STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
KAMALA D. HARRIS
ATTORNEY GENERAL

December 21, 2011

The Honorable Darrell Steinberg
President Pro-Tempore
State Capitol, Room 205
Sacramento, CA 95814

The Honorable John A. Perez
Speaker of the Assembly
State Capitol
P.O. Box 942849
Sacramento, CA 94249-0046

Re: Medical Marijuana Legislation

Dear President Pro-Tempore Steinberg and Speaker Perez:

As the state's chief law enforcement official, I am troubled by the exploitation of California's medical marijuana laws by gangs, criminal enterprises and others. My Office recently concluded a long series of meetings with representatives across the state from law enforcement, cities, counties, and the patient and civil rights communities. The primary purpose of the meetings was to assess whether we could clarify the medical marijuana guidelines that my predecessor published in 2008 in order to stop the abuses. These conversations, and the recent unilateral federal enforcement actions, reaffirmed that the facts today are far more complicated than was the case in 2008. I have come to recognize that non-binding guidelines will not solve our problems – state law itself needs to be reformed, simplified, and improved to better explain to law enforcement and patients alike how, when, and where individuals may cultivate and obtain physician-recommended marijuana. In short, it is time for real solutions, not half-measures.

I am writing to identify some unsettled questions of law and policy in the areas of cultivation and distribution of physician-recommended marijuana that I believe are suitable for legislative treatment. Before I get into the substance, however, I want to highlight two important legal boundaries to keep in mind when drafting legislation.

First, the Court of Appeal for the Second Appellate District recently ruled in *Pack v. Superior Court* (2011) 199 Cal.App.4th 1070 that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts and are therefore preempted by the federal Controlled Substances Act. Although the parties involved in that case have sought review of the decision in the California Supreme Court, for now it is binding law. As mentioned below, the decision in *Pack* may limit the ways in which the State can regulate dispensaries and related activities.

Second, because the Compassionate Use Act (Proposition 215) was adopted as an initiative statute, legislative efforts to address some of the issues surrounding medical marijuana might be limited by article II, section 10(c) of the Constitution, which generally prohibits the Legislature from amending initiatives, or changing their scope or effect, without voter approval. In simple terms, this means that the core right of qualified patients to cultivate and possess marijuana cannot be abridged. But, as long as new laws do not "undo what the people have done" through Proposition 215, we believe that the Legislature remains free to address many issues, including dispensaries, collective cultivation, zoning, and other issues of concern to cities and counties unrelated to the core rights created in the Compassionate Use Act.

With this context, the following are significant issues that I believe require clarification in statute in order to provide certainty in the law:

(1) Defining the contours of the right to collective and cooperative cultivation

Section 11362.775 of the Health and Safety Code recognized a group cultivation right and is the source of what have come to be known as "dispensaries." It provides, in full:

> Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570.

There are significant unresolved legal questions regarding the meaning of this statute. Strict constructionists argue that the plain wording of the law only provides immunity to prosecution for those who "associate" in order to "collectively or cooperatively . . . cultivate" marijuana, and that any interpretation under which group members are not involved in physical cultivation is too broad. Others read section 11362.775 expansively to permit large-scale cultivation and transportation of marijuana, memberships in multiple collectives, and the sale of marijuana through dispensaries. These divergent viewpoints highlight the statute's ambiguity. Without a substantive change to existing law, these irreconcilable interpretations of the law, and the resulting uncertainty for law enforcement and seriously ill patients, will persist. By articulating the scope of the collective and cooperative cultivation right, the Legislature will help law enforcement and others ensure lawful, consistent and safe access to medical marijuana.

(2) Dispensaries

The term "dispensary" is not found in Proposition 215 and is not defined in the Medical Marijuana Program Act. It generally refers to any group that is "dispensing," or distributing, medical marijuana grown by one or more of its members to other members of the enterprise through a commercial storefront.

Many city, county, and law enforcement leaders have told us they are concerned about the proliferation of dispensaries, both storefront and mobile, and the impact they can have on public safety and quality of life. Rather than confront these difficult issues, many cities are opting to simply ban dispensaries, which has obvious impacts on the availability of medicine to patients in those communities. Here, the Legislature could weigh in with rules about hours, locations, audits, security, employee background checks, zoning, compensation, and whether sales of marijuana are permissible.

As noted, however, the *Pack* decision suggests that if the State goes too far in regulating medical marijuana enterprises (by permitting them, requiring license or registration fees, or calling for mandatory testing of marijuana), the law might be preempted by the Controlled Substances Act. We also cannot predict how the federal government will react to legislation regulating (and thus allowing) large scale medical marijuana cultivation and distribution. However, the California-based United States Attorneys have stated (paraphrase Cole memo re: hands off approach to those clearly complying with relevant state medical marijuana laws).

(3) Non-Profit Operation

Nothing in Proposition 215 or the Medical Marijuana Program Act authorizes any individual or group to cultivate or distribute marijuana for profit. Thus, distribution and sales for profit of marijuana – medical or otherwise – are criminal under California law. It would be helpful if the Legislature could clarify what it means for a collective or cooperative to operate as a "non-profit."

The issues here are defining the term "profit" and determining what costs are reasonable for a collective or cooperative to incur. This is linked to the issue of what compensation paid by a collective or cooperative to members who perform work for the enterprise is reasonable.

(4) Edible medical marijuana products

Many medical marijuana collectives, cooperatives, and dispensaries offer food products to their members that contain marijuana or marijuana derivatives such as cannabis oils or THC. These edible cannabis products, which include cookies, brownies, butter, candy, ice cream, and cupcakes, are not monitored or regulated by state and local health authorities like commercially-distributed food products or pharmaceuticals, nor can they be given their drug content. Likewise, there presently are no standards for THC dosage in edible products.

Commercial enterprises that manufacture and distribute marijuana edibles and candy do not fit any recognized model of collective or cooperative cultivation and under current law may be engaged in the illegal sale and distribution of marijuana. Clarity must be brought to the law in order to protect the health and safety of patients who presently cannot be sure whether the edibles they are consuming were manufactured in a safe manner.

I hope that the foregoing suggestions are helpful to you in crafting legislation. California law places a premium on patients' rights to access marijuana for medical use. In any legislative action that is taken, the voters' decision to allow physicians to recommend marijuana to treat seriously ill individuals must be respected.

Please do not hesitate to contact me if you have questions or concerns.

Sincerely,

KAMALA D. HARRIS
Attorney General

cc: The Honorable Mark Leno
The Honorable Tom Ammiano