EXECUTIVE SUMMARY

Introduction

The Legislative Reference Bureau (Bureau) prepared this report in response to House Concurrent Resolution No. 127, H.D. 1, S.D. 1 (2016) (hereinafter HCR No. 127), which requested the Bureau to conduct a study on the potential impact on state government of decriminalizing the illegal possession of drugs for personal use in Hawaii. More specifically, HCR No. 127 requested that the study include:

1. A survey of all existing criminal drug offenses in Hawaii that are class C felonies or lower offenses and pertain to the illegal possession of a harmful drug, detrimental drug, marijuana, or marijuana concentrate, as defined in section 712-1240, Hawaii Revised Statutes;

2. A review of the current national drug policy of Portugal pertaining to the illegal possession of drugs for personal use, with a focus on the use of the policy as a potential model for the decriminalization of certain or all of the offenses identified under paragraph (1); and

3. The potential impact on administrative and judicial systems of state government of decriminalizing certain or all of the offenses identified under paragraph (1), such that the conduct constituting an offense would constitute an administrative or civil violation rather than a criminal offense.

Decriminalization, Depenalization, Legalization, and the Focus of this Report

In preparing this report, our purpose was to address the Legislature’s request that we focus on drug decriminalization’s potential impact on state government in Hawaii, not the broader topic of drug policy, law, or enforcement. Accordingly, we did not explore other topics, such as arrest and incarceration levels for drug offenses in other states, racial disparities in enforcement, the ability of convicted persons to find employment, or drug legalization.

We note that decriminalizing illegal possession of drugs for personal use would entail the removal of all criminal penalties for such possession. However, administrative or civil penalties against offenders would remain in place, and the distribution of illicit drugs would still be a criminal offense. In contrast, legalization of the possession of drugs for personal use would involve the removal of all penalties for such possession, and would likely entail regulation of the legal production, sale, and use of drugs. Further, decriminalization is distinguishable from depenalization. While depenalization of the illegal possession of drugs for personal use would remove incarceration as a possible penalty for such possession, depenalization would still treat such offenses as criminal offenses, which would be reflected on an offender’s criminal record.
The Portugal Experience

In our review of the current national drug policy of Portugal pertaining to the illegal possession of drugs for personal use, we must first note the historical impetus for that decriminalization. In 1999, authorities in Portugal approved a National Drug Strategy to fight against illicit drug use, largely in response to a rise in the use of heroin. The new national strategy proposed the decriminalization of the use and possession for use of drugs. Although statistical data suggest that few in Portugal were imprisoned at the time for illicit drug use or possession, the committee behind the new national strategy believed that drug users’ contact with the judicial system and prison establishments, the creation of criminal records, and the social stigma attached to criminal offenses impeded the desired recovery and social reintegration of drug addicts.

However, it is important to emphasize that decriminalization was only part of the new national strategy, which included other components, such as prevention efforts, improvement in health care, the treatment of addicts, and additional funding for such efforts. The public health-focused strategy was consistent with the country’s constitution, which guarantees all citizens the right to preventive, curative, and rehabilitative medical care. The strategy was also consistent with a 1979 law that established the National Health Service to provide free health care.

In 2000, Portugal passed its decriminalization law, Law No. 30/2000, which repealed existing criminal penalties against consuming, purchasing for consumption purposes, and possession for consumption purposes a ten-day supply of any drug among an exhaustive list of illicit drugs. The law did not specify what quantities of drugs would be considered ten-day supplies, but the application of a separate law establishes specific ten-day quantities for some, but not all, of these drugs. Those specific drugs and quantities include one gram of heroin; one gram of ecstasy; two grams of cocaine; twenty-five grams of marijuana; fifty grams of hashish; one-half gram of Delta-9-THC; and one gram of amphetamines.

Law No. 30/2000 referred to individuals who possess drugs in small quantities as “consumers,” and not “offenders.” The law also established new administrative tribunals called “dissuasion commissions” to take the place of courts in presiding over cases against alleged consumers. Each commission is composed of one expert in law and two other experts in medicine, psychology, social service work, or other allied professions.

When a consumer commits a drug offense, generally speaking, Portugal’s law does not require the consumer to appear before a commission. In some cases, police may detain a consumer who cannot be identified until the commission disposes of the consumer’s case. However, Portugal’s law does not specifically authorize law enforcement or the commissions to order any consumer to appear before the commissions.

Commissions do not always impose penalties. Commissions are required to suspend proceedings against addicted consumers for first-time violations if they agree to undergo treatment. Commissions also have broad discretion to suspend proceedings against other addicted consumers.
who agree to treatment. When penalties are appropriate, such penalties may include verbal warnings, suspensions of professional licenses, prohibitions on offenders from meeting with certain persons, restrictions on travel, and other non-criminal sanctions. However, addicted consumers may not be fined. In contrast, depending on the drug possessed, non-addicted consumers face possible fines from the equivalent of about $35 to a maximum equivalent to Portugal’s national minimum monthly wage.

**Evaluating the Portugal Experience**

HCR No. 127 relied, in large part, on the findings of a 2009 report, which was published by the Cato Institute (hereafter “the Cato report”), that drug decriminalization in Portugal resulted in:

1. No adverse effect on drug usage rates, which are among the lowest in the European Union, and particularly when compared with states with stringent criminalization regimes;
2. A decrease in lifetime prevalence rates for drug use among various age groups, particularly for youths in the critical age groups of thirteen to fifteen year olds and sixteen to eighteen year olds;
3. A dramatic decrease in drug-related deaths, including from sexually transmitted diseases; and
4. Steady declines in drug trafficking convictions.

Our research and analysis led us to conclude that the situation in Portugal is not so straightforward.

While the level of illicit drug use in Portugal is generally lower than in other nations in Europe, *problem* drug use – that is, injecting drug use or long duration of use or regular use of opioids, cocaine, or amphetamines – is worse than or at least as bad as in other European nations. Available data do not conclusively prove, or disprove, that there has been no adverse effect on drug usage rates following the decriminalization of drug possession and use in Portugal. Notably, national prevalence statistics regarding drug use in Portugal before the enactment of Law No. 30/2000 are not available. Further, one source we reviewed questioned any attempt to attribute changes in patterns of drug use in Portugal solely or primarily to the country’s decriminalization scheme, and asserted that there is no way to directly link national drug policies to prevalence of drug use. Factors other than laws that could affect drug use rates include the economy, religion, and culture. Notably, the Cato report does not appear to clearly recognize that Portugal’s decriminalization of illicit drugs was only one component in Portugal’s larger National Drug Strategy, which included prevention, treatment, and related funding. It is unclear what impact Portugal’s Law No. 30/2000 would have had if the country had not attempted to implement the broader drug strategy.
It also appears that the Cato report may have been unduly selective in the use of data. The report focused on decreases in drug use among some age groups, while ignoring increases in other age groups. Its use of lifetime prevalence rates (which measure whether individuals have ever used an illicit drug at any point in their lifetimes) may be less reliable in examining drug trends than statistics that examine individuals’ use of drugs within shorter amounts of time. Available data do not clearly establish that Law No. 30/2000 led to a dramatic decrease in drug-related deaths. Statistics that purportedly show drug-related deaths may be based on incorrect assumptions that the presence of illicit drugs in a deceased person’s body indicate that drug use actually caused that person’s death. While drug trafficking convictions have declined in Portugal, such a decline may not have been the result of a decrease in actual drug trafficking, since arrests for trafficking have not declined. One source we reviewed suggested that, because few people were incarcerated for mere drug use or possession before Law No. 30/2000, courts simply extended similar leniency to drug users whose behavior remained criminal even after the passage of that law. The source also suggested that drug traffickers may have adjusted the transportation of their supplies so that quantities of drugs in their possession at any given time would not exceed a ten-day supply.

HCR No. 127 also noted the Cato report’s assertion that money saved on drug enforcement allowed for increased resources for drug treatment programs. However, the Cato report does not provide any information that demonstrates that resources were redirected for such treatment, nor does it specify the costs of implementing Portugal’s National Drug Strategy (such as the costs of administering dissuasion commissions).

**Portugal’s Policy v. Hawaii’s Legal Framework**

Portugal’s national government can implement laws that apply throughout its jurisdiction. In contrast, Hawaii is one state among many in the United States of America. Both federal law and Hawaii law prohibit the possession of illicit drugs for personal use. Even if Hawaii were to repeal its laws regarding such possession, residents who possess illicit drugs might still face prosecution under federal law. While the use of marijuana is legal for medical purposes under Hawaii state law (as well as under the laws of twenty-seven other states and the District of Columbia), such use remains illegal under federal law. The current lack of federal prosecution of medical marijuana users in Hawaii is solely the result of the discretion exercised by the United States Department of Justice to prioritize its caseload. Following the installation of the new presidential administration in 2017, it is possible that the Department of Justice will adjust its priorities.

Portugal’s law decriminalized the possession of all illicit drugs for personal consumption. In contrast, the Legislature’s request to the Bureau in HCR No. 127, did not include exploring the possibility of decriminalizing “dangerous drugs,” which include “hard drugs” such as heroin, cocaine, and methamphetamine. Instead, the request was limited to surveying the existing criminal drug offenses in Hawaii that are class C felony or lower offenses and pertain to the illegal
possession of a harmful drug, detrimental drug, marijuana, or marijuana concentrate, as defined in section 712-1240, Hawaii Revised Statutes. These relevant drug offenses are:

- Section 712-1246, Hawaii Revised Statutes (HRS), Promoting a harmful drug in the third degree, a class C felony that carries a maximum prison term of five years and a maximum fine of $10,000;
- Section 712-1246.5, HRS, Promoting a harmful drug in the third degree, a misdemeanor that carries a maximum jail term of one year and a maximum fine of $2,000;
- Section 712-1247, HRS, Promoting a detrimental drug in the first degree, a class C felony that carries a maximum prison term of five years and a maximum fine of $10,000;
- Section 712-1248, HRS, Promoting a detrimental drug in the second degree, a misdemeanor that carries a maximum jail term of one year and a maximum fine of $2,000; and
- Section 712-1249, HRS, Promoting a detrimental drug in the third degree, a petty misdemeanor that carries a maximum jail term of one year and a maximum fine of $1,000.

Notably, while Portugal’s constitution guarantees citizens the right to medical care, the constitutions of the United States and Hawaii do not provide a similar guarantee. Thus, legally speaking, treatment for drug use is a relatively lower priority in Hawaii than it is in Portugal where it was a significant component of the country’s overall strategy. Nevertheless, treatment for drug use is already a possible alternative to incarceration in Hawaii for some offenders, including offenders whose crime is the possession of illicit drugs. Under certain circumstances, offenders may be placed on conditional discharge or probation, which requires the offender to comply with conditions, including conditions to receive drug treatment, in order to avoid incarceration. In some cases, an offender may even have his or her record expunged. Another alternative is provided in drug court programs, which involve intensive drug treatment and regular monitoring through the judicial system. However, due to the costly nature of treatment efforts employed in drug court programs, those programs only admit a limited number of offenders at a time. Further, individuals who have committed certain felonies in the past are precluded by law from participating in drug court programs.

Current Baseline Information is Insufficient to Estimate the Potential Impacts of Decriminalization

In our attempt to estimate the potential impact on administrative and judicial systems of state government of decriminalizing relevant drug offenses, we faced a barrier in the form of a lack of baseline information. While we reviewed multiple published reports from several governmental agencies and corresponded extensively with those agencies, we were not able to
obtain a complete picture of the effects that drug use and drug laws currently have on administrative and judicial systems of state government. This limitation affects our ability to analyze how changes in those drug laws might affect those systems of state government in the future.

We also sought information on drug use trends, treatment, and treatment expenditures. However, we faced challenges in collecting and comparing data regarding drug use in Portugal, the United States, and Hawaii. Challenges included the different age groups researched and surveyed in each jurisdiction, a lack of annual reporting on drug use in Portugal, and incongruent reporting on use estimates of specific drugs. According to the Hawaii High Intensity Drug Trafficking Area Investigative Support Center, the drugs that pose the greatest threat to Hawaii are methamphetamine and marijuana. Generally speaking, it appears that Hawaii and the United States have higher instances of any illicit drug use and marijuana use than does Portugal, although Portugal does have a significant number of people who have used marijuana. However, we were unable to accurately compare or quantify the drug use of the two drugs that pose the greatest threat in each respective jurisdiction, heroin (in Portugal) and methamphetamine (in Hawaii), as we could not locate annual, Hawaii-specific use prevalence estimates for those drugs.

In Hawaii, various state and county agencies spend funds on drug treatment. The primary source of public funds is the Alcohol and Drug Abuse Division (ADAD) of the Department of Health. That agency’s statistics show that admissions for treatment for methamphetamine use comprised more than half of all ADAD-funded admissions in fiscal year 2015-2016. The average per-person expenditure for ADAD-funded treatment for all substances was about $4,000 per year, with some variation, from 2011-2012 to 2015-2016. However, treatment expenditures vary based on factors such as drugs for which treatment is provided and the needs of the individuals treated. For example, we calculated, based on available data, that during fiscal year 2014-2015, the Judiciary was prepared to spend $1,306.26 on each person that it referred to treatment to a Judiciary-contracted substance-use treatment provider. Based on our calculations, treatment expenditures for Medicaid clients of the Department of Human Services (DHS) have varied from $63 to $494 per person, depending on the year in which the individual was treated as well as the substance for which the individual was treated. On the other hand, treatment expenditures for Social Services Division clients of DHS appear to have been as high as $29,912 per person in some years. It also appears that the Corrections Division, Department of Public Safety expended an average of $3,959 per inmate to treat 994 inmates in 2015-2016.

The Bureau cannot conclusively determine whether the amount of available funding is adequate for current treatment needs. Further, given the variation in treatment expenditures, we cannot determine how demand for treatment might increase after decriminalization, and we cannot predict whether the Legislature would need to increase funding for treatment or by how much, given the shortage of qualified treatment personnel. We also lack sufficient information to predict what specific impact decriminalization might have on the need to fund drug prevention efforts.

We sought information on the efforts to enforce the relevant drug offenses, and expenditures for those efforts. Available statistics from police departments and the Hawaii Criminal Justice Data Center (HCJDC) suggest that few individuals are arrested and face charges
in court solely for the commission of a relevant offense within the scope of HCR No. 127. For example, according to HCJDC data, only three hundred seventy-nine arrests were made solely for a relevant offense in 2015. Court cases were only filed against two hundred nine individuals, and only one hundred eight of those individuals were convicted. Of those convicted, only sixty-nine were incarcerated. However, we found a significant problem with this data: arrest statistics from HCJDC showed consistently different numbers than arrest statistics from county police, and we were unable to determine from those agencies the reason for the discrepancies.

Further, it is difficult to determine what are the current expenditures relating to enforcement of the relevant offenses within the scope of HCR No. 127. Police departments and the Judiciary could not isolate expenditures related to drug offenses from expenditures related to other offenses. We also received no statistical information from county prosecutors about their enforcement efforts. One county prosecutor’s office did not respond at all to our requests for information. Another prosecutor’s office responded that it did not have the resources to provide information, given the limitations of its case management system. The Office of the Public Defender, which defends most accused indigent criminal offenders, provided a similar response to our request for information about its defense efforts in drug possession cases.

As to incarceration expenditures, the Corrections Division, Department of Public Safety estimated that the State expended $140 per day to house each incarcerated inmate during fiscal year 2015-2016. However, since it was unclear exactly how the Division arrived at this estimate, the estimate may not be reliable in helping to determine how much incarceration expenditures would be reduced as a result of any decriminalization scheme.

The Uncertainty Regarding the Legislature’s Preferred Decriminalization Scheme Makes it Difficult to Estimate the Potential Impacts of Decriminalization

Even if we had sufficient statistical data regarding the use and treatment of illicit drugs and the enforcement of drug possession offenses, our ability to estimate the potential impact on administrative and judicial systems of state government of decriminalizing relevant drug offenses is hindered by the lack of specificity regarding the scope of any decriminalization scheme to be implemented in Hawaii.

There are many factors to consider in designing a decriminalization scheme. One factor is the determination of what drugs to decriminalize and in what quantities. It is not clear whether the State would decriminalize the possession of broad range of illicit drugs for personal use, or just marijuana. As noted previously, current federal law prohibits possession of the illicit drugs to which the relevant drug offenses apply, and the removal of criminal penalties under state law would not change federal law. Some states have decriminalized the possession of small quantities of marijuana. However, if Hawaii were to follow suit, it is not clear whether the Legislature would want to incur the expense of establishing Portugal-style dissuasion commissions just for the purpose of processing cases involving a single drug. It is also unclear what civil penalties should be imposed on violators, and whether violators should still be subject to arrest and detention to
ensure that they appear before the tribunals presiding over their cases. Further, the need for a broader health-based drug strategy may vary depending upon the type of drugs the State decriminalizes. If the State decides not to decriminalize methamphetamine, currently Hawaii’s greatest drug threat, because it is a dangerous drug, then the need for treatment might not be as urgent in the eyes of some policymakers.

Other Decriminalization Approaches

In 2009, Mexico enacted a law to decriminalize the possession of small quantities of a wide range of illicit drugs. Unlike Portugal’s decriminalization law, Mexico’s law kept proceedings of decriminalized offenses within the court system. Mexico’s law also allows alleged third-time offenders to be detained until released by the courts. Most notably, due to a lack of treatment efforts and treatment facilities, drug users are not receiving the medical help they need.

In the United States, laws have been enacted to decriminalize marijuana possession to some degree in nine states (Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, Ohio, Rhode Island, and Vermont), as well as depenalize such possession in four states (Connecticut, Missouri, New York, and North Carolina). Missouri’s law took effect on January 1, 2017. The foregoing list does not include the eight states (Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington) that, along with the District of Columbia, have enacted laws to legalize the possession of marijuana to some degree. Among the states that have depenalized such possession, the maximum quantity of the drug that is depenalized varies, as does the maximum fine for such possession. The most common maximum quantity is one ounce, while the most common maximum penalty is a $100 fine.

While it does not appear that the decriminalization of small amounts of marijuana has led to significant increases of drug use in the United States, it is not clear if the same results would occur in the wake of the decriminalization of other illicit drugs, such as methamphetamine. To date, no other state has decriminalized other illicit drugs.

Our Recommendation

In light of the limitations we faced in obtaining relevant statistical information from governmental agencies regarding drug use and the enforcement of drug laws, funding for improvements in the information systems of governmental agencies may be necessary for policymakers to obtain the data required to make informed decisions on decriminalization. Such improvements may assist in obtaining drug use and treatment data from the Alcohol and Drug Abuse Division of the Department of Health; the Department of Human Services; the Judiciary; and the various counties. Improvements may also be necessary to obtain more consistent and reliable information on enforcement efforts from the Hawaii Criminal Justice Data Center; the county police departments; county prosecutors; the Office of the Public Defender; the Judiciary; and the Department of Public Safety.
Factors to Consider for the Legislature’s Preferred Decriminalization Scheme

As noted above, the uncertainty regarding the Legislature’s preferred decriminalization scheme makes it difficult to estimate the potential impacts of decriminalization. Therefore, in designing a decriminalization scheme, policymakers may wish to consider:

(1) Whether there is a need to implement a broader health-based strategy to reduce drug use;

(2) Which of the illicit drugs, and what quantities of those drugs, should be decriminalized;

(3) Whether, and what, civil penalties should be established;

(4) Whether administrative or judicial tribunals are better suited for proceedings to enforce decriminalized drug offenses; and

(5) Whether violators would remain subject to arrest and detention.