

**REPORT REGARDING THE FINAL DRAFT
BILL ENTITLED “RELATING TO
CANNABIS,” PREPARED BY THE
DEPARTMENT OF THE ATTORNEY
GENERAL**

Prepared for and respectfully submitted to

Senator Joy A. San Buenaventura
Chair, Senate Committee on Health and Human Services

Senator Jarrett Keohokalole
Chair, Senate Committee on Commerce and Consumer Protection

Representative David A. Tarnas
Chair, House Committee on Judiciary and Hawaiian Affairs

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I. EXECUTIVE SUMMARY

Historically, the Department of the Attorney General (“Department”) has opposed legislative efforts to legalize adult-use cannabis without offering substantial constructive comments or feedback to improve the bill. This may have been a reasonable position to take when the chances that any one of the prior bills would become law were slim. But as it has become apparent that passage of a cannabis-legalization bill has become much more likely in recent years, we believe that it would be irresponsible—both from a legal standpoint and as a matter of commonsense—for the Department to refrain from weighing in on how a transition to legalization could best protect the public welfare.

The Attorney General performs many roles in our system of government. Among them, the Attorney General is the chief legal officer and the chief law enforcement officer in the State of Hawai‘i. The Attorney General both prosecutes crimes and gives advice and counsel to public officials in matters connected with their public duties. Because of the Attorney General’s different roles, questions concerning bills that would legalize and regulate adult-use cannabis can be difficult to answer. From a legal perspective, cannabis remains illegal under federal law and is listed as a Schedule I substance under the Controlled Substances Act, which means that a legalization regime is always subject to very substantial risks. From a law-enforcement perspective, the legalization of cannabis raises concerns—from the potential proliferation of black-market activity parallel to the legal market, to the difficulty of ascertaining whether someone is driving while high, to the very real health impacts that may arise from cannabis use, especially by our youth. From these perspectives alone, the Attorney General cannot support a bill legalizing adult-use cannabis, irrespective of how well-crafted the bill may be.

Viewing the Attorney General’s roles together, however, we believe that the Legislature must be provided with comprehensive legal guidance in the drafting process because the legal and law-enforcement problems that could arise from the passage of a bill are very real and very serious. Mere unproductive naysaying and refusing to assist is something that the Department cannot indulge in. To do so will possibly result in laws in which law-enforcement and public-health concerns are unaddressed. That is a luxury that the Department of the Attorney General cannot afford.

The Department of the Attorney General, therefore, has taken its duty to advise the Legislature with the utmost gravity. Hundreds of hours of research, drafting, and consultation have gone into producing the four documents provided to you today: (1) this Report; (2) a final draft bill entitled

“Relating to Cannabis,” in both PDF and Word formats; (3) a table of contents for the final draft bill; and (4) a redline showing the changes made between the draft bill circulated to you on November 9, 2023, and the final draft bill, including annotations.

This Report is intended to provide context to the Department’s work in creating the final draft bill, the choices that the Department made in including or excluding certain provisions, and the Department’s ultimate position on the final draft bill. The Report will proceed in four parts.

First, this Report will detail the Department’s work in 2023 in researching and drafting the final draft bill.

Second, this Report will give a high-level overview of just some of the inherent problems posed by any legislation legalizing cannabis. No effort to legalize adult-use cannabis, however carefully planned and well intentioned, will be without problems and serious risks to public safety and public health. It is important for the Legislature to consider these risks for the purposes of determining whether a bill should be passed at all, but also to understand how the final draft bill attempts to mitigate these risks.

Third, this Report will detail what the Department considers to be the “six pillars”—the most important elements—of the final draft bill:

- (A) The enacting of the Hawai‘i Cannabis Law, which is a legal safe harbor from state criminal prosecution concerning activities relating to cannabis for those who strictly comply with its provisions;
- (B) The creation of a robust, independent body—the Hawai‘i Cannabis Authority (“Authority”)—with the power to regulate all aspects of the cannabis plant (whether medical cannabis, adult-use cannabis, or hemp) in accordance with the Hawai‘i Cannabis Law;
- (C) The continuing role of law enforcement agencies in addressing illegal cannabis operations not acting in accordance with the Hawai‘i Cannabis Law, which pose threats to public order, public health, and those business operators who choose to operate in the legal market;
- (D) A vibrant, well-funded social-equity program to be implemented by the Authority with the intent to bring greater economic

opportunity to disadvantaged regions of our state and to help transition formerly illicit operators into the legal market;

- (E) A delayed effective date of eighteen months for the legalization of adult-use cannabis and the first legal retail sales to allow the Authority, law enforcement, licensees, and the public to prepare; and
- (F) The implementation of extensive, well-funded public-health protections, including public-education campaigns to inform the public about the new laws and the continuing risks to public health—especially to children—posed by cannabis and financial assistance for public-health services such as addiction and substance abuse treatment.

Fourth, the Report states the Department’s position: that the Department *does not support* the legalization of adult-use cannabis but *will not oppose* the passage of the final draft bill, as it may be amended, so long as provisions intended to protect public safety and public health remain in the bill and provisions unacceptable to the Department are not inserted, as set forth in Section V of this Report.

* * *

The Department believes that the final draft bill is well drafted and researched, reasonable, balanced, and keenly focused on protecting the public welfare. But no matter how sound a legal framework might seem in theory, the success or failure of a statewide cannabis legalization program is almost entirely a function of how it is implemented. Because of the problems associated with cannabis legalization for which there are no perfect solutions and the numerous variables associated with implementation, the Department does not warrant that legalization will be a “success” or will not be beset with major issues, even if the final draft bill were to be adopted without amendment. The Department can at most state that the proposed legislation represents our best judgment about how to promote a legal market, minimize risks of societal harm, mitigate damage that does come to pass, avoid liability, and provide workable tools and substantial resources for law enforcement and public-health officials to promote the public welfare.

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II. THE DEPARTMENT’S WORK ON THE FINAL DRAFT BILL

A. The Attorney General and the Department

Under the Hawai‘i Constitution, the Attorney General is the chief legal officer and chief law enforcement officer for the state and bears “the ultimate responsibility for enforcing penal laws of statewide application.”¹ The Attorney General is the head of the Department of the Attorney General, which is one of the principle executive departments of the state.²

The Attorney General and her Department perform a broad array of functions. Some of these functions involve the enforcement of laws—among other things, the Attorney General and the Department prosecute those who violate the laws of the state;³ conduct civil, administrative, and criminal investigations;⁴ and enforce drug-nuisance-abatement laws.⁵

The Attorney General also plays a very different role: she is the lawyer for the state and its public officials. As is relevant here, the Attorney General

shall, without charge, at all times when called upon, give advice and counsel to . . . public officers, in all matters connected with their public duties, and otherwise aid and assist them in every way requisite to enable them to perform their duties faithfully.⁶

The different roles of the Attorney General and the Department are sometimes in tension with one another. Advising the Legislature on the issue of legalizing adult-use cannabis is an example of such a time.

B. Why the Department Prepared the Final Draft Bill

Since Colorado and Washington became the first two states to legalize recreational adult-use cannabis in 2012, it is undeniable that our sister states are trending toward state-law legalization of adult-use cannabis. As of the date of this Report, 24 states plus the District of Columbia have enacted laws regulating adult-use cannabis.⁷ Less than two months ago, on November 7,

¹ Haw. const. art. V, § 6; *Amemiya v. Sapienza*, 63 Haw. 424, 427, 629 P.2d 1126, 1127, 1129 (1981); *Marsland v. First Hawaiian Bank*, 70 Haw. 126, 130, 764 P.2d 1228, 1230 (1988).

² HRS § 26-7.

³ HRS § 28-2.

⁴ HRS § 28-2.5.

⁵ HRS § 28-131.

⁶ HRS § 28-4.

⁷ National Conference of State Legislatures, *Report: State Medical Cannabis Laws*, available at <https://www.ncsl.org/health/state-medical-cannabis-laws> (last accessed Jan. 4, 2024).

2023, the Ohio electorate voted “yes” to legalize adult-use cannabis by a percentage of 57.19% to 42.81%.⁸

The story does not appear to be so different in Hawai‘i. A July 2022 Honolulu Star-Advertiser poll of 800 registered Hawai‘i voters answered the question “Do you support or oppose the legalization of recreational marijuana to generate tax revenue for the state?” as follows: 58% in support, 34% in opposition, and 8% undecided, with a margin of error of plus or minus 3.5 percentage points.⁹ The poll showed virtually identical support across each of the four major counties: City and County of Honolulu (58% support), County of Maui (56% support), County of Kaua‘i (56% support), and the County of Hawai‘i (59% support).¹⁰

Legislatively, in 2023, S.B. 669, S.D.2, a bill that would legalize adult-use cannabis, passed out of the Senate on third reading with a vote of 22 ayes, 7 ayes with reservations, and 3 noes.¹¹

Given that the odds of legislation legalizing adult-use cannabis becoming law within the next several years appear to have risen significantly, the grave legal and societal problems that could arise if such legislation became law, and the Department’s substantive concerns with previous legalization bills, Attorney General Anne Lopez decided that the Department needed to work on draft legislation with the intent of embedding provisions intended to protect the public welfare *into the very structure of the legislation*.

By working on this draft, the Department is not “supporting” the legislative policy of legalizing adult-use cannabis. Instead, the Department is recognizing that our state could legalize adult-use cannabis—like approximately half the states in the nation—even if the Department “opposed” the legislation and refused to assist the Legislature. This would be to the public’s detriment.

⁸ Ballotpedia, *Ohio Issue 2, Marijuana Legalization Initiative (2023)*, available at [https://ballotpedia.org/Ohio_Issue_2,_Marijuana_Legalization_Initiative_\(2023\)](https://ballotpedia.org/Ohio_Issue_2,_Marijuana_Legalization_Initiative_(2023)) (last accessed Jan. 4, 2024).

⁹ Ashley Mizuno, *Hawaii voters support legalizing recreational cannabis, but split on legalizing gambling*, Honolulu Star-Advertiser (July 25, 2022), available at <https://www.staradvertiser.com/2022/07/25/hawaii-news/hawaii-voters-support-legalizing-recreational-cannabis-but-split-on-legalizing-gambling/> (last accessed Jan. 4, 2024).

¹⁰ *Id.*

¹¹ Hawai‘i State Legislature, SB 669 SD2 Relating to Cannabis, available at https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=669&year=2024 (last accessed Jan. 4, 2024).

C. The Department’s Drafting Process

Beginning in May 2023 and continuing through October 2023, Special Assistant to the Attorney General Dave Day and a working group of deputy attorneys general and public servants from a variety of subject-matter divisions in the Department—Criminal Justice Division, Labor Division, Crime Prevention and Justice Assistance Division, Health Division, Commerce and Economic Development Division, Tax and Charities Division, and deputy attorneys general who have the Department of Public Safety and the Department of Law Enforcement (“DLE”) as clients—met to discuss what legislation legalizing adult-use cannabis might look like, challenges that could arise, possible solution to those challenges, necessary research, communications with other subject-matter divisions and agencies, the progress of drafting, and concrete proposals for the bill. In June 2023, the working group visited several licensed cannabis facilities on O‘ahu with officials from the Department of Health (“DOH”).

Formal drafting of the bill began in July 2023. The drafting team—Special Assistant Day, Deputy Attorney General Andrew Goff of the Health Division, and Deputy Attorney General Kotoba Kanazawa of the Legislative Division—worked with the larger departmental working group and other divisions within the Department, including the Tobacco Enforcement Unit and the Hawai‘i Criminal Justice Data Center. The drafting team also worked closely with Michele Nakata, Chief of the Office of Medical Cannabis Control and Regulation (“OMCCR”), a division of DOH, who provided invaluable insight into cannabis policy and regulation and frequently acted as a liaison with government regulators in our sister states.

During the initial drafting process, the drafting team consulted with, among others, state legislators, DOH and OMCCR, the Department of Commerce and Consumer Affairs (“DCCA”), the Department of Taxation, Banking Commissioner Iris Ikeda, and DLE. The drafting team had online meetings with cannabis regulators and state attorneys from the states of Alaska, Washington, Oregon, California, Colorado, Maryland, New York, and Massachusetts to discuss their experiences and thoughts on what works and what does not. The drafting team also met with policy experts, including the Cannabis Regulators Association (“CANNRA”),¹² the Parabola Center for Law and Policy,¹³ and Dr. Gary Kirkilas.¹⁴

¹² Cannabis Regulators Association Home Page, <https://www.cann-ra.org/>.

¹³ Parabola Center Home Page, <https://www.parabolacenter.com/>.

¹⁴ Dr. Gary Kirkilas Home Page, <https://drgarykirkilas.com/>.

In June 2023, Special Assistant Day attended the External Stakeholder Meeting of CANNRA in Annapolis, Maryland, where he spoke with regulators from at least a dozen states, along with licensees, health officials, and social-equity advocates about their experiences in the regulated-cannabis space and their thoughts about the Department’s conceptualization of the draft bill.

In August 2023, Special Assistant Day led an information-gathering site visit to the Massachusetts Cannabis Control Commission (“MCCC”) for the purpose of learning about the successes, challenges, costs, best practices, recommendations, and lessons learned since Massachusetts legalized adult-use cannabis. In attendance from Hawai‘i were Senator Joy San Buenaventura, Senator Jarrett Keohokalole, Representative David Tarnas, Department of Health Deputy Director for Health Resources Debbie Kim Morikawa, OMCCR Chief Michele Nakata, Special Assistant Day, and Deputy Attorney General Andrew Goff. In Massachusetts, the group met with the MCCC’s commissioners; the executive director, chief operating officer, chief financial and accounting officer, and associate general counsel; the MCCC’s licensing, social-equity, testing, and investigation teams; the head of the MCCC’s research initiative; local and state law enforcement officials; and Massachusetts Representative Daniel M. Donahue, who is the Chair of the Joint Committee on Cannabis Policy in the Massachusetts Legislature.

On August 29, 2023, members of the drafting team attended an event highlighting dangers of legalizing cannabis presented by the Honolulu Department of the Prosecuting Attorney entitled “Keep Hawaii, Hawaii: Impacts of Legalizing Marijuana.”

In October 2023, a draft of the cannabis bill was circulated to the heads of all principal departments, along with supervisors for every division in the Department, for comment and input.

On November 9, 2023, the Department circulated what will be referred to in this Report as the November 9, 2023 draft bill, entitled “Relating to Cannabis,” to Senator Joy San Buenaventura, Senator Jarrett Keohokalole, and Representative David Tarnas. Subsequently, the Department circulated the November 9, 2023 draft bill to police chiefs and prosecutors statewide and to the principals of the current licensed medical-cannabis dispensaries in the state. The November 9, 2023 draft bill found its way into the media and became publicly available online. The Department provided the November 9, 2023 draft bill to anyone who asked for a copy.

The Department has received comments from the following entities and individuals regarding the November 9, 2023 draft bill:

- Representative Tarnas provided substantial positive and constructive feedback on the November 9, 2023 draft bill, along with points of suggested revision. He emphasized that these points were his personal views and did not speak for the House of Representatives as a whole. Attorney General Lopez and members of the drafting team met with Representative Tarnas and his Legislative Attorney Sean Aronson to discuss his feedback. Many changes based upon Representative Tarnas’s comments have been incorporated into the final draft bill.
- County of Kaua‘i Prosecuting Attorney Rebecca V. Like presented feedback and comments on the November 9, 2023 draft bill.¹⁵
- The Executive Director of the Hawai‘i High Intensity Drug Trafficking Area Gary Yabuta stated his disagreement with a marijuana legalization model based upon Massachusetts.
- Karen O’Keefe, Director of State Policies, of the Marijuana Policy Project provided feedback. Some of Director O’Keefe’s points were addressed in Representative Tarnas’s feedback. The Department agreed with Director O’Keefe’s proposal that more money be allocated to social equity and community reinvestment, including a larger portion of the tax revenue; the Department, therefore, increased recommended seed funding for social-equity licensing from \$5 million to \$10 million, and increased the percentage of tax revenue going to social-equity licensing from 20% to 25%. *See Redline Draft at pp. 264, 325.*
- The MCCC provided feedback regarding Massachusetts’s program, stating that (1) adult-use cannabis legalization has diminished the unregulated markets and cannabis criminal-justice encounters, but that Black/Hispanic populations are still disproportionately impacted by cannabis violations despite similar use rates with other racial cohorts; and (2) preliminary research has found that youth-cannabis use has not increased after the implementation of Massachusetts’s cannabis-legalization legislation, but that public-health monitoring should assess and proactively prevent more severe adverse effects,

¹⁵ In December 2023, former Kaua‘i County Prosecuting Attorney Justin Kollar penned an editorial in the Honolulu Star-Advertiser in support of legalizing adult-use cannabis. Justin Kollar, *Column: Legal adult-use cannabis boosts safety*, Honolulu Star-Advertiser (Dec. 12, 2023), available at <https://www.staradvertiser.com/2023/12/12/editorial/island-voices/column-legal-adult-use-cannabis-boosts-safety/> (last accessed Jan. 4, 2024).

such as increased cannabis-use disorders, unintentional ingestion, and mental health disorders, which some studies have identified as emerging issues. In December 2023, the drafting team met with a number of MCCC officials to discuss the November 9, 2023 draft bill. Among other things, MCCC officials strongly advised that the DLE law-enforcement unit (*see* section IV.C.1, *infra*) should remain a key component of the bill.

- The Hawai‘i Hemp Farms Association (“HHFA”) provided substantial feedback on the bill and stated that it opposed the bill for a number of reasons, including if references to hemp remained in the bill. The Department also received 19 emails stating similar concerns. Members of the drafting team met with HHFA President Gail Byrne Baber and Vice President Grant Overton to discuss the bill. Based upon these discussions, the Department has made a number of changes to the hemp sections of the bill intended to address many of HHFA’s concerns, as exhibited in the redline bill (*see* section IV.B.2, *infra*).
- Clifton Otto, M.D., of Akamai Cannabis Consulting, provided comments recommending that the bill should be amended to provide a legal safe harbor from federal prosecution. The Department respectfully cannot accept this recommendation because it is black-letter law that states have no power to pass legislation overriding federal law or attempting to control federal law-enforcement activities. Only the United States Congress can legislate on the federal level.
- The Hawai‘i Cannabis Industry Association (HICIA) stated that it supports the November 9, 2023 draft bill, but provided some comments. Members of the drafting team met with T.Y. Cheng, Chairman of HICIA, to discuss its concerns.
- Tan Yan Chen, Executive Director of Cure O‘ahu, provided substantial constructive feedback on the bill. Among other things, Ms. Chen expressed concerns that the 18-month delayed effective date for legalization (*see* Final Draft Bill at p. 329, § 86) may not be sufficient to get the Authority up and running in time.

The redline draft presented to you today includes the changes made to the November 9, 2023 draft bill, many based upon the comments received, along with annotations of key points. The clean version of the bill will be referred to as the “final draft bill” in this report.

III. THE INHERENT PROBLEMS POSED WHEN CONSIDERING ANY LEGISLATION LEGALIZING CANNABIS

When considering legislation to legalize adult-use cannabis at the state level, many serious legal concerns and consequences arise from one very significant point: that cannabis remains illegal under federal law. Furthermore, there are many state and local law-enforcement concerns to consider arising from state-law cannabis legalization, and experiences from our sister states show that there are no easy, surefire solutions to these problems, if solutions exist at all. These include the continuation or growth in the illicit market, which competes with the legal market; driving while high; and problems relating to public health, particularly with respect to children.

We anticipate that during the legislative process, many different concerns will be raised. The Department, however, wishes to address just some of these here to demonstrate the gravity of a decision to enact any legislation legalizing adult-use cannabis, including if such legislation is the final draft bill we present to you today.

A. Illegality Under Federal Law

Under federal law, cannabis is a Schedule I drug under the Controlled Substances Act, meaning that, for federal purposes, it has “a high potential for abuse” and “has no currently accepted medical use in treatment in the United States,” and that “[t]here is a lack of accepted safety for use of the drug . . . under medical supervision.”¹⁶ Because of its illegality, federal law prohibits a myriad of activities concerning cannabis, including possession, creation, and distribution.¹⁷ In other words, in a state that has legalized cannabis, under federal law, a state licensed cannabis dispensary in full compliance with state law and regulations could theoretically still be subject to federal criminal prosecution.

Beyond the criminal penalties associated with violations of the Controlled Substances Act, the Department would like to focus on two aspects of federal illegality that would impact a cannabis-legalization regime in Hawai‘i: the questions of financial institutions and inter-island transportation.

Every single state we spoke to noted that the lack of banking and financial services willing to work with the cannabis industry is a major hurdle to the success of the legal market. Because banks and financial

¹⁶ 21 U.S.C. § 812(b)(1) & Schedule I (c)(10).

¹⁷ See 21 U.S.C. §§ 841, 844.

institutions are federally regulated, many believe that doing business with the cannabis industry is an unacceptable risk.

“Even in states where cannabis is legal, financial institutions that do not want to work with marijuana businesses consistently deny and shut down cannabis business bank accounts. This causes chaos across the state-legalized cannabis industry, primarily in those states without banks and credit unions willing to work within the confines of [federal guidance].”¹⁸ Alaska, for example, noted that there was only one institution that serviced the cannabis industry in the largest state by land area in the nation – a credit union in Fairbanks, which requires an airplane to reach from Anchorage.¹⁹

Mentioning the credit union in Fairbanks dovetails with the second issue: federally regulated transportation and transportation in areas of federal jurisdiction. As the only insular state in the United States, Hawai‘i will face legal problems regarding transportation that many other states do not have because transporting cannabis between islands will involve legal risk for the transporter under federal law. This includes the potential need to bring samples to other islands for testing purposes, if every island does not have a testing facility.

Discussions with Alaska and Massachusetts, both of which have inhabited island territories, stated the difficulties, but Massachusetts noted that with respect to Martha’s Vineyard, which has a seasonal population, the MCCC promulgated special self-testing regulations for the islands—an imperfect solution to just one of the problems associated with federally regulated transportation. Because Hawai‘i is a chain of islands, Hawai‘i will have problems with transportation that no other state has faced and are impossible to predict with any degree of precision should adult-use cannabis be legalized.

B. The Illicit Market

After legalization, the illicit, unregulated market will not disappear. Every state we spoke with noted that the illicit market continues to pose a threat to the legal market by undercutting the legal market in prices, a public-health danger because cannabis sold on the illicit market is not tested,

¹⁸ Hilary V. Bricket, *Navigating the Hazy Status of Marijuana Banking*, Business Law Today 1, 2 (Aug. 2017).

¹⁹ While the Draft Final Bill includes a provision on banking, see Final Draft Bill § A-92, p. 170, the problems with banking in the cannabis industry ultimately require a federal solution.

and a public-safety concern because of organized crime. In some states that have legalized cannabis, the illicit market has flourished.²⁰ In California, for example, in 2019, in the year after cannabis became legal, illicit cannabis smuggling arrests at LAX airport increased by 166%.²¹

Many provisions of the final draft bill are designed to combat the illicit cannabis market: the emphasis on the continuing role of law enforcement, no cannabis crimes are repealed, a competitive 10% tax rate on cannabis retail sales, the establishment of mission-driven cannabis law-enforcement and public-nuisance units, and a well-funded social-equity licensing program intended to help bring operators in the illicit market into the legal one are just some examples. But all of this together, along with the continuing roles of counties in enforcing the law, will not be a panacea to eliminate the illicit market and the law-enforcement concerns inherent in it.

C. Driving While High

There is no question that using cannabis can impair driving. The Centers for Disease Control and Prevention (“CDC”) cautions that cannabis affects areas of the brain that control your body’s movements, balance, coordination, memory, and judgment and its use can impair important skills required for safe driving by slowing reaction time and ability to make decisions, impairing coordination, and distorting perception.²²

As early as 2014, researchers at the National Institute of Health concluded that “[e]pidemiologic data show that the risk of involvement in a motor vehicle accident increases approximately 2-fold after smoking” and “[e]vidence suggests recent smoking and/or blood THC concentrations 2-5 ng/mL are associated with substantial driving impairment, particularly in occasional smokers.”²³

²⁰ See Joseph Detrano, Rutgers Center of Alcohol and Substance Use Studies, *available at* <https://alcoholstudies.rutgers.edu/cannabis-black-market-thrives-despite-legalization/> (last accessed Jan. 4, 2024).

²¹ Joseph Serna, *Pot smuggling arrests at LAX have surged 166% since marijuana legalization*, Los Angeles Times (May 12, 2019), *available at* <https://www.latimes.com/local/lanow/la-me-lax-marijuana-trafficking-california-airports-20190512-story.html> (last accessed Jan. 4, 2024).

²²Centers for Disease Control and Prevention, *Marijuana Use and Driving: What You Need to Know* (October 2021), *available at* <https://www.cdc.gov/marijuana/factsheets/pdf/MarijuanaFactSheets-Driving-508compliant.pdf> (last accessed Jan. 4, 2024).

²³ Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, 59 *Clinical Chemistry*, Issue 3 (Mar. 1, 2013), *available at* <https://academic.oup.com/clinchem/article/59/3/478/5621997> (last accessed Jan. 4, 2024).

Statistics collected by the Rocky Mountain High Intensity Drug Trafficking Area Investigative Support Center illustrated a large increase in traffic fatalities in Colorado involving cannabis from the time it was legalized, from 2013 to 2020.²⁴ The statistics showed that since recreational cannabis was legalized in 2013:

- Traffic deaths when drivers tested positive for cannabis increased 138% (55 in 2013 compared with 131 in 2020) while all Colorado traffic deaths increased 29%.
- Since recreational cannabis was legalized, the percentage of all Colorado traffic deaths involving drivers who tested positive for marijuana increased from 11% in 2013 to 20% in 2020.²⁵

In 2020, of the 120 drivers involved in fatal wrecks in Colorado who tested positive for cannabis use, 117 were found to have delta-9 THC in their blood.²⁶ “This would indicate use within hours according to [Colorado] data.”²⁷ Of the drivers found to have delta-9 THC in their blood, “69% were over 5 nanograms per milliliter[.]”²⁸

In Washington, the AAA Foundation for Traffic Safety published a study entitled “Cannabis Use Among Drivers in Fatal Crashes in Washington State Before and After Legalization” that analyzed fatal crashes from 2008 to 2017 to determine the impact of the legalization of recreational cannabis.²⁹ The study found that, prior to cannabis legalization, an average of 8.8% of all drivers in fatal crashes statewide each year were THC-positive.³⁰ After legalization became effective, this increased to an average of 18.0%.³¹ The highest level was reached in 2017, the last year studied, with 21.4% of drivers involved in a fatal crash testing positive for THC.³²

If cannabis is legalized in Hawai‘i, and even if the Department’s recommendations regarding high driving and open containers are adopted

²⁴ Rocky Mountain High Intensity Drug Trafficking Area Investigative Support Center, *The Legalization of Marijuana in Colorado: The Impact*, Volume 8 (Sept. 2021), available at <https://www.dfaf.org/wp-content/uploads/2021/09/RMHIDTA-Marijuana-Report-2021.pdf> (last accessed Jan. 4, 2024).

²⁵ *Id.*, pp. 2, 8.

²⁶ *Id.*, p. 8.

²⁷ *Id.* (emphasis in original).

²⁸ *See, id.*

²⁹ Tefft, B.C. & Arnold, L.S., *Cannabis Use Among Drivers in Fatal Crashes in Washington State Before and After Legalization* (Jan. 2020), available at https://aaafoundation.org/wp-content/uploads/2020/01/19-0637_AAAFTS-WA-State-Cannabis-Use-Among-Drivers-in-Fatal-Crashes_r4.pdf (last accessed Jan. 4, 2024).

³⁰ *Id.*, p. 3.

³¹ *Id.*

³² *Id.*, p. 4, figure 1.

(see section IV.C.2, *infra*), it is reasonable to anticipate an increase in traffic accidents and fatalities involving cannabis-impaired drivers, as well as an increase in the raw number of traffic fatalities.

D. Public Health and the Protection of Children

The public servants at the Department of the Attorney General are not medical professionals, nor do we claim to be. But as law-enforcement officials, one of our top priorities is to look out for the public welfare of children. Through our discussions with the Department of Health, we have grave concerns regarding the impact that cannabis (particularly the more potent cannabis products available today) has on the developing brains of young people and the public safety and social costs that inevitably follow.

It is sometimes said that cannabis is a “harmless drug” and causes no damage to a person’s health. Every public-health official we spoke with rejected that assertion.

With respect to children, the CDC has stated that cannabis use among teens, who have actively developing brains, causes harm to the brain itself, with negative effects including difficulty with thinking and problem-solving, problems with memory and learning, reduced coordination, difficulty maintaining attention, and problems with their school and social life.³³ Another study noted that “[t]he potential association of cannabis use with adolescent development represents an increasingly relevant public health issue, particularly given evidence of increased problematic cannabis use among adolescents in areas where recreational cannabis use has been legalized.”³⁴ Calls to poison control centers about children 5 and under consuming edible cannabis products rose from 207 in 2017 to 3,054 in 2021, a

³³ Centers for Disease Control and Prevention, *Marijuana and Public Health, Health Effects: Teens*, available at <https://www.cdc.gov/marijuana/health-effects/teens.html> (last accessed Jan. 4, 2024).

³⁴ Matthew. D. Albaugh, Ph.D, et al., *Association of Cannabis Use During Adolescence with Neurodevelopment*, JAMA Psychiatry (June 16, 2021), available at https://www.thenmi.org/wp-content/uploads/2021/07/jamapsychiatry_albaugh_Cannabis_Neurodevelopment.pdf (last accessed Jan. 4, 2024); see also Claire McCarthy, M.D., *Secondhand marijuana smoke and kids*, Harvard Health Publishing (June 5, 2018), available at <https://www.health.harvard.edu/blog/secondhand-marijuana-smoke-and-kids-2018060514012> (last accessed Jan. 4, 2024) (exposure to cannabis second-hand smoke may have permanent effects on executive function, memory, and IQ).

1,375% increase.³⁵

The Department is deeply concerned about the negative health effects of cannabis on the young people of Hawai‘i and how legalization of cannabis in the state could exacerbate their risk of exposure to cannabis.

IV. THE SIX PILLARS OF THE FINAL DRAFT BILL

The Department has stated some of our major concerns with respect to cannabis legalization in general. The Department’s final draft bill was created with these concerns in mind—to allow our elected legislators who wish to proceed down the path of legalizing adult-use cannabis to give serious consideration to a bill that is intended to proactively address these concerns in a meaningful way, created by a team of excellent attorneys and public servants, in consultation with stakeholders in Hawai‘i and other states’ regulators. To do this, the Department implanted public-safety and public-health protections into the structure of the legislation.

In the Department’s opinion, the most important aspect of any cannabis-legalization regime is the transition period: the time between the passage of the bill and the date cannabis becomes legal with first-day sales from licensed cannabis businesses. The transition must be orderly, and the success or failure of the transition period is a function of whether or not law enforcement is acting vigorously to investigate and prosecute illegal cannabis offenses during the transition period and the readiness of law enforcement, regulators, licensees, and the public at large for the day when cannabis possession becomes legal for adults over 21 years of age and licensed dispensaries begin making their first sales.

While the final draft bill is obviously quite long, it utilizes six primary legislative “pillars” that provide the legislative structure for the whole. Each “pillar” is designed to address issues associated with the transition to a legal market and its continued success.

A. The Hawai‘i Cannabis Law

The final draft bill proposes the enactment of the Hawai‘i Cannabis Law—a legal safe harbor from state criminal prosecution concerning activities relating to cannabis for those who strictly comply with its provisions.

³⁵ Berkeley Lovelace, Jr., *Reports of young children accidentally eating marijuana edibles soar*, NBC News (Jan. 4, 2023), available at <https://www.nbcnews.com/health/health-news/reports-young-children-accidentally-eating-marijuana-edibles-soar-rcna63501> (last accessed Jan. 4, 2024).

It is common knowledge that illicit-market cannabis possession, cultivation, and distribution are prevalent in Hawai‘i even though these acts remain illegal outside of the medical-cannabis program. In turn, it is self-evident that one of the primary goals of legalizing the cannabis market through a regulatory regime is to encourage people to abandon the illicit market and to join the legal market.

Some states’ legislative efforts have intentionally or inadvertently sidelined or even denigrated law enforcement and the essential role it has played and must continue to play in combating criminal and illicit-market activity. The sidelining of the role of law enforcement can manifest itself in legislation through the repeal of criminal laws concerning cannabis. The denigration of the role of law enforcement can manifest itself with legislative language that is critical of historical law-enforcement practices in enforcing then-existing laws or that rewards those with criminal convictions with monetary grants. This only serves to disincentivize law enforcement from investigating and prosecuting cannabis crimes and illicit-market activity in the future, which will cause harm to the public interest and the legal cannabis market.

The final draft bill proposes a positive, forward-looking path. Here, in the final draft bill, strict compliance with the Hawai‘i Cannabis Law is the only path to legal cannabis operations and activities. Criminal laws concerning cannabis remain largely intact and in some instances are made more robust, particularly with respect to the sale of cannabis to children. Because unlicensed cannabis operations and activities will remain illegal and because we envision real consequences for violating cannabis laws (see section IV.C, *infra*), the final draft bill will help promote an orderly transition to a legal market, will incentivize those who wish to participate in the cannabis industry to enter the legal market, and will benefit those who are playing by the rules by punishing those operators who are not.

Another aspect of the Hawai‘i Cannabis Law to emphasize is balancing the policy goals of the Legislature, the necessity of regulation to protect the public welfare, and the imperative to help foster a legal market that can be competitive with the illicit market. To balance these considerations, the Department used moderation and reasonableness as touchstones. When a provision in the bill would cause licensees to bear a high cost for minimal societal benefit, we have generally excluded that provision to allow the regulated market to be competitive, which in turn curtails the illicit market.

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B. The Hawai‘i Cannabis Authority

The final draft bill creates a robust, independent body—the Hawai‘i Cannabis Authority (the “Authority”)—with the power to regulate all aspects of the cannabis plant (whether medical cannabis, adult-use cannabis, or hemp) in accordance with the Hawai‘i Cannabis Law. The Authority’s structure itself is modeled largely on the Massachusetts Cannabis Control Commission. It is governed by an executive board of five members appointed by the Governor and subject to Senate confirmation: (1) the chair, who shall have a professional background in public health, mental health, substance use treatment, or toxicology; (2) a vice chair who shall have a professional background in public safety or law enforcement; (3) one member who shall have professional experience in corporate management or a professional background in finance; (4) one member who shall have professional experience in oversight or industry management, including commodities, production, or distribution in a regulated industry; and (5) one member who shall have a professional background in legal, policy, or social justice issues related to a regulated industry.³⁶ The board is supported by an executive director with enumerated powers.³⁷

1. State Modeling of Regulatory Authority

In modeling the Hawai‘i Cannabis Authority, the Department looked at a variety of jurisdictions for the purpose of constructing a legislative framework and agency that appeared to work best. In drafting the Hawai‘i Cannabis Law and creating a new agency, the Authority, the Department pulled provisions from a number of jurisdictions that we felt were strong and would work in a cannabis-legalization bill focused on the public welfare. In the final draft bill, statutory provisions based upon laws and regulations from all over the country can be found.

The Department found, however, that Massachusetts and its regulatory agency, the Massachusetts Cannabis Control Commission, provided a good starting point from which to base a general legislative structure. Among the things that struck us as important are its independence from other state and local agencies, a well-structured and professional organization, a commission comprised of members with diverse backgrounds including public safety and public health, a strong executive direct and executive team, a mission-driven licensing paradigm that works

³⁶ See Final Draft Bill § A-7, pp. 28–29.

³⁷ See *id.*, § A-9, pp. 34–40.

with licensees to remain in compliance, a strong enforcement team working to ensure compliance with laws and regulations, and open lines of communication with state and local law enforcement, along with a belief that law enforcement continues to play a crucial role in safeguarding the public welfare. We also note something that made the MCCC stand out in our eyes: a high level of pride in their work, a belief in their mission, and good morale among the officers and staff.

The Department, therefore, utilized Massachusetts as a base model from which to begin its work. Having such a base model will allow Hawai‘i to use Massachusetts’ experiences and regulations efficiently, provide a reference point for those in the industry, and stand the Authority up faster—and speed in execution is *very* important (*see* section IV.E, *infra*)—by adapting a regulatory framework grounded in an existing comprehensive regulatory regime to Hawaii’s unique cannabis landscape.

That is not say that we adopted Massachusetts’s laws and regulations wholesale. Far from it. The Department has taken the concepts we believe have worked in Massachusetts, borrowed concepts from other states, and created new provisions that we believe will improve upon what other states have done to date. We also recognize that every program has had its share of challenges and problems that have necessitated shifts in philosophies or changes to laws. It is important that a cannabis program remains flexible, especially in its nascent stages, to adapt as data becomes more available, technologies continue to develop, and regulations become more standardized across the nation.

2. Regulating the Plant: The Question of Hemp

One of the crucial aspects of the final draft bill is the uniform regulation of all aspects of the cannabis plant. This includes having the Authority regulate hemp. Cannabis and hemp are the same plant, with many of the same chemical compounds, known as cannabinoids. The term “hemp” refers to a cannabis plant that has a low concentration of a specific cannabinoid, delta-9 tetrahydrocannabinol (delta-9 THC). Delta-9 THC is the most prevalent (but not only) cannabinoid that gets people high. There are also cannabinoids that are not intoxicating, such as cannabidiol (“CBD”).

While hemp was initially legalized on a federal level to allow for industrial products, such as cloth, paper, and hempcrete, the past few years have seen a rise in hemp-derived cannabinoid products. Some of these products, such as CBD products, are not considered psychoactive and are marketed as helpful to treat post-traumatic stress disorder, nausea, anxiety,

or epilepsy.³⁸ More concerning are products containing intoxicating cannabinoids such as delta-8 THC, delta-9 THC, delta-10 THC, and THC acetate (THC-O).³⁹ These cannabinoids are created by treating hemp-derived CBD with acids or solvents that may leave residue on the final product. The U.S. Food & Drug Administration (“FDA”) and CDC have both issued warnings regarding delta-8 THC products containing unsafe chemicals.⁴⁰ The FDA has stated:

Some manufacturers may use potentially unsafe household chemicals to make delta-8 THC through this chemical synthesis process. Additional chemicals may be used to change the color of the final product. The final delta-8 THC product may have potentially harmful by-products (contaminants) due to the chemicals used in the process, and there is uncertainty with respect to other potential contaminants that may be present or produced depending on the composition of the starting raw material. If consumed or inhaled, these chemicals, including some used to make (synthesize) delta-8 THC and the by-products created during synthesis, can be harmful.⁴¹

If adult-use cannabis were to become legal, two of the biggest barriers to a successful legal cannabis market are gaps in regulation that could cause harm to the public welfare and the potential proliferation of illicit cannabis that would cause harm to the legal market. Hemp, as currently regulated, would constitute such a gap in regulation and would make it more difficult for law enforcement and regulators to combat the illicit cannabis market.

Law enforcement is unable to readily distinguish hemp flower, leaves, and seeds from the same components of illegal cannabis. The only certain way to distinguish between hemp and cannabis plants is through chemical testing to determine how much THC is in the plant.⁴² State law enforcement and cannabis and hemp regulators must be equipped with the resources and mission to properly regulate hemp if cannabis is legalized.

³⁸ Hemp-Derived Cannabinoids—Cannabidiol, Cannabis Law Deskbook § 25:7 (2023-2024 ed.).

³⁹ Hemp-Derived Cannabinoids—Delta-8 THC and other cannabinoids, Cannabis Law Deskbook § 25:10 (2023-2024 ed.).

⁴⁰ See CDC, *Increases in Availability of Cannabis Products Containing Delta-8 THC and Reported Cases of Adverse Events* (Sep. 14, 2021), available at <https://emergency.cdc.gov/han/2021/han00451.asp> (last accessed Jan. 4, 2024); FDA, *5 Things to Know about Delta-8 Tetrahydrocannabinol – Delta-8 THC*, available at <https://www.fda.gov/consumers/consumer-updates/5-things-know-about-delta-8-tetrahydrocannabinol-delta-8-thc> (last accessed, Jan. 4, 2024).

⁴¹ See FDA, *supra* n.40.

⁴² See CANNRA, *Cannabinoid Hemp: An Overview*, available at <https://www.cann-ra.org/white-papers-and-factsheets> (last accessed, Jan. 4, 2024).

Including hemp in this bill ensures that one agency is tasked with overseeing the various and complex aspects of how federal and state law regulate cannabis. Currently in Hawai‘i, hemp cultivation is regulated by the United States Department of Agriculture (“USDA”), post-harvest transportation of hemp is regulated by the Hawai‘i Department of Agriculture (“DOA”), and hemp processing and products are regulated by DOH. This patchwork regulatory scheme leads to gaps in regulation and enforcement, and confusion among the agencies, industry, and consumers over what is legal. Having hemp included in one state agency that has the proper expertise is essential to ensuring a uniform approach to the cannabis plant, cannabinoids, and cannabis and hemp products.

If adult-use cannabis is to become legal in Hawai‘i, it is the Department’s position that because of its unique legal status, the cannabis plant—whether adult-use or medical cannabis or hemp—must have a single state regulator, the Authority. Regulators from other states we spoke to agreed with this approach, noting difficulties that hemp posed in their states where hemp is regulated by other agencies. The Department will oppose any cannabis legalization bill that does not centralize state regulatory authority over all aspects of the cannabis plant in the same regulator.

The Department is sensitive to the concerns raised by the HHFA. After careful consideration, and with a better understanding of HHFA’s concerns, the final draft bill has been amended to include more regulations favorable to the hemp industry, while still shifting overall jurisdiction over hemp to the Authority.⁴³

The intent of the final draft bill is to keep much of the current hemp regulatory structure in place, while bringing state regulations under the umbrella of the Authority. The cultivation of hemp is still regulated by the USDA.⁴⁴ The HHFA raised concerns that state regulations would encroach upon the USDA authority and lead to duplicative regulatory burdens. To allay those concerns, we included provisions based on Act 263 of 2023, requiring hemp cultivators to comply with all USDA regulations⁴⁵ and ensuring that the state regulations will not duplicate USDA regulations for hemp cultivation.⁴⁶

However, the USDA hemp cultivation program only covers cultivation of hemp up to harvesting the plant. Currently, there are no federal

⁴³ See Redline Draft at pp. 150–157.

⁴⁴ See *id.* §§ A-42(b), -80, pp. 92, 151.

⁴⁵ See *id.* § A-80(a), (b), p. 151–52.

⁴⁶ *Id.* § A-80(e), p. 153.

regulations specifically for hemp processing or the sale of a hemp cannabinoid product, as the FDA has concluded that the existing regulatory framework for foods or dietary supplements cannot adequately manage many of the risks associated with CBD and other cannabinoid products.⁴⁷ Therefore, it is imperative that the state regulatory framework includes hemp processing and the sale of hemp products.⁴⁸

After harvest, the state must regulate the processing of hemp into a product. This is a law enforcement concern, as extracting hemp cannabinoids can result in a concentrated delta-9 THC product that would no longer be considered hemp under the federal definition. The final draft bill requires a license for hemp processing to ensure hemp products created in the state use good manufacturing practices and meet testing requirements, so a consumer knows what is in the product and that the product is safe to consume.⁴⁹

Equally important is regulating the sale of hemp products in the state to ensure public safety and public health concerns presented by intoxicating hemp-derived cannabinoid products. There should be, at minimum, age restrictions and testing requirements for these products. It makes little sense to require stringent testing and age restrictions for the use of cannabis when a youth can purchase an intoxicating cannabinoid product, created with unclear manufacturing practices, that could contain harmful contaminants.

For these reasons, the final draft bill allows the Authority to create a restricted cannabinoid product list for specific products deemed harmful to public health or public safety.⁵⁰ Hemp-derived cannabinoid products on the list would require a permit to sell or be prohibited to sell.⁵¹ Fees, eligibility

⁴⁷ Janet Woodcock, M.D., *FDA Concludes that Existing Regulatory Frameworks for Foods and Supplements are Not Appropriate for Cannabidiol, Will Work with Congress on a New Way Forward*, available at <https://www.fda.gov/news-events/press-announcements/fda-concludes-existing-regulatory-frameworks-foods-and-supplements-are-not-appropriate-cannabidiol> (last accessed Jan. 4, 2024).

⁴⁸ While some advocates argue that any regulation of hemp products in the state is preempted by the 2018 Farm Act, the U.S. District Court for the District of Hawai‘i has held that regulating hemp products is not preempted, stating: “The 2018 Farm Act does not require the State of Hawai‘i to allow Plaintiff to sell and/or distribute its hemp products and, therefore, that portion of HAR 11-37 does not conflict with the 2018 Farm Act’s express preemption clause.” *Duke’s Invs. LLC v. Char*, Civ. No. 22-00385 LEK-RT, 2022 WL 17128976, at *8 (D. Haw. Nov. 22, 2022); *see also Duke’s Invs., LLC v. Char*, Civ. No. 22-00385 JAO-RT, 2023 WL 3166729, at *13 (D. Haw. Apr. 28, 2023) (the “2018 Farm Act explicitly provides that it does not preempt states from creating laws that regulate hemp more stringently.” (internal quotation marks omitted)).

⁴⁹ *See* Redline Draft § A-81, p. 155.

⁵⁰ *See Id.* § A-79(a), p. 150.

⁵¹ *See Id.* § A-78(b)(4), p. 149.

criteria, and other restrictions, including restricting sales to consumers over the age of 21, can be developed by rules.

The final draft bill contains several other changes to address the concerns of the HHFA. *First*, the final draft bill allows for a crude hemp extract product that may be sold to another hemp processor and has specific testing requirements.⁵² *Second*, the final draft bill is clear that a restricted cannabinoid product derived from hemp is not considered cannabis, while maintaining the Authority’s ability to limit or prohibit the sale of products that are considered dangerous to public health or public safety.⁵³ *Third*, the final draft bill clarifies that industrial hemp is not considered a hemp product, does not need a license to process, and is not subject to the same regulations as a hemp product, including testing, packaging, and labeling.⁵⁴ *Fourth*, included in the final draft bill is a provision adapted from Act 263 of 2023, that allows hemp to be processed by certain methods within an agricultural building or structure, as defined by HRS § 46-88.⁵⁵ We believe that this is a reasonable approach that takes the concerns of the hemp industry into account while also addressing the Department’s primary concern regarding hemp: uniform regulation of the cannabis plant.

C. Promotion of the Continuing Role of Law Enforcement and Prosecutors

The final draft bill promotes the continuing role of law enforcement and prosecutors in addressing illegal cannabis operations not acting in accordance with the Hawai‘i Cannabis Law, which pose threats to public order, public health, and those who choose to operate in the legal market. Here, the Department will focus on two aspects of the final draft bill: (1) criminal and civil law enforcement and (2) new provisions governing driving while high and open containers.

1. Criminal and Civil Enforcement

This draft bill acknowledges the role that law enforcement has played in the past in promoting the rule of law by asking law enforcement to play the same role moving forward. To enforce cannabis criminal laws, the Department of the Attorney General is proposing the creation of a Cannabis Enforcement Unit within DLE: a mission-driven unit tasked with investigating and enforcing cannabis criminal laws throughout the state in

⁵² See *Id.* §§ A-52(b)(4), -82(b), pp. 111, 156.

⁵³ See *Id.* §§ A-3 (definition of “cannabis”), A-79, pp. 10, 150–51.

⁵⁴ See *Id.* §§ A-81, -82, pp. 155–57.

⁵⁵ See *Id.* § A-81(d), p.155.

coordination with the Authority.⁵⁶ After discussing law-enforcement concerns with Representative Tarnas, the final draft bill was revised to provide that the Cannabis Enforcement Unit will focus on serious crimes involving cannabis, including distribution to minors, organized crime, and crimes involving violence or the use of firearms.⁵⁷ The draft bill also explicitly provides that nothing diminishes the authority or responsibility of county law enforcement officers and prosecutors to enforce and prosecute cannabis crimes.⁵⁸

Based upon the discussion with Representative Tarnas, the Department is now proposing the expansion of a drug-nuisance-abatement unit at the Department, which is already established, to tackle cannabis offenses with civil, rather than criminal, enforcement means.⁵⁹ The Attorney General can bring civil lawsuits to abate a nuisance caused by the manufacturing or distribution of drugs in violation of the penal code, HRS § 712, part IV. A court can quickly issue a temporary writ of injunction upon filing of a verified complaint or affidavit that would show a nuisance exists.⁶⁰

Finally, based upon the discussion with Representative Tarnas and comments received from Kaua‘i Prosecuting Attorney Like, the Department is proposing the creation of a public safety grant program for the purposes of providing grants to state and county agencies and private entities to assist with public-safety and law-enforcement resources relating to cannabis.⁶¹ Such grants could be used to train law-enforcement officers in drug-recognition techniques and mental-health first aid and to support crisis-intervention services, mental-health programs, and homeless outreach.⁶²

Through both criminal and civil enforcement mechanisms, legal force can be brought against illicit operators who are acting illegally and cause harm to the legal market. Through comprehensive law enforcement, illegal operators may be induced to attempt to enter the legal market.

⁵⁶ Final Draft Bill § A-18, pp. 53–55.

⁵⁷ *Id.* § A-18(a), pp. 52–53. Multiple officials at the MCCC stated that a mission-driven law-enforcement unit at the state level would be invaluable to combating the illicit market.

⁵⁸ Final Draft Bill § A-19, pp. 55–56.

⁵⁹ HRS § 28-131.

⁶⁰ HRS § 712-1272.

⁶¹ Final Draft Bill § A-90, p. 164.

⁶² *Id.* § A-90(b), pp. 164–66.

2. Driving While High and Open Containers

Detecting and effectively curtailing driving while impaired by cannabis has proven to be perhaps the single most difficult question to answer during the Department's drafting process. As discussed in section III.C., *supra.*, cannabis legalization has been shown to lead to an increase in traffic accidents and fatalities involving cannabis-impaired drivers, as well as an increase in the raw number of traffic fatalities. Therefore, it is imperative that if cannabis is to be legalized, the law must provide mechanisms for discouraging and controlling driving while high that can be used by law enforcement and effectively allow prosecutors to secure convictions.

Just as with drunk driving, driving while high must be condemned and viewed as inherently wrong. The intent of the final draft bill is to treat cannabis the same as the current laws regarding alcohol. To that effect, part IV of the final draft bill would prohibit the consumption of cannabis or possessing an open container of cannabis in vehicles and driving while under the influence of cannabis and would impose the same penalties for the analogous crimes involving alcohol.⁶³

The Department believes that two things are imperative: (1) that those under 21 years of age be subject to a zero tolerance legal standard of no THC in the body, unless that individual is a registered medical-cannabis patient, and (2) that those over the age of 21 and medical-cannabis patients under the age of 21 be subject to a set numerical standard of THC in the body that establishes intoxication as a matter of law, similar to the 0.08% blood alcohol content ("BAC") standard for drunk driving.

First, it is the Department's position that for those under the age of 21 are not registered medical-cannabis patients, the standard for driving under the influence of cannabis should be the same as for drunk driving—zero. There are good reasons for this: those under the age of 21, whose brains are still developing, should not be consuming cannabis products at all, for the reasons set forth in section III.D, *supra.*, unless they hold a valid medical-cannabis card. Further, unquestionably, under the Hawai'i Cannabis Law, those under 21 who are not medical cannabis patients are legally prohibited from possessing or consuming cannabis. Through the Authority's public-education campaigns, the public, including those under 21 years of age, will be informed about what is and is not allowed under the Hawai'i Cannabis Law. *See* section IV.F, *infra.*

⁶³ *See* Final Draft Bill Part IV, pp. 194–219; *Compare with, e.g.*, HRS §§ 291-3.1 (consuming or possessing intoxicating liquor while operating a motor vehicle or moped); -3.2 (consuming or possessing intoxicating liquor while a passenger in a motor vehicle); § 291E-61 (operating a vehicle under the influence of an intoxicant).

The final draft bill provides that it is unlawful for any person under the age of 21 to operate any vehicle with a measurable amount of THC.⁶⁴ This is the same standard applied to those under the age of 21 with a measurable amount of alcohol.⁶⁵ Statutes prohibiting driving with any THC in the system have routinely been upheld by courts in our sister states. *See, e.g., People v. Fate*, 636 N.E.2d 549, 551 (Ill. 1994) (upholding statute imposing absolute bar against driving vehicles following ingestion of any cannabis, without regard to physical impairment, as reasonable exercise of police power); *State v. Phillips*, 873 P.2d 706, 710 (Ariz. Ct. App. 1994) (“We believe that the legislature was reasonable in determining that there is no level of illicit drug use which can be acceptably combined with driving a vehicle; the established potential for lethal consequences is too great.”); *People v. Turner*, No. 347551, 2020 WL 1963977 (Mich. Ct. App. Apr. 23, 2020) (upholding statute that prohibiting driving with any amount of Schedule I controlled substance in body, noting that “under rational-basis review, perfection is ‘neither possible nor necessary’” (citation omitted)).

The final draft bill includes a per se limit of tetrahydrocannabinol (THC) a person over 21 or a person under 21 with a medical-cannabis card can have in their system while driving—it is illegal to drive with THC at a concentration of five or more nanograms per milliliter of blood. Once a driver is shown to have reached or surpassed this legal limit, that person will be considered impaired by law.

In setting this per se limit, we acknowledge that testing for cannabis impairment is inherently difficult due to the limitations of current technology. Unlike alcohol, THC and its metabolites can remain in a person’s system for a considerable amount of time after the initial effects of cannabis use have worn off. For that reason, we chose not to incorporate a zero-tolerance approach as the mere presence of THC or its metabolites may not be a reliable indication of impairment.

But legislating in this area does not require perfect science or unimpeachable facts. Five other states, Illinois, Montana, Nevada, Ohio and Washington, currently have per se limits for THC.⁶⁶ The legal level of THC

⁶⁴ Final Draft Bill, Section 9 at pp. 199–205. Again, the exception is if the person under 21 is a medical cannabis patient. *Id.* at p. 200.

⁶⁵ HRS § 291E-64(a) (“It shall be unlawful for any person under the age of twenty-one years to operate any vehicle with a measurable amount of alcohol.”).

⁶⁶ We note that Colorado allows a reasonable inference of impairment if a driver exceeds the specified THC level of 5 ng/mL. Colo. Rev. Stat. § 42-4-1301(6)(A)(IV). The Department

in these states ranges between 2 nanograms per milliliter (ng/ml) of blood and 5 ng/mL. Such per se statutory limits have been upheld against challenges in our sister states. *See, e.g., State v. Jensen*, 477 P.3d 335 (Mont. 2020) (upholding statute prohibiting driving with THC level, excluding metabolites, of 5 ng/mL in the blood and adopting trial court language with approval that “[t]he legislature has the responsibility to pass laws that provide for the general welfare notwithstanding the absence of a perfect measuring method”); *Williams v. State*, 50 P.3d 1116 (Nev. 2002) (upholding per se standard of 2 ng/mL of marijuana or 5 ng/mL of marijuana metabolite); *Garfinkel v. Second Jud. Dist. Ct. of State ex rel. Cnty. of Wahsoe*, No. 57028, 2010 WL 5275797 (Nev. Dec. 13, 2010) (rejecting claim that standard of 5 ng/mL of marijuana metabolite in blood lacked rational basis); *State v. Doane*, 152 N.E.3d 956 (Ohio Ct. App. 2020) (upholding per se marijuana metabolite statute). “While THC blood levels do not correlate to impairment in the same way that the 0.08 BAC correlates to alcohol impairment, THC levels above 5.00 ng/mL do appear to indicate recent consumption in most people (including chronic users), and recent consumption is linked to impairment.”⁶⁷

There is no perfect solution regarding driving while impaired by cannabis. The Department remains committed to the approach we believe will best ensure safe roadways. However, it bears reiterating that we are willing to work with the Legislature on alternative solutions that fit within our parameters in Section V, *infra*, including the bodily fluid to be tested, if they can be shown to be enforceable and effective deterrents to driving under the influence of cannabis.

D. The Social Equity Program

The final draft bill provides for a vibrant, well-funded social equity program to be implemented by the Authority with the intent to bring greater economic opportunity to disadvantaged regions of our state and to help transition formerly illicit operators into the legal market. “Social equity” licensing has been a hallmark of adult-use cannabis programs nationwide. We believe that a strong social equity licensing program, focused on providing economic opportunity to disproportionately impacted areas, is sound law-enforcement policy if the decision is made to legalize cannabis.

believes that providing for a reasonable inference of impairment will have minimal value in obtaining convictions where the burden of proof is beyond a reasonable doubt and rejects this as an alternative.

⁶⁷ *State v. Fraser*, 509 P.3d 282, 290 (Wash. 2022) (en banc); *see also* Section III.C, *supra*.

1. Social Equity Licensing

The final draft bill provides a social equity program for those who live in “disproportionately impacted areas,” which are “historically disadvantaged communities, areas of persistent poverty, and medically underserved communities[.]”⁶⁸ These are, not coincidentally, areas of high crime and low economic opportunities.

If it is the Legislature’s decision to legalize cannabis and open a new market, the economic benefits should flow not simply to the privileged few but to those in areas of high crime and persistent poverty.⁶⁹ It also provides a perhaps once-in-a-generation opportunity to promote genuine respect for the rule of law among individuals for whom such messages have not yet resonated because, in their minds, they have yet to tangibly experience its value for themselves.

We agree with the Report of the Dual Use Cannabis Task Force to the Thirty Fourth Legislature (2023) where it spoke of “equity in the market”: “Social equity applicants can face high barriers to market entry, given complicated and burdensome regulations, and having no guidance or support to operate in an extremely challenging regulated environment.”⁷⁰ Because bringing formerly illicit operators into the legal market is a self-evident goal of legalizing adult-use cannabis, a social equity program that provides the resources for success in the legal market is necessary to accomplish this goal.

This final draft bill provides such a program, with a position of Chief Equity Officer, who provides grants and technical assistance to qualifying social equity applicants.⁷¹ The final draft bill creates the cannabis social equity special fund to administer the social-equity program, and calls for initial seed funding of \$10 million, which doubles the initial \$5 million called

⁶⁸ Final Draft Bill §§ A-3 (definition of “disproportionately impacted area”), A-83, at pp. 15, 150.

⁶⁹ We note here that the bill provides residency requirements for licensees. See Final Draft Bill § A-43(b)(2), p. 89. While such residency requirements are frequently suspect, in *Brinkmeyer v. Washington State Liquor & Cannabis Bd.*, No. C20-5661 BHS, 2023 WL 1798173 (W.D. Wash. Feb. 7, 2023), *appeal dismissed*, 2023 WL 3884102 (9th Cir. 2023), the U.S. District Court for the District of Washington upheld a license residence requirement from a Dormant Commerce Clause and Privileges and Immunities Clause challenges, holding that those constitutional doctrines did not apply to federally illegal markets. The law regarding how federal constitutional provisions apply to federally illegal markets is very unclear at this time and a residency restriction involves legal risk. We are happy to discuss the merits of this provision with you and the Legislature.

⁷⁰ Report of the Dual Use Cannabis Task Force to the Thirty Fourth Legislature at p.14, available at <https://health.hawaii.gov/opppd/files/2022/12/Act-169-SLH-2022-Dual-Use-of-Cannabis-Task-Force-FINAL-REPORT.pdf>.

⁷¹ Final Draft Bill § A-6(c), p. 27.

for in the November 9, 2023 draft bill, and similarly increases the percentage of tax revenues going to social-equity licensing from 20% to 25%, based upon comments received from Director Karen O’Keefe of the Marijuana Policy Project.⁷²

The social-equity program can give grants to social-equity applicants to help them enter the legal market, as well as to community organizations for the purpose of developing and implementing nonprofit projects addressing community needs in disproportionately impacted areas, including housing and child-care programs.⁷³

2. A Forthcoming Report to the Legislature on Expungement

The Department is aware that the issue of expungement of low-level cannabis crimes and the sealing of court records is an important issue to many people and advocacy groups. While the Department does not oppose expungement as a concept, we believe decisions on expungement should be made after adult-use cannabis is legalized, a mechanism for expungement is identified that will enable expedient processing, and resources are made available to implement the mechanism correctly.

With respect to the issue of expungement and the sealing of court records relating to low-level cannabis offenses, the final draft bill calls for the Executive Director of the Authority, in consultation with the Department and the Judiciary to submit a report no later than 20 days prior to the regular session of 2027 regarding the advisability of expunging or sealing low-level criminal offenses related to cannabis, a recommendation regarding which offenses and records should be expunged or sealed, if any, and the best mechanism for expunging and sealing records without causing undue burden on the Judiciary, the Department, or any other agency.⁷⁴

We have two concerns with expungement of records, particularly with respect to calls for so-called “automatic” expungement: (1) executing “automatic” expungement, which we interpret to mean that expungement would happen immediately and no application would be required, is impossible; and (2) the Department believes that the expungement of cannabis convictions prior to the legalization of cannabis itself undermines a lawful transition to the legal cannabis market.

⁷² Redline Bill § A-13 at pp. 51–52; Section 27, p. 262; and Section 69 at p. 323.

⁷³ Final Draft Bill § A-84, pp. 150–54.

⁷⁴ *Id.* § A-27(b), pp. 64–65.

First, the current mechanism for expungement in statute does not allow for “automatic” expungement or sealing of a criminal record. The Hawai‘i Criminal Justice Data Center (“HCJDC”) is a division of the Department of the Attorney General and is responsible for the statewide criminal history record information system (CJIS-Hawaii) and for processing expungement orders pursuant to HRS § 831-3.2. To expunge records relating to any offense, every single record must be examined manually. HCJDC receives approximately 114 applications for expungement per month and there is currently only one staff member capable of processing expungement requests.

As of January 2, 2024, there are over 50,000 arrests with a charge code of HRS § 712-1249, Promoting a Detrimental Drug in the Third Degree, which the Department considers to be the most minor criminal offense for cannabis. There are over 10,000 convictions for the same offense, and a court order would be required to expunge these convictions under existing law.⁷⁵ The expungement process is not automatic: it is time and resource intensive. If the Legislature decides to implement an expungement program, it must be an application-driven process.

Updating information-technology resources can assist with searching and filtering through data; however, every file will still need to be reviewed by a person at some point. It is likely that the process will also require the courts, prosecutors, or law-enforcement agencies to review their own files.

Finally, if the legislature decides to implement an expungement program that is not initiated by application, it is recommended that the process not require a certificate of expungement. The current expungement process requires a certificate of expungement, along with the expunged arrest record, mugshot, and fingerprints associated with the arrest or conviction, to be mailed to the individual qualifying for an expungement. If an application is not required, confirming an individual’s mailing address can be incredibly difficult or impossible. Mailing this type of sensitive information to an unconfirmed address would be reckless. This is why any expungement process is application driven, and the Department opposes legislation calling for “automatic” expungement at this time.

Second, it is the Department’s position that any decision regarding expungement should occur after adult-use cannabis is legalized and retail sales begin to assess both the advisability and scope of any expungement or sealing of court records. This is based upon two primary principles—the first, already discussed at length, is to promote the role that law-enforcement will continue to play after a cannabis-legalization bill passes into law and

⁷⁵ HRS § 706-622.5.

particularly during the transition period to a legal adult-use market. To expunge records prior to the date that conduct previously illegal under Hawai‘i law becomes legal undermines the public perception of a lawful transition to legalization. It could reasonably create a perception that cannabis crimes, whenever committed, will not be prosecuted because they will one day be expunged. To immediately expunge any cannabis crimes at this stage, prior to the effective date of legalization and before facts on the ground are known, is a position the Department opposes.

Representative Tarnas has heard our position on this matter and has called for the Department to work towards finding effective solutions to the issues of expungement and the sealing of records. Should a cannabis-legalization bill pass into law, the Department will begin efforts in 2025, in consultation with the Authority and the Judiciary, to examine these issues and assist in efforts to address the Legislature’s policy objectives.

E. Delayed Effective Date for the Legalization of Adult-Use Cannabis to January 1, 2026

The final draft bill contains a delayed effective date of eighteen months from the date the bill is signed into law—January 1, 2026—for the legalization of adult-use cannabis and the first legal retail sales to allow the Authority, law enforcement, licensees, and the public to prepare.⁷⁶

Regarding the length of the transition period, there is a diversity of opinion on what the best practice is. We have spoken to individuals who have called for legalization and legal retail sales on the day the bill is signed into law, and those who have noted the need for an extended transition period of many years.

We are persuaded, however, that the optimal transition period is 18 months from the date the bill is signed into law. This was approximately the transition period given to the Massachusetts Cannabis Control Commission, which opined that this provided sufficient time to adopt interim rules, staff and equip the Commission, accept social-equity applications and other licensing applications, allow all licensees to ramp up production to meet demand, educate the public about what is and is not allowed under the cannabis law and about the health risks associated with cannabis use, and put as much in order as possible prior to the first dispensaries opening their doors. It will also allow the Legislature to consider amendments to improve the legislation based upon the experience of government actors prior to legalization. While the Department would welcome a longer transition period, an 18-month transition period is acceptable to the Department,

⁷⁶ See Final Draft Bill Section 84, p. 315.

although it will require the Authority and other responsible government actors to act with the utmost speed.

We are also persuaded that legalizing cannabis prematurely when existing legal dispensaries are not able to meet demand, and regulators and law enforcement are not yet prepared, is the most clearcut road to failure for the program as a whole—it will cause the illicit market to proliferate to meet demand, destroy any sense of an orderly transition to legality, and promote a lawless “anything goes” mentality among the people of the state. It will also harm the social equity program before it has a chance to prove its value because by the time social equity licensees can open their doors, the pre-existing licensees may already have cornered the legal market.

F. Public Health Protections and Public Education Campaigns

The final draft bill implements extensive, well-funded public health protections, including mandatory public-education campaigns to inform the public about the new laws and the continuing risks to public health—especially to children—posed by cannabis and financial assistance for public health services such as addiction and substance abuse treatment.

The draft bill creates a public health and education special fund for education and substance abuse prevention and calls for initial seed money of \$5 million.⁷⁷ Part of this money shall be used on a comprehensive public health and education campaign regarding the legalization of cannabis and the impact of cannabis use on public health and public safety to begin no later than July 1, 2025 (i.e., six months prior to the date cannabis becomes legal pursuant to the terms of the Hawai‘i Cannabis Law).⁷⁸ This initial public health and education campaign is critical to the transition to legalization: to ensuring that the public is aware of the public-health risks associated with cannabis to all people, best practices for keeping cannabis out of the hands of children, information about what is and is not permitted under the Hawai‘i Cannabis Law, the dangers of driving while high and its consequences, and the potential penalties for not adhering to the law, among other things.

The draft bill also creates a cannabis public health and education grant program to assist substance-abuse programs and youth services, including for the creation or maintenance of youth recreational centers and services for housing.⁷⁹ Youth recreational centers may not only improve neighborhoods, but will also provide healthy recreational options for children.

⁷⁷ Final Draft Bill §§ A-14, A-87–89, Section 71, pp. , 49–50, 158–64, 311.

⁷⁸ *Id.* § A-87, p. 158.

⁷⁹ Final Draft Bill § A-88(b), pp. 159–62.

Substance-abuse treatment may include services for housing, residential treatment, out-patient treatment, counseling, and other related services.

The Hawai‘i Cannabis Law also provides substantial statutory protections for public health to ensure that cannabis sold in the legal market is safe and is not being pedaled to children. This includes mandatory laboratory testing for all products sold in the legal market, which includes testing for contaminants, pesticides, and potency—the purity of the product is one of the main selling points of the legal market, and adequate testing of cannabis must be a priority.⁸⁰ It also includes labeling requirements so that consumers are informed about what they are purchasing.⁸¹ Finally, there are substantial statutory advertising, marketing, and packaging provision intended to protect children.⁸²

V. THE DEPARTMENT’S POSITION ON THE FINAL DRAFT BILL

During the legislative session, any given testimony is generally categorized in one of three groups: testimony in support, testimony in opposition, and neutral comments. Despite the substantial work put into the final draft bill, the Department does *not support* the passage of the legalization of adult-use cannabis. But the Department will not *oppose* the passage of a bill, and will remain neutral on the question of its passage, so long as the bill contains the key elements identified in this section and does not include provisions antithetical to these elements, as it may be amended through the legislative process.

For the reasons set forth in Section III of this Report, including that cannabis remains illegal under federal law, is listed as a Schedule I substance under the Controlled Substance Act, and the public-safety and public-health concerns inherent in cannabis legalization, the Attorney General, as the chief legal officer and chief law enforcement officer of the State of Hawai‘i, cannot and does not support the passage of any bill that legalizes cannabis.

The Department of the Attorney General, however, will not oppose the final draft bill in its current form. That being said, the Department

⁸⁰ Final Draft Bill § A-52, pp. 104–06. The Department notes that under the Final Draft Bill, the Authority is responsible for adopting rules on product standards, including THC potency limits and limits on servings per package. *Id.* § A-55(a), p.109. The Department is deeply concerned about high-potency cannabis as a health risk, particularly with respect to children, but understands that complex potency regulations may be appropriate to service, for example, certain medical conditions. The Department, however, would support a legislative ceiling on cannabis-product potency that is in the interest of protecting public health.

⁸¹ Final Draft Bill § A-54, pp. 108–09.

⁸² Final Draft Bill §§ A-53, A-56, pp. 106–08, 110–13.

understands and fully respects the Legislature’s authority to make amendments to this bill, and it will not oppose the bill simply because it contains amendments.

While the Department cannot foresee every conceivable amendment to the bill, the Department initially notes that the Department will oppose any cannabis legalization bill that is not substantially based upon the final draft bill in structure and substance (i.e., the Department will oppose a cannabis-legalization bill primarily drafted by others). The Department further states that it will oppose any bill that does not include the following key elements:

- (1) The Hawai‘i Cannabis Law must provide a legal safe harbor from state and county criminal prosecution concerning activities relating to cannabis for those who strictly comply with the provisions of the Hawai‘i Cannabis Law.
- (2) The governing regulatory authority (i.e., the Hawai‘i Cannabis Authority) must be an independent, administratively attached agency that has regulatory authority over all aspects of the cannabis plant, which includes adult-use cannabis, medical cannabis, and hemp.
- (3) A statement that it is the intent of the Legislature to ensure that state and county law enforcement agencies work closely with the governing regulatory authority and vigorously investigate and prosecute illegal cannabis activities that fall outside of Hawai‘i Cannabis Law’s safe harbor protections and the statutory provision regarding county law enforcement and prosecution in § A-19.
- (4) A cannabis enforcement unit established within DLE (*see* §§ A-17 & -18) and funded by a portion of tax revenue.
- (5) Funding for statewide cannabis nuisance abatement from a portion of tax revenue (*see* § A-16).
- (6) A mandate that the governing regulatory authority make the protection of public health and public safety its highest priority.
- (7) Provisions and penalties regarding open containers of cannabis in cars and driving under the influence of cannabis must approximate those for open containers of alcohol and driving while drunk. This includes those found in part IV of the bill, and must include zero tolerance for driving under the influence

of cannabis for those under the age of 21 (except for those with a medical card) and an enforceable per se THC limit for those 21 and over (or those under 21 who hold a medical-cannabis card).

- (8) Substantial public health, education, and legal provisions regarding the prevention and treatment of the use of cannabis by those under the age of 21, including restrictions on packaging, marketing, and advertising relating to children.
- (9) A delayed effective date for the legalization of adult-use cannabis of January 1, 2026, at the earliest.
- (10) Funding for a substantial public-education campaign to be implemented prior to the legalization of adult-use cannabis.

The Department will oppose any bill that contains any of the following provisions:

- (1) A provision mandating the immediate or “automatic” expungement of cannabis crimes or sealing of court records. Notwithstanding this, and as set forth in Section IV.D.2, *supra*, the Department does not oppose expungement as a concept. Instead, decisions on expungement should be made after adult-use cannabis is legalized, the social impacts of legalization are clearer, and the mechanism to be used is determined to be both functionally possible and effective.
- (2) A provision allowing for the consideration of past convictions for cannabis crimes as a positive factor, or of constitutionally suspect classifications (i.e., race, sex) as factors, in licensing or decision-making. The Department believes that a focus on “disproportionately impacted areas,” as that term is defined in § A-3, will effectuate the goals of social-equity licensing without raising legal or law-enforcement concerns.
- (3) A provision that would prevent parole or probation from being revoked for the use of cannabis.
- (4) A provision that would prevent law enforcement from utilizing the odor of cannabis for any lawful purpose.

To reiterate, we cannot anticipate every possible amendment. To the extent that we have objections to specific amendments, the Department will endeavor to work with the Legislature to find a mutually acceptable solution.

VI. CONCLUDING REMARKS OF THE ATTORNEY GENERAL

The final draft bill presented to you today is not “the Department of the Attorney General’s cannabis bill.” It is the work product of attorneys at the Department of the Attorney General and reflects the Department’s judgment about how to mitigate as many of the serious risks to the public welfare as possible if the Legislature decides to legalize adult-use cannabis. Our work product is now in your hands—for you and your colleagues at the Legislature to use, modify, or disregard in your judgment as legislators.

Should this bill or a version of this bill be introduced at the legislative session, the Department of the Attorney General will participate as it normally does and will testify in accordance with the positions set forth in Section V, *supra*. But our involvement with any such bills will be deeper than that if you wish, and we will be available to work with you on amendments during the legislative session.

While the Department does not support the legalization of adult-use cannabis, I am proud of what we have presented here today. This is a reasonable, moderate bill that sought to balance a myriad of interests with significant known and unknown risks. It is the creation of highly skilled public servants. I would like to thank all of the personnel in the Department who participated in this laborious, time-intensive process. I would like to particularly thank Deputy Attorney General Andrew Goff, Deputy Attorney General Kotoba Kanazawa, and my Special Assistant Dave Day for their tireless efforts over the past year.

The Legislature represents the democratic will of the people of Hawai‘i. One of the Department of the Attorney General’s main priorities under my administration has been to improve the Department’s working relationship with the Legislature. This work demonstrates our true dedication to this prerogative.



ANNE LOPEZ

Attorney General of Hawai‘i