

To: ULC Drafting Committee on Public Health Emergency Authorities

From: Diane Boyer-Vine, Chair
Heidi Tseu, Vice-Chair
Professor Rob Gatter, Reporter

Date: November 4, 2021

Re: Introductory memorandum

In July 2021, the Executive Committee of the Uniform Law Commission (“ULC”) approved the formation of a drafting committee on public health emergency authorities. The scope of that approval is laid out in the Issues Memorandum, which is attached to this memorandum. This memorandum will serve to provide high-level background on the work of the Study Committee on Public Health Emergency Authorities. This memorandum will also delineate the steps this committee should take in order to prepare a draft model act for a first reading in July 2022.

Study Committee on Public Health Emergency Authorities

In and around March 2020, the Executive Committee of the ULC formed three study committees in relation to the SARS-CoV-2 pandemic. One of those study committees focused on public health emergency authorities. Commissioner Boyer-Vine chaired that committee with Professor Wendy Parmet as the reporter. The initial scope for that study committee was as follows:

To address the authority of state governments to respond to epidemics, pandemics, and other health emergencies and to consider:

1. The authority of state governments to order individual and area quarantines, isolation, social distancing, and other restrictions on travel and gatherings and the enforcement of such powers;
2. The authority of states to order the closure of non-essential business, and the criteria for determining which businesses are essential;
3. State government acquisition of critical resources through collective purchasing mechanisms (including the need to comply with federal antitrust law) or through commandeering private property; and
4. Rules for medical practice, including crisis standards of care, licensure reciprocity, and information sharing.

After many meetings and the use of subcommittees to explore specific subtopics, the Study Committee recommended to the Scope and Program Committee that a drafting committee be formed to develop a model, not uniform, act. The recommendation of a model act acknowledged the opposition on the committee to the recommendation of any drafting committee. Part of the opposition’s concern was the political climate surrounding the current pandemic.

The recommendation to form a drafting committee limited the scope of any model act to the authority between state executive branch officials and the Legislature. As you will read in the various reports made to the Scope and Program Committee by the Study Committee during 2020 and 2021, many issues were explored and left out of a recommendation for drafting a model act. The Study Committee did

elaborate on ways that the scope of drafting a model act should be approached. Specifically, the Study Committee recommended:

“The Study Committee concluded that the model law could provide greater clarity as to the type of conditions that warrant emergency measures; explicate the role of the governor and other officials (e.g. health officials); provide explicit authorization for (without requiring) a set of community mitigation measures and controls over the distribution of needed supplies and pharmaceuticals (including vaccines); require executive branch officials to rely on the best available public health evidence and explain the bases for emergency orders; including meaningful processes, such as consultation with health officials and affected communities, and the development of an administrative record that could facilitate judicial review; mandate transparency; and protect constitutional rights and judicial review. It should also require consultation with a range of stakeholders, including socially vulnerable communities. In addition, the model could include a sunset on emergency measures while not preventing the state from responding to longer-term crises.”

We believe these recommendations and parameters from the Study Committee, approved through the Scope and Program Committee and Executive Committee, provide the foundational elements for the work of this drafting committee.

Drafting Committee on Public Health Emergency Authorities

With respect to the work of the drafting committee, the Chair, Vice Chair, and ULC Executive Director interviewed several candidates for the reporter position. We are honored to have engaged Professor Rob Gatter from Saint Louis University Law School. You may find his biography at slu.edu/law/faculty/robert-gatter.php. ..

The drafting committee has much work to do in order to prepare a draft model act for first reading in July 2022. At our first meeting this November, we will start with the Issues Memorandum prepared by Professor Gatter and attached to this memorandum. By the close of our December meeting, we hope to have an outline of a first draft of a model act. The Chair, Vice Chair, and Professor Gatter (and perhaps a few other persons associated with the drafting committee) will work on a model act for discussion at a spring meeting of the drafting committee. We plan to meet in person in the spring, but it all depends on the course of the current pandemic.

Before our November meeting, each commissioner and observer should consider whether there are other stakeholders we should invite to the committee. If you have names and contact information for potential observers, please email the Chair, Vice Chair, and reporter. We will initiate an invitation to participate in our process. As an aside, observers are viewed as equal participants in our process only limited in their input when a formal vote of the committee is called.

We look forward to working with you on this important project for the ULC. Many members of the Study Committee believed the ULC was the appropriate body to undertake the development of a model act on this subject given the ULC’s deliberate, nonpartisan process in drafting acts. The Chair, Vice Chair, and reporter also believe this is the case. With thoughtful respectful discussion free of partisan politics, we can develop a model act that allows states to decide which parts of the act will enable jurisdictions to respond efficiently and effectively during a public health crisis.