. Determine whether the current legal provisions are sufficiently strong, fair, and abuse-resistant;

3. Establish whether the program is being implemented lawfully, effectively, and efficiently; and
4. Make recommendations based on findings in these areas.

These objectives demonstrate that the evaluation is of two types: process and outcome. Process evaluations typically attempt to determine whether the program operated as it was designed to operate. For example, did the program actually target the persons it was designed to target? Did the program personnel do what they were supposed to do? The point of comparison is usually some written document, such as a statute or grant application.

Although we are disappointed that your findings enumerated at page 9 did not directly answer the question posed in objective number 3, above, we are not surprised, indeed we expected, that your process evaluation would find that the program is being implemented lawfully, effectively, and efficiently by the Department of the Attorney General. In fact, your report finds no evidence of abuse of our asset forfeiture law, systemic or otherwise, like you believe exists on the mainland, particularly under federal law.

Specifically, you found that "[t]he Department of the Attorney General appears to have implemented the law appropriately" and "carefully." (Draft Report at 11, 13) You also found that:

Various audits by us and an outside auditor since 1990 indicate that the Department of the Attorney General has carried out its forfeiture responsibilities with restraint and in compliance with the law. The department has implemented the program with increasing efficiency and effectiveness in many areas including staffing, handling of cash and other assets, accounting, and auctions.

We did not assess the counties' implementation of the law. But the boundaries established by the statute and the moderate approach of the attorney general's department appear to have set the tone for a restrained use of forfeiture by county authorities.

(Draft Report at 14). These findings are consistent with those

of the Legislature in 1993 when it found that the law had been "fairly enforced and administered" and that "law enforcement agencies in this state have been using the law in an appropriate fashion." House Standing Committee Report No. 524-93 and Conference Committee Report No. 46-93.

Unfortunately, we are very disappointed by the findings and recommendations which stem from the outcome evaluation driven by objectives number 1 and 2. An outcome evaluation asks whether a program works and is much more difficult to do because it requires the evaluator to find answers rather than just doing the comparisons required by a process evaluation. It goes without saying that without these answers, no conclusion can be drawn. It simply will not suffice to say "we don't know the answer," or even worse, to ask a question which you know can not be answered and then conclude "the program does not work and must be changed."

However, we find that your findings and recommendations regarding the deterrent effect of forfeiture and the fairness of forfeiture proceedings under State law fail in this regard. They simply do not answer the questions posed by objectives number 1 and 2. At best, we believe this results from a flawed analytical methodology which rests on mistaken assumptions and incomplete information. At worst, it is the result of a persistent anti-law enforcement bias. As a result, we believe your findings are unsupported by the evidence or, more accurately, are based on a lack of evidence and that your recommendations are, accordingly, unwarranted. We also believe, as we have stated on prior occasions, that your finding and recommendation regarding the Criminal Forfeiture Fund is incorrect. Perhaps most importantly, you fail to apprehend the impact this recommendation will have on the viability of the forfeiture program if it is implemented.

We focus on these shortcomings in the balance of our response.

## II. METHODOLOGY

Your report is introduced by a brief background discussion on asset forfeiture, including the history of our law, a description of some of its key provisions, its use, and users, and a summary of the audits to which the forfeiture program has been subjected. The report also briefly sets forth its scope and methodology.

### A. Mistaken assumptions

#### 1. Background of asset forfeiture.

Your report begins with a background discussion of

forfeiture which states that "[f]orfeiture is an ancient legal doctrine based upon the fiction that property itself can be 'guilty.' In recent years the doctrine has been revived and expanded upon as a weapon against crime." (Draft Report at 1). While it is true that forfeiture can be traced to ancient times, a fact we have pointed out in each of our annual reports submitted (with copies to you) pursuant to Haw.Rev. Stat. §712A-16(6), see, e.g. Proceedings Under the Hawaii Omnibus Criminal Forfeiture Act, Fiscal Year 1994, at 3, it has in no sense of the term laid dormant until "recent" times.

As we also pointed out, Congress enacted the first civil forfeiture statute in 1789. In his treatise, "Prosecution and Defense of Forfeiture Cases," Matthew Bender and Co., Inc. (1985), former Department of Justice official David B. Smith observes:

Civil forfeiture of property played a significant role in federal law enforcement from the earliest years of the Republic through the end of the nineteenth century. Because Customs duties and excise taxes on liquor and tobacco constituted the principal source of federal revenue from 1789 until the First World War, when the Constitution was amended to permit a tax on income, it was necessary to have harsh and effective laws to deter smuggling and other attempts to evade payment of customs duties and excise taxes. Protection of the federal fisc was the main purpose served by our early forfeiture laws. This purpose and the general harshness of the law in the early years of the Republic explains the stringency of modern forfeiture law, which has changed remarkably little since 1789.

Id. at 1-1 - 1-2 (footnotes omitted). As this commentary makes clear, forfeiture is not a draconian punishment dredged up from ancient times to fill government coffers at the expense of individual rights as you suggest at page 12 of the report. Rather it is one weapon in a larger arsenal which has been consistently used to combat illegal activities, the recent widespread use of which is attributable to the widespread problem it seeks to address.

2. Haw. Rev. Stat. Chapter 712A.

Although the report states that "[w]e examined Chapter 712A in detail," (Draft Report at 6), it is immediately apparent that, for example, you do not understand the true

nature and purpose of administrative forfeiture and how it is different from judicial forfeiture. This is demonstrated by, among other things, your critically unexamined repetition of the ridiculous "suggestion" that "administrative forfeiture under Chapter 712A, HRS, allows Hawaii's attorney general to act as judge, jury, and executioner." (Draft Report at 12).

The fact is that the only administrative forfeiture is an uncontested one. The Attorney General does not act as judge, jury, or executioner because, as Haw. Rev. Stat. §712A-10 makes clear, property may be administratively forfeited only if the claimant declines to contest the forfeiture by removing the matter to court or files a Petition for Remission or Mitigation. Such a petition concedes that the property is subject to forfeiture but asks the Attorney General to pardon the property in whole or in part due to extenuating circumstances not amounting to a legal defense to forfeiture. In either case, the claimant does not contest the forfeiture. If the claimant contests the forfeiture, the matter must be resolved by a judge. This point has been made repeatedly in our annual reports. See, e.g., Proceedings Under the Hawaii Omnibus Criminal Forfeiture Act, Fiscal Year 1994, at 7-8.

This misunderstanding is also reflected in your discussion of administrative forfeiture throughout the report. At page 3 of the report you state that "administrative forfeiture is an expedited procedure in which the attorney general receives a forfeiture petition from a prosecuting attorney and decides whether the property will be forfeited." This statement incorrectly implies, and rests on the mistaken assumption discussed above, that the Attorney General orders property administratively forfeited by ruling on the merits of a forfeiture petition filed by a prosecuting attorney and contested by a claimant to the property. Again, if a claimant contests the administrative forfeiture petition, the action must be removed to court. Put another way, it is the claimant, not the Attorney General, who decides whether the property will be administratively forfeited.

You also state that "[a]dministrative forfeiture, an expedited version of forfeiture that does not require a lawsuit by the government," (Draft Report at 12), "can occur without the 'beyond a reasonable doubt' protections that would otherwise apply." (Id.). Again, these statements reflect your mistaken belief that administrative forfeitures are contested forfeitures which should be resolved like a criminal prosecution. However, as even you observe, "[a]lmost 90 percent of these [administrative forfeiture] petitions are uncontested." (Draft Report at 4). Where the action seeks a civil remedy and is uncontested, why should proof beyond a reasonable doubt be required?

Your criticism of administrative forfeiture on this basis shows that you also do not understand its purpose. Again, as we have pointed out repeatedly in our annual reports, the practice of resolving uncontested forfeitures through judicial proceedings unnecessarily consumes resources and causes delay. See, e.g., Proceedings Under the Hawaii Omnibus Criminal Forfeiture Act, Fiscal Year 1994, at 7-8. Even the National Conference of Commissioners on Uniform State Laws, ("NCCUSL"), on which you relied heavily in making your recommendations, provided for administrative forfeiture in its model legislation, the Uniform Controlled Substances Act (1994), ("UCSA"). Preliminarily, NCCUSL noted that "[a]s to uncontested forfeitures, the administrative process permits the State to prosecute a forfeiture action without the delay inherent in invoking formal judicial proceedings." Prefatory Note, Uniform Controlled Substances Act (1994). The National Conference went on to observe that:

Many forfeitures are not contested. Administrative forfeiture permits the State to gain ownership of property in such cases without the need to seek court approval. This mechanism avoids the expense and the drain on judicial resources accompanying judicial forfeitures. It also expedites the process. Even an uncontested judicial forfeiture will require time for processing by the courts; the length of time will largely depend on the size of the court's docket. During any period of delay, property may depreciate. Administrative forfeiture reduces this problem.

Commentary, §512, UCSA.

Despite your "detailed" reading of Chapter 712A, your report also glosses over the many amendments law enforcement has sought or supported in order to ensure that forfeiture remains abuse-resistant. For example, in 1991 legislation presented by the Law Enforcement Coalition set time limits within which a prosecuting attorney must file a petition for forfeiture after both the original seizure and the filing of a claim to remove an administrative forfeiture petition to court. The same bill also provided for an extension of time for the claimant to respond to a forfeiture petition. It also set forth specific criteria to guide the Attorney General in disposing of a Petition for Remission or Mitigation of Forfeiture. In 1994, the Coalition presented legislation which, among other things, codified the constitutional requirement recently announced by the United States Supreme Court that the owners of real property be given a hearing before the seizure of real property.

## B. Information Gathering

We see three principal problems inherent in the information gathering methodology employed for this report: the narrow scope of your evaluation, the limited sampling and investigation of cases reviewed, and the sources of information relied upon to interpret the data.

### 1. Scope.

According to the report, the scope of your inquiry excluded an evaluation of all the agencies who participate in the program except our own. (Draft Report at 6). That severely restricts the source of data from which any conclusions might be drawn because while we process administrative forfeiture petitions and manage seized and forfeited property we have no involvement in seizing property or in seeking its administrative or judicial forfeiture. Any conclusions regarding the success of the program would seem, by definition, to be ones drawn from either non-existent or unrepresentative evidence.

### 2. Case sampling.

The sampling of cases and the limited investigation of those cases again presents an inherently limited basis from which to draw any conclusions. To begin with, there is no such thing as a "systematic random" sample. (Draft Report at 6). A sample is either random, meaning that every case has an equal likelihood of being selected, or it is systematic, meaning a starting point is selected (randomly or otherwise) and every "nth" case thereafter is selected. Because systematic samples may not be representative, we believe that a complete sample (all 261 cases instead of just 25) should have been used. At the very least, there should have been a comparison made between the systematic sample and the known universe of 261 cases to see if the sample was, indeed, representative. As discussed below, this problem is especially significant when it comes to the report's discussion of the evidence of asset forfeiture's deterrent effect.

### 3. Sources.

Some of the sources of information consulted are only vaguely identified and unduly emphasized or, when clearly identified, are identifiable as having a distinct bias. Even worse, the report lacks candor in failing to identify credible, contrary sources. For example, in your discussion of the deterrent effect of forfeiture you note that "most" of the law enforcement officials interviewed expressed a belief that forfeiture helps deter crime but then discount that opinion by

Ms. Marion Higa  
October 18, 1995  
Page 8

observing that "these views appear to be based primarily on personal observation and opinion." Yet, you then turn around and rely on what must be the personal observation and opinion of a minority of law enforcement officials to find there is little evidence of deterrence! Although we have more to say below on how to examine the issue of deterrence, we believe the manner in which you weighed these interviews smacks of a double standard.

Your report also places great emphasis on the forfeiture provisions of the UCSA authored by NCCUSL. You claim that:

The drafting committee for the 1994 model act had advisors from the American Bankers Association, the American Bar Association, the American College of Real Estate Lawyers, the National Association of Criminal Defense Lawyers, and the National Association of Realtors. Organizations such as the American Civil Liberties Union, Criminal Justice Policy Foundation, National Association of Attorneys General, and National District Attorneys Association were also represented.

(Draft Report at 14).

Although you claim to have consulted with the American Prosecutors Research Institute, ("APRI"), (Draft Report at 6), an arm of the National District Attorneys Association, you could not have done so and still represented the forfeiture provisions of the UCSA to be the product of multipartisan deliberations which included them. The truth is that because NCCUSL could not arrive at an agreement regarding the forfeiture provisions proposed by the Drafting Committee, provisions which were acceptable to APRI and other law enforcement groups, the provisions were omitted from the 1990 version of the UCSA and a new Drafting Committee was appointed. As illustrated above, that Committee was so dominated by the criminal defense bar and others hostile to law enforcement interests that to suggest, as you do above, that these interests were "represented" is a farce. In fact, the National Association of Attorneys General and the National District Attorneys Association withdrew in protest. The outcome of the proceedings was, to say the least, a foregone conclusion.

While you disingenuously rely on the forfeiture provisions proposed by NCCUSL, you fail to even mention the proposals made by the President's Commission on Model State Drug Laws. The bipartisan Commission was created by Congress and its

twenty-four members, appointed by President Bush, included state legislators, treatment service providers, an urban mayor, police chiefs, state attorneys general, a housing specialist, district attorneys, a state judge, prevention specialists, attorneys, and other experts. The work of the Commission, which was completed in December 1993, was adopted by President Clinton.

The mission statement of the Commission was "to develop comprehensive model state laws to significantly reduce, with the goal to eliminate, alcohol and other drug abuse in America through effective use and coordination of prevention, education, treatment, enforcement, and corrections." The Commission divided itself into five task forces: Economic Remedies, Community Mobilization, Crimes Code, Treatment, and Drug-Free Families, Schools, and Workplaces. The end product of their work was a five volume proposal comprised of model legislation with supporting commentary and documentation intended to provide states with a set of comprehensive, multi-disciplinary strategies to combat the drug problem.

In our view, the model legislation proposed by the President's Commission is far more representative of the differing viewpoints on forfeiture than is that of NCCUSL. Indeed, after hearing from representatives of both the 1990 and 1994 NCCUSL Drafting Committees, the Commission chose to model its forfeiture proposals on those made by the 1990 Drafting Committee. To disagree is one thing, but your failure to even acknowledge the existence of this important proposal reflects a shocking lack of candor on your part.

## II. FINDINGS AND RECOMMENDATIONS

### A. Impact of Forfeiture on Crime is Uncertain

This finding is not only not responsive to your first objective (whether Chapter 712A is depriving criminals of the profits of their illegal activities), but it sets up a "straw man" issue to avoid answering the question. Instead, you rephrase the question as whether forfeiture deters crime, a question which can not be answered. After all, how do you prove why someone didn't do something? Should we repeal the murder statutes because people are still committing murders? This approach permits you to ignore the fact that approximately \$1,000,000 worth of assets per year are being transferred from persons engaged in criminal activity to law enforcement without an iota of evidence that these assets were other than the product or tools of criminal conduct or that they were transferred in other than a fair, legal, and constitutional process.

Your report begins its discussion of this issue by suggesting that there is no proof that the property forfeited was connected with crime "because most cases are civil in nature, do not require a criminal conviction, and rest only on 'probable cause' that the items were connected with a crime, since most cases are uncontested." (Draft Report at 9). A criminal conviction is not necessary to prove that a crime occurred unless you are seeking to imprison the offender. Our judicial system everyday processes tort cases that have as their basis criminal conduct but because the relief sought is economic, they are civil cases. Does that mean that because something less than proof beyond a reasonable doubt is necessary to prevail that the conduct did not occur? Of course not.

Moreover, we again ask why proof beyond a reasonable doubt be required when the claimant defaults? You don't level this criticism against civil lawsuits brought to remedy tortious conduct. Rule 55(b)(1), Hawaii Rules of Civil Procedure, permits the clerk to enter default judgment with no proof as to the plaintiff's claim where the the claim is for an amount certain (as is the case with forfeiture where specific property is named as the defendant) and the defendant has failed to plead or otherwise respond. Why do you leave unexamined the 90% default rate? Is it because you don't want to admit that offenders know they committed the conduct alleged and that the property is subject to forfeiture? What number of cases on the civil docket as a whole result in defaults? The number is very low because liability and damages are almost always contested. Why won't you give law enforcement credit for investigating and prosecuting cases that are warranted by the facts? We know that if cases were being improperly filed, we'd hear about it from you. Instead, the silence is deafening.

Your factfinding efforts on the issue of deterrence are, as discussed above, destined to fail because even if this issue was correctly framed, your investigation was inadequate and your findings determined by a preordained destination. There are two types of deterrence: general and specific. General deterrence refers to whether a particular action such as asset forfeiture influences a potential criminal's decision not to break the law. Since there are so many factors which influence such a decision, it's difficult to determine which one caused the result. Limited conclusions can, however, be drawn from interviews or arrest statistics. While you acknowledge the difficulty of measuring general deterrence, you made no effort to answer the question.

Specific deterrence would have been easier to measure. Specific deterrence refers to whether persons whose property was seized and forfeited decreased or ceased their criminal

activity. It would have been a simple matter to check the criminal histories in the 25 cases you reviewed to determine what impact the seizure and forfeiture had on the claimants. It would not have been that much more difficult to examine all 261 cases to be sure that the results were representative. You did not do this.

As discussed above, you also discounted the interviews conducted with law enforcement officials on this issue. However, when we asked this same group of officials to respond to this aspect of your report, we received several examples of general and specific deterrence. On the Big Island, for example, annual marijuana plant eradications have dropped over a period of years from over 1,500,000 per year to 350,000 in conjunction with vigorous criminal prosecution and civil forfeitures. The frequency of large cash purchases of vehicles and other costly merchandise has decreased significantly. In one particular case, a defendant continued selling cocaine from her home in an otherwise quiet residential area even after being arrested. Her dealing was not stopped until her house was seized.

You chose either not to look for such evidence, or to ignore it when you found it, in favor of drawing negative inferences from interviews with a minority of law enforcement officials. Yet, even those interviews don't support your findings. For example, you note that one official claimed that offenders have learned to circumvent the law by using property which is leased or otherwise belongs to another and have hidden their assets in a "cat and mouse" game. Most law enforcement is a "cat and mouse" game. Criminals aren't trying to get caught, they're trying to avoid it. Obviously, if offenders are trying to avoid forfeiture it's because forfeiture makes it difficult to commit crimes. That's a more accurate measure of deterrence than any you have proposed.

You also suggest that one official believes there's no deterrent effect to asset forfeiture under state law because because the return to the participating agencies is less than under federal law. That certainly hasn't stopped the Honolulu Police Department which is responsible for at least two thirds of the property seized under state law. Even so, such an observation only militates toward giving law enforcement a greater direct share than they now receive, especially since, as discussed below, there is no evidence that the enforcement efforts in this State have in any way been skewed by the availability of forfeiture funds nor has there been any evidence discovered that law enforcement has taken improper actions in individual cases they have pursued.

Finally, your report takes no account of the deterrent

effect that the expenditure of funds from the Criminal Forfeiture Fund must have on crime. Although you refer to it variously as the "department's" fund (Draft Report at 3), or as a fund used "for expenditure by the attorney general," (Draft Report at 10), it is not until the discussion of your recommendation that the fund be repealed that you acknowledge that "[t]he attorney general has spent fund moneys mostly for education and training deemed related to law enforcement." (Draft Report at 18).

What do you suppose the effect of more than \$300,000 per year spent on education and training has been on the ability of law enforcement to deter crime, especially where there is no other source of funding for this purpose? How would the Big Island Police Department have been able to convert from revolvers to 9mm semiautomatic pistols, now the national standard, without these funds? You ask none of these questions because the answer would have been obvious: the benefits obtained from the expenditure of these funds represents a significant portion of the general deterrence provided by asset forfeiture.

Ultimately, your discussion of the deterrent effect fails because it ignores the measurable in favor of the unmeasurable and places less trust in law enforcement than in criminal offenders, 90% of whom do not contest proceedings in which no evidence of abuse was found. That is indeed a sad commentary on the perspective you bring to this report.

#### B. Statute Could be More Fair

This finding defies explanation because, even though your efforts to answer objective 2 (whether the current legal provisions are sufficiently strong, fair, and abuse-resistant) find no evidence whatsoever to the contrary, you recommend that the law be made more "fair" in a manner which, particularly as it applies to requiring proportionality analysis of proceeds forfeitures and permitting appeal of administrative forfeitures, will weaken the law in order to remedy a nonexistent problem.

You begin your discussion with the cursory observation that Chapter 712A "seeks to balance the interests of law enforcers, criminals, property owners, and the public." (Draft Report at 11). Yet, before you ever elaborate on the basis of this statement, you launch into a discussion of problems purportedly found elsewhere so as to minimize the truth about our law and its implementation and to permit you to make recommendations which "do not reflect any evidence of abuse in Hawaii." (Draft Report at 15).

You attempt to justify the recommendations that follow by observing that "forfeiture is controversial for many reasons." (Draft Report at 12). The first reason you identify is that forfeiture permits the "taking by government of property that was illegally used or acquired without compensating the property owner," a "challenge" to protections afforded by the Fifth Amendment to the United States Constitution. This statement, which clearly reveals your anti-law enforcement agenda, is about as true as saying that convicting a person accused of crime violates the Constitution! It is not the remedy at issue, it is the procedure by which it is imposed.

You move on to that issue by again raising the red herring that forfeiture may occur civilly or administratively without a criminal conviction obtained by proof beyond a reasonable doubt, without a criminal charge, and even if the offender has been acquitted. The constitution does not require that a civil proceeding, i.e. one which seeks an economic remedy, be it administrative or judicial, to employ the procedures required where the State seeks to impose criminal punishment on an offender. Also, neither the Constitution nor fairness bars a civil proceeding after an offender is acquitted. Do you suggest that the families of Nicole Brown and Ronald Goldman be precluded from seeking money damages from O. J. Simpson now that he has been acquitted of murder charges? If you do, the error of your reasoning is plainly obvious. If you do not, then you must admit that there is nothing "controversial" about pursuing forfeiture in the above circumstances.

You also suggest that forfeiture is controversial because it "requires property owners to bear the burden of proving that their interest in the property is exempt from forfeiture once the government establishes a likelihood that the property is forfeitable." (Draft Report at 12). However, you fail to acknowledge that the burden of proof is often placed on parties opposing the State, even in criminal proceedings. For example, Haw. Rev. Stat. §704-402 requires that a defendant claiming insanity to prove it by a preponderance of the evidence. Haw. Rev. Stat. §702-237 requires a defendant claiming entrapment to prove it by a preponderance of the evidence. As is the case with exemptions from forfeiture, the burden of proof is placed on defendants in these circumstances because they control the information necessary to prove or disprove the defense.

You also claim that forfeiture is controversial because of media reports, "particularly on the mainland," that forfeiture has disrupted the lives of people who faced loss of property under questionable circumstances. (Draft Report at 12). Yet you cite not one local instance of such media coverage and you acknowledge elsewhere in the report that you found no evidence of such questionable circumstances in your evaluation of cases

brought here. You compound this error of omission by repeating the previously discussed ridiculous statement regarding the role of the Attorney General as "judge, jury, and executioner" in administrative forfeiture.

You also claim that forfeiture is controversial because asset sharing creates the possibility of abuse because by giving law enforcement agencies incentive to pursue only those cases with substantial assets, thereby skewing enforcement priorities. (Draft Report at 12). Not only do you fail to cite any instances of such abuse, either here or nationally, but you ignore the possibility that the presence of substantial assets is an indicator of the gravity of the conduct involved and merits being given priority for that reason, not because there may be a financial stake in the outcome. Indeed, in an era when governments are disinclined to spend funds for traditional criminal sanctions such as imprisonment, targeting the most financially dangerous offender may be an appropriate prioritization of law enforcement activities.

Your discussion of case law to further bolster the claim that forfeiture is "controversial" weapon in need of limits is not only incomplete but flat wrong. You state that the U.S. Supreme Court has limited forfeiture by requiring that "the forfeited property . . . be proportional to the alleged offense," (Draft Report at 13), because "the Eighth Amendment excessive fines clause applies to civil forfeiture." (Draft Report at 17). This is an overbroad reading of Austin v. United States, \_\_\_ U.S. \_\_\_, 125 L.Ed.2d 488, 113 S. Ct. 2801 (1993), in which the Court considered only whether the Excessive Fines Clause of the Eighth Amendment applies to facilitation or instrumentality forfeitures. These are forfeitures which target property used to commit or facilitate commission of an offense, such as vehicles or real property.

However, Austin did not hold that proceeds of a criminal offense sought to be forfeited must be proportional to the offense itself because when "the property taken by the government was not derived from lawful activities, the forfeiting party loses nothing to which the law ever entitled him." United States v. Tilley, 18 F.3d 295, 300 (5th Cir.), cert. denied, 115 S.Ct. 1574 (1994). Such a party "has no reasonable expectation that the law will protect, condone, or even allow, his continued possession of such proceeds because they have their very genesis in illegal activity." Id.

You also state that "the Ninth Circuit Court of Appeals recently held that pursuing both a criminal case and a civil forfeiture case for the same offense under federal forfeiture laws" violates the constitutional prohibition against "double jeopardy," a clear reference to United States v. \$405,089.23,

33 F.3d 1210 (9th Cir. 1994). What you fail to report is that in United States v. Cretacci, 62 F.3d 307 (9th Cir. 1995), the Ninth Circuit significantly narrowed that ruling in a manner particularly pertinent here in light of your mischaracterization of administrative forfeiture. In Cretacci, the Court held that a criminal prosecution following an administrative forfeiture does not violate the Double Jeopardy prohibition because forfeiture of property as to which no claim is filed is not a punishment. Given that no claim is filed in 90% of the forfeiture cases filed under State law, the impact of \$405,089.23 is far less significant than you imply.

Finally, we were simply flabbergasted that, after describing the abuse-resistant nature of Chapter 712A and the responsible manner in which it has been implemented, you would state that "[t]he controversy surrounding forfeiture, and its questionable impact on crime, could justify repeal of Chapter 712A." (Draft Report at 13). This is truly the most outrageous of the many outrageous statements made in this report and flies in the face of all the evidence you gathered. But, since you had to begrudgingly concede that "the Legislature has made a previous policy choice in favor of forfeiture," you go on to recommend amendments which the evidence demonstrates are unnecessary.

Although the foregoing should amply demonstrate why there is no need to implement your recommendations to raise the burden of proof and statutorily require proportionality in proceeds cases, we simply can not let pass your recommendation that the Chapter 712A be amended "to provide for judicial review of the Attorney General's decision or order in administrative forfeiture cases." (Draft Report at 17). You propose such an amendment because you believe that the prohibition of appeals found in Haw. Rev. Stat. §712A-10(11) is "unduly harsh" and because the Attorney General has a "direct stake" in proceedings in which the Attorney General has final decision-making authority. (Draft Report at 17). You also state that the right to appeal is consistent with the UCSA and federal law.

Your recommendation that there be a right to appeal from the Attorney General's decision in administrative forfeiture cases again shows you do not understand what administrative forfeiture is: uncontested. Why should the 90% of people who fail to file a claim in an administrative forfeiture proceeding be allowed to later challenge it? Why should it matter that the Attorney General has a stake in the outcome if the claimant chooses not to contest it and the order is based solely on that choice? If for no reason other than the finality of judgments, claimants should not be allowed to assert for the first time in a judicial forum that which they failed to assert in an

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administrative one. The basis of the petition is the same so requiring the court to determine the claim which the claimant failed to assert previously defeats the purpose of administrative forfeiture: conservation of judicial resources.

You also suggest that the prohibition on appeals of the Attorney General's decision on a Petition for Remission or Mitigation of Forfeiture should be dispatched. But Haw. Rev. Stat. §712A-10(5) specifically states that the petition "shall not be used to challenge the sufficiency of the evidence to support the forfeiture but shall presume a valid forfeiture and ask the attorney general to invoke the executive power to pardon the property, in whole or in part." (Emphasis supplied). Again, the very premise of this process is that the petitioner concedes forfeitability and asks the Attorney General, with sole discretion, to forgive the property. The discretionary decision to grant relief is an act of grace not subject to judicial review. See, e.g. Ivers v. United States, 581 F.2d 1362, 1371 (9th Cir. 1978).

Your reliance on the UCSA and federal law as the source of the recommended right to appeal also is misplaced. Neither the UCSA or federal law provides for direct appeal to a court of an administrative forfeiture decision. The UCSA permits the claimant to request an administrative recognition that the property is exempt from forfeiture. §513, UCSA. If the exemption is denied, then the claimant may demand that the forfeitability of the property be determined by a court. §§513 and 514, UCSA. This same result obtains under Chapter 712A when a claim is filed in response to a Petition for Administrative Forfeiture. The prosecuting attorney must either honor it, and release the property, or institute a judicial forfeiture action to obtain forfeiture of the property. Haw. Rev. Stat §712A-10(9). The UCSA does not provide for appeal of an uncontested forfeiture and Chapter 712A should not be amended to do so.

Federal law also does not provide, so far as we have been able to determine, for direct appeal of an administrative forfeiture decision, whether obtained by way of default or denial of a Petition for Remission or Mitigation of Forfeiture. Rather, there is a body of case law that recognizes the power of the federal courts, on collateral review, to provide relief under the Tucker Act, 28 U.S.C. §1346, or the Civil Rights Act, 42 U.S.C. §1983, in certain, very narrowly circumscribed situations. In our view, such collateral review of comparable decisions under State law is already available pursuant to Haw. Rev. Stat. Chapter 661 and the federal Civil Rights Act.

C. Criminal Forfeiture Fund Should be Repealed

This recommendation echoes the disputed recommendations made in Report Nos. 92-11 and 94-19 submitted by you pursuant to Act 240, Session Laws of Hawaii, 1990 and Act 280, Session Laws of Hawaii 1993. You believe that repeal is appropriate because the Criminal Forfeiture Fund, ("Fund"), does not meet the criteria required by these Acts, the Fund escapes the normal legislative appropriations process which would provide "accountability and oversight of the expenditures of forfeiture proceeds," and the Fund is not necessary. (Draft Report at 17 - 18).

1. Act 240 Criteria.

As your report notes, the Legislature adopted what became Act 240, Session Laws of Hawaii 1990, to determine whether existing and proposed special and revolving funds are justified and whether moneys appropriated from the General Fund for these programs and revenues generated by programs funded by special or revolving funds should be deposited into the General Fund. Both current and proposed funds are to be evaluated by two criteria:

- (1) the extent to which the fund serves its intended purpose; and
- (2) the extent to which the fund reflects a clear link between the benefits sought and the charges made upon the users or beneficiaries of the program, as opposed to serving primarily as a means to provide the program or users with an automatic means of support which is removed from the normal budget and appropriations process.

However, Act 240 specifically provides that these are not the exclusive criteria by which existing funds are to be analyzed. Inasmuch as proposed funds are also to be analyzed to determine the probable effects of the proposed fund and assess alternative forms of funding, it seems reasonable that the probable effects of repealing an existing fund and alternative sources of funding for the affected program should also be evaluated. Nonetheless, you chose to consider as an additional criterion only whether the existing fund is financially self-sustaining.

It seems clear that the Legislature intended that no single criterion be deemed dispositive inasmuch as Act 240 directs the Auditor to evaluate the effectiveness and

efficiency of the various funds and make recommendations to improve policies, procedures, and practices even where the Auditor recommends repeal. For these reasons, we are disappointed that you continue to apply an overly restrictive reading of the criteria specified by the Legislature in Act 240.

2. Legislative oversight.

Another reason you recommend repeal of the Fund is that, as with other special and revolving funds, the fund is not subject to the oversight that comes with limiting expenditures to those authorized by the appropriations process. However, the Fund is subject to numerous controls, some of which you recognize. First, we must account for all expenditures through the report we are required to submit pursuant to Haw. Rev. Stat. §712A-16(6). None of the expenditures disclosed in these reports has ever been called into question by the Legislature or anyone else. Second, administration of the Fund has been the subject of a number of audits by your office and by outside certified public accountants. As you note, we have made improvements in the administration of the Fund based on your audits and the outside audits have "indicated no internal control or legal compliance problems" in the administration of the Fund. (Draft Report at 18).

Third, as you noted, forfeited property and the sale proceeds in excess of \$3,000,000 per year must be deposited to the General Fund. Fourth, pursuant to Haw. Rev. Stat. §712A-16(3), moneys from the Fund may be expended only for law enforcement purposes and may complement, but not supplant, funds regularly appropriated for such purposes. Even you recognize the importance of these controls because it is their presence which leads you to recommend that only the 50% of asset forfeiture proceeds now being deposited into the Fund, as opposed to the 25% shares that go the police and prosecutors, be deposited to the General Fund. (Draft Report at 20).

Yet, in reliance on the UCSA you still recommend repeal of the Fund in favor of legislative appropriation. In particular, you cite the belief that "earmarking forfeited property for law enforcement uses gives the seizing agencies direct financial incentives in forfeiture -- an unsound policy that risks skewing law enforcement priorities." (Draft Report at 20). You believe that legislative appropriation will "remove some of the taint of forfeiture, reduce the potential for abuses, and lend credence to the claim that forfeiture is not merely a revenue-generating device for law enforcement." (Draft Report at 20). You also state that if abuses occur in the future, or if more legislative control is desired, the law can be amended to direct all of the proceeds of forfeiture into the General Fund. (Draft Report at 20).

Again, we have to ask, what evidence is there that earmarking of funds has skewed law enforcement priorities? As we noted earlier, you have cited no evidence of it, here or on the mainland, and, as we also pointed out, concentration of efforts on cases involving substantial assets reflects an effort to target the most economically dangerous offenders. This is especially true where traditional criminal sanctions are becoming less and less viable due to problems such as prison overcrowding and law enforcement can expect to recover some of its operational costs by targeting these offenders. If anything, the increase in total assets seized and forfeited since the enactment of Chapter 712A in the absence of abuse demonstrates that the financial incentives have improved performance by law enforcement, not skewed its priorities.

The fact that the Legislature has twice rejected your recommendation to repeal the Fund would indicate that they support the manner in which it is being used. Indeed, if, as you note, the Legislature is free to amend the law in the future if abuses occur under your recommendation to divide the proceeds of forfeiture between law enforcement and the General Fund, one must wonder why you are recommending an amendment to repeal the Fund when you find no abuses under present law. The answer perhaps lies in the fact that you seem to view the different approaches to, for example, the drug problem as competing instead of complementary. Indeed, in your discussion of the the deterrent effect of forfeiture, you argue that the impact of forfeiture is debatable in the same way that the impact of enforcement as compared to treatment, rehabilitation, and education is debatable. (Draft Report at 11).

In our view, we should not have to choose between these different approaches to the drug problem but should use them in coordination as a part of a larger arsenal of weapons. This is precisely the approach which was taken by the President's Commission on Model State Drug Laws when it proposed a comprehensive approach consisting of community mobilization, education, treatment, and enforcement. The Commission recommended creation of a special fund for asset forfeiture, similar to that found in Chapter 712A, to ensure that there are sufficient resources to pursue these cases. Otherwise, limited law enforcement resources will, of course, be directed to priorities such as violent crime and the assets of economic offenders will not be captured. We believe the same rationale supports retention of all asset forfeiture proceeds for law enforcement purposes, whether divided as provided by current law or distributed directly to law enforcement agencies.

At the same time, to ensure that a stable source of funding is available for drug abuse prevention and treatment programs is made available, the President's Commission

recommended assessment of a "user fee" from convicted drug defendants whose activities fuel drug dependency. This proposal was derived from a successful New Jersey program that has now generated over \$36,000,000. Our own Legislature adopted such a proposal when it passed legislation which became Act 205, Session Laws of Hawaii 1995. The Legislature took this comprehensive approach to the drug problem one step further when it also enacted the Drug Dealer Liability Act, Act 203, Session Laws of Hawaii 1995. This Act provides for the imposition of civil damages on drug dealers based on the theory of market share liability.

We believe that these choices demonstrate the Legislature's belief that existing law is sufficiently abuse resistant and that, rather than siphoning money away from law enforcement initiated asset forfeiture efforts in a manner that may undermine the viability of forfeiture, additional, innovative means of funding other weapons in the fight against drug abuse need to be created.

### 3. Necessity of the Fund.

You find that the Fund is not necessary because participating law enforcement agencies can receive their respective 25% shares without the Fund. You reject our previously noted concern that, given the choice between receiving no more than 25% of the proceeds of forfeiture under State law and receiving up to 85% of the proceeds under federal law, law enforcement will choose federal law. Although you recognize the reduced incentive to use the State law under your proposal, you dismiss this fact by saying that "forfeiture should be pursued for its value as a law enforcement tool, not for its financial rewards." (Draft Report at 21). You conclude by stating that if fewer State forfeitures result, then asset forfeiture has been oversold as a deterrent to crime or asset forfeiture is more attractive under federal law. (Id.).

As was the case with your prior reports, you recommend that the Fund be repealed without first assessing the probable effects of repeal or the availability of alternative funding for the purposes specified in Section 712A-16(4), HRS. In particular, you make no mention of how the program will operate without the moneys now being drawn from the Fund. Currently, the program incurs substantial costs for storage and maintenance of assets, legal advertising, and personnel (who have no discretionary authority in, and, therefore, no stake in the outcome of, administrative forfeiture proceedings). It is naive to think that the Legislature will be willing to fund the expenses of a temporary program, especially those involving personnel, in the current economic climate.

Moreover, because repeal of the Fund will give law enforcement agencies greater incentive to use of federal law to recover their costs, the Legislature will lose the oversight it would otherwise have under State law. Finally, repeal of the Fund will not serve its intended purpose -- reacquisition of budgetary control -- because there will be far less money for the Legislature to appropriate, the substantial portion of asset forfeiture proceeds having gone directly to the respective agencies via the federal "equitable sharing" program.

The fact is that asset forfeiture is pursued for its value as a law enforcement tool but use of that tool has costs which are more likely to be recovered under federal law. If State law is not used because those costs can not be recovered, it is not a loss to law enforcement but a loss to the public. Some cases will not be pursued because they can not be brought under federal law and the ones that can will not be subject to the same scrutiny as those which are pursued under State law. To press forward with your recommendation under these circumstances, knowing that there is no corresponding benefit to anyone, is just plain irresponsible.

### III. LACK OF A RECOMMENDATION FOR PERMANENT ENACTMENT

One recommendation we hoped to find in your report is one that the law be permanently enacted at the next legislative session. As you know, the initial two year enactment of Chapter 712A and the two subsequent three year reenactments were designed to ensure that law enforcement acted with restraint in using Chapter 712A. We believe, and your report confirms, that Chapter 712A is abuse-resistant and has been fairly implemented. Permanent enactment is, therefore, warranted.

We believe that permanent enactment is also necessary. Although we are now in compliance with your recommendations regarding administration of the program, it has taken us eight years to do so. One reason is that it is very difficult to attract and retain qualified candidates for for the property manager and paralegal positions because, as long as the program is temporary, the positions are subject to termination. There simply is not enough job security for us to keep the program properly staffed. Indeed, the paralegal position is currently vacant for that reason.

Although the Legislature did not specifically ask you to address this question in Act 196, Session Laws of Hawaii 1993, we believe you have the inherent power to do so. Indeed, that question was not posed to you in the legislation which prompted your first audit of the asset forfeiture program in 1989 but you recommended that Chapter 712A be extended anyway. Given

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our compliance with your recommendations and the evidence that Chapter 712A has been fairly implemented, we believe that the time has come for you to recommend permanent enactment, especially since, as you note, the Legislature can at any time amend or repeal the law if it becomes necessary.

IV. CONCLUSION

While we appreciate the opportunity to review and comment upon your report and are gratified by your findings regarding our operation of the asset forfeiture, we are deeply disappointed by the recommendations it makes and the findings on which they are based. We hope that you will give serious consideration to the concerns we have raised before you finalize the report. Please feel free to call me if you need additional information or clarification of our comments.

Very truly yours,



Margery S. Bronster  
Attorney General

MSB/ELB:elb