MEMORANDUM

To: PHEA Model Law Drafting Committee

From: Rob Gatter, Reporter

Date: September 9, 2022

Re: Issues Following First Reading

This Committee approved a version of the Public Health Emergency Authorities Model Law that received both an informal and formal first reading as part of the Uniform Law Commission's 2022 Annual Meeting in July. The feedback the Committee received raises several issues, which are presented in this memorandum as the Committee prepares for its next drafting session on September 12, 2022. These issues are organized section-by-section based on the version of the PHEA Model Law presented at the ULC 2022 Annual Meeting.

Section 1: Title. No issues

Section 2: Definitions.

- Is the definition of "business" consistent with the most recent version of a definition of "business" used in other ULC acts and model laws, and, if not, should it be?

- Is the definition of "person" consistent with the most recent version of a definition of "person" used in other ULC acts and model laws, and, if not, should it be?

- Should the definition of "public health emergency" eliminate references to the cause of an emergency and focus instead only on the effect of an emergency?
    - In addressing this question, the Committee will recall that it borrowed the basic structure of the current definition from a 2001 emergency public health powers model law (the Georgetown model law), which more than 30 jurisdictions have adopted in whole or in part.

- Should the definition of "public health emergency" include "human made disasters" in addition to "natural disasters" already part of the definition?

- Should the definition of "public health emergency" qualify the phrase "requires action to eliminate, reduce, contain, or mitigate that probability" with the following language: "which the Gov. believes, based on the evidence at the time, requires …" or other language to similar effect?
    - There is at least some risk that the phrase "requires action" would be interpreted otherwise to impose strict scrutiny on a Governor's actions.

- Are the phrases “high probability” and “affected population” in the definition of “public health emergency” too vague such that they should be clarified with a definition, alternative language, or commentary?
    - In addressing this question, the Committee will recall that each of these two phrases are part of the definition of public health law in the 2001 Georgetown model law, which more than 30 jurisdictions have adopted.
    - Should “high probability” be replaced with “a higher than normal probability”?
    - Should “affected population” be replaced with “the population affected or likely to be affected” by the agent, toxin or disaster underlying the emergency?

- With respect to the definition of “public health emergency,” should the Committee clarify what is meant by “medical . . . resources” or “public health . . . resources” the availability of which might be substantially impacted by an emergency, and, if so, whether to do this in the text of the definition or in a comment?
    - Related to this, should the Committee clarify what is meant by a “substantial adverse impact on the availability” of such resources? Is the availability of resources substantially and adversely affected when, as a result of emergent conditions, existing or accessible resources are insufficient to meet all of the needs of each person who needs those resources regardless of ability to pay?

- Should the repetition in (A) and (B) in the definition of “public health emergency” be eliminated by re-consolidating (A) and (B) so as to shorten the definition? And, if so, how best to make clear that the phrase “imminent threat or actual appearance of” applies to each of the following: an infectious agent or toxin, a biologic agent or toxin, a radiologic agent or toxin, a chemical agent or toxin, and a natural disaster?

Section 3: Relationship to other State Law

- Should this section be redrafted in the negative: “Except as provided in Section 10, this [act] shall not supersede other law of this state unless there is a conflict between this [act] and other law of this state in which case this [act] shall prevail”?
    - In addressing this issue, the Committee will recall that an earlier draft of this section of the PHEA Model Law was written in the negative.
    - At least one Commissioner at the Annual Meeting opined that, when stated in the negative, the relationship between this Model Law and others is clearer.

- Should this section be amended or comments added to clarify the relationship between this Model Law and other state statutes that empower Governors to declare other kinds of emergencies?
    - For example, should the language of or commentary for this section clarify that, by declaring a public health emergency under this Model Law, a Governor retains the authority under other state law to declare other kinds of

emergencies (e.g., a flood that affects drinking water in such a way as to qualify as a public health emergency)?
    - Similarly, should the language of or commentary for this section clarify that the scope of and limitations to a Governor's power under other state law to issue orders related to an emergency other than a public health emergency does not affect the scope of or limitations to a Governor's power to issue public health emergency orders under this Model Law?

- Should this Section (and/or Section 10) be amended to more clearly state that state and local public health officials retain the authority to take any and all actions they are authorized to take under other state law whether or not a Governor has declared a public health emergency under this Model Law and whether or not a Governor has issued orders of any sort under Section 6 of this Model Law?

Section 4: Declaration of a Public-Health Emergency; Renewal

- Should this Section be amended to state expressly that "a [Governor] may, by [executive order], issue a declaration of a public health emergency and renew a declaration of a public health emergency upon the [Governor's] determination that a public health emergency, as defined in Section 2(4), exists in the state."?
    - This is currently implied, but not expressly stated.

- Should subsection 4(a) (rather than subsection 4(d)) state the 60-day duration for an initial or a renewed declaration? Related to this, does the language in this Section make sufficiently clear that an initial declaration can last for 60-day and that a renewal may last for up to another 60 days and that each successive renewal may last for another 60 days?

- Should the Model Law expressly address the delegation of authority from a Governor to one or more public health authorities identified in subsection (b)(4) has having a responsibility to respond to the declared public health emergency, and, if so, how so and where in the Model Law?
    - The Committee will recall that an earlier draft of the Model Law used the phrase "Governor or Governor's delegate" throughout. The Committee chose to refer only to the Governor because a Governor has the authority under other state law to delegate executive authority within the executive branch.
    - That said, the phrase "public health authority" is defined in the Model Law to include not only state executive agencies, but also local agencies.
    - So an additional question is whether the Committee intends for the Model Law to create new authority for a Governor to delegate responsibilities during a public health emergency to agencies outside of the state executive branch or whether the Committee intends for the Governor to use the powers the Governor has under existing state law to delegate responsibilities during an emergency.

- Should subsection (b)(5)—requiring a Governor to disclose governmental and public health sources with whom the Governor consulted when deciding to declare a public health emergency—be retained as is, expanded, eliminated, or replaced with a provision about record retention?
    - The Committee will recall that it included this section to promote transparency by and accountability of a Governor. In an earlier draft, the Committee considered whether to require the Governor to consult the state's chief public health officer and decided against doing so. Instead, the Committee chose the current language of (b)(5), believing that it could encourage a Governor to consult with public health and other experts.
    - Feedback suggests that the Commission finds this too intrusive on the inner workings of a Governor's decision-making, that consulting a source is easily gamed, and that the requirement of disclosure might chill otherwise valuable consultation.

- Should the commentary related to sub-section (b) explain that the required report by a Governor promotes accountability in part by requiring that a record be created related to an initial declaration and each renewal of a declaration?
    - Some commissioners asked about the remedy if a Governor fails to meet the requirements of subsection (b), and others questioned whether the required report was an invitation to sue.
    - Commentary could clarify that a person with standing may exercise their right to sue under the applicable state APA if the required report is not created, if it is created too late, or if it fails to address each of the reporting topics described in subsection (b).
    - Commentary can also clarify that the remedy such a person with standing may pursue is to ask a court to set aside a Governor's declaration, which, in turn, would nullify any public health emergency orders that Governor issued following the Governor's declaration.
    - The potential of such an administrative challenge and remedy is a key form of accountability created by subsection (b).

- Should subsection (c) include a requirement to for a Governor to consider both the benefits and economic harms that can result from orders issued after a Governor declares a public health emergency, or is it sufficient that section 6 (addressing the orders a Governor may issue during a declared public health emergency) contains such a requirement?

- Should the power of a Governor to respond to a public health emergency of uncertain duration be limited by a prohibition in the Model Law against a Declaration of Public Health Emergency's lasting more than a total of 180 days?
    - Currently, under (d) a declaration of public health emergency may last for 60 days and no longer, at which time the declaration expires unless renewed by

a Governor, and there is no limitation on the number of times a Governor may renew a declaration. Yet, a Governor must re-make the case in support of renewing a declaration with each renewal.

- Several Commissioners at the first reading encouraged the Committee to limit a Governor's power to maintain a state of emergency by adding a provision authorizing a legislature to terminate a declaration of public health emergency by legislative resolution. Because this would create a legislative veto mechanism that would likely be unconstitutional in most states, the Committee previously decided against adding such a provision.
- As an alternative, the Committee agreed to consider limiting the total duration of a declaration of public health emergency number to 180 days on the theory that this would encourage a Governor to negotiate with state legislators about an ongoing public health response when a Governor's authority to maintain a public health emergency is coming to an end.
- As the Committee considers whether to impose a 180-day limitation on a declaration of public health emergency, the Committee should address the following related issues:
    - If a public health emergency lasts longer than 180 days a Governor would be authorized to maintain a state of public health emergency, and if—as a result—a Governor could no longer issue public health emergency orders and all public health emergency orders issued during those 180 days expired, could the public health needs of the state be served adequately by the legislature and/or the non-emergency powers of executive-branch health officials?
    - Would a 180-day limitation on a declaration of public health emergency result in a Governor's negotiating the ongoing public health response with legislators, or could it result in some other less desirable political response?
    - If the PHEA Model Law were to limit the total duration of a declaration of public health emergency to 180 days, then the Committee should also consider whether the Model Law must distinguish between a prohibited renewal of an existing declaration of public health emergency and an initial declaration of a new public health emergency, and, if so, how? For example:
        - Not all coronavirus outbreaks are identical (e.g, SARS-2003, MERS-2012, COVID-19); if one CoV outbreak were to follow on the heels of a first CoV outbreak, is that the same public health emergency, or is it a new emergency that resets the 180-day clock?
        - How much time must elapse between the end of one threat and a second emergence of the same threat (e.g., measles outbreaks) before the authority of a Governor to declare a public health emergency resets?

- If a Governor declares a public health emergency only for County 1 due to unsanitary water in the county following a river flood, and if that Governor three days later declares a public health emergency only for County 2 also for unsanitary water in the county due to the same river flood, do those two declarations operate on different calendars under the Model Law or are they treated as one expanded declaration?

- If the Committee imposes a 180-day limitation on the duration of a declaration of public health emergency, should the model law also authorize a Governor to renew a declaration of public health emergency beyond the 180-day limitation if the Governor consults with the legislature prior to doing so? When addressing this issue, the Committee should account for the following related issues:
    - What would constitute "consulting" the legislature both procedurally and substantively?
    - Would a Governor have the power to renew a declaration if the Governor consulted but did not obtain the consent of the legislature?
    - What would the duration of the renewal be—another 180 days?

- Should the comment under subsection (e)—which contains the reporting requirement—expressly explain that the purpose of imposing the same reporting requirement on a Governor's initial and any renewed declaration of public health emergency is to promote accountability of the Governor every 60 days if an a public health emergency lasts for an extended period of time?

- Should the commentary about subsection (f) explain that, while this subsection declares that a Governor's declaration of a public health emergency is not subject to any rulemaking procedures in a state's APA, the Governor's action in declaring a public health emergency is otherwise subject to the state's APA including judicial review?

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Section 5: Termination of Declaration of Public Health Emergency

- Should subsection (b) clarify that a declaration "terminates upon the earlier" of the two dates referred to in that subsection?

- Should bracketed subsection (c) be clarified or eliminated because of the risk that the Model Law will appear to endorse what would likely be an unconstitutional legislative veto in most states?
    - In addressing this issue, the Committee will recall that, under most state constitutions, the only way for a legislature to act with force of law is to pass a bill in each chamber, present it to the Governor for signature or veto, and—in the case of veto—to successfully override the veto. Any other legislative

action (e.g., a joint resolution) attempting to nullify executive branch action is likely an unconstitutional legislative veto.
    - The Committee has discussed this issue previously and chose to include the bracketed subsection together with a comment explaining that any unilateral legislative action to terminate a Governor's declaration of public health emergency is likely unconstitutional in most states.
    - By including even this bracketed subsection, is the model law encouraging state legislatures to "unbracket" and thereby include a subsection that appears to authorize unconstitutional legislative conduct, and would a better alternative be to remove the bracketed subsection completely and explain the risk of an unconstitutional legislative veto through comments in various key spots in the Model Law?
    - Is it a good alternative to clarify the bracketed language to include "by joint resolution" because it might highlight the extraordinary and likely unconstitutional legislative authority being described in the bracketed subsection (c)?
    - If the Committee leaves the bracketed subsection (c) as is, then should the comment related to this subsection be moved back to a legislative note, and should it also (as an alternative) be in the prefatory note?
    - If the Committee leaves the bracketed subsection (c) in place, then should the Committee amend it to include a substantive standard that the legislature must satisfy in order to take such legislative action, or would this raise its own constitutional concerns?

Section 6: Authority to Issue Public-Health-Emergency Orders

- Should the Title of this section be changed to "[Governor's] Authority under a Declaration of Public Health Emergency; Public-Health-Emergency Order"?

- Should subsection (b) be amended to move the catch-all power to issue orders that are "necessary" to be the last item in the list so as to reduce the likelihood that this power is interpreted to be narrowed to or by the list of more specific orders described in this subsection.

- Should this Section (or any Section in the Model Law) replace the word "necessary" with "appropriate" or "reasonable" because the word "necessary" likely will be interpreted to mean "strictly required" and "nothing less restrictive will suffice" and "supported by significant evidence showing the action will be effective at achieving its ends"?

- Is the list of types of orders in subsection (b) sufficient to encompass all of the kinds of orders the Committee thinks a Governor should be authorized to issue?
    - Should it specifically state the power of a Governor to enter into contracts?

    - Should it include expressly or by reference to other state laws the power to order individuals into quarantine or isolation?
    - Should it include the power to suspend ordinarily applicable laws so as to permit and encourage compliance with public health emergency orders; for example, procurement rules for government purchases and contracts, terms of leases of buildings that must be used for emergency purposes, laws establishing deadlines and other standards for grant submissions, tax returns, applications for benefits and licenses, etc.?
    - Does the existing language of each type of order account for the recent tendency of courts to interpret these powers narrowly?
    - Does the existing language of each type of order authorize a Governor to provide people with financial assistance in the form of unemployment benefits beyond the normal limits, payroll assistance, medication, food, water, etc.; for example, consider the needs of those put out of work or business or staying home to avoid disease transmission?

- Should subsection (b) clarify (either in its text or in commentary) that the authority of a Governor to issue orders does not include the authority to shut down the judiciary or the legislature, and, if not, then how should the Model Law be clarified on this point?

- Is any of the categories of orders listed in subsection (b) sufficient to authorize an order prohibiting hoarding of scares items (e.g., toilet paper), and, if not, should such a category be added?

- Should subsection (c) be reworked *both* to require (c)(1) *and* to treat (c)(2) and (c)(3) as factors (an to eliminate the word “practicable” in doing so)?

- Should the phrase “equitably distribute” in subsection 6(c)(3) be clarified (and if so how) or should the Committee replace that phrase with a word like “balance”?
    - Questions during the first reading focused on whether this provision would require imposing economic harm on a person or a business in order to do equity for another.
    - Some questions sought clarification about whether “equitably distribute” means “equally distribute” or “distribute on a non-discriminatory fashion” or something else.

- Should subsection (f) be deleted because it merely restates the authority that a Governor already has to delegate authority within the executive branch, or should it be retained because it clarifies that the Model Law does not intend that the authority to make orders is an authority that can only be carried out by a Governor personally?

- Should the Model Act identify (in Subsection 6 and/or 7 or in their comments) factors to be used to determine essential business or services?

    - In addressing this question, the Committee should note that the Model Law does not use the word “essential” or the phrases “essential business” or “essential services.” Instead, the Model Law in Section 6 authorizes a Governor to craft orders as necessary and Section 7 requires a Governor to consider economic harms as a factor.

Section 7: Requirements for a Public-Health-Emergency Order.

- Should the Model Law (either in Section 7 or 8) state that the consequence of failing to satisfy each of the requirements in Section 7 is that the order is null and void?

- Should this Section require that a Governor specify in a public health emergency order all of the information necessary to determine to whom it applies?
    - While a declaration of public health emergency could apply to an entire state, some orders might apply only to certain locations within the state; should this Section require that such information be expressly stated in the order?
    - While a declaration of public health emergency could apply to all persons and businesses in the state, a particular order might be aimed at nursing homes or individuals over the age of 60; should this Section require that such information be expressly statesd in the order?

Section 8: Termination of Public-Health-Emergency Order

- Should an additional provision be added providing that a state order terminates if a similar federal order exists and is terminated?

- Should the bracketed subsection 8(4) regarding legislative termination of an order be deleted from the Model Law because it could be read as endorsing a legislative veto that would be unconstitutional under most states’ constitutions?

- If the Committee chooses to retain subsection 8(4), should the language from comment 3, which describes a standard for how a legislature should proceed, be incorporated into subsection 8(4), which does not provide a standard?

- Should the Model Law (whether in Section 8 or elsewhere) address judicial review, or should it rely on existing state APAs that address judicial review of administrative action?

Section 9: Executive Privilege and Open Records

- Should the Committee delete this provision on the grounds that the Model Law provides extraordinary powers to a Governor, which justifies complete transparency, and on the grounds that lengthy litigation would result otherwise?

- If the Committee retains this section, then should the Committee add a legislative note informing states to consider adding a conforming amendment to its open meetings law.

- Should the Model Law defer to each state's definition of "executive privilege," and, if so, does the current language of this Section do so with sufficient clarity?

Section 10:

- ***During the first-reading, there was a motion to strike Alternative C, which passed. So the Reporter will delete Alternative C from the Model Law.***

- Should this title of this Section replace the phrase "Preemption of" with "Relationship to"?

- Should the Committee clarify the meaning of the phrase "more protective of public health" in Alternative B?
    - In addressing this issue, the Committee is reminded that Comment 3 under Section 10 provides that Alternative B "is designed to allow a political subdivision experiencing greater harm or risk from the public-health emergency as compared to the rest of the geographic area subject to the declaration of public-health emergency to take steps that are more protective than the steps taken by the Governor through a public-health-emergency order."
    - Imagine a state's Governor issues an order closing schools during a pandemic. Could a political subdivision use this language to order its own schools to open, claiming that the education, socialization, and mental health of children suffer when they cannot attend school, that the children living in the political subdivision are experiencing greater educational or social or mental health harms than is true for the rest of the state, and thus the order to open its own schools is "more protective of public health"?

- Should this Section (in conjunction with Section 3) be amended to more clearly state that local public health officials retain the authority to take any and all actions they are authorized to take under other existing law whether or not a Governor has declared a public health emergency under this Model Law and whether or not a Governor has issued orders of any sort under Section 6 of this Model Law unless such local action directly conflicts with an order by the Governor under Section 6?

- Should the Committee eliminate subsection (c) because the most appropriate way to limit the use of field pre-emption is with statutory language protecting local law from pre-emption unless local law directly conflicts with state law, which the Section already addresses in other subsections?

Section 11: Injunctive Relief

- Should the bracketed word “Governor” be retained or replaced or supplemented to include the Attorney General, and, if so, how best to account for the fact that AG and Governor are elected separately and there could be conflict between the two?
- Can and, if so, should the authority to pursue injunctive relief be addressed as part of Section 12(b)?

Section 12: Civil Penalties

- Should the penalties in this Section be capped to one penalty per day, or should this Section authorize a penalty for each violation?

- Is Comment 4 under this Section sufficient to clarify that this Section does not create a private right of action?

- Should this Section state who is authorized to bring an action to impose the civil penalties described in this Section?

- Should this Section retain the intent standard of “knowing,” or should the intent standard be eliminated? If the word “knowing” is to remain in this Section, should it be defined so as to address, for example, whether or not the violator needs to have actual knowledge about the existence of the order that the person has violated (e.g., “I didn’t know that an order requiring me to wear a mask had been issued”), or whether it is enough that the violator knew that they acting or failing to act in a specific way, which action or failure to act violates an order about which the violator was ignorant?

- Should the Section further clarify its relationship to existing criminal law?
    - For example, in the name of preventing crime, some state statutes or local ordinances prohibit an individual from entering a place of business with all or parts of their face concealed. How should this Section or another clarify that a person complying with a public health emergency order requiring that individuals wear masks when indoors cannot be charged or prosecuted with violating another law that, during normal times, prohibits concealing one’s face when entering a place of business?
    - At the same time, how should this Section or another clarify that a person who pulls a ski mask over their face and enters a business is not protected by the Model Law from being charged and prosecuted for a crime of concealing one’s face when entering a business?

Section 13: Relation to Electronic Signatures in Global and National Commerce Act. No issues.

Section 14: Severability. No issues.

Section 15: Effective Date. No issues.