JOSH GREEN, M.D.
GOVERNOR

ANNE E. LOPEZ
ATTORNEY GENERAL

MATTHEW S. DVONCH
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
Ka 'Oihana O Ka Loio Kuhina
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

April 20, 2023

The Honorable Karl Rhoads
Senator, District 13
Thirty-Second State Legislature
State of Hawai'i
Hawaii State Capitol, Room 210
415 South Beretania Street
Honolulu, Hawai'i 96813

Re: Standards for Mental Health Intervention and the Assisted Community Treatment Law

Dear Senator Rhoads:

This opinion letter responds to your letter dated January 19, 2023, requesting a formal opinion on six issues, relating to chapter 334, Hawaii Revised Statutes ("HRS"). After further discussions with your office, this opinion letter also responds to a seventh issue concerning the enforcement of an Assisted Community Treatment ("ACT") order under the ACT law, chapter 334, part VIII.

As your requests recognize, much of chapter 334 and the ACT law hinges upon the assessment of differing degrees of an individual's "dangerousness"—that is, of an individual's risk of endangering self or others. Risk is necessarily a function of probability, not certainty.

This opinion is intended to answer your specific questions and help provide clarity on chapter 334's and the ACT law's standards and functions.

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I. ISSUES PRESENTED AND SHORT RESPONSES[1]

Issues Presented #1 & #2:

1. The Department of the Attorney General's ("Department") interpretations of the "dangerous to self," "dangerous to others," "imminently dangerous to self or others," and "predictably result" standards from chapter 334 and the ACT law and the rationale for the Department's interpretations.

2. Whether there have been any cases that implicate these standards or any constitutional challenges to the standards, and summaries of any relevant litigation.

Short Response to Issues #1 & #2:

The adjective "dangerous" concerns risk, not inevitability. All four relevant phrases analyze the risk posed by an individual to cause injury analyzed as a function of time.

"Dangerous to self" has two statutorily defined meanings. The Department interprets the first defined meaning to concern intentional acts of objectively serious self-harm or attempted self-harm or verbal or nonverbal communications of an intent to seriously harm self. The Department interprets the second defined meaning to have three elements: (1) recent behavior that objectively renders the person unable to care for self without assistance, (2) causation, and (3) a "high" probability that death or substantial physical harm or disease will befall the individual unless adequate treatment is afforded.

"Dangerous to others" has two elements: (1) a "high" probability that the individual will cause physical or emotional injury to another person; and (2) a recent act, attempt, or threat made by the individual that is relevant to proving the first element.

"Imminently dangerous to self or others" means "that, without intervention, the person will likely become dangerous to self or dangerous to others within the next forty-five days." HRS § 334-1. To be deemed imminently dangerous to self or others, by definition,

[1] This opinion simultaneously addresses issues #1 and #2 together and reframes them to address two additional legal standards not initially requested.

the individual does not need to be currently dangerous to self or dangerous to others.

The phrase "is now in need of treatment in order to prevent a relapse or deterioration that would predictably result in the person becoming imminently dangerous to self or others" is an aspect of the second prerequisite element to obtain an ACT order. This phrase has three elements: (1) the individual is now in need of treatment; (2) treatment would prevent a relapse or deterioration in the individual's condition; and (3) the relapse or deterioration, absent treatment, would predictably result in the individual becoming imminently dangerous to self or others.

The following cases implicate these standards and will be discussed below: *In re Doe*, 102 Hawai'i 528, 78 P.3d 341 (App. 2003); *In re JK*, 149 Hawai'i 400, 491 P.3d 1179 (App. 2021); *In re PC*, No. CAAP-15-0000015, 2017 WL 2602003 (Haw. App. June 15, 2017) (SDO); *Suzuki v. Yuen*, 617 F.2d 173 (9th Cir. 1980); and *State v. Kotis*, 91 Hawai'i 319, 984 P.2d 78 (1999).

Issue Presented #3:

3. The Department's understanding of the point at which a person's existing and untreated severe mental illness demonstrates that the person has already become a danger to self.

Short Response to Issue #3:

Whether an individual has become "dangerous to self" presents a mixed question of law and fact because the answer is dependent upon the facts and circumstances of each particular case.

Issue Presented #4:

4. Whether medically proven information that a specific mental illness will continue to progress and that a person having a mental illness will continue to deteriorate over the succeeding 45 days meets the "imminently dangerous" standard or the "dangerous to self" standard.

Short Response to Issue #4:

Issue #4 presents a mixed question of law and fact because it is dependent upon the facts and circumstances of each case. The Department notes that simply having a mental illness, even one that persists and worsens over a 45-day period, does not satisfy the "imminently dangerous to self or others" standard without evidence of how that disease will give rise to risk of injurious behavior.

Issue Presented #5:

5. For a person not deemed a current danger to self, the specific conditions that mental health emergency workers, law enforcement personnel, or other authorized individuals making an assessment of the person for possible emergency admission, pursuant to section 334-59, HRS, would need to believe will likely occur over the 45-day window in order to initiate an emergency admission.

Short Response to Issue #5:

Issue #5 presents a mixed question of law and fact, and the Department is unable to speculate what specific conditions would need to exist to justify emergency transport under HRS § 334-59(a). It is the mental health emergency workers or law enforcement personnel who will assess the totality of the circumstances and consider whether an individual may be "imminently dangerous to self or others."

Issue Presented #6:

6. For a person not deemed a current danger to self and not meeting the criteria for emergency admission, actions that the State can take concerning the person.

Short Response to Issue #6:

For an individual not meeting the criteria for emergency admission, a proceeding to place the individual into assisted community treatment could be initiated, if appropriate. Absent an ACT order, the social services or treatment available to individuals who consent to receive such services or treatment are outside the scope of this opinion letter.

Issue Presented #7:

7. Can an individual be compelled to take medication under an ACT order?

Short Response to Issue #7:

Yes. An individual subject to a current ACT order can be compelled to take medication under the ACT order[2] only if the individual is "within an emergency department or admitted to a hospital[.]" HRS § 334-129(b). Once in an emergency department or hospital, upon being examined, the individual can be "physically forced to take medication under a family court order for assisted community treatment," if a qualified medical provider determines that the individual is "imminently dangerous to self or others" and if the provision of the medication "is indicated by good medical practice[.]" HRS §§ 334-59(b) & (d), 334-129(b).

II. DISCUSSION

A. Response to Issues #1 and #2: The Department's Interpretation of the Gradations of Risk in Chapter 334 and the ACT Law

One of the touchstones of chapter 334 and the ACT law is the use of the adjective "dangerous" in various contexts. For purposes of this opinion letter, that word is used in four relevant phrases. Three of the phrases are defined terms: "dangerous to self," "dangerous to others," and "imminently dangerous to self or others." HRS § 334-1. The fourth phrase is undefined and unique to the ACT law: "is now in need of treatment in order to prevent a relapse or deterioration that would predictably result in the person becoming imminently dangerous to self or others." HRS § 334-121(2).

To understand chapter 334 and the ACT law requires a legal interpretation of these statutory terms. When interpreting statutes, Hawai'i law requires us to consider five well-established principles:

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[2] As used in this opinion, "medication" refers to medication prescribed pursuant to an ACT order's treatment plan. This opinion should not be construed to impact a physician's ability to administer medication to treat acute symptoms in an emergency situation where such treatment "is indicated by good medical practice." *See* HRS § 334-59(b).

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Haw. Gov't Emps. Ass'n, AFSCME Local 152, AFL-CIO v. Lingle, 124 Hawai'i 197, 202, 239 P.3d 1, 6 (2010).

The plain meaning of "dangerous" is straightforward. It concerns risk, not inevitability—it means "[a]ttended with risk; perilous; hazardous; unsafe." BLACK'S LAW DICTIONARY 274 (6th abridged ed. 1991). And, as used in chapter 334 and the ACT law, the four relevant phrases analyze risk, evidenced by personal history and medical assessments, viewed through prisms of different timespans.

1. "Dangerous to Self" and "Dangerous to Others"

"Dangerous to self" and "dangerous to others" are defined terms that describe the most acute danger a person poses as a function of time. People who are dangerous to self or others pose a genuine risk of killing or injuring themselves or others now.

a. "Dangerous to Self"

"Dangerous to self" has two statutorily defined meanings where the person "recently":

(1) Threatened or attempted suicide or serious bodily harm; or

> (2) Behaved in such a manner as to indicate that the person is unable, without supervision and the assistance of others, to satisfy the need for nourishment, essential medical care, including treatment for a mental illness, shelter or self-protection, so that it is probable that death, substantial bodily injury, or serious physical debilitation or disease will result unless adequate treatment is afforded.

HRS § 334-1. This definition requires proof of actual actions or behaviors of the individual within the not-so-distant past.

The Department relies upon the plain language of the statute and interprets the first defined meaning ("[t]hreatened or attempted suicide or serious bodily harm") to concern intentional acts of objectively serious self-harm or attempted self-harm or verbal or nonverbal communications of an intent to seriously harm oneself.

The second defined meaning ("[b]ehaved in such a manner . . . .") has three elements: (1) recent behavior that objectively renders the person unable to care for self without assistance, (2) causation, and (3) a "high" probability that death or substantial physical harm or disease will befall the individual unless adequate treatment is afforded. *See In re JK*, 149 Hawai'i 400, 411, 491 P.3d 1179, 1190 (App. 2021) (a factfinder must find it "highly probable" that a condition "would result in . . . death, substantial bodily injury, or serious physical debilitation or disease unless adequate treatment was afforded").[3]

All three components of the second defined meaning must be established for a person to be found to be "dangerous to self." *In re Doe*, 102 Hawai'i 528, 554, 78 P.3d 341, 367 (App. 2003). In *In re Doe*, the ICA considered the commitment of a college graduate who had been diagnosed with schizophrenia and paranoid delusions. While medication helped, she refused to take it out of paranoia, which resulted in poor self-care. When symptomatic, she also tended to yell loud, racist remarks in close proximity to people, prompting concerns that some would retaliate.

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[3] The Hawai'i Intermediate Court of Appeals ("ICA") in *In re JK* held that a factfinder must find it "highly probable," rather than just "likely" as the statute says, that death, injury, or disease would befall the individual.

The ICA reversed the trial court's order of commitment, holding:

> While there was clearly evidence adduced below that Doe's refusal to take her medications would result in her failure to get better, there was no clear and convincing evidence presented that Doe would probably die, or suffer substantial bodily injury, serious physical debilitation, or serious disease if she were not involuntarily hospitalized.

Id. at 554, 78 P.3d at 367. While noting that other states upheld involuntary commitment in similar cases, the ICA held that there was no evidence that people she yelled slurs at retaliated or attempted to retaliate against her.

b. "Dangerous to Others"

"Dangerous to others" is a defined term that means "likely to do substantial physical or emotional injury on another, as evidenced by a recent act, attempt, or threat." HRS § 334-1.

This definition has two elements: (1) a "high" probability that the individual will cause substantial physical or emotional injury to another person; and (2) a recent act, attempt, or threat made by the individual that is relevant to proving the first element.[4] *See In re JK*, 149 Hawai'i at 412, 491 P.3d at 1191 (record must show "high probability" that person was dangerous to others).

2. "Imminently Dangerous to Self or Others"

"Imminently dangerous to self or others" is a defined term that means "that, without intervention, the person will likely become dangerous to self or dangerous to others within the next forty-five days." HRS § 334-1. A finding of imminent dangerousness is a constitutional prerequisite to justify involuntary commitment or forceable medication. *See Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980) ("We agree that the danger must be imminent to justify

[4] It is possible that the facts in *In re Doe*—the repeated shouting of racist slurs at people—could have satisfied the "dangerous to others" standard, but the family court's order in that case, and thus the ICA's opinion, did not address that issue. *See* 102 Hawai'i at 553, 78 P.3d at 366.

involuntary commitment."); *State v. Kotis*, 91 Hawai'i 319, 334, 984 P.2d 78, 93 (1999) (criminal defendant may be involuntarily medicated with antipsychotic drugs where individual poses actual, rather than theoretical, danger to self or others).

Hawai'i case law concerning the "imminently dangerous to self or others" standard does not significantly clarify how it should be applied: of the two cases on point, one case had overwhelming evidence of dangerousness while the other had virtually none.

In *In re PC*, an unpublished ICA summary disposition order, an individual was involuntarily hospitalized after the family court found that he was "imminently dangerous to others." No. CAAP-15-0000015, 2017 WL 2602003 (Haw. App. June 15, 2017) (SDO). The individual, who was visiting his parents, admitted to having homicidal ideations towards his father; plunged a large knife into his parents' mattress on his father's side of the bed; and sent threatening pictures of guns, bullets, and knives to his parents, among other things. His parents fled the house for fear of their safety and two days later, the Department of Health filed a petition for involuntary hospitalization. The ICA held that the evidence showed that the individual was imminently dangerous to others.

In re JK, on the other hand, involved no substantial evidence of dangerousness. 149 Hawai'i 400, 491 P.3d 1179 (App. 2021). In *In re JK*, the individual, who suffered from bipolar disorder, told his son that God gave him the power to put his finger through metal and also wanted to teach his son how to shave with a straight razor. His spouse testified that the individual said that he wanted to go to the gym multiple times a day, ate nothing but protein bars, and never slept. A doctor generically testified that if untreated, "the dangerousness would become imminent within 45 days and there would be *some harm*." *Id.* at 410, 491 P.3d at 1189 (emphasis in original). There was also testimony, however, that he had never harmed himself or anyone else.

The ICA held that the doctor's testimony that there would be "some harm" within 45 days was insufficient to meet the "dangerous to self" standard because it requires a probability of resulting "death, substantial bodily injury, or serious physical debilitation or disease unless adequate treatment is afforded to the individual." *Id.* at 411, 491 P.3d at 1190. The ICA also held that "irregular sleep and diet, unconventional behavior, and refusal to take medication, without more," was insufficient to establish that the

individual was dangerous to self. *Id.* The ICA finally held that there was no evidence that he was "dangerous to others": noting that the family court itself found that the incident with the straight razor was not a threat, the ICA held that there was no evidence in the record that he had "ever acted, attempted, or threatened to inflict substantial physical or emotional injury upon another person." *Id.* at 412, 491 P.3d at 1191.

The principles that can be elucidated from the *In re JK* case are that an expert predicting that a person is imminently dangerous to self or others cannot merely opine that the individual will cause "some harm" within a 45-day period but rather must articulate an opinion reflecting the gravity of the legal standard. Further, mere strange behavior or utterances are insufficient, without more, to establish that a person is imminently dangerous to self or others.

Given the lack of meaningful Hawai'i case law defining the contours of the phrase "imminently dangerous to self or others," we must largely rely upon well-established rules of statutory interpretation, which begin with the plain language of the statute. "Imminently dangerous to self or others" means "that, without intervention, the person will likely become dangerous to self or dangerous to others within the next forty-five days." HRS § 334-1. ***To be deemed imminently dangerous to self or others, by definition, the individual does not need to be currently dangerous to self or dangerous to others.*** Instead, the inquiry of whether a person is "imminently dangerous to self or others" involves an assessment of risk—a medical assessment based upon historical facts—that the individual will become dangerous to self or dangerous to others within a 45-day period.

3. "Is Now in Need of Treatment in Order to Prevent a Relapse or Deterioration that Would Predictably Result in the Person Becoming Imminently Dangerous to Self or Others"

The second prerequisite element to obtaining an ACT order requires that a family court find:

> (2) The person is unlikely to live safely in the community without available supervision, *is now in need of treatment in order to prevent a relapse or deterioration that would predictably result in the person becoming imminently dangerous to self or*

> *others*, and the person's current mental status or the nature of the person's disorder limits or negates the person's ability to make an informed decision to voluntarily seek or comply with recommended treatment[.]

HRS § 334-121(2) (emphasis added).

The phrase "is now in need of treatment in order to prevent a relapse or deterioration that would predictably result in the person becoming imminently dangerous to self or others" is one of the things that makes the ACT law important—according to the plain language of the statute, *to be placed under an ACT order, an individual does not need to be currently dangerous or even imminently dangerous.* Instead, the Department interprets the phrase to have three elements: (1) the individual is now in need of treatment; (2) treatment would prevent a relapse or deterioration in the individual's condition; and (3) the relapse or deterioration, absent treatment, would predictably result in the individual becoming imminently dangerous to self or others.[5]

B. Response to Issue #3: The Point at Which an Individual Becomes Dangerous to Self Presents a Mixed Question of Fact and Law

Issue #3—the Department's understanding of the point at which a person's existing and untreated severe mental illness demonstrates that the person has reached the stage of "dangerous to self"—presents a mixed question of fact and law that cannot be precisely answered in the abstract. A mixed question of fact and law requires the application of facts to a legal standard and is "dependent upon the facts and circumstances of the particular case." *Price v. Zoning Bd.*

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[5] The spirit in which this phrase should be read is evident from the harm that the Legislature sought to address in the ACT law generally: "Individuals with severe mental illnesses often cycle between homelessness, emergency room treatment, incarceration, and hospitalization." Act 221, 2013 Haw. Sess. Laws 690. To address this, the Legislature found that "[a]ssisted community treatment provides an opportunity for people with serious mental illness to be treated in the least restrictive setting and reduces the trend toward criminalizing mental illness." Conf. Comm. Rep. No. 77, in 2013 House Journal, at 1550, 2013 Senate Journal, at 810.

of Appeals of City & Cnty. of Honolulu, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994). Here, to determine whether a person meets the "dangerous to self" standard requires an assessment of the totality of the circumstances and ask whether the individual is "dangerous to self," as that term is defined.

The Department, however, can provide some general guidance. As noted above, the second paragraph of the "dangerous to self" legal standard has three elements: (1) recent behavior that renders the person unable to care for self without assistance, (2) causation, and (3) a high probability that death or substantial physical harm or disease will befall the individual unless adequate treatment is afforded.

With respect to the first element, by statute, such behavior must indicate that the person is unable "to satisfy the need for nourishment, essential medical care, including treatment for a mental illness, shelter or self-protection[.]" HRS § 334-1. Such behavior could run the full gamut of behavior associated with mental health or substance abuse.

The question then becomes whether such behavior creates a high probability that "death, substantial bodily injury, or serious physical debilitation or disease will result unless adequate treatment is afforded." *Id.* This is a mixed question of law and fact and one that, depending on the circumstances, may require expert testimony of a psychiatrist or other medical provider to establish. It is common sense, however, that the following behaviors, if proven by clear and convincing evidence, would very likely establish a causal link to a high probability of death, injury, or disease:

- Inability or refusal to treat existing medical conditions, such as diseases, broken bones, or wounds
- Habitual walking in moving automotive traffic without the right of way
- Habitual wearing of clothing soiled with human waste
- Inability or refusal to eat or drink
- Consuming rancid food or liquids, poisonous substances, or non-food items
- Habitual driving under the influence of alcohol or drugs
- Repeated instances of being found unconscious in public or dangerous places

C. Response to Issue #4: When and Under What Conditions a Person Becomes "Imminently Dangerous to Self or Others" Presents a Mixed Question of Fact and Law

Issue #4—whether medically proven information that a specific mental illness will continue to progress and that the person will continue to deteriorate over the succeeding 45 days meets the "imminently dangerous to self or others" standard—presents a mixed question of fact and law that the Department cannot respond to with any precision because the analysis is inherently fact-bound. *See Price*, 77 Hawai'i at 172, 883 P.2d at 633.

As a general matter, the Department notes that simply having a mental illness, even one that persists and worsens for 45 days, is not enough as an evidentiary matter to satisfy the "imminently dangerous to self or others" standard, which does not rest upon the severity of illnesses, but upon an assessment of how a medical condition may progress, how that medical condition may manifest itself in the future through objectively ascertainable behavior, along with the probable results of such behavior. Establishing that a person is "imminently dangerous to self or others" will depend on the circumstances.

D. Response to Issue #5: Whether a Person Satisfies the Legal Standard for Emergency Transport Is a Mixed Question of Fact and Law

Pursuant to HRS § 334-59(a), an emergency admission begins with one of the three statutory procedures for transporting an individual to an appropriate location for examination: (1) an "MH-1" transport, which is initiated by a law enforcement officer (HRS § 334-59(a)(1)); (2) an "MH-2" ex parte order issued by a judge (HRS § 334-59(a)(2)); or (3) transport at the direction of a qualified medical provider who has examined the individual (HRS § 334-59(a)(3)).

To justify emergency transport, none of the three transport procedures considers whether an individual poses a *current* danger to self or others. Instead, each of the three procedures requires that a person find, to differing degrees of certainty, that there is a basis to believe that the individual is "imminently dangerous to self or others."

First, an "MH-1" transport initiated by law enforcement involves two tiers of review: a law enforcement officer must have "*reason to*

believe" that the individual is imminently dangerous to self or others; and, thereafter, a mental health emergency worker "*determin[es]*" that the individual is imminently dangerous to self or others. HRS § 334-59(a)(1) (emphasis added).[6]

Second, a judge may issue an ex parte "MH-2" transport order if there is "*probable cause*[7] *to believe* the person is mentally ill or suffering from substance abuse, is imminently dangerous to self or others and in need of care or treatment, or both[.]" HRS § 334-59(a)(2) (emphasis added).

Third, a licensed physician, advanced practice registered nurse, physician assistant, or psychologist who has examined the individual is authorized to direct transportation by ambulance or other suitable means to a licensed psychiatric facility if there is "*reason to believe*" that the individual is "(A) Mentally ill or suffering from substance abuse; (B) Imminently dangerous to self or others; and (C) In need of care or treatment[.]" HRS § 334-59(a)(3) (emphasis added).

Beyond this, Issue #5—which asks what specific conditions mental health emergency workers, law enforcement personnel, or other authorized individuals would need to believe likely to occur over a 45-day window to initiate an emergency admission—presents a mixed question of fact and law that cannot be answered with precision in the abstract. *See Price*, 77 Hawai'i at 172, 883 P.2d at 633.

E. Response to Issue #6: The Purpose of the ACT Law is to Provide Treatment Options Before an Individual Becomes "Imminently Dangerous to Self or Others"

Issue #6 asks: For an individual not deemed a current danger to self and not meeting the criteria for emergency admission, what actions can the State take concerning the individual?

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[6] A law enforcement officer may also "take into custody and transport . . . any person threatening or attempting suicide." HRS § 334-59(a)(1).

[7] "Probable cause" to support an MH-2 emergency transport is "established by a state of facts as would lead a person of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion" that the MH-2 criteria are met. *Cf. State v. Russo*, 141 Hawai'i 181, 194, 407 P.3d 137, 150 (2017) (probable-cause standard to support a criminal charge).

Under existing law, an individual can be placed under an ACT order, assuming the standards set forth in HRS § 334-121 are met. The process begins when an interested party (who may be a parent, grandparent, spouse, sibling, adult child, reciprocal beneficiary, a service provider, case manager, outreach worker, or mental health professional) files a petition with the family court. HRS §§ 334-122 & -123(a). An ACT order can provide the individual with numerous services—not just medication, but therapy, activities, and vocational training—that are intended to prevent medical decompensation.

Absent an ACT order, we are informed that the State can provide social services and treatment to individuals who consent to receive services or treatment.

F. Response to Issue #7: An Individual Can Be Compelled to Take Medication Under an ACT Order

The ACT law provides a legal framework for treating individuals with a history of episodic symptoms of a mental illness or substance-abuse problem. The framework provides a legal process for proactively generating a treatment plan that is legally enforceable *before the individual becomes imminently dangerous to self or others again*.

To obtain an ACT order, a family court must find, based on the professional opinion of a psychiatrist or a qualified advanced practice registered nurse[8] that:

(1) The person is mentally ill or suffering from substance abuse;

(2) The person is unlikely to live safely in the community without available supervision, is now in need of treatment in order to prevent a relapse or deterioration that would predictably result in the person becoming imminently dangerous to self or others, and the person's current mental status or the

[8] A "qualified" advanced practice registered nurse, as that term is used in this section, is one "with prescriptive authority and who holds an accredited national certification in an advanced practice registered nurse psychiatric specialization." *See, e.g.*, HRS § 334-129(a).

nature of the person's disorder limits or negates the person's ability to make an informed decision to voluntarily seek or comply with recommended treatment;

(3) The person has a:

(A) Mental illness that has caused that person to refuse needed and appropriate mental health services in the community; or

(B) History of lack of adherence to treatment for mental illness or substance abuse that resulted in the person becoming dangerous to self or others and that now would predictably result in the person becoming imminently dangerous to self or others; and

(4) Considering less intrusive alternatives, assisted community treatment is essential to prevent the danger posed by the person, is medically appropriate, and is in the person's medical interest.

HRS § 334-121. Element 1 must be established beyond a reasonable doubt, while elements 2, 3, and 4 must be established by clear and convincing evidence. HRS § 334-127(b). These standards and burdens of proof largely mirror those required for involuntary hospitalization and for the ordering of treatment, including medication, over the patient's objection without an ACT order. *See* HRS §§ 334-60.2 & -161. The major exception is that, absent an ACT order, the patient must be "imminently dangerous to self or others," whereas the ACT order standard "is now in need of treatment in order to prevent a relapse or deterioration that would *predictably result* in the person becoming imminently dangerous to self or others[.]" *Compare* HRS § 334-60.2(2) *and* § 334-161(a)(2), *with* HRS § 334-121(2) (emphasis added).

The due process provided to the individual is frontloaded to a time, ideally, before the individual becomes "imminently dangerous to self or others," envisioning that the individual can be adequately treated in the community rather than through repeated and episodic involuntary hospitalization. At the hearing on an ACT petition, a psychiatrist or qualified advanced practice registered nurse is required to testify in person. HRS § 334-126(g). That testimony:

> shall state the facts which support the allegation that the subject meets all the criteria for assisted community treatment, provide a written treatment plan, which shall include non-mental health treatment if appropriate, provide the rationale for the recommended treatment, and identify the designated mental health program responsible for the coordination of care.
>
> If the recommended assisted community treatment includes medication, the testimony of the psychiatrist or [qualified] advanced practice registered nurse . . . shall describe the types or classes of medication which should be authorized, and describe the physical and mental beneficial and detrimental effects of such medication.

Id.

After hearing the evidence, if the family court finds that the evidence satisfies the requisite elements found in HRS § 334-121, "the family court shall order the subject to obtain assisted community treatment for a period of no more than one year. The written treatment plan submitted pursuant to section 334-126(g) shall be attached to the order and made a part of the order." HRS § 334-127(b). Then,

> If the family court finds by clear and convincing evidence that the beneficial mental and physical effects of recommended medication outweigh the detrimental mental and physical effects, if any, the order may authorize types or classes of medication to be included in treatment at the discretion of the treating psychiatrist or [qualified] advanced practice registered nurse . . . .

Id. Therefore, if the family court so decides, a medication regimen can be incorporated into an enforceable court order that is valid for up to one year. With an enforceable order, a treating psychiatrist or qualified advanced practice registered nurse "may prescribe or administer to the subject of the order reasonable and appropriate medication or medications, if specifically authorized by the court order, and treatment that is consistent with accepted medical standards and the family court order, including the written treatment plan . . . ." HRS § 334-129(a).

The question then becomes how the medication regimen is legally enforced if the subject individual refuses to consent to take medicine under the ACT order while the ACT order is in effect. And this is where an ACT order provides treatment options in a timeframe that is not otherwise available.

Without an ACT order, in general, to force a patient to take medication over the patient's objection, the patient needs to have been "committed to a psychiatric facility for involuntary hospitalization or is in the custody of the [Director of Health] and residing in a psychiatric facility," and a court must thereafter issue an order mandating treatment over the patient's objections. *See* HRS § 334-161(a).

As discussed below, this is not necessarily required if an individual is subject to an ACT order. With an ACT order, the individual may be physically forced to take medication *under the ACT order* if he is within an emergency department or admitted to a hospital:

> No subject of the order shall be physically forced to take medication under a family court order for assisted community treatment unless the subject is within an emergency department or admitted to a hospital, subsequent to the date of the current assisted community treatment order.

HRS § 334-129(b).[9] To transport the individual to a hospital emergency department for failure to comply with an ACT order, the individual may be taken by an interested party with the consent of the individual or "[i]n accordance with section 334-59." HRS § 334-129(c); *see also* Section II.D *supra* (the three mechanisms of emergency transport under HRS § 334-59(a)).[10]

Once at the emergency room, but before the individual can be forcibly medicated under the ACT order, ***a determination must be made***

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[9] The intent behind this provision is to ensure that the individual is in a location where forcible medication can be administered safely.

[10] Before effectuating compulsory transportation to an emergency department, the psychiatrist or qualified advanced practice registered nurse "shall make all reasonable efforts to solicit the subject's compliance with the prescribed treatment." HRS § 334-129(d).

that the individual is "imminently dangerous to self or others" to satisfy constitutional mandates. *See Suzuki*, 617 F.2d at 178. The individual is, therefore, provided with an "emergency examination": an "examination, which shall include a screening to determine whether the criteria for involuntary hospitalization listed in section 334-60.2 persists, by a licensed physician, medical resident under the supervision of a licensed physician, or advanced practice registered nurse[.]" HRS § 334-59(b).

If the emergency examination and screening reveals that the individual is imminently dangerous to self or others, then the individual can be "physically forced to take medication under a family court order for assisted community treatment," where such treatment "is indicated by good medical practice[.]" HRS §§ 334-59(b) & (d), 334-129(b); *cf. Kotis*, 91 Hawai'i at 330 n.14, 984 P.2d at 89 n.14 (the Legislature "allow[ed] for involuntary medication of a patient on an outpatient basis").[11]

Medication under an ACT order may be compelled in an emergency department as stated above, or during hospitalization. *See* HRS §§ 334-59(b) & (d), -60.3, -60.5(j). What is not required with an ACT order is the issuance of a new order for treatment over the patient's objections pursuant to HRS § 334-161.[12]

III. CONCLUSION

This analysis sets forth the Department's position in response to your inquiries regarding the meaning and functioning of chapter 334, HRS, and the ACT law. We conclude:

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[11] Although HRS § 334-129(d) provides that "refusal of treatment shall not, by itself, constitute a basis for involuntary hospitalization[,]" this provision is not an obstacle to the enforcement of an ACT order. An individual does not need to be formally involuntarily hospitalized pursuant to HRS § 334-60.3 to be forced to take prescribed medication under an ACT order.

[12] While HRS § 334-60.5(j) notes that a court, in granting a petition for involuntary hospitalization, may "authorize the involuntary administration of medication, where the subject has an existing order for assisted community treatment . . . and in accordance with the treatment prescribed by that order," nothing in the ACT law requires that a second order be entered to enforce an already existing ACT order.

(1) To be deemed "imminently dangerous to self or others," the individual does not need to be currently dangerous to self or others.

(2) Determinations surrounding whether a person is "dangerous to self" or "imminently dangerous to self or others" are mixed questions of fact and law.

(3) If an individual is not "imminently dangerous to self or others," the individual may be placed under an ACT order, if appropriate.

(4) An individual can be forcibly medicated under an ACT order if the individual is within an emergency department or admitted to a hospital, it is determined there that the individual is "imminently dangerous to self or others," and the administration of medication pursuant to the ACT order is indicated by good medical practice.

Very truly yours,

Dave Day
Special Assistant to the Attorney General and Deputy Attorney General

APPROVED:

Anne E. Lopez
Attorney General