24 April 2020

The Hon Tammy Franks MLC
Chair COVID-19 Response Committee
Legislative Council
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Dear Ms Franks

Establishment of a COVID-19 Response Committee

1. I refer to your telephone conversation with the Society’s Policy Lawyer, Anna Finizio, on 17 April 2020 in relation to the establishment of a COVID-19 Response Committee (“the Committee”) by the Legislative Council.

2. The Society is pleased to learn of the establishment of the Committee and would be happy to assist the Committee with its work on an ongoing basis.

3. The COVID-19 pandemic has enlivened emergency powers which have never been utilised in South Australia, or nationally, before. These extraordinary powers, afforded not only to the Government, but also the State Coordinator/Police Commissioner, and South Australian Police (SAPOL), are incredibly broad and coercive.

4. The powers give rise to an inevitable tension between the enforcement of public health measures and the infringements on individual rights and freedoms. The Society considers that emergency measures imposed by governments must be necessary, reasonable and proportionate in the circumstances. In the Society’s view, the Committee has an important role to play in the monitoring and scrutinising of actions and decisions which may impact upon rights and liberties in this context.

5. Furthermore, it is considered the Committee should exercise oversight as to any unintended consequences of these powers, including disproportionate effects on vulnerable populations and how these effects may be mitigated.

6. The Society has set out below a number of relevant matters for the Committee’s consideration. In particular, matters within the relevant COVID-19 legislative framework which it is understood the Committee will have regard.
**Legislative framework**

7. The Society considers that the Committee should have broad terms of reference which enables it to examine all aspects of the response to the COVID-19 pandemic. However, the Committee may wish to be guided by legislative framework provided by the **Covid-19 Emergency Response Act 2020** (“the Act”) and Covid-19 Emergency Response Regulations 2020 (“the Regulations”). Furthermore, the Society suggests the Committee have regard to relevant provisions under the **Public Health Act 2011 (SA)** (“the Public Health Act”) and the **Emergency Management Act 2004 (SA)** (“the EMA”), as well as Directions issued under section 25 of the EMA.

8. The Society notes section 6 of the Act provides that the legislation will expire on:
   
a) The day on which all relevant declarations relating to the outbreak of the human disease named COVID-19 within South Australia have ceased (provided that the Minister is satisfied that there is no present intention to make a further such declarations); or

b) The day falling 6 months after the commencement of this section, whichever is the earlier.

9. The sunset provision attached to the Act is a significant safeguard. The Society suggests the Committee should ensure that it is utilised to prevent the ‘rolling’ enactment of these extraordinary powers. Notwithstanding the Committee’s oversight of the legislative framework during the COVID-19 emergency, it is considered the Committee will play a particularly important role in conducting a robust review following the expiry of the legislation.

10. Some general principles which may guide or assist the Committee in its assessment of various powers granted and the exercise of those powers, includes measures such as necessity and proportionality, the impact on individual rights and liberties, the inclusion of relevant safeguards and avenues for independent review.

**General matters arising out of the Act and Regulations**

11. The Act provides for broad regulation making powers (see for example, section 19). The Society understands the intention of the regulation making powers as set out in the Act, is to allow for sufficient flexibility to deal with matters as they arise during the COVID-19 pandemic. Indeed, the Society intends to seek regulations with respect to requirements around documents to ensure that members of the community can continue to have ongoing access to justice and legal services throughout the pandemic.

12. While it is expected that the Committee may wish to monitor regulations made on an ongoing basis, the Society makes some preliminary suggestions below as to matters falling under the Act and the current Regulations that the Committee may wish to monitor and seek specific data on. These include powers relating to residential and commercial tenancies, as well as the detention of protected persons, which were of particular concern to the Society’s Human Rights and Administrative Law Committees.

**Residential and Commercial Tenancies**

13. The Committee may wish to have regard to the extent to which the Act has been relied upon to prevent termination of residential or commercial leases.
14. For example, the Society notes section 8(g) of the Act which provides that a residential tenancy cannot be terminated under that Act solely on the grounds of a breach of residential tenancy agreement consisting of a failure to pay rent where the tenant is suffering financial hardship as a result of the COVID-19 pandemic. The Committee may wish to monitor the operation of this provision in practice, in particular, how the term ‘solely’ is interpreted and applied, including where COVID-19 hardship is one of a number of factors giving rise to termination.

**Detention of Protected persons**

15. Schedule 1 of the Act contains a number of special provisions relating to the detention of certain protected persons during the COVID-19 pandemic. Protected persons include those who are the subject of a guardianship or administration order (or both) under the *Guardianship and Administration Act 1993*; or a mentally incapacitated person who is resident of a supported residential facility; or a mentally incapacitated person who is a resident in other supported accommodation of a kind prescribed by the regulations.

16. Protected persons are a vulnerable class of persons and therefore the Committee may wish to monitor and review the operation of these provisions (both within the Act and Regulations). The Committee may wish to consider the following:

16.1 The nature and content of any Guidelines issued;

16.2 The use of detention powers, including the number and duration of any orders of detention, the circumstances/conditions of detention and the reasons given to justify detention;

16.3 The support provided to any person subject to detention powers, including access to legal representation;

16.4 The number of reviews conducted under Regulation 8 of the COVID-19 Emergency Response (Schedule 1) Regulations 2020;

16.5 The number of protected persons identified under Regulation 4 of the COVID-19 Emergency Response (Schedule 1) Regulations 2020; and

16.6 The number of Treatment Plans developed or modified under Regulation 5 of the COVID-19 Emergency Response (Schedule 1) Regulations 2020.

17. The Committee may also wish to monitor and review Community Visitor scheme established under the COVID-19 Emergency Response (Schedule 1) Regulations 2020, including:

17.1 The number of Community Visitors appointed, their qualifications and terms of appointment;

17.2 Any reports made by Community Visitors;

17.3 The number of inspections conducted at places of detention (and like facilities), and means by which those inspections are being conducted (for example, in person, or via an audio-visual link); and

17.4 Any instances and relevant details where refusal of entry has occurred under Regulation 11(8) of the COVID-19 Emergency Response (Schedule 1) Regulations 2020;
18. In the event that these provisions cause a significant increase in the workload of the South Australian Civil and Administrative Tribunal (“the SACAT”), the Committee may wish to consider whether the SACAT is adequately resourced to deal with the additional matters arising. Furthermore, the Committee may also wish to consider and monitor whether the rights and interests of persons subject to detention are being fairly represented in these proceedings.

Directions made under section 25 of the EMA

19. The declaration of a major emergency under the EMA provides the Government and SAPOL with broad powers to make directions for entire cohorts of people, including the power to direct or prohibit the movement of persons and vehicles; take possession of, protect or assume control over any land, body of water, building, structure, vehicle or other thing; and direct a person to remain isolated or segregated from other persons or to take other measures to prevent the transmission of a disease or condition to other persons.¹

20. The Society considers that a key responsibility of the Committee would be to monitor (on an ongoing basis), Directions issued by the State Co-ordinator under section 25 of the EMA and any expiation notice/fines issues under these Directions.

21. Covid-19 restrictions, like other offences for behaviour that occurs in public, such as public drunkenness and fare evasion, risk disproportionate application to vulnerable populations who of necessity have greater contact with public areas, amenities and services, such as people with disability, people experiencing homelessness, economically disadvantaged people, children and young people, and Aboriginal and Torres Strait Islander people.²

22. While it is expected that SAPOL may have a number of relevant protocols and guidelines in place to deal with vulnerable groups (including to divert people where appropriate to homelessness, health and welfare services), the Committee may wish to monitor and consider the impact of the Directions with respect to public gatherings on vulnerable populations in South Australia, and whether any additional training/guidelines/measures are required.

23. The Society also takes the view that action should be taken to reduce the numbers of people coming into contact with the criminal justice system and being detained in watchhouses and prisons, as these facilities are already overcrowded and at risk of becoming vectors for infection. Enclosed for the information of the Committee is a letter from the Society to the Minister of Corrections dated 27 March 2020, regarding the early release of prisoners in response to COVID-19. The legal profession remains concerned as to the impact of an outbreak of COVID-19 in a South Australian correctional facility (adult and youth facilities and the Adelaide Remand Centre) on the corrections system and the wider community. The Committee may wish to be mindful of such matters, including the impact of the COVID-19 measures (i.e. Directions) on the criminal justice system.

24. While it’s likely that one of the key directions of interest will be the Emergency Management (Gatherings NO 2) (COVID-19) Direction 2020, the Society suggests the Committee should seek the following information for its review with respect to the various Directions issued by SAPOL:

24.1 The number of expiation notices issued and value of subsequent fines issued;

¹ See section 25 of the Emergency Management Act 2004 (SA).
² Law Council of Australia, ‘Governments and Policymakers’ (Justice Project Final Report, August 2018) 42.
24.2 The location where expiations/fines are issued;

24.3 The social demographics of persons issued expiations/fines (i.e. age, gender, ethnicity);

24.4 Whether any expiation/fines have been issued to people of no fixed abode, or rough sleepers; and

24.5 The rate of compliance with expiation notices and instances where the notices have been challenged in court.

25. The Society understands the need for the measures imposed to protect the community against COVID-19, however, the concept of social distancing is not only novel to the community, but can be confusing due to unclear federal messaging and inconsistency between federal and state approaches in some instances. Therefore, it is important given the amount of power and discretion afforded to SAPOL in these circumstances that appropriate oversight is exercised.

26. In addition to these powers, federal and state biosecurity laws have also been enlivened to control borders and impose quarantine conditions. Similarly, the powers available under our biosecurity legislation are incredibly broad and have widespread implications for individuals, families and businesses.

27. The Committee may also wish to consider the wider impact of the restrictions on the community, particularly with respect to domestic violence and access to services.

Amendments to the Public Health Act 2011

28. The Society notes as part of the COVID-19 response a number of amendments were made to the Public Health Act under the South Australian Public Health (Controlled Notifiable Conditions) Amendment Act 2020. The changes include:

28.1 Orders can be made orally in urgent situations;

28.2 A person can be detained (without having not complied with any orders previously) in urgent situations if they “could have been exposed to a notifiable condition” and “could present a risk to public health”;

28.3 A person can be directed to do something if they “could have been exposed to a notifiable condition”;

28.4 A person can be directed to remain at a specified place, including, without limitation, a hospital or quarantine facility; and

28.5 A warrant for arrest can be issued if, a person who has a notifiable condition; has been exposed to a notifiable condition; or could have been exposed to a notifiable condition is engaging (or has engaged) in conduct that creates a risk to others.

29. The changes do not bestow new powers, they simply provide easier access to existing powers where “urgent action” is required. What is urgent is left to the discretion of the Chief Public Health Officer. Another important change is the previous threshold required to use these powers has been lowered. There is no longer a requirement that you actually have the condition, or that you have been exposed to the condition, it’s enough that you “could” have been exposed.
30. More recently, the Act has made further amendments to these provisions, including extending the period for which oral orders must be confirmed in writing and the period for which someone can be detained on the basis that they “could” have been exposed to a notifiable condition from 48 to 72 hours.

31. The Act has also introduced some additional powers with respect to the power to require detention under section 77 of the Public Health Act. The amendments provide that the Chief Public Health Officer or an authorised person may apprehend and take a person to the place at which the person is to be detained under a detention order; restrain the person and otherwise use force in relation to the person as reasonably required in the circumstances; and be assisted by such persons as may be necessary or desirable in the circumstances.

32. Given some of these changes are now embedded into the Public Health Act (i.e. as a result of the South Australian Public Health (Controlled Notifiable Conditions) Amendment Act 2020) and will remain post COVID-19, it is appropriate that the Committee reviews the amendments and their operation during the COVID-19 crisis. It is suggested that the Committee may wish to specifically review the number of oral orders issued, as well as the number of and details around detention orders made under the Public Health Act during the COVID-19 emergency.

33. The overriding principle of the Public Health Act is that the community has the right to be protected from a person whose infectious state or behaviour may prevent a risk. However, the Public Health Act also states that any restrictions imposed on individuals must be proportionate to any risks, and should be the least restrictive means possible to prevent the spread of disease. The Committee as part of its work should review the use of these powers to ensure they have been exercised in a way that is limited and proportionate, or whether additional safeguards are needed.

Amendments to the Emergency Management Act 2004

34. The Act also makes a number of amendments to the EMA. The Act amends section 25(3), to provide extremely broad powers to the State Coordinator and authorised officers to exercise or discharge a power under the EMA, even if in doing so it would contravene another law of the State. The Act also provides that the State Coordinator or an authorised officer may use such force that is necessary in the exercise or discharge of a power or function under the EMA to ensure compliance.

35. Additional amendments under the Act provide that a direction or requirement under the EMA may be issued in the form of a written instrument or in any other form (including, without limitation, orally, by SMS or email).

36. The Society considers that it would be appropriate for the Committee to review the exercise of powers under these provisions, with particular regard to whether such powers were necessary and proportionate. To empower the Police Commissioner and SAPOL with the ability to disregard existing laws to exercise the broad powers given to them under the EMA is truly extraordinary. While it is hoped that such powers do not need to be utilised, in the even that they are, special scrutiny must be applied.

Consultation by the Committee

37. The Society understands that throughout the COVID-19 pandemic both regulations and directions will be made in a fast paced environment and the opportunity for the Committee to consult with external stakeholders may be limited. However, where possible, it would be beneficial for the Committee to actively engage with the community, experts and key government agencies.
38. Extensive consultation should be facilitated at the time the Act and Regulations expire, to assist the Committee with an in-depth review of the effectiveness and impact of the legislation. The Committee may wish to consider alternative engagement strategies in addition written submissions, including social media and online forums (to increase participation in light of social distancing measures which are likely to remain in place for some time).

The Society would be pleased to support the Committee in its work. Please do not hesitate to contact the Society for any further information or assistance.

Yours sincerely

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Enc: Letter to the Minister of Corrections 27 March 2020