

Rights Resource Network SA

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Secretary to the Committee
COVID-19 Response Committee
Parliament House
North Terrace
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Via email covid19@parliament.sa.gov.au

31 January 2022

Dear Committee Secretary

SOUTH AUSTRALIA'S MANAGEMENT OF THE COVID-19 PANDEMIC SINCE NOVEMBER 2021

I write as the Director of the [Rights Resource Network SA](https://www.rightsnetworksa.com/) and Senior Lecturer in Law at the University of South Australia. Thank you for the opportunity to provide feedback on South Australia's management of the COVID-19 pandemic, and in particular on matters arising since November 2021 including border closures and restrictions, and the implementation of South Australia's COVID-Ready Plan and the "living with COVID" phase. I appreciate that given the upcoming State Election, and the absence of any scheduled sitting days for the House of Assembly, the Committee is unlikely to be in a position to report on the outcome of its most recent call for submissions. However, I trust that the information shared in this submission will be of use for future parliamentary scrutiny of government responses to the pandemic.

The [Rights Resource Network SA](https://www.rightsnetworksa.com/) is a volunteer-run collaboration that shares information and research among academics, community organisations and individuals who share an interest in protecting the human rights of South Australians.¹ Our Network includes a range of experts who are also interested in South Australia's response to COVID-19 and who would be very pleased to meet with the Committee and/or provide further written submissions in the future. This submission represents my own views as Director, based on the Network's past advocacy and research in this area. I am grateful for the assistance of Alec Crespo and Ryan Feuerherdt in the preparation of this submission.

When raising the below matters for consideration, I wish to acknowledge the hard work and dedication of the South Australian Parliament, the South Australian Government, the South Australian Police and SA Health officers and express gratitude to all those involved in keeping the South Australian community safe from harm. This submission is not intended to be a critique of any individual or office holder, but rather a set of recommendations and questions designed to enhance the quality of parliamentary scrutiny of the South Australian response to the pandemic.

¹ The Rights Resource Network is a volunteer-run network that received funding from the Law Foundation of South Australia in 2020 and 2021. It exists to share information and create opportunities for collaboration and joint advocacy among academics, community organisations and individuals who are committed to protecting the human rights of South Australians. The Network is governed by a volunteer Advisory Group with broad range of expertise and experiences. For more information visit <https://www.rightsnetworksa.com/>



Summary of Recommendations

I recommend that the Committee take steps to:

- facilitate increased parliamentary oversight and scrutiny of South Australian Government's response to COVID-19 pandemic, using a human rights-based approach
- increase the diversity of expert voices within the State Emergency Management Committee
- revise the legislative framework authorising the use of extraordinary emergency powers
- enhance resources and services for vulnerable communities through meaningful consultation with persons with lived experience
- preserve and promote the right to vote by debating and enacting the Electoral (Electronic Documents and Other Matters) Amendment Bill 2021.

I also consider it to be critical that the SA Parliament retains the COVID-19 Committee in some form following the March 2022 Election. This Committee is one of the only democratic forums that provide scrutiny of the SA Government's response to the pandemic.

Further information about each of these key recommendations is provided below:

Facilitating enhanced parliamentary oversight of South Australian Government's response to COVID-19 pandemic using a human rights based approach

As you would be aware, in response to the outbreak and spread of COVID-19 in South Australia, the Chief Executive of the Department of Health and Wellbeing made a public health emergency declaration under the *Public Health Act* on 15 March 2020.² This declaration was followed by another declaration by the SA State Coordinator who declared a major emergency on 22 March 2020 under the *Emergency Management Act*.³ This declaration can only be in force for a maximum period of 14 days, unless extended by the Governor which has occurred on a rolling basis since March 2020.⁴

The declaration of a Major Emergency under the Act gives significant far reaching powers to the State Coordinator or an 'authorised officer' (such as a police officer or a doctor) including powers to direct a person to 'remain isolated or segregated from other persons'⁵ or direct a person to 'undergo medical observation, examination ...or treatment'.⁶ The powers also extend to providing the State Coordinator with the power to effectively override pre-existing state laws if they are of the view that 'that the scope of an emergency is of such a magnitude that demand for medical goods or services cannot be met without contravening the laws of the State'.⁷

² *South Australian Public Health Act 2011* (SA) s 87.

³ *Emergency Management Act 2004* (SA) s 23(1), for document see https://www.covid-19.sa.gov.au/_data/assets/pdf_file/0004/145687/Major-Emergency-Declaration-Signed-1300-Hrs-22032020.pdf.

⁴ *Ibid* s 23(2)(b).

⁵ *Ibid* s 25(2)(fb).

⁶ *Ibid* s 25(2)(fc).

⁷ *Ibid* s 25(3).

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This means that the potential scope of executive-led emergency lawmaking in response to the COVID-19 pandemic is extremely broad in South Australia, with flow-on implications for the rights and freedoms of the South Australian community.

As the pandemic enters its third year, the impacts of executive-led emergency lawmaking on people's lives have moved from immediate, acute limitations on their freedoms to far deeper, wide ranging effects on their relationships, economic stability, health and wellbeing, education and employment.

Executive-made directions and directives that were accepted in 2020 as necessary, effective and proportionate can no longer be left unexamined or unscrutinised by Parliament and the community. This is patently apparent not only to health and economic experts, but also to South Australian communities who are increasingly confused or sceptical about the rationale or evidence base for key COVID-19 measures, even if they retain a strong commitment to adhere to measures designed to promote and protect public health.

The COVID-19 pandemic has also underscored the need to continuously invest in building relationships of trust between lawmakers, law enforcers and community members, particularly when delegating lawmaking power to executive officers.⁸

There is also a need to ease the burden on individual executive officers who are currently tasked with two potentially competing duties: (1) delivering accurate, timely expert advice; and (2) assessing how that advice should be acted upon having regard to the impact on other important rights and interests. The second of these two tasks involves a proportionality assessment that could be strengthened and clarified through the use of human rights principles that have been tried and tested in many other comparable jurisdictions in Australia and overseas.⁹

Taken together, these circumstances give rise to a clear need for independent scrutiny, from a human rights perspective, of all COVID-19 emergency measures – not just at the time they are introduced but throughout the time they are in place so as to ensure each measure is, and remains: **necessary**, **proportionate**, and **justified**.

This scrutiny task – which should continue to be undertaken rigorously by this Committee – must also be supported by:

- Clear legislative provisions prescribing review of any COVID-19-related delegated legislation, legislative instrument or directive in a timely and efficient manner;
- Prioritising and highlighting the existing Scrutiny Principles for the Legislative Review Committee (which already include a reference to reviewing certain delegated legislation that trespasses unduly on personal rights and liberties), and allocating additional secretariat resources to the Legislative Review Committee to undertake more systematic scrutiny of rights-impacting regulations and proposed legislation;

⁸ See for example Mark Evans 'Public trust in the government's COVID response is slowly eroding. Here's how to get it back on track' *The Conversation* (12 July 2021) available at <<https://theconversation.com/public-trust-in-the-governments-covid-response-is-slowly-eroding-heres-how-to-get-it-back-on-track-163722>>

⁹ See for example the federal Parliamentary Joint Committee on Human Rights Guide to Human Rights available at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>

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- Establishing a Scrutiny of Bills Committee (as recommended by the Select Committee on the South Australian Parliamentary Committee System).

The Rights Resource Network SA is also of the view that South Australia needs a **Human Rights Framework** to secure the dignity and equality of all South Australians and to facilitate our active participation in the democratic life of our State. Such a Framework could build upon and enhance the existing scrutiny work undertaken by South Australian Parliamentary committees and provide a consistent set of rights-based criteria and analytical tools to support all parliamentarians to evaluate the positive and negative impacts of proposed new legislation on the people in their electorates. Other features of a South Australian Human Rights Framework could be set out in stand-alone legislation (such as a Human Rights Act or Charter of Rights) that should be developed in close consultation with the South Australian community. Key features of such legislation should include:

- A list of protected human rights and responsibilities and an acknowledgement that human rights can be subject to proportionate and reasonable limits when necessary to protect or promote other human rights.
- A requirement that all public servants, government officials, members of parliament and judicial officers undertake regular human rights training, with a focus on the most prevalence human rights issues confronting South Australia (including those relating to First Nations peoples, children, and persons with disabilities).
- A requirement that human rights principles are considered in all forms of government decision making and parliamentary law-making.
- Clear pathways for individuals and groups to challenge government decisions on the basis that they have failed to consider human rights principles, or acted in a way that unjustifiably burdens or breaches their human rights.
- Meaningful remedies for individuals and groups that can show that their human rights have been ignored or unjustifiably burdened or breached.
- Regular, public and independent review of South Australia's progress towards improving human rights outcomes and preventing human rights abuses

The Rights Resource Network SA will shortly release a detailed report outlining how such a Framework could be implemented in practice and the broad range of benefits it offers parliamentarians and community members.

Increase the diversity of expert voices within the State Emergency Management Committee

The State Emergency Management Committee (SEMC) is established under Part 2 of the [Emergency Management Act 2004](#) (SA) and has a wide range of important powers including preparing, reviewing and monitoring the State Emergency Management Plan and maintaining 'oversight of emergency management planning in the State' and monitoring the capacity of agencies and organisations with functions under the State Emergency Management Plan. Under the Act, the Minister is given the authority to prescribe guidelines for the membership of the SEMC, but members must include Chief Executive Officers of government departments responsible for administering the emergency measures as well as the State Co-ordinator.

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This Committee is currently yielding exceptional policy making and delegated lawmaking power. While its members may be diligent and professional, and have achieved some strong outcomes, we are now at the stage of the pandemic where more voices need to be heard. This executive-dominated group is not able to represent the full range of views and perspectives necessary to develop a strong recovery plan. It also lacks transparency and democratic accountability. For example:

- How is the advice provided by SA Health to the SEMC, Premier and/or State Coordinator weighed against other key public interests including economic interests?
- How can the SA community better understand the nature of the advice provided by SA Health the SEMC? Can it be made publicly available in some form?
- What other sources of information is the SEMC, Premier and/or State Coordinator relying upon when issuing directions or directives?
- What additional consultation processes do the SEMC, Premier and/or State Coordinator engage in when issuing new directives or directions? Does this extend beyond government officers? How are the interests of nurses, teachers, retail workers etc considered?
- What is the relationship between National Cabinet and the SEMC? What criteria is applied by SEMC when deciding to depart from a principle or position adopted by National Cabinet?

The Australian Council of Social Services (ACOSS) has called for the creation of a civil society COVID Rapid Response Group including ACOSS, unions, business peaks and public health experts to work closely with government to address the impacts of the rampant spread of the Omicron and Delta COVID variants. A similar body could be established in SA to help address some of the above concerns.

Revising the legislative framework authorising the use of extraordinary emergency powers

Since March 2020, the SA Parliament has passed a large number of legislative provisions designed to empower government officials, primarily police and health officials, to issue directives or directions or take other unprecedented actions to protect and promote public health.¹⁰ Whilst some of these provisions have been subject to sunset clauses,¹¹ disallowance motions or other forms of parliamentary oversight and scrutiny, many key provisions have effectively empowered executive officers to exercise almost unlimited law-making powers.

For example, on 22 March 2020 the State Coordinator made a Declaration of a Major Emergency under section 25 of the *Emergency Management Act 2004* (SA). This Declaration was not required

¹⁰ For example see South Australian Public Health (Controlled Notifiable Conditions) Amendment Act 2020; Local Government (Public Health Emergency) Amendment Act 2020; COVID-19 Emergency Response Act 2020; COVID-19 Emergency Response (Bail) Amendment Act 2020; COVID-19 Emergency Response (Further Measures) Amendment Act 2020; Emergency Management (Quarantine Fees and Penalty) Amendment Act 2020; COVID-19 Emergency Response (Further Measures) (No 2) Amendment Act 2020; COVID-19 Emergency Response (Expiry and Rent) Amendment Act 2020; COVID-19 Emergency Response (Expiry) Amendment Act 2021; COVID-19 Emergency Response (Expiry) (No 2) Amendment Act 2021; Statutes Amendment COVID-19 Permanent Measures) Act 2021; COVID-19 Emergency Response (Expiry) (No 3) Amendment Act 2021

¹¹ For example On 7 May 2020 the South Australian Parliament enacted the COVID-19 Emergency Response Act 2020 (SA). This legislation had some measures (including those relating to hardship measures for renters and those in residential facilities) that expired via a sunset clause, which was extended twice but expired on 3 December 2021.

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to be authorised or reviewed by Parliament. Under the *Emergency Management Act*, the Declaration of a Major Emergency can continue for a maximum of 28 days but can be extended by the Governor for additional 28 day periods. Such extensions have continued to be made from 22 March 2020 until the time of writing. There is no requirement under the *Emergency Management Act* for the Parliament to review or re-authorise the Declaration of a Major Emergency.

The State Coordinator (remains authorised under section 25 of the *Emergency Management Act* to do things like “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”. The State Coordinator is also given a broad authorisation to “take any necessary action to implement the State Emergency Management Plan”, provided the Declaration of a Major Emergency remains in force.

The Declaration of a Major Emergency has been extended **24 times** since March 2020. This is an unprecedented time frame for powers that were enacted for the purpose of enabling a rapid and effective response to a short term emergency situation, such as a flood or fire. It is critical that these powers now be subject to parliamentary oversight and review. Should the powers in section 25 be considered to be necessary to remain in place on an ongoing basis, then the primary legislation should be amended, with appropriate provisions for regular parliamentary review, for example every six months as per the Victorian approach.¹² The Victorian *Public Health and Wellbeing Act 2008* (Vic) also contains safeguards with respect to powers impinging upon individual liberties, including that: infectious disease management be governed by principles respecting personal rights; measures which least restrict the rights of a person should be chosen; and public health orders are subject to appeal, requiring a review by the Chief Health Officer within seven days.¹³ Similar safeguards could be incorporated into the South Australian legislation.

It is essential that the South Australian community – represented by their elected members of Parliament - now have the opportunity to evaluate and assess the effectiveness and necessity of the South Australian emergency management powers and their suitability in the context of the third year of the COVID-19 pandemic. For example, it is important for the community to better understand and be in a position to evaluate the criteria used by the State Coordinator to determine when, why and how to introduce a new Direction under the *Emergency Management Act 2004*. Other questions arise about the decision-making processes associated with issuing and enforcing directions under the *Emergency Management Act 2004* and the *Public Health Act*. For example:

- Is regard had to the impact of the directions or directives on the individual rights and liberties of South Australians or particular groups within the community? If so, what criteria is applied? Can this be shared with the community?
- Is there one central location where the Parliament and the public can see how many infringement notices have been issued and enforced (relating to COVID-19 directions)?

¹² See e.g. Victorian Department of Health, 14th Report to Parliament on the State of Emergency Report under section 198(8A) of the Public Health and Wellbeing Act 2008 (2021) [14th Report to Parliament on the State of Emergency X4Kj4hTB.pdf](#)

¹³ See e.g. *Public Health and Wellbeing Act 2008* (Vic), ss 111-12, 121-22; Pelkas, C. (2010) 'State Interference with Liberty: The Scope and Accountability of Australian Powers to Detain During a Pandemic', *Flinders Law Journal*, 12(1).

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- What additional resources have been provided to police, courts and Legal Services in response to directions that include fines or penalties (including for example the recent fines associated with failing to report a Rapid Antigen Test (RAT) outcome)?
- Have prosecutorial guidelines been developed to inform decision making about prosecution of infringement notices or other penalties?

Key questions also need answering in response to the expiry of Schedule 2 of the [COVID-19 Emergency Response Act 2020 \(SA\)](#). First enacted in May 2020, the *COVID-19 Response Act* is designed to complement other legal responses to the pandemic. The measures that expired on 1 December 2021 included those that were designed to ease the pressure on renters and people living in supported residential facilities who may have suffered financial hardship as a result of the COVID-19 pandemic. Also expired is Schedule 2 of the *COVID-19 Response Act*, which modified the scope of powers exercisable by the State Coordinator under section 25 of the [Emergency Management Act 2004](#) (SA). In its previous form, Schedule 2, authorised the State Co-ordinator or an authorised officer to “exercise or discharge a power or function under [section 25 the *Emergency Management Act*] even if to do so would contravene another law of the State.” It also authorised the State Co-ordinator to make directions with respect to classes of persons, or exempt classes of persons from the scope of the directions. These modifications are now no longer in force. This does not mean that the State Co-ordinator can no longer issue directions or exercise powers in response to the COVID-19 pandemic. As noted above, the Coordinator remains authorised under section 25 of the *Emergency Management Act* to do a wide range of things. However, the expiry of Schedule 2 of the *COVID-19 Response Act* raises some important questions for the South Australian Parliament and the South Australian community, particularly when consideration is given to the broader context in which these extraordinary laws were originally made. For example, why was it that the Schedule 2 powers relating to section 25 were once considered necessary but are no longer needed? How can the Declaration of a Major Emergency continue to justify the use of broad, discretionary police powers, but no longer justify protections for vulnerable renters and those living in residential facilities?

Enhancing resources and services for vulnerable communities

One of the consequences of the lack of consistent parliamentary scrutiny of the Government's response to the COVID-19 pandemic is an increasing concern that key vulnerable groups within the community are not being adequately considered, consulted, or protected. Clearly, the challenges associated with service provision in the pandemic should not be underestimated and often depend upon a range of extraneous factors over which the SA Government has limited control (including global supply chains, inter-state border closures and the emergence of new variants of the COVID-19 virus). However, significant improvements could be obtained by adopting a more deliberative approach to policy making as we ‘learn to live’ with COVID-19. This is particularly critical in the following sectors:

- primary and secondary education, including access to RAT and vaccinations for teachers and returning school children;
- aged care and other supported living environments, including access to RAT and vaccinations for residents and staff as well as access to allied health services and other social supports;

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- victims of family and domestic violence, including access to emergency and access to trauma-informed policing and other holistic family supports;
- disability and mental health, including self-determined approaches to service provision and care; and
- First Nations peoples and specialist service providers.

While it may have initially been considered impracticable to seek input from persons with lived experience in the above sectors, we are now at a stage in the pandemic where consultation with a diverse range of South Australians is urgently needed to develop effective and sustainable solutions to increasingly complex policy challenges. This Committee can and should play a lead role in facilitating this consultation, including as it develops criteria for review and scrutiny of COVID-19 laws and policies in the future.

Preserving and promoting the right to vote

As South Australians prepare to go to the polls for State and Federal elections, there is an urgent need for the SA Parliament to consider, debate and enact reforms recommended by the SA Electoral Commission and included within the Electoral (Electronic Documents and Other Matters) Amendment Bill 2021. These measures, which include provisions designed to assist persons who may be isolating due to COVID-19 to vote through assisted means, could prove vital to preserving the right to vote in SA.

International law recognises that the right to participate in public affairs and to vote requires states to take positive measures to ensure that all persons entitled to vote are able to exercise that right, including those potentially excluded by their personal circumstances.¹⁴ Currently, the *Electoral Act 1985* (SA) contains provisions to enable persons who are 'by reason of illness, infirmity or disability, precluded from voting at a polling booth' to make a 'declaration vote'.¹⁵ However, the steps involved in making a 'declaration vote' include applying for declaration voting papers 'before 5 p.m. on the Thursday last preceding polling day'. This requirement could work to preclude persons who have found out that they are close contacts or COVID positive in the days prior to polling day. A person in this circumstance may face the 'catch 22' of being legally required to isolate, *and* legally required to vote, but unable to exercise a valid vote under the current provisions of the *Electoral Act 1985* (SA).

Parliamentary attention is urgently needed to ensure that every eligible voter in South Australia is able to freely and easily exercise their fundamental democratic right to vote. Clear public information about 'COVID-safe' voting is also needed to support the great work already undertaken by the South Australian Electoral Commission in this area.

Future of the COVID-19 Committee

The Rights Resource Network SA is grateful for the work of this Committee and its past scrutiny of the SA Government's response to the pandemic. The Network hopes that the issues raised above will feature prominently in the work of a future iteration of the Committee, subject to the outcome of

¹⁴ See, for example, United Nations Human Rights Committee *CCPR General Comment No 25: Article 25 (Participation in public affairs and the right to vote)*, CCPR/C/21/Rev 1/Add 7, 12/07/96 at [11], [12] available at <http://www.ohchr.org>.

¹⁵ *Electoral Act 1985* (SA) s71.

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the March 2022 Election. The Network also hopes that the work of any future COVID-19 Committee is more visible and accessible to the South Australian community. This could be achieved by:

- Clearer promotion of the Committee on the SA Parliament website including for example a 'one click link' to the Committee's role, functions and how to engage (rather than being listed along with all other committees requiring multiple click throughs to access basic description of what the committee does and how to engage with it).
- Providing an open invitation for members of the public to provide written submissions through an easy access submission porthole (in line with the approach adopted by the Senate Select Committee on COVID-19). This could be supported by the production of video content featuring the Chair of the Committee or other Committee members welcoming members of the community to contribute to the Committee's important scrutiny work.
- Dissemination of key information (including calls for submissions or upcoming public hearings) via social media including Facebook and Twitter.
- Proactive invitations to key stakeholders to make submissions, including community organisations representing Aboriginal people, young people, people with disabilities, and others who may be marginalised from the parliamentary lawmaking process.
- Committee hearings scheduled in suburban or regional locations – or partnerships with suburban or regional locations to enable live broadcasts of hearings if conducted online.
- Issuing media releases for consideration by print and online media when the Committee delivers reports or is holding public hearings.

The Rights Resource Network SA looks forward to continuing to help facilitate further community consultation in this area. In our view, the South Australian community is eager and well placed to assist in the development of more holistic legislative and policy response to COVID-19. I look forward to speaking to the Committee further about this submission and can be contacted on 0401132544 as well as via email sarah.moulds@uinsa.edu.au.

Yours sincerely

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