

Memorandum 2022-27

Emergency-Related Reforms: Informational Report

In May 2020, in response to the COVID-19 pandemic, the Commission¹ decided to devote part of its resources to studying legal issues related to the public health crisis.²

In 2021, the Commission was authorized to study the following topic:

Whether the law should be revised to provide special rules that would apply to an area affected by a state of disaster or emergency declared by the federal government, a state of emergency proclaimed by the Governor under Section 8625 of the Government Code, or a local emergency proclaimed by a local governing body or official under Section 8630 of the Government Code. Before beginning a study under this authority, the commission shall provide notice to legislative leadership and any legislative policy committee with jurisdiction over the proposed study topic and shall consider any formal or informal feedback received in response to the notice...³

The Commission commenced work on this topic in 2022.⁴ At its March 2022 meeting, the Commission directed the staff to proceed with preparation of an informational report on this topic. The report would identify alternative approaches and analyze their policy implications, without making recommendations. This memorandum presents a proposed method for preparing the informational report. The memorandum then applies that methodology to the first element of the analysis, alternative approaches to establishing a state of emergency under the law.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (May 2020), p. 3; see also Memorandum 2020-19 and its supplements.

3. 2021 Cal. Stat. res. ch. 108 (ACR 24 (Chau)).

4. See Memoranda 2022-12, 2022-21; see also Memorandum 2022-3, pp. 29-30, 46; Minutes (Jan. 2022), p. 3.

PROPOSED METHOD AND STRUCTURE FOR REPORT

In the informational report, the staff intends to first present a clear analytical framework for assessing the implications of different approaches in emergency laws. The framework would identify the key policy objectives for an emergency law, which would then be used in evaluating different approaches.

The remainder of the discussion in the informational report would be organized to follow the main operational elements of emergency law. For each operational element, the report would describe alternative ways that states address the operational element and assess how well each alternative achieves the identified policy objectives. This method should provide a uniform and easily-understandable way of organizing information about the pros and cons of different policy approaches taken in emergency laws.

More detail about the proposed analytical framework and report organization is provided below. **The Commission should feel free to suggest changes to this initial proposal.** Approving an acceptable analytical method for compiling the informational report is a key goal of this memorandum.

Policy Objectives

The staff has identified several policy objectives for emergency laws. They are listed below, with a brief explanation of their importance.

Some of these objectives are complementary and could perhaps have been grouped together, while other objectives could perhaps have been subdivided, as the objective covers multiple related, but distinct issues. Some objectives are in tension with one another and could involve trade-offs.

Identifying the important policy objectives for emergency law will provide standards that can be applied in analyzing the different approaches taken in emergency laws. **Commissioners and interested members of the public should feel free to suggest changes to the policy objectives summarized below.**

- *Certainty.* The law should provide certainty about who holds emergency powers, how those powers can be exercised, under what circumstances emergency actions can be taken, and how long the emergency action will last. Uncertainty could lead to problematic disputes and delay.
- *Feasibility.* Procedures for exercising emergency powers and overseeing emergency action need to be achievable under emergency conditions. The law should not require formalities that

may not be achievable or should provide flexibility for situations when emergency conditions prevent formal compliance.

- *Information Input and Output.* This objective is not limited to emergency law. The law should be designed to ensure government action is informed by reliable information and considers different viewpoints. Emergency circumstances will justify addressing these matters differently than they are addressed in general law. Overall, the democratic legitimacy of emergency action would be improved by both identifying the informational basis for decisions and providing a meaningful opportunity for public input.
- *Oversight.* Ideally, emergency law should include a mechanism to either prevent or correct problematic inaction or abuse of emergency powers.
- *Speed and Nimbleness.* The law should provide for quick emergency action. In many kinds of emergencies, time is of the essence. Similarly, the law should allow quick response as conditions change or new information is received.

Operational Elements

In general, emergency law can be broken down into three main procedural steps:

- (1) Establishing a state of emergency.
- (2) Exercise of emergency powers during a state of emergency.
- (3) Termination of a state of emergency.

For each procedural step, the laws can take different approaches to the necessary actors, necessary actions, and necessary procedures.

For example, in framing a statutory approach to the establishment of a state of emergency, the questions to answer include:

- Who can establish a state of emergency?
- By what process is the state of emergency established?
- Are there additional procedural requirements upon establishing a state of emergency?

Scope of Analysis

This memorandum draws heavily upon the materials summarizing different emergency laws found on the websites of the National Conference of State Legislatures and Ballotpedia.⁵ Those collections include data from the different

5. <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx> (site date April 22, 2022); https://ballotpedia.org/Sources_of_state_emergency_power_authority,_2020 (article last updated Oct. 13, 2020).

states, U.S. territories and commonwealths, and the District of Columbia (hereafter, collectively referred to as “states” for ease of reference). The staff also looked at the current draft of the Public Health Emergency Authorities Act (“draft PHEA Act”) being prepared by a committee of the Uniform Law Commission (“ULC”).⁶ In general, the discussion of policy approaches in this memorandum first discusses the approach taken in California, before discussing alternatives from other states.

The alternative approaches selected by staff for inclusion in the analysis are intended to be illustrative, not exhaustive. They were chosen to exemplify materially different approaches taken in other jurisdictions. The memorandum does not present a catalog of all approaches, nor does it address the detailed differences in implementation for each general approach.

States may have multiple laws that govern different types of emergencies (or pertain to different aspects of an emergency).⁷ For instance, California’s ESA has rules applicable specifically to state of war emergencies.⁸ In some states, the relevant emergency law focuses specifically on public health emergencies,⁹ or the general emergency law includes provisions applicable only to a specified type of emergency (e.g., public health emergency or COVID, specifically).¹⁰ Also, the draft PHEA Act pertains, as the name suggests, to public health emergencies.

The focus of the analysis in this memorandum will be on the broad policy questions presented by state emergency laws generally. More specific statutes may

The staff confirmed that the specific provisions cited in this memorandum are current.

To a lesser degree, the staff also consulted other resources that compile and describe emergency laws. See, e.g., *infra* note 7; T.H. Little, A Summary State Legislative Powers Relative to Declarations of Emergency in the Fifty States (May 18, 2020), *available at* <https://www.sllf.org/wp-content/uploads/Summary-of-Legislative-Roles-in-Terminating-Emergency-Declarations.pdf>; G. Sunshine et al., *An Assessment of State Laws Providing Gubernatorial Authority to Remove Legal Barriers to Emergency Response*, 17 *Health Security* 156-161 (2019), *available at* <https://www.nga.org/wp-content/uploads/2019/06/An-Assessment-of-State-Laws-Providing-Gubernatorial-Authority-to-Remove-Legal-Barriers-to-Emergency-Response.pdf>.

6. Discussion draft of Public Health Emergency Authorities Act (Apr. 25, 2022) (hereafter, “draft PHEA Act”).

7. See generally D.G. Orenstein, L.C. White, et al., *Emergency Declaration Authorities Across All States and D.C. Table* (June 16, 2015), *available at* <https://www.networkforphl.org/wp-content/uploads/2020/01/Emergency-Declaration-Authorities.pdf>.

8. For other laws relating to state of war emergencies, see also, e.g., descriptions of laws in Arizona and Minnesota at <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>.

9. See, e.g., Okla. Stat. tit. 63, ch. 81 (the Catastrophic Health Emergency Powers Act).

10. See, e.g., D.C. Code Ann. § 7-2306(c-1) (special provision for extension of the Mayor’s emergency order related to COVID; this law is only in effect until October 26, 2022); Fla. Stat. Ann. § 252.36(1)(c) (legislative intent regarding public schools and extended public health emergencies, specifically noting COVID).

be noted to the extent that they bear on broader policy questions or offer an approach that may be suitable for emergency law generally.

Emergency law has received a great deal of legislative attention in recent years. With the changing landscape (and large number of jurisdictions addressed in this memorandum), some policy approaches that are worth discussion may be missing from this memorandum.

The staff welcomes additional input on approaches taken in other states that should be considered by the Commission.

Terminology

The terminology in the emergency laws of different states differs to some extent (e.g., whether the condition is an “emergency” or “state of emergency,” whether the state of emergency is “proclaimed” or “declared”). Many of these terminology differences appear to be stylistic, as opposed to substantive. In those cases, this memorandum uses the terminology in California’s Emergency Services Act (e.g., “state of emergency,” “proclaim”) to avoid possible confusion about the different terminology.

ESTABLISHMENT OF A STATE OF EMERGENCY

By way of illustrating the approach outlined above and making some progress in the development of the content of the information report, the remainder of this memorandum presents an analysis of the first major element of emergency law, the establishment of a state of emergency.

It discusses different approaches to the treatment of the issues involved in the establishment of a state of emergency, assessing each in terms of its compatibility with the policy objectives listed above.

Who Proclaims a State of Emergency?

Generally, the Governor has the power to proclaim a state of emergency. Some states also empower the Legislature to proclaim a state of emergency. These different approaches are described below.

Governor

Under California law, the Governor¹¹ is empowered to proclaim a state of emergency.¹² The California ESA makes no mention of a legislatively-proclaimed state of emergency. Similarly, in Hawaii, the law expressly grants the Governor sole authority for determining whether to issue a state of emergency proclamation for the state.¹³

The draft PHEA Act similarly authorizes the Governor to proclaim a public health emergency.¹⁴

Laws that only permit the Governor to proclaim a state of emergency would seem to further the following policy objectives:

- *Certainty.* Where only the Governor is empowered to proclaim a state of emergency, there is no question who is responsible to act.
- *Feasibility.* Allowing a single decisionmaker to proclaim a state of emergency could be more feasible in an emergency than requiring a collective decision. For instance, emergency conditions may prevent a collective body from gathering, achieving quorum, or meeting other procedural requirements to make decisions.
- *Speed and Nimbleness.* A single decisionmaker can act more quickly than an entity.

However, laws that permit only the Governor to proclaim a state of emergency may be in tension with the following objectives:

- *Information Input and Output.* By permitting the decision to be made by a single decisionmaker, the law does not necessarily require that different perspectives be taken into account, nor does it necessarily require that the information underlying the state of emergency decision be distributed publicly.
- *Oversight.* The law does not include a mechanism for someone other than the executive to proclaim a state of emergency if the executive refuses to act in emergency circumstances.

11. In California's Emergency Services Act, "Governor" is defined as "the Governor or the person upon whom the powers and duties of the office of Governor have devolved pursuant to Section 10 of Article V of the California Constitution." Gov't Code § 8556.

12. Gov't Code § 8625; see also Gov't Code § 8588 (allowing the Director of Emergency Services to proclaim an emergency in situations where the Governor is inaccessible); Health & Safety Code § 101080 (relating the authority of the director of the State Department of Health Services to declare a health emergency).

13. Haw. Rev. Stat. Ann. § 127A-14(c) ("The governor or mayor shall be the sole judge of the existence of the danger, threat, or circumstances giving rise to a declaration of a state of emergency in the State or a local state of emergency in the county, as applicable.").

14. Draft PHEA Act, *supra* note 6, § 4.

Governor or Legislature

In at least seven states, the law empowers either the Governor or the Legislature to proclaim a state of emergency.¹⁵ For example, in New Hampshire, the law grants the Legislature “the same power [as the Governor] to declare a state of emergency by concurrent resolution of the house and senate.”¹⁶

Laws that only permit either the Governor or the Legislature to proclaim a state of emergency would seem to further the following policy objectives:

- *Feasibility.* This approach fares similarly to the prior approach with respect to feasibility, as a governor could independently proclaim a state of emergency in either case. This approach provides somewhat more flexibility by also permitting legislative action, even though legislative action may be more difficult in emergency circumstances.
- *Information Input and Output.* Where the Legislature makes the state of emergency decision, the collective and public decisionmaking process of the Legislature would take into account more perspectives and include public discussion of the decision.
- *Oversight.* By allowing for alternative actors, this approach provides some checks to ensure that a state of emergency would be proclaimed in appropriate circumstances.

However, laws that permit either the Governor or the Legislature to proclaim a state of emergency may be in tension with the following objectives:

- *Certainty.* If either the Governor or the Legislature could act, it may be less clear who *should* act.
- *Speed and Nimbleness.* If there is uncertainty over who should proclaim a state of emergency, as noted above, the state of emergency proclamation could be delayed.

How is a State of Emergency Proclaimed?

This discussion focuses on a state of emergency proclaimed by a governor. Generally, states that permit legislatures to proclaim a states of emergency specify that the Legislature can act by concurrent resolution.¹⁷

15. See discussion of “State Laws that Expressly Authorize Legislatures to Declare a State of Emergency” at <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>; see also, e.g., Ala. Code § 31-9-8(a) (“The existence of a state of emergency may be proclaimed by the Governor as provided in this subsection or by joint resolution of the Legislature”).

16. N.H. Rev. Stat. § 4:45(I).

17. See discussion of “State Laws that Expressly Authorize Legislatures to Declare a State of Emergency” at <https://www.ncsl.org/research/about-state-legislatures/legislative-oversight-of-executive-orders.aspx>.

This discussion focuses on the specific requirements for the state of emergency proclamation contained in the emergency law itself. In some instances, the emergency law may rely on other general laws to describe the character of the state of emergency proclamation. For example, the draft PHEA Act requires that a state of emergency proclamation be made by “executive order, in a record.”¹⁸ Thus, the general law specifying the form of executive order would presumably apply to a state of emergency proclamation.

In Writing

California law requires that the proclamation of a state of emergency be in writing.¹⁹ Some other states’ emergency laws similarly specify that the state of emergency proclamation must be in writing.²⁰

Requiring that the state of emergency proclamation be in writing would seem to further the following policy objectives:

- *Certainty.* Requiring a written proclamation will provide more clarity as to when the state of emergency has been proclaimed and when the Governor’s emergency powers commence.
- *Information Input and Output.* A formal writing could be easily circulated and distributed to provide notice of the state of emergency proclamation. A formal writing would also provide some indicia of its character as an official act. A writing could also include some information about the basis for the state of emergency proclamation.
- *Oversight.* A formal writing, to the extent that it includes some information about the basis for the decision, will help others to understand and assess the decision.

This approach would be in tension with the following policy objectives:

- *Feasibility.* Although extreme, there may be emergency situations that impede the preparation and distribution of a formal writing.
- *Speed and Nimbleness.* The requirement of a formal writing may delay emergency action in some situations, as described below with regard to informal proclamations.

18. Draft PHEA Act, *supra* note 6, § 4(b). The draft Act defines record as “information inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form.” *Id.* § 2(6).

19. Gov’t Code § 8626.

20. See, e.g., Iowa Code Ann. § 29C.6(1), Ky. Rev. Stat. Ann § 39A.100(1).

Informal Verbal Proclamation

In one state, Arkansas, the law permits a verbal state of emergency proclamation in certain circumstances. Specifically, the law provides:

When time is critical because of rapidly occurring disaster emergency events, the Governor may verbally declare for immediate response and recovery purposes until the formalities of a written executive order or proclamation can be completed in the prescribed manner.²¹

Similarly, Delaware law appears to provide for emergency actions to be taken prior to the formal state of emergency proclamation (“Such an emergency order may be issued in writing subsequent to its effect so long as a written log recording the dates and times of such order is maintained by [Delaware Emergency Management Agency].”).²²

It is worth noting that in both of these cases the informal proclamation is permitted initially, but a formal written proclamation must still be issued. Thus, this approach provides flexibility to initiate a state of emergency in extreme circumstances that preclude compliance with the formal requirements, while still ensuring that the formal requirements are satisfied when possible.

Because this approach requires a formal writing to be prepared, the policy analysis below focuses *only* on the initial period before the formal written proclamation. And, by removing the obligation to comply with formalities during this period, the policy analysis is essentially the opposite of the prior approach (i.e., the formalities, or lack thereof, are the key consideration for the policy analysis).

By permitting informal proclamations to initiate the state of emergency, this approach would further the policy objectives:

- *Feasibility.*
- *Speed and Nimbleness.*

During the initial phase between the informal proclamation and the formal proclamation, this approach may be in tension with the following policy objectives:

- *Certainty.*
- *Information Input and Output.*

21. Ark. Code Ann. § 12-75-107(a)(2).

22. Del. Code Ann. tit. 20, § 3102 (10) (defining “state of emergency”).

- *Oversight.*

Contents of State of Emergency Proclamation

In some cases, the laws require specific findings or information to be included in a state of emergency proclamation.

No Specific Requirements in Statute

California law indicates that the Governor is empowered to proclaim a state of emergency in specified circumstances.²³ While the statute does not specify that the Governor needs to include findings about these specified circumstances, such findings were included in the Governor's proclamation of a state of emergency for the COVID-19 pandemic.²⁴

In some cases, other states appear to have similar laws that do not specify the required contents of the state of emergency proclamation.²⁵ The staff did not assess whether the state of emergency proclamations in these states also include findings about the statutory conditions for a state of emergency.

The absence of formal requirements for the contents of a state of emergency proclamation would seem to further the following policy objectives:

- *Feasibility.* With fewer formal requirements, it may be easier to initiate a state of emergency. This is particularly true where the required contents of the state of emergency proclamation involve required actions that must be taken prior to the state of emergency proclamation (e.g., consulting with affected parties or experts).
- *Speed and Nimbleness.* More formalities will typically lead to some delay. To the extent that the state of emergency proclamation must include certain contents, the preparation of that document will need to be undertaken more carefully to avoid omitting required information.

This approach has mixed results for the following objective:

- *Certainty.* The absence of specific requirements for the state of emergency proclamation could allow for more reliance on the

23. Gov't Code § 8625.

24. See Proclamation of a State of Emergency (Mar. 4, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>; see also Cal. Correctional Police Officers Ass'n v. Schwarzenegger (2008) 163 Cal.App.4th 802, 820, 77 Cal.Rptr.3d 844, rev. denied (Aug. 20, 2008) ("But there is no language in the Emergency Services Act that requires the Governor to state each aspect of the necessary finding in the proclamation itself. Issuance of the proclamation implies the Governor has made the finding. Therefore, it is sufficient if the proclamation sets forth circumstances that support the implied finding." (citations omitted))

25. See, e.g., Ga. Code Ann. § 38-3-51; 20 Ill. Comp. Stat. Ann. 3305/7; Minn. Stat. Ann. § 12.31.

proclamation without the need to assess its contents. However, where the required contents provide some assurance that the statutory conditions for initiating a state of emergency have been satisfied, including that information in the proclamation could help avoid uncertainty about whether those conditions have been met.

This approach seems to be in tension with the following objectives:

- *Information Input and Output.* Without required contents, the state of emergency proclamation may provide little information about the basis for the state of emergency proclamation.
- *Oversight.* The absence of substantive data about the emergency or findings regarding statutory conditions may make it more difficult to assess the appropriateness of the state of emergency proclamation.

Specific Findings or Information Required

In some cases, emergency laws specify certain information that must be included in a state of emergency proclamation.

For example, the draft PHEA Act requires that a public health emergency proclamation (or renewal) include all of the following:

- (1) a description of the nature and cause of the public health emergency;
- (2) the political subdivision or geographic area, including the entire state, subject to the public health emergency;
- (3) the duration of the declaration of the public health emergency if shorter than the maximum duration permitted under this [act];
- (4) the public health authority responding to the emergency; and
- (5) the identity of any person or agency the [Governor] consulted in declaring or renewing a public health emergency.²⁶

Some states' laws also include requirements for the contents of a state of emergency proclamation, although those vary in terms of how much required content is specified in the statute.²⁷ In general, laws specifically pertaining to

26. Draft PHEA Act, *supra* note 6, § 4(b).

27. See, e.g., Iowa Code Ann. § 29C.6(1) (written proclamation shall "indicate the area affected and the facts upon which it is based" and, if the emergency meets the definition of a "public health disaster," include a written statement to that effect); Mo. Rev. Stat. § 44.100 (proclamation must find "that a natural or man-made disaster of major proportions has actually occurred within this state, and that the safety and welfare of the inhabitants of this state require an invocation of the provisions of this section"); N.H. Rev. Stat. § 4.45(I)(a)-(d) (the emergency proclamation shall specify the nature of the emergency, political subdivisions or geographic areas subject to the declaration, conditions that have brought about the emergency, and duration of the state of emergency, if less than 21 days.). See also N.J. Stat. Ann. § 26:13.3(a) (specific to a public health

public health emergencies, like the draft PHEA Act, contain more detailed requirements for the proclamation's contents.

The policy analysis for requiring certain information be included in a state of emergency proclamation is the inverse of the prior approach (i.e., no specified required contents). Specifically, this approach would seem to further the following policy objectives:

- *Information Input and Output.*
- *Oversight.*

This approach has mixed results for the following objective:

- *Certainty.*

This approach seems to be in tension with the following objectives:

- *Feasibility.*
- *Speed and Nimbleness.*

Required Notice of s State of Emergency Proclamation

Emergency laws generally include some requirements about notice and distribution of state of emergency proclamations. Often, these requirements may be very general (as in California). In some cases, the law specifies particular notice be provided to the Legislature (or some subset thereof).

This discussion focuses specifically on notice of the state of emergency proclamation. Required notice of emergency orders or acts will be discussed in a later memorandum in connection with the discussion of emergency orders.

General Notice

California's Emergency Services Act requires the Governor to file the proclamation with the Secretary of State and cause "widespread publicity and notice" of the state of emergency proclamation.²⁸ For a state of emergency proclamation, the Act does not require specific notice to the Legislature or legislative leadership.

Some other states also include a similarly worded general notice requirement for a state of emergency proclamation (the requirement may also apply to

emergency), N.M. Stat. Ann. § 12-10A-5 (B) (specific to a public health emergency), Ore. Rev. Stat. § 401.165(5).

28. Gov't Code § 8626.

emergency acts more broadly, including emergency orders and termination or extension of the state of emergency).²⁹

Such general notice requirements further the following policy objective:

- *Information Input and Output.* The notice requirement contributes to wide distribution of the state of emergency proclamation.

In some cases, state law provides more specific requirements for publication or distribution of state of emergency proclamations. For instance, Hawaii law requires state of emergency proclamations be “post[ed] on the applicable state or county emergency management agency website and [announced] by means calculated to bring its contents to the attention of the general public, including by official announcement by means of television or radio broadcast, or both, or by Internet”³⁰

These more specific notice requirements would similarly further the objective related to information input and output, as well as furthering the following policy objective:

- *Certainty.* Specific requirements for effectuating notice ensure that people know where to find information about state of emergency proclamations.

However, the more specific requirements could be in tension with the following policy objective:

- *Feasibility.* Where the emergency circumstances disrupt communications, it may not be possible to comply with more specific notice requirements.

Specific Notice to Legislature or Specified Legislative Members

Some states, in addition to having a general notice requirement, also require specific notice to be given to the Legislature (or specified legislative members).

29. See, e.g., Miss. Code Ann. § 33-15-11(b)(17) (“As soon thereafter as possible, such proclamation shall be filed with the Secretary of State and be given widespread notice and publicity.”); Minn. Stat. Ann. § 12.31(2)(a) (“An order, or proclamation declaring, continuing, or terminating an emergency must be given prompt and general publicity and filed with the secretary of state.”).

30. Haw. Rev. Stat. Ann. § 127A-15(a); see also, e.g., Idaho Code Ann. § 46-1008 (A proclamation “shall be disseminated promptly by means calculated to bring its contents to the attention of the general public and unless the circumstances attendant upon the disaster prevent or impede, be promptly filed with the Idaho office of emergency management, the office of the secretary of state and the office of the recorder of each county where the state of disaster emergency applies.”)

For example, for a public health emergency, Connecticut law requires the Governor to make a “good faith effort to inform the [president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both houses of the General Assembly and the cochairpersons and ranking members of the joint standing committee of the General Assembly having cognizance of matters relating to public health] before declaring that the emergency exists.”³¹

Minnesota law requires the Governor, upon proclaiming a state of emergency, to immediately notify the majority and minority leaders of the Senate and the speaker and minority leader of the House.³²

The draft PHEA Act requires the Governor to submit a report to the Legislature (and make it publicly available) not later than 7 days after the public health emergency proclamation.³³ The act also specifies required contents of the report.³⁴

In general, requirements for legislative notice further the following policy objectives:

- *Certainty.* Clear requirements about who should receive notice help to ensure that notice is distributed to those persons.
- *Information Input and Output.* A specific notice requirement helps to disseminate the information through expected pathways.
- *Oversight.* Providing the Legislature with specific notice of state of emergency proclamations facilitates legislative oversight.

31. Conn. Gen. Stat. Ann. § 19a-131a(a); see also *id.* § 19a-131a(b)(1) (the law authorizes the specified legislative leaders to disapprove and nullify an public health emergency declaration within 72 hours of the declaration).

32. Minn. Stat. Ann. § 12.31(2)(a) (“When the governor declares a peacetime emergency, the governor must immediately notify the majority and minority leaders of the senate and the speaker and majority and minority leaders of the house of representatives.”).

33. The number of days is bracketed in the draft Act, which may suggest that the drafting committee might anticipate variations for specified timeline. See draft PHEA Act, *supra* note 6, § 4(e). See also *id.* § 4(b) (contents) and Legislative Note to § 4 (“[S]ome states may need to specify how the Governor will submit the report required in [subsection (e)]. This is particularly true for states with legislatures that are not in session year-round, which states should specify procedures for the Governor to submit this report both when the Legislature is in session and when it is not. Among states with part-time legislatures, existing procedures, if any, for a Governor to submit this report to the Legislature when it is out of session vary significantly. Whether a state specifies a procedure for the Governor to submit this report when its Legislature is out of session and, if so, which procedure it specifies will be affected by state law for calling a special session for the Legislature.”).

34. See draft PHEA Act, *supra* note 6, § 4(e) (the report must “describ[e] the evidence on which the [Governor] based the declaration and each of the specifications required in subsection (b), including any additional evidence the [Governor] considered after making or renewing the declaration and before submitting the report. The report must identify how the declaration and each specification is rationally based on that evidence.”).

However, such a requirement could be in tension with the following policy objectives:

- *Feasibility.* In an emergency situation, it may be difficult to communicate with or distribute information to the necessary persons.
- *Speed and Nimbleness.* If notice is required before issuing the state of emergency proclamation, the proclamation could be delayed, particularly where emergency conditions impede notice distribution.

To avoid conflict with these policy objectives, a notice requirement could be waived where notice is not feasible (e.g., the good faith effort, as in Connecticut, above) or where delayed action would cause undue harm.

Can/Must Governor Call a Special Session of the Legislature?

Before addressing the role of special sessions in different emergency laws, it may be helpful to include a brief note about special sessions generally and how they are distinct from regular legislative sessions. As described on the National Conference of State Legislatures website:

Unlike regular sessions, there is no specific timing for special (or extraordinary) sessions. They occur intermittently to deal with the specific issues or topics. Usually, the scope of a special session—that is, the topics that may be taken up—is limited to the issues specified in the notice calling for the special session.

There are no limits on the number of special session[s] that may be called. Many factors can influence the number of special legislative sessions that occur in any year, including court decisions; federal government actions; length of or scope limits on regular legislative sessions; length or scope limits on special sessions; natural or other disasters; party control of the legislature and governor's office; political culture of the state; redistricting; or state economy.³⁵

California Law on Special Sessions

The California Constitution empowers the Governor to “on extraordinary occasions” call a special session (also known as an extraordinary session).³⁶ During a special session, the Legislature “has power to legislate only on subjects specified in the proclamation but may provide for expenses and other matters incidental to

35. <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>.

36. Cal. Const., art. IV, § 3(b). Although it does not have general power to call itself into special session, the Legislature is authorized to convene in special session in the situation of a war or enemy-caused disaster. See *infra* notes 41 and 42.

the session.”³⁷ The Constitution provides specific timelines for special session legislation.³⁸

Special Policy Consideration: Character of and General Rules for the Legislature

On this issue, it is worth noting that California is one of a few states with a full-time, well-resourced legislature.³⁹ The staff is not familiar with the different laws regarding convening the Legislature when not in session, but, in general, the need for a legislative special session may be more acute in states with part-time legislatures.

Also, most states noted in the discussion below permit the Legislature to itself call a special session.⁴⁰ In general, California does not.⁴¹ Given that difference, there may be special policy and legal considerations to take into account regarding whether emergency law should specifically address special sessions.

No Special Rule Regarding Legislative Special Session on Emergency Proclamation

Under the Emergency Services Act, the Governor is not expressly authorized or obligated to call a special session of the Legislature upon proclaiming a state of emergency.⁴² As noted above, the Governor is generally empowered to “[o]n extraordinary occasions ... cause the Legislature to assemble in special session.”⁴³

The absence of a particular rule in emergency law for calling a special session may be in tension with the following policy objectives:

37. Cal. Const., art. IV, §§ 8(c)(1) (statutes enacted in special session generally take effect on the 91st day after adjournment of the special session); 10(b)(3), (4) (relating to timelines for veto of special session legislation).

38. Cal. Const., art. IV, § 3(b).

39. See <https://www.ncsl.org/research/about-state-legislatures/full-and-part-time-legislatures.aspx>.

40. See generally <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>.

Some emergency laws implicitly recognize the Legislature’s ability to call itself into session to consider termination of an emergency. See, e.g., Ark. Code Ann. § 12-75-107(c)(1)(B).

41. See <https://www.ncsl.org/research/about-state-legislatures/special-sessions472.aspx>; but see also Cal. Const. art. IV, § 21(c) (In a war- or enemy-caused disaster, the Legislature may provide rules for “[c]onvening the Legislature.”); Gov’t Code §§ 9035-9037.

42. But see Gov’t Code § 8624(b) (Powers granted to the Governor with respect to a state of war emergency end when “[t]he Governor has not within 30 days after the beginning of such state of war emergency issued a call for a special session of the Legislature for the purpose of legislating on subjects relating to such state of war emergency, except when the Legislature is already convened with power to legislate on such subjects.”); see also Cal. Const., art. IV, § 10(f) (requiring a special session upon declaration of a fiscal emergency).

43. Cal. Const., art. IV, § 3(b); see also *supra* notes 41 and 42.

- *Certainty.* Although there is general authority to call for special sessions, this approach does not provide an express rule about special sessions in emergency situations.
- *Oversight.* This approach, by not expressing raising the issue of a special session in connection with a state of emergency proclamation, may make it less likely that a special session would be called and that could, in turn, impede legislative oversight.

Express Authority to Call Special Session on State of Emergency Proclamation

Certain states permit the Governor to call a special session of the Legislature upon a state of emergency proclamation.⁴⁴ These laws can permit or require some other executive or legislative officials to weigh in on the need for a special session.⁴⁵

This approach may further the following policy objectives:

- *Certainty.* This approach ensures there is clear express authority for the Governor to call the Legislature into special session.
- *Oversight.* This approach implicitly recognizes a possible need for legislative action or oversight in a state of emergency.

Since this reform would be permissive, the approach would not necessarily result in a special session. The policy implications of the special session itself are included in the analyses below (i.e., where a special session is required or automatic).

Requirement that Governor Call Special Session on State of Emergency Proclamation

In some instances, the law may require the Governor to call a special session when a state of emergency is proclaimed. For instance, in Georgia, the law requires

44. See, e.g., Ala. Code § 31-9-8(a), Conn. Gen. Stat. Ann. § 28-9(a) (provision applies to “civil preparedness emergencies”; separate provisions govern public health emergencies, see *id.* § 19a-131a).

45. See, e.g., Ala. Code § 31-9-8(a) (Lieutenant Governor or Speaker of the House may request that the Governor call the Legislature into special session). Like California, Alabama elects their governor and lieutenant governor separately in the general election. See <https://nlga.us/research/methods-of-election/>.

In some cases, the law may provide special rules for situations where the Governor receives a request for a special session, but the Governor declines to call the special session. See, e.g., N.D. Cent. Code Ann. § 37-17.1-05(3)(b) (“If a state of disaster or emergency relating to public health is declared and in effect and the legislative assembly is not in session, the legislative management may meet to vote on whether the legislative management should request the governor call a special session of the legislative assembly. If the governor does not call a special session within seven days after the legislative management sends a request to the governor, the declared state of disaster or emergency relating to public health terminates thirty days after the request from the legislative management was sent to the governor.”).

the Governor to call a special session of the Legislature upon proclamation of a state of emergency.⁴⁶

Requiring a special session call when a state of emergency is proclaimed would seem to further the following policy objectives:

- *Certainty.* This approach makes clear that the Legislature will be called into session upon a state of emergency proclamation.
- *Information Input and Output.* This approach ensures that the Legislature can respond to the state of emergency proclamation and emergency acts.
- *Oversight.* This approach ensures early legislative oversight during a state of emergency.

This approach may be in tension with the following policy objectives:

- *Feasibility.* This approach may require calling the Legislature into session when emergency circumstances prevent the Legislature from meeting or conducting business.
- *Speed and Nimbleness.* This approach may result in delay, especially if the Governor and Legislature disagree on how to respond to the emergency.

Automatic Special Session on State of Emergency Proclamation

In some states, the statutory provisions provide for the Legislature to convene without a separate act of the Governor when a state of emergency is proclaimed.

Oklahoma law provides that a special session of the Legislature commences automatically on the morning of the second day following a proclamation of a catastrophic health emergency.⁴⁷

This approach is similar to the previous approach with respect to the policy objectives. This approach performs slightly better with regard to certainty (i.e., this approach removes the possibility of a governor refusing to call the special session). Also, by making the special session automatic, this approach may be somewhat better with respect to the speed and nimbleness policy objective (i.e., no possibility of a delay in the call for special session).

46. Ga. Code Ann. § 38-3-51(a) (this requirement applies specifically to a “state of emergency or disaster exists as a result of a public health emergency”); see also, e.g., Gov’t Code § 8624(b) (powers granted to the Governor with respect to a state of war emergency end when “[t]he Governor has not within 30 days after the beginning of such state of war emergency issued a call for a special session of the Legislature for the purpose of legislating on subjects relating to such state of war emergency, except when the Legislature is already convened with power to legislate on such subjects.”); Mt. Code Ann. § 10-3-505(1) (requiring the Governor issue an order convening a special session within 45 days of an emergency proclamation related to an enemy attack).

47. Okla. Stat. tit. 63, § 6405(C).

UPDATE ON DRAFT PUBLIC HEALTH EMERGENCY AUTHORITIES ACT

The ULC's Public Health Emergency Authorities Committee met on April 8th and 9th to work through a discussion draft of the Act. After that meeting, an updated draft was prepared, which will be reviewed by the ULC Style Committee at its May 5th-8th meeting. In preparing this memorandum, the staff used the draft PHEA Act prepared for the Style Committee's review.

There will be an informational meeting about the Act sometime between May 24 and June 17 (before the Act is presented at the ULC Annual Meeting in July).

From having attended part of the earlier committee meeting and reviewed the materials, the staff understands:

- This act is intended to be a model (as opposed to uniform) act. According to the ULC website, "[a]n act is designated as a 'Model' Act if uniformity may be a desirable objective, though not a principal objective, and the act may promote uniformity and minimize diversity even though a significant number of jurisdictions may not adopt the act in its entirety, or the purposes of the act can be substantially achieved even though it is not adopted in its entirety by every state."⁴⁸
- This act would be a standalone act pertaining to public health emergencies (i.e., the act could supplement existing emergency laws).⁴⁹
- The act includes required reporting or substantive findings in connection with public health emergency declarations (including the initial declaration, renewal, and termination), as well as emergency orders.⁵⁰
- The act also includes provisions about the relationship between state and local governments in emergencies.⁵¹ The act also includes penalties for violations of emergency orders.⁵²

48. See <https://www.uniformlaws.org/acts/overview/modelacts>.

49. See draft PHEA Act, *supra* note 6, § 3 ("Subject to Section 10 [relating to executive privilege and public records law], this [act] supersedes any conflicting state law.").

50. See *id.* §§ 4 (relating to declaration and renewal of public health emergency), 5 (relating to termination of public health emergency), 7 (relating to emergency orders), and 8 (relating to renewal of orders).

51. See *id.* § 11 (related to preemption of local authority).

52. See *id.* §§ 12 (related to injunctive relief), 13 (related to civil penalties/fines).

ADMINISTRATIVE MATTERS

Legislative Notification

Letters about this study were sent to California's legislative leadership and certain legislative committees, as specified in the resolution of authority.

Stakeholder Outreach

The staff is in the process of identifying contacts at the organizations and entities on the list attached to this memorandum. The staff will be reaching out to these entities and organizations to inform them of the Commission's study of emergency law. **The staff welcomes any suggestions from Commissioners on additional stakeholders to contact.**

Respectfully submitted,

Kristin Burford
Staff Counsel

ENTITIES TO BE NOTIFIED OF THIS STUDY

- California Legislature (as directed in Resolution of Authority)
 - Leadership
 - Committees (Assembly and Senate Committees on Judiciary, Assembly Committee on Emergency Management, and Senate Committee on Governmental Organization)
- California Governor's Office
- California Office of Emergency Services
- California Health and Human Services Agency
 - California Emergency Medical Services Authority
 - California Department of Health Care Services
 - California Department of Managed Health Care
 - California Department of Public Health
 - California Department of Social Services
- California Business, Consumer Services & Housing Agency
 - California Alfred E. Alquist Seismic Safety Commission
- California Employment Development Department
- California Department of Education
- California Department of Insurance
- CalFire (Department of Forestry & Fire Protection)
- California Public Utilities Commission
- California Division of Occupational Safety and Health
- California Lawyers Association Public Law Section
- League of California Cities
- California State Association of Counties
- County Health Executives Association of California
- County Welfare Directors Association of California
- California Central Valley Flood Control Association
- American Red Cross
- Network for Public Health Law
- California Professional Firefighters
- California Police Chiefs Association
- California Hospital Association
- California Association of Public Hospitals and Health Systems