Department of Law's Response to Legislative Affairs Agency's February 14, 2022 Memo Regarding Executive Order 121

February 18, 2022

As a general matter, the Legislative Affairs Agency memo dated February 14, 2022 reverses prior advice provided by the Legislative Affairs Agency, Division of Legal Services, dating back to 1995, regarding the use of executive orders. On April 24, 1995, the agency issued a memo advising then Senator Dave Donley that the Governor could use an executive order to move all of the functions of the Alaska Oil and Gas Conservation Commission (AOGCC) and the Alaska Public Utilities Commission (APUC) and eliminate those two commissions. The Division of Legal Services does not indicate in its February 14 memo why it now takes a different position regarding executive orders.

Leg Legal's Memo:

On the first day of this session, Governor Dunleavy transmitted Executive Order 121 (EO 121) to the House. This order will divide the Department of Health and Social Services (DHSS) into two new departments: the Department of Health (Health) and the Department of Family and Community Services (DFCS).

The Alaska Constitution, art. III, sec. 23, permits the governor to "make changes in the organization of the executive branch." Prior governors used executive orders to merge two departments together and to transfer functions from one department to another department. Direct precedent also exists for splitting an existing department into two departments. However, little authority sheds light on the permissible scope of an executive order.

Department of Law response:

Here, the Legislative Affairs Agency, Division of Legal and Research Services ("Leg Legal") only provides a partial citation to the constitutional provision that gives the governor the authority to issue executive orders. The full citation is critical to the legal analysis and is set forth below:

> The governor **may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders.** The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.

Alaska Const. art. III, sec. 23. (emphasis added)

Thus, executive orders may be used to *either* make changes in the organization of the executive branch or in the assignment of functions among its units. EO121 does both of these things but nothing more.

The use of executive orders was discussed at the Alaska Constitutional Convention proceedings and a review of those proceedings (pages 2226-2229) makes clear the delegates viewed the use of the executive order was important to the concept of a strong executive.

Leg Legal's Memo:

The Alaska Supreme Court has considered a challenge to the creation of a new department by executive order. EO 55 created the Department of Corrections in 1983. About three decades later, a prisoner filed a *pro se* lawsuit alleging, among other claims, that "DOC's creation by executive order violated the separation of powers doctrine." The Alaska Supreme Court's analysis of this claim was cursory: it found "no merit" to the argument and simply noted that "the Constitution itself, in article III, section 23, clearly empowers the executive to adjust the organization of its agencies."

Department of Law response:

In the paragraph above, Leg Legal cites *Rae v. State*, 407 P.3d 474,477 (Alaska 2017). This citation to *Rae v. State* underscores that an executive order splitting a department is permissible and does not violate separation of powers. In the above paragraph, Leg Legal somewhat glosses over the salient point in the Court's decision: that the Constitution *clearly* empowers the governor to make organizational changes and reassign functions. Indeed, there have been 118 previous executive orders to date that have done just that.

The power of the governor to reorganize principal departments is not qualified or restricted. Separation of powers is maintained by the legislative veto contemplated by art. III, sec. 23.

Leg Legal's Memo:

Similarly, past attorney general opinions have not substantively analyzed whether creating a new department within the executive branch is constitutional—they simply presume the act is constitutional.

Department of Law response:

No analysis is required because the constitution already provides that the executive branch will consist of up to 20 principal departments. AK Const., Art III, Sec. 22.

The governor has the power to supervise each principal department. AK Const., Art. III, Sec. 24.

Most importantly, the creation of a new department by executive order is not new. Although somewhat buried in a footnote, Leg Legal does identify in footnote 6 that EO 39 created the Department of Transportation and Public Facilities.

Leg Legal's Memo:

Attorney general opinions have also endorsed the practice of amending statutes to effectuate department changes: for example, the 1979 opinion cited above contains a footnote stating that "[u]nder Article III § 23 of the Alaska Constitution and AS 24.30.130(b), executive orders can create statutory law" and attached EO 39 as an appendix. But EO 121 differs vastly in scope from prior orders—while EO 39 was only seven pages in length and it enacted eight new statute sections, the document length and the breadth of statutory changes contained in EO 121 is unprecedented.

Department of Law response:

Again, the Alaska Constitution, art. III, sec. 23 (which Leg Legal selectively cites), allows executive orders to have "force of law." This requires changes to statutes—if not, there would be no need for the legislature to have the opportunity to veto the governor's proposed executive order.

There is no legal requirement that an executive order be short or limited in scope. Leg Legal's citation to an appendix to a 1979 opinion of this office should not be interpreted as binding authority for the inference Leg Legal subjectively makes. And, the inference is wrong. For example, EO 107 contained 91 sections. The Constitution does not require that an EO have prior precedent.

The length and breadth of EO 121 merely underscores the importance of splitting DHSS for administrative efficiency. DHSS is the largest department with the largest budget. Its split enables reassignment of functions for efficient administration. It will allow the resulting departments to do a better job of serving Alaskans.

Leg Legal's Memo:

EO 121 also dwarfs EO 55 in breadth. The latter was 16 pages long and almost exclusively consisted of amendments to then-existing statutes that made conforming grammatical changes such as amending "Division of Corrections" to "Department of Corrections" (or amending "Commissioner of Health and Social Services" to "Commissioner of Corrections"). The creation of new statute sections in EO 55 was confined to only 11 lines of text in one section. In contrast, EO 121 is 100 pages long and makes numerous amendments to existing statutes, enacts and repeals over 100 statute sections, and amends policy that is currently codified in statute. In sum, EO 121 looks more like a bill than any previous executive order.

Department of Law response:

These are conclusory statements with no legal citations or support. All executive orders "look like bills." Further, executive orders have been of varying size. As noted above, EO 107 contained 91 separate sections.

Leg Legal's Memo:

Before reviewing EO 121 I searched for caselaw that would define the scope of a governor's ability to create or amend existing statutory law. Unfortunately I could find none. Nevertheless, the bounds of executive authority is implied by the separation of powers doctrine. Our constitution vests the legislative power exclusively in the legislature. The executive branch would usurp this power if it could enact legislation via executive order. And yet the governor must have some ability to amend statutes, otherwise he could not effectuate art. III. sec. 23. Thus, while the line separating a permissible executive order from an impermissible policy enactment is ill-defined, a line nevertheless exists.

Department of Law response:

Leg Legal provides no legal support for the above conclusion. If Leg Legal had considered the full text of art. III, sec. 23, it would see that the separation of powers line is clearly drawn:

> "The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor."

This protection of the equal branches of government was contemplated by the framers. EO 121 does not attempt to exceed the bounds of art. III, sec. 23, or to impinge upon legislative power. It is instead narrowly tailored to turn a giant department into two more manageable ones, which is clearly permitted by the constitution.

Leg Legal agrees that the governor has "some ability" to change statutes. However it suggests this should also be limited to be consistent with former EOs. There is no legal basis to support this position. Suggesting the governor's power is limited to reorganization of departments or reassignments that are short or limited in scope would abrogate the governor's constitutional reorganization power.

Leg Legal's Memo:

Having watched recent presentations before both the House and Senate Health & Social Services Committees, I understand that the governor's administration agrees that it would be inappropriate to use EO 121 to enact substantive changes to statute. That assessment comports with the advice Legislative Legal Services gave to the legislature last year regarding EO 119.

Department of Law response:

As set out in the LAA's Constitutional handbook: "[**The reorganization] provision bolsters the governor's management powers by simplifying the task of altering the organization of the executive branch.** It does not apply to the organization of the legislative or judicial branches. The organization of the executive branch is a legislative function, and without this provision, the governor would be required to introduce a bill to accomplish any organizational objectives. A bill would require the expenditure of time and political resources; it would require a majority vote in both houses; and in the end it might not be entirely to the governor's liking. While the procedure in this section does not guarantee success, it definitely biases the outcome in favor of the governor's plan. Use of the executive order to restructure the administrative system, subject to the legislature's review, was first adopted by Congress in the Reorganization Act of 1932. It became a popular modernization reform in the states thereafter. Today, most governors and the U.S. president possess it, as a matter of either constitutional or statutory law. **Changes to those aspects of executive agency structure and organization that are not set in statute do not require the use of this procedure by the governor**." Gordon Harrison, Alaska Legislative Affairs Agency, "Alaska's Constitution, A Citizen's Guide," p. 87 (emphasis added).

Civil Division Director Kraly's use of "substantive" is a short-hand reference to recognize that only the legislature can create new law and that the governor's reorganization power has limits. The reorganization power may be used only to "make changes in the organization of the executive branch or in the assignment of functions among its units which [the governor]

considers necessary for efficient administration." Technically speaking, all statutory changes made by EOs are "substantive" if enacted.

In evaluating the enumerated concerns that Leg Legal has raised, we will use the constitutional standard to evaluate whether, in accordance with Alaska Const. art. III, sec. 23, any change is an **organizational change** or a **reassignment of an executive branch function** from one unit to another. Because again, it is these constitutional provisions that provide the legal standard for executive orders, not conversational terminology such as “substantive change.”

Leg Legal's Memo:

With that context, I have reviewed EO 121 in search of provisions that might enact a substantive change to law or that pose other problems, such as poor drafting technique or the introduction of statutory inconsistencies. For the reasons documented below, EO 121 contains several dozen sections that warrant the legislature's consideration.

Sec. 2. This section relates to criminal history background checks administered by the Department of Public Safety. Page 3, line 2, of EO 121 permits a background check to be run for Health for an entity listed in AS 47.32.010(c), but AS 47.32.010(c) defines entities that are regulated by DFCS, not Health. It is unclear why a reference to subsection (c) was added here.

Department of Law response:

This is a **reassignment** of an executive branch function. Section 2 amends AS 12.62.400(a), regarding national criminal history record checks for individuals and entities subject to AS 47.05.310, to separate individuals and entities under the authority of the Department of Health (DOH) from those under the authority of the Department of Family and Community Services (DFCS). AS 47.32.010(c) is added because the entities regulated by DFCS would still require background checks.

Leg Legal's Memo:

Sec. 3. This section amends AS 12.65.120(a), a statute relating to the state child fatality review team. Currently, this team exists in DHSS and includes a social worker with DHSS who is appointed to the team by the commissioner of health & social services. EO 121 makes a substantive change by moving the child fatality review team to Health, but stating that the social worker must come from another department (DFCS) and be appointed by another commissioner (the commissioner of family and community services).

Department of Law response:

This is an **organizational change**. Section 3 amends AS 12.65.120(a), establishing the state child fatality review team, to state that the team is within the Department of Health and that the social worker team member is within the Department of Family and Community Services and appointed by the commissioner of family and community services. In accordance with current AS 12.65.120(a), the state child fatality review team is also composed of prosecutors appointed by the attorney general, and an investigator with the state troopers appointed by the commissioner of public safety. There is nothing out of place about this reorganization from DHSS to Department of Health.

Leg Legal's Memo:

Sec. 5. This section replaces a chapter cite ("AS 47.80") with a citation to a single statute ("AS 44.29.600"). It is unclear why the executive order changes a chapter cite to a section cite or what effect the change might have.

Department of Law response:

This is a **reassignment** of an executive branch function. Section 5 amends AS 14.30.231, naming the Governor's Council on Disabilities and Special Education as the advisory panel for education of children with disabilities, so that the statutory reference for the council is correctly expressed as AS 44.29.600 (Governor's Council on Disabilities and Special Education) rather than AS 47.80 as a whole. To track the transition more closely, we would be willing to substitute 'AS 44.29.600 – 44.29.670', or 'AS 44.29.600 – 44.29.690' to track our accidental omission of the definitions section for the statutes addressing the council. This technical omission appears to be the type of correction that the revisor of statutes would make based upon past practice of LAA. If necessary, however, the administration is willing to submit a bill to fix this.

Leg Legal's Memo:

Sec. 14. Currently DHSS's commissioner sits on the Emergency Response Commission. This section names the Commissioner of Health to that commission, but not the Commissioner of DFCS. This reflects a change in policy, as the commissioner who oversees all of the programs to be housed in DFCS would no longer partake in the Emergency Response Commission.

Department of Law response:

This is an **organizational change or reassignment** of an executive branch function. It also avoids policy change by avoiding the addition of a second commissioner (the DFCS commissioner) to an existing commission without action of the legislature. Prior memoranda issued by Leg Legal identified the addition of more than one commissioner on an existing board or commissioner as a concern. For this reason, EO 121 consistently names only one commissioner to a board, commission, or committee, where applicable.

Section 14 amends AS 26.23.071(b), to state that the commissioner of health sits on the Alaska State Emergency Response Commission. This reassignment is not substantive. The functions of the Department of Family and Community Services address juvenile justice, termination of parental rights, and licensure of foster homes, child placement agencies, and runaway shelters. Issues with respect to disasters—for example, public health emergencies, epidemiology, licensure of medical and other facilities, medical assistance, and licensure of emergency medical services personnel and mobile intensive care paramedics—sit squarely with the Department of Health.

Leg Legal's Memo:

Sec. 15. Page 9, lines 7 - 8, changes "fees received under AS 47.32" to "fees received by entities listed under AS 47.32.010(b)." This new language is narrower and contains a qualification that does not exist in current statute. It is unclear what effect, if any, this amendment will cause. This section relates to Health, but the same issue exists in the statute covering DFCS, as documented below for sec. 16.

Sec. 16. This section makes the same change to statute as that flagged for sec. 15, but in relation to DFCS; accordingly, it references AS 47.32.010(c) instead of subsection (b).

Department of Law response:

These are related **organizational changes**. Sections 15 and 16 amend AS 37.05.146(c)(77) and add AS 37.05.146(c)(80), to change the name of the Department of Health and Social Services to the Department of Health. Also, section 16 transfers, to the new provision for the Department of Family and Community Services, a reference to income received from a state or federal agency for children in foster care. Sections 15 and 16 make precise citations to address which entity's licensing fees under AS 47.32 are available to which department. The precise citations are made for accuracy.

Leg Legal's Memo:

Sec. 27. This section enacts 21 new statutes, which are mostly renumbered statutes that currently exist in AS 47.30. However, EO 121 makes a nonconforming change to existing law in at least four statutes:

Department of Law response:

These are all **organizational changes or reassignments** of executive functions. Section 27 transfers sections regarding the Alaska Mental Health Trust Authority from former AS 47.30.011 - 47.30.061 to AS 44.25.200 - 44.25.295, and transfers sections regarding the long-term care ombudsman, established in the Alaska Mental Health Trust Authority, from former AS 47.62 to AS 44.25.300 - 44.25.390.

Leg Legal's Memo:

AS 44.25.210. This recodifies current AS 47.30.016. However, subparagraph (b)(2)(B) adds "established by AS 44.29.600," which does not exist in the current statute. It is unclear what effect this change might have.

Department of Law response:

This is an accurate citation to the relocated statute establishing the Governor's Council on Disabilities and Special Education and is consistent with the remainder of subsection (b)(2). It is nothing more than a finder's aid.

Leg Legal's Memo:

AS 44.25.260. This recodifies current AS 47.30.041. The current statute states that the commissioner of DHSS is an advisor to the board of the Alaska Mental Health Trust Authority. The new statute would designate the commissioner of Health—but not DFCS—as an advisor to the board. This would result in a substantive change to law, as the commissioner tasked with overseeing the Alaska Psychiatric Institute would no longer advise the Alaska Mental Health Trust Authority.

Department of Law response:

This is an **organizational change or reassignment** of function providing that after DHSS is split, the commissioner of health will remain as an advisor to the Mental Health Trust Authority board. It retains the existing number of commissioner advisors to the board, in accordance with existing AS 47.30.041.

A draft version of EO 121 would have named both the commissioner of health and the commissioner of family and community services as advisors to the Alaska Mental Health Trust Authority board. Leg Legal stated in a January 14, 2022 memo that this was problematic, as the legislature decided in 1991 to name three commissioners to the board. We agreed, which is why this section of EO 121 is a straightforward reassignment of an existing function.

Separately, because the Department of Health would retain licensing authority, Leg Legal's "oversight" concern is misplaced (see for example, Sec. 79 concerning proposed AS 47.32.010(b), which assigns centralized licensure functions over residential psychiatric treatment facilities to the Department of Health).

Leg Legal's Memo:

AS 44.25.270. This recodifies current AS 47.30.046. The section mandates that the Alaska Mental Health Trust Authority prepare a proposed budget each year. The new statute only requires that a copy of this proposed budget be provided to the commissioner of Health, not the DFCS commissioner. This is a change from current law, under which a copy of the proposed budget must be provided to the commissioner who oversees the Alaska Psychiatric Institute.

Department of Law response:

This is an **organizational change or reassignment of function**. Existing AS 47.30.046(b) provides that when the Mental Health Trust Authority submits its proposed budget, "the authority shall also provide a report to the Legislative Budget and Audit Committee, the governor, the Office of Management and Budget, the commissioner of health and social services, and all entities providing services with money in the mental health trust settlement income account, and shall make it available to the public." It does not create a new obligation.

Relatedly, maintaining the requirement that the report be submitted to only one commissioner is consistent with the recommendation made by Leg Legal in its March 2021 and July 2021 memoranda.

Leg Legal's Memo:

Sec. 28. The current statute (AS 44.29.020(a)) states that DHSS "shall administer the state programs of public health and social services, including…." This section will amend that statute so that it reads that Health "shall administer state programs, including ……" In other words, this change removes the qualification that currently exists in statute. The result is a much broader mandate that, essentially, permits Health to run *any* state program, not just those programs enumerated in the statute.

Department of Law response:

Section 28 makes **organizational changes** and **reassigns** executive branch functions. The word "including" exists in current statute (AS 44.29.020(a)). Any issues with interpretation of "including" could be addressed through a minor technical edit.

Section 28 **reassigns** the following functions to the Department of Family and Community Services: management of state institutions, child welfare services, the Alaska pioneers' home, and the Alaska veterans' home. Regarding mental health treatment and diagnosis, Section 28 distinguishes between the services under AS 47.30.660 - 47.30.915, provided by the Department of Family and Community Services, and those services still provided by the Department of Health. Section 28 also changes the name of the department from the Department of Health and Social Services to the Department of Health.

Leg Legal's Memo:

For additional problems related to this section, see the discussion below for proposed AS 44.30.020.

Secs. 29 - 32. These sections relate to fees for service and appear to bolster the statutory authority surrounding those fees. In other words, the executive order grants authority over a greater range of statutory services than currently exists. You may wish to ask the Department of Law for an explanation of these changes.

Department of Law response:

These sections make **organizational changes or reassign** executive branch functions. Specifically, Sections 29 - 31 make amendments to address the renumbering of provisions in AS 44.29.020(a), to address the transfer of certain mental health programs and services to DFCS and to change the name of the Department of Health and Social Services or

commissioner of health and social services to the Department of Health or commissioner of health, as applicable.

Assuming that Leg Legal means that the new citations to AS 44.29.800 – 44.29.890 add new fee authority, it is mistaken. This citation reflects a **reassignment** of executive branch functions: the Alaska Mental Health Trust Authority Board, that sat in AS 47.30 and thus within the range of the existing citation, now is transferred to a place outside of AS 47.30: AS 44.29.800 – 44.29.890. The new citation neither increases or decreases actual fee authority, if any.

Leg Legal's Memo:

Sec. 35. This section reenacts 26 statute sections that are currently codified in AS 44.29. Many of these reenactments are problematic.

Department of Law response:

These sections make **organizational changes or reassign** executive branch functions and as such are squarely within the governor's reorganization power.

Section 35 transfers sections regarding the Governor's Council on Disabilities and Special Education from AS 47.80.030 - 47.80.095 to AS 44.29.600 - 44.29.670, transfers sections regarding the statewide independent living program from former AS 47.80.300 - 47.80.330 to AS 44.29.700 - 44.29.730, transfers sections regarding the Alaska Commission on Aging from AS 47.45.200 - 47.45.290 to AS 44.29.750 - 44.29.795, and transfers sections regarding the Alaska Mental Health Board from former AS 47.30.661 - 47.30.669 to AS 44.29.800 - 44.29.890.

Leg Legal's Memo:

AS 44.29.650. This recodifies current AS 47.80.080. The spanned citation that currently exists in statute is "AS 47.80.030 - 47.80.090." With the renumbering that EO 121 effectuates, that spanned citation should be updated to read "AS 44.29.600 - 44.29.660," however, this section contains what appears to be a drafting error and actually reads "AS 44.29.600 - 44.29.670."

Department of Law response:

Rather than setting up a drafting error, as Leg Legal argues, EO 121 fixes an error and therefore is just a **reassignment** of executive branch functions. Specifically, the span cite in

EO 121 takes in current AS 47.80.095, a statute that is omitted from the spanned citation in current *AS 47.80.080.*

Leg Legal's Memo:

AS 44.29.660. This recodifies current AS 47.80.090, which grants a statutory mandate to the Governor's Council on Disabilities and Special Education. Subsections (5) and (9) in the current statute direct this council to work with DHSS on an annual plan "prescribing programs that meet the needs of persons with developmental disabilities as required under" federal law and to submit to the commissioner of DHSS a proposed interdepartmental program budget for services to disabled persons. The revisions in EO 121 change this to only include Health, not DFCS, which results in the commissioner and department that oversee Juvenile Justice, OCS, API, and the Pioneers Home being excluded.

Department of Law response:

This is an **organizational change** that transfers an existing responsibility of DHSS to the new Department of Health. This is consistent with federal law requiring a single Designated State Agency (DSA) named for GCDSE. *See* PL 106–402, Sec. 125 (Developmental Disabilities Assistance and Bill of Rights Act of 2000).

Additionally, AS 44.29.660 is directed at medical assistance and Medicaid: subject matter that would lie within divisions of the Department of Health (health care services, behavioral health, senior and disabilities services).

Leg Legal's Memo:

AS 44.29.670. This recodifies current AS 47.80.095. Subsection (b) directs "the department" to consider the vision of support services needed for new and existing services for persons with physical and mental disabilities. But whereas the current statute applies to DHSS, the amendment in this section leaves the term "department" undefined.

Department of Law response:

We disagree that "department" requires a definition because AS 44.29.670 follows the drafting convention of current AS 47.80.095 and because the only department referred to in AS 44.29 is the Department of Health. To the extent that a definition is required, revision could be accomplished by the revisor of statutes or through a bill.

Leg Legal's Memo:

AS 44.29.750. This recodifies current AS 47.45.200. The current statute names the commissioner of DHSS (or the commissioner's designee) as a member of the Alaska Commission on Aging. The amendment in this section changes that to the commissioner of Health. This constitutes a substantive amendment to law, as it results in the commissioner responsible for overseeing the Pioneers' Home being removed from the Alaska Commission on Aging.

Department of Law response:

This is an **organizational change** or reassignment of an existing function. The commissioner of health was selected rather than both resulting commissioners in order to retain the commission's existing numerical composition. Additionally, current AS 47.45.200 and proposed AS 44.29.750 name the chair of the Alaska Pioneers' Homes Advisory Board as a member of the Alaska Commission on Aging. As mentioned previously, EO 121 consistently avoids adding additional members to boards and commissions in good faith following commentary previously provided by LAA in its 2021 memoranda.

Leg Legal's Memo:

Sec. 36. This enacts new statute sections to establish DFCS (art. I) and the Pioneers' Homes Advisory Board (art. 2). The amendments in art. I are problematic.

AS 44.30.020. This statute section should be reviewed in conjunction with sec. 28. The current statute (AS 44.29.020) requires DHSS to administer the state programs of public health and social services. Subsection (b) of the current statute directs that DHSS "shall comply with AS 15.07.055 to serve as a voter registration agency to the extent required by state and federal law, including 42 U.S.C. 1973gg (National Voter Registration Act of 1993)." By operation of AS 44.30.020, EO 121 removes that mandate from DFCS. This constitutes a substantive change in law, as no other statute will give DFCS the mandate to serve as a "voter registration agency." The effect of this change is unknown; AS 15.07.055(a)(2) currently designates "divisions of [DHSS] *that provide public assistance* through the food stamp program, Medicaid program, Special Supplemental Food Program for Women, Infants, and Children (WIC), and Alaska temporary assistance program" as voter registration agencies. And while EO 121 appears to transfer those divisions to Health, proposed AS 47.06.010(1) would direct DFCS to "administer applicable *public assistance*."

AS 44.30.030. This statute section derives from current AS 44.29.022. But in this new statute, subsection (c) adds language referencing "the community behavioral health system" that does

not exist in the current statute (see AS 44.29.022(d)). This new language may constitute a substantive change to law, and you may wish to ask the Department of Law for an explanation of its purpose.

Department of Law response:

Section 36 **reassigns** executive branch functions.

With regard to AS 44.33.020, current AS 15.07.055(a)(2) names the divisions of the current DHSS that "provide public assistance through the food stamp program, Medicaid program, [WIC food assistance program], and Alaska temporary assistance program" as voter registration agencies. None of those divisions move outside the Department of Health under EO 121, and AS 47.06.010(1) does not change that outcome.

Leg Legal correctly points out a drafting error in AS 44.33.030. While the error is not catastrophic or unconstitutional, the state would be best served by correction of this error through a companion bill.

Leg Legal's Memo:

Sec. 41. This section amends the statutory delegation of duties that currently apply to DHSS, but would only apply to Health after a department split. "Welfare services" and "institutional care" are removed from Health's mandate in proposed subsections AS 47.05.010(10) and (11). It is unclear why these terms are taken out when Health will be tasked with administering public assistance. This may constitute a substantive change in law, and I advise that you ask the Department of Law for an explanation.

Department of Law response:

The changes in AS 47.05.010 are a **reassignment** of executive branch functions. "Welfare services" and "institutional care" transfer to DFCS. Public assistance—e.g., Medicaid, Alaska temporary assistance, heating assistance, food stamps, and other forms of adult public assistance, even if commonly considered "welfare" remain with the Health.

Leg Legal's Memo:

Sec. 42. Currently, AS 47.05.090(a) states that DHSS may "enter into the Interstate Compact on Adoption and Medical Assistance and supplementary agreements with agencies of other states for the provision of adoption and medical assistance under AS 47.07 and other

provisions of this title for eligible children with special needs." This section amends the law by stating that Health and DFCS "may **cooperate**" on this matter.

Presumably this means that they may cooperate with each other, but the language is ambiguous. It also likely constitutes a substantive change in law: the current status is that one principle department makes this agreement. If EO 121 goes into effect, then two departments will have to decide this. What if the commissioners disagree? Would this statute authorize one department to enter the compact if the other department chooses not to?

Department of Law response:

This is an **organizational** change. In section 42, EO 121 preserves permissive text in current AS 47.05.090(a) that allows DHSS discretion to enter the Interstate Compact on Adoption and Medical Assistance. The amendments posed by EO 121 provides equivalent discretion for Health and DFCS to cooperate and enter into the Compact.

Leg Legal's Memo:

Sec. 44. AS 47.05.300(a) is vague. Currently the subsection applies to an individual or entity that is required by statute or regulation to be licensed or certified by *DHSS*. After the revision, the plain language would make it apply to an "individual or entity that is required by statute or regulation to be licensed or certified…." As it is worded, there is no qualification that the license or certification must come from Health or DFCS. Would the amendment to this section then make it apply to any entity that is required to be licensed under Title 8?

Department of Law response:

The amendments proposed in Section 44 are **reassignments** of executive functions currently held by DHSS to both Health and DFCS.

The amendments would not make AS 47.05.300(a) apply to entities required to be licensed under Title 8 because Title 8 licenses ***individuals*** not ***entities***. Further, entity is clearly defined in AS 47.05.390 (see section 64). While it may have been more clear to retain the deleted word "by," the series-qualifier canon of statutory construction logically applies. Because a straightforward, parallel construction involves all verbs in the series—i.e., “is required” and “is eligible”—the postpositive modifier starting with “from” applies to the whole series: licenses, certifications, and eligibility for payments.

Leg Legal's Memo:

Secs. 45 - 49. A similar problem exists here as in sec. 44. After the revisions in EO 121, the word "department" will be undefined for AS 47.05.310. The result is that the term will not serve as a qualifier in these statute subsections. Once again, would the resulting law apply beyond Health or DFCS to, for example, an individual licensed by the Department of Commerce, Community, and Economic Development?

Department of Law response:

This response is related to the response to Sec. 44.

These changes are all **reassignments** of executive branch functions. Leg Legal suggests that the background check provisions of AS 47.05.310 – 47.10.390 are now vague for not identifying a specific department, or for perhaps implying even that a profession licensed under AS 08 could now call for background checks. However AS 47.05.300(a) specifically identifies the applicable departments: the Department of Health and the Department of Family and Community Services. This specificity leaves no ambiguity. Sections 45-49 all specifically reference the "department with licensing or certification authority for the individual" which of course would be either the Department of Health or the Department of Family and Community Services as referenced in AS 47.05.300(a).

Leg Legal's Memo:

Sec. 51. This section amends AS 47.05.310(h) so that the resulting law would state that an entity or individual that is not required to be licensed or certified by either department is ineligible to receive a payment from the "applicable" department. I do not know how to interpret this. If neither department requires a person to be licensed, then which department is the "applicable" department?

Department of Law response:

To the extent that EO 121 changes the references in AS 47.05.310(h) from "the department" to "either department" or "the applicable department", the amendments **simply reassign executive branch functions** in accordance with the amendments to AS 47.05.300(a).

To the extent that the memorandum questions how AS 47.05.310(h) operates in practice, the memorandum strays outside the scope of the subject. The memorandum's issues would be the same if the existing reference to "the department," i.e., the Department of Health and Social

Services, stayed in place. Additionally, those issues are nonexistent: all that AS 47.05.310(h) does, regardless of changes made by EO 121, is clarify that an individual who need not be licensed or certified nonetheless will be denied eligibility for payments if the agency discovers misdeeds through information obtained outside of a licensure or certification requirement.

Leg Legal's Memo:

Sec. 56. This section has the same problem as sec. 51. Which department is the "applicable" department if neither department requires the individual or entity to be licensed or certified?

Department of Law response:

And we have the same answer—see above remarks for sec. 51 (and related Sec. 44 - 49 concerning interpretation of AS 47.05.300(a)).

Leg Legal's Memo:

Sec. 63. The effect of this section may constitute a substantive change to the law. The current statute permits an individual dissatisfied with a decision of a variance committee to apply to the commissioner of DHSS for reconsideration. This section splits that review authority between the two new commissioners, resulting in two bifurcated reconsideration channels. Whereas the current commissioner of DHSS would be aware of *all* reconsideration requests that an individual applies for, under EO 121 the commissioner of DFCS would not be aware of such requests in Health, or vice versa.

Department of Law response:

Frankly, this is the point of the executive order—to establish different functions in different departments, which would be heard before different commissioners.

The language of Section 63 is a **reassignment** of executive branch functions. The Leg Legal memorandum takes the new language out of context and expresses concern that somehow a variance committee could report to both commissioners, leading to a conflicting result. In reality, we see little confusion over which matters will go before the Department of Health and which before the Department of Family and Community Services. For example, an individual seeking a variance to work in a child care facility would seek a variance from the commissioner of health; if that same individual wanted to work in a runaway shelter or be a

foster parent, the individual would seek a variance from the commissioner of family and community services.

Leg Legal's Memo:

Sec. 65. This section adds a new chapter to Title 47. The following sections in that new chapter are problematic.

AS 47.06.010. Paragraph (2) directs DFCS to "adopt regulations necessary for the conduct of its business and for carrying out federal and state laws." This language broadens the scope of rulemaking authority above what is currently bestowed on DHSS. Current AS 47.05.010(2) limits this provision to regulations necessary for carrying out "federal and state laws granting adult public assistance, temporary cash assistance" and other assistance programs.

Additionally, currently AS 47.05.010(5) directs DHSS to "cooperate with the federal government in matters of mutual concern pertaining to adult public assistance…." This direction was omitted in this new statute despite the fact that AS 47.06.010(1) directs DFCS to "administer applicable public assistance."

AS 47.06.030. Currently, AS 47.05.012 grants DHSS the authority to adopt or amend a regulation that incorporates by reference material from a preapproved list of documents. EO 121 would enact this new statute to grant that same authority to DFCS. However, the list of approved documents in AS 47.06.030 is drastically reduced from that contained in AS 47.05.012. This section clearly constitutes a substantive change to the law.

Department of Law response:

The changes to AS 47.06.010 and AS 47.06.030 are **organizational changes or reassignments** of executive functions. Through AS 47.06, EO 121 carves out responsibilities specific to DFCS. The chapter is sequentially placed after AS 47.05, which establishes the responsibilities of Health. Throughout AS 47.06, EO 121 simply reassigns executive functions currently performed by DHSS to DFCS.

Proposed AS 47.06.010(2) simply **reassigns executive branch functions**. Its language is not an exact mirror of the duties listed in AS 47.05.010(2) because the EO's reorganizational intent is for those duties to lie with the Health rather than DFCS. The comparable language in AS 47.06.010(2) addresses the duties of the *Department of Family and Community Services*, as expressed in AS 44.30.020, AS 47.06.010(1), and AS 47.32.010(c).

Similarly, EO 121 would revise AS 47.05.010(2) to require that the Department of Health continue to "adopt regulations necessary for the conduct of its business and for carrying out

federal and state laws granting *adult* public assistance, temporary cash assistance, diversion payments, or self-sufficiency services for needy families under the Alaska temporary assistance program, and other assistance." These duties are all within the umbrella of adult public assistance, general relief, and, for example, Medicaid. The executive order does not transfer those duties to the Department of Family and Community Services.

Likewise, the concern expressed by Leg Legal in footnote 18 that administration of adult public assistance will be "given to two principle [*sic*] departments" is without foundation. The duty to cooperate with the federal government with respect to adult public assistance, as expressed in AS 47.05.010(5), cannot have an equivalent in AS 47.06, because AS 47.06 does not assign matters of *adult* public assistance to the Department of Family and Community Services. Leg Legal's commentary on AS 47.06.010(2) and AS 47.05.010(2) reflect lack of understanding of DHSS programs and apparent conflation of "public assistance" and "adult public assistance." Public assistance is not the same as adult public assistance.

With respect to proposed AS 47.06.030, this is a **reassignment** of an executive branch function currently held by DHSS to DFCS. Any language that appears to be "reduced" from proposed AS 47.06.030 is retained in the sections applicable to Health, as reassigned through the executive order.

Leg Legal's Memo:

AS 47.06.050. This section, similar to sec. 42 (as discussed above), permits Health and DFCS to inter into the Interstate Compact on Adoption and Medical Assistance. However, the language in this section differs slightly from that in sec. 42, and it is unclear what effect, if any, the different wording would cause. Additionally, the definition of "state" found in this section is not present in sec. 42.

Department of Law response:

See related discussion in Sec. 42. This is an **organizational** change. Under AS 47.06.050(a), the "Department of Family and Community Services and the Department of Health, in cooperation, may, on behalf of the state, enter into the Interstate Compact on Adoption and Medical Assistance." This provision envisions both the commissioner of health and the commissioner of family and community services entering the Compact jointly.

Leg Legal's Memo:

Sec. 72. This section amends AS 47.30.523(a). The current version of the statute declares that it "is the policy of the state that ... the community mental health program be coordinated, to the

maximum extent possible, with the programs established under AS 47.80…." The executive order retains that language, but it makes no amendment to this statute to reflect that the Governor's Council on Disabilities and Special Education as well as the Statewide Independent Living Council have been repealed out of AS 47.80 and reenacted into AS 44.29. This is a major drafting error that has the effect of substantively changing the law: if EO 121 goes into effect, it would no longer be the explicit "policy of the state" that the community mental health program be coordinated with the Governor's Council on Disabilities and Special Education and the Statewide Independent Living Council.

Department of Law response:

This is a **reorganization or reassignment** of executive function.

The only change made by Sec. 72 is the correction of a citation: AS 47.30.056 is replaced with AS 44.25.290.

The Leg Legal memo incorrectly quotes existing AS 47.30.523(a), which provides: "It is the policy of the state that … the community mental health program be coordinated, to the maximum extent possible, with the programs established under **AS 47.37, AS 47.65**, AS 47.80, and other programs affecting the well being of persons in need of mental health services." (Emphasis added.)

The conclusion that this is a major drafting error is wrong.

First, input from both the Governor's Council on Disabilities and Special Education (GCDSE) and the Statewide Independent Living Council (SILC) on the community mental health program would be retained through operation of the language "other programs affecting the well being of persons in need of mental health services."

Secondly, both the GCDSE and the SILC retain direct involvement in the development of the state's community mental health program as a component of the state's integrated comprehensive mental health program. See Sec. 27, AS 44.25.290, p. 20, lines 21 - 26 of EO 121. Both the GCDSE and the SILC retain their existing statutory obligations and purposes. The GCDSE is also able to provide significant input on the state's community mental health program through its selection of a member of the Alaska Mental HealthTrust Authority board.

If anything, this is a technical error that could be easily rectified through insertion of "AS 44.25" in AS 47.30.056(a)(3).

Leg Legal's Memo:

Sec. 78. This statute would task both DFCS and DOH with preparing, and periodically revising and amending, a plan for an integrated mental health program. This may constitute a substantive change to the law, as assigning one task to two departments could frustrate legislative oversight.

Department of Law response:

This is a **reorganization or reassignment** of executive function. The above comment reflects a lack of basic understanding of the state's integrated comprehensive health program process, including built-in legislative oversight mechanisms.

In Sec. 78, AS 47.30.660 is amended to effectuate division of powers held by DHSS to Health and DFCS. It identifies the cooperative powers and duties of the Department of Health and the Department of Family and Community Services with respect to the integrated comprehensive mental health programs and integrated comprehensive system of care. It also makes amendments to address the transfer, from AS 47.30 to AS 44.25, of statutes regarding the Alaska Mental Health Trust Authority.

The state's integrated comprehensive mental health program and related budget is a cooperative effort by the Governor's office, DHSS, the Alaska Mental Health Trust, board advisors (represented by DNR and DOR), and the members of the Alaska Mental Health Authority's board, which includes persons selected by the Alaska Mental Health Board, the Governor's Council on Disabilities and Special Education, the Advisory Board on Alcoholism and Drug Abuse, the Alaska Commission on Aging, the Alaska Native Health Board, and a person selected by the Authority. It is hard to imagine that with this confluence of input that legislative oversight would be obstructed by the inclusion of an additional department with valuable input into the process, especially when oversight is accomplished through an annual report to the Legislative Budget and Audit Committee (AS 47.30.046(a)) and a related public report describing the trust's assets, earnings, budget recommendations, and the reasons for the budget recommendations. AS 47.30.046(b).

Leg Legal's Memo:

Sec. 84. This section substantially rewrites AS 47.32.050(a). Perhaps the rewrite does not change the meaning of the statute, but it nevertheless effectuates a substantial rewording of existing statute.

Department of Law response:

This is a **reassignment of executive function**. Here, AS 47.32.050(a) is revised to provide that the department with licensing authority over an applicant entity may issue a provisional license, and that the same department must conduct an inspection and investigation prior to issuing a provisional license.

It is unclear why Leg Legal included a reference to Section 84, or why this language is included. There is no prohibition against a substantial rewording of a statute in an executive order so long as the proposed change is a reorganization or reassignment of executive function.

Leg Legal's memo lacks legal analysis here and includes what appears to be superfluous commentary.

Leg Legal's Memo:

Secs. 89 - 90. These sections appear to contain errors, which make them difficult to understand. Both of these sections amend a subsection of AS 47.32.090 to read "[t]he department **with licensing authority under (a) of this section….**" But (a) of this statute section does not grant licensing authority; it instead states that a person may file a complaint "with the department that has licensing authority." These sections appear to be referring to the department with which the claim is filed, but as they are written it is unclear to what department or entities these provisions would apply. It would be helpful if this language was more clear. Another drafting error occurs toward the bottom of sec. 90, which enacts a sentence reading: "The Department of Health and the Department of Family and Community Services shall adopt regulations to implement this subsection for the entities licensed by that department." This sentence is ungrammatical.

Department of Law response:

Sections 89 and 90 **reorganize or reassign** executive functions by splitting existing DHSS functions between Health and DFCS.

These changes are explained in consideration of section 88. Section 88 would amend AS 47.32.090(a) to insert "that has licensing authority for that type of entity under AS 47.32.010" after "department." The effect of this change is to divide licensing authority appropriately between the resulting departments. By incorporating reference to AS 47.32.010 (as repealed and reenacted pursuant to Section 79), it is easy to track the responsibilities of the new departments.

Leg Legal's Memo:

Sec. 94. On page 81, line 14, the executive order changes the word "department" to "regulatory" in AS 47.32.130(b)(2)(A). This changes the sentence to require that formal written notice of a revocation or suspension decision include a statement of any "regulatory" requirement- instead of any "department" requirement - that the respondent submit a written response. This could constitute a substantive change to the statute.

Sec. 95. The same issue exists here as in sec. 94.

Department of Law response:

The amendments presented by Sections 94 and 95 are **organizational changes or reassignments** of executive functions with minor language changes to maintain grammatical integrity.

As amended by Sec. 94, AS 47.32.130 divides existing DHSS enforcement authority between Health and DFCS. The split of authority between the departments is clarified through reenactment of AS 47.32.010 (Sec. 79). Sec. 94 amends AS 47.32.130(a) to include a citation to the department with licensing authority pursuant to AS 47.32.010.

The change pointed out in the Leg Legal memo concerning AS 47.32.130(b)(2)(A) replaces "department requirement" with "regulatory requirement." Use of "regulatory" in this fashion is common and unlikely to create confusion. It maintains existing obligations for formal written notice.

Likewise, in Sec. 95, AS 47.32.140(a) is amended such that "any department requirement" becomes "any regulatory requirement." This usage is common and does not change the subsection's notice requirements.

Leg Legal's Memo:

Sec. 96. This section demonstrates the problems that result from having one statute apply to two different departments. The word "applicable" in this context is ambiguous. It seems that it is intended to refer to the same department "that provide[d] notice of a violation," but that is not obvious from the statute. As demonstrated above (see the discussions referencing both departments' mandate to administer public assistance), EO 121 results in some overlap in the function of the two new departments. If one department provides notice to an entity under AS 47.32.140, but the entity believes that the other department is the "applicable" department, how would this statute subsection be interpreted? Could the entity submit a plan of correction to the department that did not provide notice of the violation?

Department of Law response:

This is a **reassignment or reorganization** of existing executive function. There is no legal error.

As revised, AS 47.32.140(b) inserts "applicable" before the word "department" in two locations, changes "the" to "that" and clarifies that the department "that provides notice of a violation" may take enforcement actions.

It clearly states that an entity receiving a notice under subsection (a) shall submit a plan of correction to the "applicable" department, and that after perceived cure, the entity shall submit an allegation of compliance to the same department. Upon receipt, the "applicable" department may conduct follow-up investigation or inspective, after which time, the department that provided notice of violation may take additional enforcement actions. Since both departments will engage in licensing functions, these edits were necessary for clarity in how the reassignment of licensing to the two departments will operate. It does not change any core obligation or responsibility of the departments or the entities the "applicable" department will license.

Leg Legal's Memo:

Sec. 101. This section changes current statutory language from "within 15 days" to "not later than 15 days." The change may change the manner in which deadlines are calculated, which would be a substantive amendment of statute.

Department of Law response:

This is a **reassignment** of existing executive functions. The proposed changes insert the word "applicable" before "department" in two places, and rewords the appeal deadline for clarity in how the reassignment of licensing to the two departments will operate. It does not change any core obligation or responsibility of the departments or the entities the entities the "applicable" department will license.

Leg Legal's Memo:

Sec. 109. This section substantially rewords AS 47.32.180(c). The rewording is so substantial that it may change the way in which this subsection is interpreted. Furthermore, it is unclear why this statute would need to be amended in this manner to effectuate the department split.

Department of Law response:

This is a **reassignment** of existing functions. An executive order may reword a statute and may create new statutes. Here, AS 47.32.180(c) is reworded to provide specificity as to which department it applies to - no more and no less. Again, as noted above, since both departments will engage in licensing functions, these edits were necessary for clarity in how the reassignment of licensing to the two departments will operate. It does not change any core obligation or responsibility of the departments or the entities the "applicable" department will license.

Leg Legal's Memo:

Sec. 110. Currently, AS 47.32.190 states that the divisions within DHSS assigned to implement AS 47.32 "shall have access to any information compiled or retained by other divisions or' DHSS. This section amends the statute by isolating the two departments from each other. (For example, a division within DFCS could access information from other divisions within DFCS, but it could not access information from divisions within Health.) This constitutes a substantive change to the law, and it could frustrate the purpose of this statute, which is "to assist in administering the provisions or current AS 47.32.

Department of Law response:

This is a **reorganization and reassignment** of executive function. The separation of Department of Health and the Department of Family and Community Services is the purpose and intent of EO 121. Again, as noted above, since both departments will engage in licensing functions, these edits were necessary for clarity in how the reassignment of licensing to the two departments will operate. It does not change any core obligation or responsibility of the departments or the entities the "applicable" department will license.

It is imperative that licensing and procedures related to the entity types listed in AS 47.32.010(b)(e.g. hospitals, residential child care facilities, etc.) are conducted in accordance with privacy laws and agreements, and that information is not needlessly circulated between departments with separate missions and separate functions. These edits preserve the integrity of the current process and do not allow for broader sharing than was originally contemplated in the statute as it is exists now.

Leg Legal's Memo:

Sec. 116. This section amends AS 47.37.050, which creates an interdepartmental coordinating committee to assist "in formulating a comprehensive plan for prevention of alcoholism and drug abuse and for treatment of alcoholics, intoxicated persons, and drug abusers." This section removes the commissioner of DHSS as chairperson, and appoints the commissioner of Health as chairperson. The commissioner of DFCS does not serve on the committee, which means that the commissioner who oversees the Alaska Psychiatric Institute, Juvenile Justice, and OCS will not be part of the interdepartmental committee focused on alcoholism and drug abuse. This is a substantive change to the law.

Department of Law response:

This is a straightforward **reorganization or reassignment** of function that substitutes the commissioner of health for the commissioner of health and social services in three places in AS 47.37.050(a). The commissioner of DFCS was not added in order to avoid changing the composition of the coordinating committee. We omitted this because of LAA concerns over adding two commissioner in EO 119 (see LAA memoranda dated March and July 2021).

Leg Legal's Memo:

Sec. 118. This section changes an "and" to an "or," which changes the meaning of the statute. This is a substantive change to the law.

Department of Law response:

This is a **reorganization or reassignment** of existing functions, designed to comport as closely as possible with existing statutory language. Section 118 would amend AS 47.40.110 to reorganize DHSS into Health and DFCS. The "and" changed to an "or," as identified by Leg Legal, is qualified by the added language "as applicable." This ensures that persons providing services purchased by either Health or DFCS are licensed and supervised in the "applicable" manner pursuant to AS 47.32. The changes are organizational and an administrative assignment of function, not a change in program. The word "and" would be inappropriate because it would imply both are licensed under 47.32—which would be incorrect.

Leg Legal's Memo:

Sec. 119. This section adds qualifying language ("for purchases made by the respective departments") to a statute that authorizes DHSS to adopt regulations. This added language could constitute a substantive change to the law.

Department of Law response:

This is a **reorganization or reassignment** of existing functions. As proposed, Section 119 would amend AS 47.40.120 to reorganize DHSS into Health and DFCS, and adds clarifying language to require that the fees established pursuant to regulation are authorized by the correct department pursuant to AS 47.40.100 - 47.40.120.

Leg Legal's Memo:

Sec. 120. This section replaces DHSS with Health in AS 47.80.100(a). The statute currently mandates that DHSS, in conjunction with other departments, "plan, develop, and implement a comprehensive system of services and facilities for persons with disabilities that is consistent with the state plan adopted" by the Governor's Council on Disabilities and Special Education. The result of this amendment is substantive, as DFCS will no longer have a statutory mandate to engage in this process despite the fact that DFCS oversees programs that serve persons with disabilities, such as OCS, Juvenile Justice, and the Alaska Psychiatric Institute.

Department of Law response:

This is a **reorganizational change or reassignment** of executive function. Section 120 amends AS 47.80.100(a) to replace DHSS with "Department of Health" and update a citation. The reorganization of a department is within the governor's prerogative. This is another case of selective quotation by Leg Legal.

While there is no "statutory mandate," EO 121 does not change AS 47.80.100(a)'s language allowing the Department of Health and Department of Education and Early Development to coordinate with "other departments of the state as appropriate" to "plan, develop, and implement a comprehensive system of services and facilities for persons with disabilities that is consistent with the state plan adopted under AS 47.80.090(5) and is dispersed geographically within the state." It is likely that DFCS would become involved in planning through this permissive language though data sharing agreement or Memorandums of Understanding. The placement of the council in Health does not change the operations of the council going forward.

Leg Legal's Memo:

Sec. 121. Similar to sec. 120, this section replaces the commissioner of DHSS with the commissioner of Health in a statute that requires an annual report to the Alaska Mental Health Trust Authority that addresses helping persons with disabilities become gainfully employed in the general workforce. The result is that the commissioner of DFCS will no longer oversee this report, which is a substantive change to existing law.

Department of Law response:

This is a **reorganizational change or reassignment** squarely within the governor's reorganizational power. We omitted this as well because of LAA concern over adding two commissioner in EO 119 (see memoranda dated March and July 2021).

Leg Legal's Memo:

Sec. 125. This uncodified section states that a person who applied for assistance and was determined eligible under a statute that is repealed may continue to receive the assistance "so long as the person remains eligible." It is unclear under what statute a person who meets this criteria would "remain eligible."

Department of Law response:

Section 125 is a **transitional provision** intended to clarify that persons determined to be eligible for medical, public, or other assistance under a repealed statute will continue to receive the assistance without having to reapply. The language "so long as the person remains eligible" is consistent with existing requirements for ongoing eligibility.

Leg Legal's Memo:

Sec. 126. This uncodified section states that a facility or entity that is operating under a valid license or approval issued under a statute repealed or amended by EO 121 may continue to operate under that license or approval "as provided in this section." But it is unclear what "as provided" means, as the section offers no explanation. Without an explanation, this section could cause those facilities or entities to lose their license.

Department of Law response:

Section 126 is a **transitional provision** allowing facilities or entities operating under a license or approval issued under a statute that is repealed or amended by EO 121 to continue operating. The words "as provided in this section" retain their ordinary meaning, and refer to the section of uncodified law created by Sec. 126. There is no ambiguity.

Leg Legal's Memo:

Sec. 133. This uncodified section states that a department affected by EO 121 "may proceed to adopt regulations" to implement EO 121. The executive branch is therefore granting itself rulemaking authority.

Department of Law response:

Section 133 is a **transitional provision** that would amend uncodified law to allow any department affected by EO 121 to adopt implementing regulations. This language does not create any new powers not already held by a department.

REGULATIONS. A department affected by this Order may proceed to adopt regulations to implement this Order. The regulations take effect under AS 44.62 (Administrative Procedure Act) but not before the effective date of the corresponding enabling statute.

Leg Legal's Memo:

Conclusion. This executive order greatly exceeds the length and scope of prior executive orders, such as EO 39 and EO 55, that merged or split executive branch departments. Additionally, it contains a number of drafting errors, introduces ambiguity into the Alaska Statutes, and it amends statutes in a manner that may be considered as substantive. Given the breadth of statutory amendments needed to split a department as large as DHSS, a bill might be a more appropriate vehicle. Unlike an executive order, a bill going through the legislative process would permit the legislature to 1) identify and correct oversights and drafting errors, and 2) make policy decisions when necessary.

Department of Law response:

EO 121 is a constitutionally sound, systematic approach to splitting DHSS into two separate more efficient and effective departments. This executive order is squarely within the governor's reorganization power as set forth in article III, sec. 23. It is not overly broad; it was carefully drafted to not exceed the governor's reorganization power. In addition, while a bill is an alternative vehicle to accomplish the same result, a bill is not required nor it is necessary. A bill to accomplish this split would impede the governor's ability to accomplish organizational objectives with the goal of administrative efficiency.

Leg Legal's Memo:

Additionally, the errors documented above should not be considered an exhaustive list. I have merely reviewed EO 121 with the principle objective of identifying obvious drafting errors and examples of substantive statute revision. I have not, for example, reviewed the entirety of Titles 44 and 47 in search of additional statutes that should have been included in EO 121. I have also not reviewed all the statutes listed in secs. 123 and 134 - 137 to ensure those lists are error free (nor can I ensure that those lists are comprehensive). Therefore, the fact that a section of EO 121 is not discussed in this memo should not be considered as an endorsement of that section by Legislative Legal Services. There are likely other errors and problems that will only become apparent during implementation of EO 121.

Department of Law response:

Leg Legal provided a comprehensive review of retracted EO 119 in March and July of 2021 and those comments were carefully considered and incorporated into EO 121; any issues raised by Leg Legal that were not implemented in EO 121 were summarized and provided to Leg Legal. LAA was provided with final working draft of EO 121 in the fall of 2021 so that they could conduct a thorough review and the legislative and executive branches could work on these matters together. The response from Leg Legal to this work draft was not received until January 2022, with insufficient time to incorporate their comments prior to the start of the legislative session. This last minute analysis was both disappointing and frustrating and as noted above is without much, or any, legal merit.

In consideration of this exchange, EO 121 has been very carefully reviewed by the governor's administration, Leg Legal, and the Department of Law. Any unforeseen administrative, implementation, or policy issues may be addressed when they arise through regulatory action, a revisor’s memo, or a corrective bill.