**STANDARD BRIEFING NOTE 6**

**RIGHTS IMPACTS OF COVID-19 LAWS IN SOUTH AUSTRALIA**

This Briefing Note contains key points, key terms, background information and examples of practical application as well as links to further information and local contacts. It does not contain legal advice and should be used as a starting point for further research t rather than an authoritative source. Feedback on its contents is welcome.

*This was prepared in a hurry to provide a rough overview -* ***Current as of 24 April 2020***

**Key Points**

* The *COVID-19 Emergency Response Act 2020* (SA) and related Regulations, Guidelines and Directions contain a number of exceptional features that have the potential to impact **positively and negatively** on individual rights. For example, the *COVID-19 Emergency Response Act 2020* (SA):
	+ Aims to protect the South Australian community from the health risks posed by COVID-19 pandemic (impact on *International Covenant on Economic Social and Cultural Right*s (ICESCR) Article 12- right to highest attainable standard of physical and mental health; *International Covenant on Civil and Political Rights* (ICCPR) Article 6 – right to life)
	+ Aims to protect small businesses in South Australia from the economic risks posed by COVID-19 pandemic (impact on International Covenant on Economic Social and Cultural Rights (ICESCR) Article 11 – right to adequate standard of living)
	+ Aims to protect renters and those in residential parks and supported residential facilities from housing risks posed by COVID-19 pandemic (impact on International Covenant on Economic Social and Cultural Rights (ICESCR) Article 11 - right to adequate housing and living conditions)
	+ Aims to protect mentally incapacitated person from the risks posed by COVID-19 pandemic (impact (ICESCR) Article 12)
	+ Makes changes to the rights of landlords and tenants that apply retrospectively (impact on Article 4 regarding retrospective application of laws)
	+ Authorises a range of public officers to detain people without charge (impact on ICCPR Article 9 – freedom from arbitrary detention)
	+ Invests a wide range of public officers (including police and health officials) with wide discretions to direct, restrict or limit the conduct of individuals in response to the COVID-19 pandemic, including in ways that would otherwise breach State laws and with immunity from civil and criminal legal action, *without* the need for approval by Parliament (impact on ICCPR Article 9 – freedom from arbitrary detention, Article 12- liberty of movement, Article 17 – right to privacy, Article 21 – right to peaceful assembly, Article 22 – freedom of association).
* It is well recognised under international human rights law that in times of emergency, it may be permissible for States to take action that would breach or interfere with certain human rights to preserve the life or wellbeing of its citizens. For example, ICCPR Article 4 provides:
	+ *In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.*
* The key question for those interesting in monitoring the ongoing rights impacts of these laws is whether the interference with any rights remains necessary because of the presence of an ongoing public health emergency, and if so, whether any restrictions on rights is limited to the extent necessary to respond to that emergency situation.
* Some key features of the South Australian legislative response to COVID-19 are set out below (current as of 24 April 2020).

**Table of Key Features of COVID-19 Emergency Response Act 2020 (SA)**

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| **Section**  | **Description**  |
| 2 | **Retrospective application** of sections 7-9 (taken to have commenced on 30 March 2020) |
| 6 | **Sunsetting clause** – Part 2 Schedule 1 and Schedule 2 expire on the date fixed by the Minister which must be either (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 declaration); or (b) the day falling 6 months after the commencement of this section, whichever is the earlier |
| 7 | **Commercial leases – protections for Lessees** If a lessee is suffering **financial hardship** as a result of the COVID-19 pandemic, a lessor cannot take ‘prescribed action’ (eg termination or eviction) against lessee for failing to pay rent or failing to pay outgoings or for not operating a business on the premises or other acts set out in the Regulations If a lessee is acting in compliance with a COVID-19 law, their conduct will constitute a breach of a commercial lease.Rent cannot be increased during COVID-19 pandemic if lessee suffering financial hardshipParties can apply to the Small Business Commissioner to determine disputes about COVID-19 financial hardship – appeals to Magistrates Court[COVID-19 Emergency Response (Commercial Leases) Regulations 2020](https://www.legislation.sa.gov.au/LZ/C/R/COVID-19%20Emergency%20Response%20%28Commercial%20Leases%29%20Regulations%202020.aspx) provides that financial hardship for commercial leases the lessee is eligible for, or receiving, a JobKeeper payment in respect of the business of the lessee (whether in their capacity as an employer or on their own behalf). |
| 8 | **Residential leases – protections for Tenants** Modifies *Residential Tenancies Act* (RTA)to provide that landlords must not: increase rent; undertake physical inspections (to be conducted by audio-visual means instead); take action against a tenant for following a State COVID-19 law; use s78A of the RTA to seek compensation for failure to pay rent due to COVID-19 hardship; terminate a lease solely on the basis of failure to pay rent due to COVID-19 hardship. Tenants can have repairs carried out without obtaining approval from landlord.The Tribunal cannot make an order terminating a lease solely on the basis of failure to pay rent due to COVID-19 hardship; make orders requiring interest to be paid on any amount payable under a residential tenancies agreement; use s99 of the RTA to make orders enforcing possession if tenant or others self-isolating at the premises.The Tribunal can use its powers under s89 of the RTA to make any order it sees fit/appropriate having regard to the conditions of the COVID-19 pandemic.When making orders for possession under s93 of the RTA, the Tribunal must have regard to the COVID-19 circumstances and may amend or modify such an order having regard to tenant’s circumstances The Tribunal can also vary or set aside or replace any orders made during the prescribed period (covering retrospective application of this provision – applying as of 30 March 2020). |
| 9 | **Residential Parks – protection for tenants**Modifications to *Residential Parks Act* as per modifications to RTA in section 8. |
| 10 | **Supported Residential Facilities – protection for tenants**Modifications to *Supported Residential Facilities Act* as per modifications to RTA in section 8. |
| 12 | **Treasurer powers to modify financial reporting and audits**Treasurer in consult with Auditor General can modify or suspend requirements under the *Public Finance and Audit Act* if necessary having regard to COVID-19 pandemic – but these powers cannot be used to diminish the protections or powers of the Auditor General under any Act or law. If the Treasurer exercises these powers the Auditor General must report on their use and that report must be tabled in Parliament.  |
| 13 | **Auditor General can undertake review following use of Treasurers powers under section 12** |
| 14 | **General power to extend all time limits and terms of appointment in any law via regulation (under *any* Act)**This includes anything that needs to be done at a particular time or within a particular period; or any appointment or circumstance ceases at a particular time or exists for a particular period; or anything would expire or cease at a particular time or at the end of a particular period.Regulations to be made by Governor, and may be subject to limitations.Must not extend beyond 6 months |
| 15 | **Modification of requirements relating to laying of reports before Parliament**For example extending tabling requirements for most reports by 7 days and allowing receipt of reports by President of House if Parliament not sitting |
| 16 | **General power to suspend or modify requirements re signing or witnessing documents (under *any* Act)**Regulations to be made by Governor, and may be subject to limitations.Must not extend beyond 6 months |
| 17 | **Meetings in person etc may occur by audiovisual or other means**Exceptions to be contained in regulations  |
| 18 | **Service of document can occur in modified form** |
| 19  | **Regulation making powers – very broad** Governor has very broad regulation making powers under this Act including power to set out the circumstances in which a person will be taken to be suffering financial hardship as a result of the COVID-19 pandemic for the purposes of the Act and fines of up to $10,000 for breach of regs and fines of up to $5000 for breach of regs, as well as regs relating to modification or suspension of the operation of Schedule 1 or any Act or law relating to the matters dealt with in that Schedule.Also includes power to provide that ***any matter or thing is to be determined, dispensed with, regulated or prohibited according to the discretion of the Minister, the State Co-ordinator, the Chief Public Health Officer or any other specified body or person*.**Regs to expire after 6 months |
| 21 | **Regulations subject to disallowance**All regs made under the Act must be laid before each House of Parliament on the next sitting day of that House after the regulations are made |
| 22 | **Immunity from civil and criminal liability for actions/conduct/omissions made in relation to this Act in relation to COVID-19 outbreak**  |
| **Schedule 1** | **Detention of protected persons during COVID-19 pandemic** |
| **2** | **‘protected person’ = mentally incapacitated person** means a mentally incapacitated person within the meaning of the *Guardianship and Administration Act 1993* or a mentally incapacitated person who is a 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 |
| **4** | **Guidelines relating to detention** – to be made by Minister by notice in the Gazette. Guidelines have been published in the [Gazette 23.4.2020 p812](http://www.governmentgazette.sa.gov.au/2020/April/2020_034.pdf) and include requirement that detention be ‘the least restrictive of the protected person's rights and personal autonomy as is consistent with his or her proper care and protection so as: to facilitate compliance with any directions or guidance given by the State Co-ordinator or Chief Public Health Officer in relation to the COVID-19 pandemic; and/or to address any identified risks to the protected person and/or others arising from the COVID-19 pandemic’. The Guidelines further provide that detention pursuant to Schedule 1 must not comprise seclusion except as an option of last resort and that the nature and means of any detention pursuant to Schedule 1 must not be determined based upon the convenience of others (including the person exercising the power of detention).  |
| **5, 8** | **‘authorising officer’= or any public servant appointed by the Minister** who in the opinion of the Minister, has the appropriate qualifications or experience to perform the functions and exercise the powers conferred on the Authorising Officer under this Schedule; subject to the direction and control of the Minister; must comply with Guidelines and any regs; can be terminated at any time by the Minister  |
| **6** | **Authorising Officer may give directions** Broad powers to direct for purposes considers appropriate for the purposes of this ScheduleDirections to be in writing and must have regard to COVID-19 circumstancesFines for failure to comply : max $75000 for corporations $5000 for individuals |
| **7** | **Authorising Officer can delegate powers in writing**  |
|  | **Authorised officers = police officers, officers under Emergency Management Act or other classes of public servant as per regs** |
| **9** | **Authorised officer can detain protected persons**If they reasonably believe that a protected person is unlawfully at large and that taking action under this clause is appropriate for a purpose related to the COVID-19 pandemic – detention can be at the persons’ place of residence or other place determined by officer – must comply with guidelines. Cannot detain in correctional facility and cannot deny medical treatment |
| **10** | **Guardians of protected persons can detain and exercise other powers**Can detain person using reasonable force in place of residence or other place if considered reasonably necessary for COVID-19 pandemic or other action authorised by Tribunal |
| **11** | **Certain persons at prescribed premises may detain protected persons during COVID-19 pandemic**Powers for operators or persons in charge of supported residential facilities or supported accommodation to detain protected persons for up to 48 hours for limited purposes eg to contact guardian or Tribunal, or for longer periods with approval from guardian or authorising officer or Tribunal |
| **12** | **Authorising officer can detain protected person if no guardian** If satisfied that to do so is appropriate for a purpose related to the COVID-19 pandemic – can also take other action considered necessary with respect to protected person – must be in writing and in line with Guidelines |
| **13** | **Duration of detention not more than 28 days** |
| **14** | **Extension of detention period and other orders by Tribunal**Can include use such force as may be reasonably necessary for the purpose of ensuring the proper medical or dental treatment, day-to-day care and wellbeing of the protected person. |
| **15** | **Review of detention by Authorising Officer if detention extended beyond 28 days by Tribunal order** |
| **16** | **Review by Authorising Officer on application of aggrieved person**Review under this clause in any manner that the Authorising Officer considers appropriate, and the Authorising Officer may confirm, vary or reverse the decision under review – can be subject to regs |
| **17** | **Review of decisions by Tribunal**Reviewable decisions = decision to detain a protected person under clause 11, a decision of the Authorising Officer under clause 12; any other decision of a kind prescribed by the regulation |
| **18** | **Tribunal may give advice,** direction or approval to Authorising officer, guardian or prescribed person |
| **19** | **Offence to remove protected person from place of detention**Penalty of $10,000 |
| **Regulations**  | **Community Visitor Program**Details Community Visitors Program now set out in COVID-19 Emergency Response (Schedule 1) Regulations 2020 section 10. Appointment of Principal Community Visitor’ by Minister (and removal at Ministers discretion), this person can then appoint other community visitors. Visitors have powers to conduct visits and inspections to place where protected persons are detained and to refer matters of concern to Minister or other appropriate person or body and to act as advocates for person’s detained, and to consider issues raised by guardians friends or carers or families of persons detained. Fines are included for those that stop community visitors from carrying out their functions. A visit can occur by Community Visitor’s own initiative or on request (by guardian, relative, carer or friend of such a protected person) at ‘reasonable time of day’ and with notice to those in control / owning premises where person is detained. The Principal Community Visitor must report to the Minister on the work of the community visitors every 3 months from 30 July 2020. |
| **Schedule 2** | **Temporary modification of particular State laws** |
| **1** | **Broadening scope of powers of State Co-ordinator and authorised officers** Under the *Emergency Management Act 2004* to include:giving a direction or make a requirement in response to a health emergency that applies to persons generally throughout the State. **may exercise or discharge a power or function under this section even if to do so would contravene another law of the State**; **may use such force as is reasonably necessary** in the exercise or discharge of a power or function under this section or in ensuring compliance with a direction or requirement **Directions can be in writing or via email or SMS or orally**Must consult with Chief Medical Officer if in relation to health careCan enforce penalties of up to $1000 |
| **5** | **Broadening scope of detention powers under South Australian Public Health Act 2011**For the purposes of giving effect to a detention order made under s77 of the Public Health Act, the Chief Public Health Officer or an authorised person can apprehend and take the person to a place of detention; and restrain the person and otherwise use force and be assisted by such persons as may be necessary or desirable in the circumstances. “Authorised persons” = police and anyone else appointed by the Chief Public Health Officer  |

**List of Regulations as at 24 April 2020**

* [COVID-19 Emergency Response (Commercial Leases) Regulations 2020](https://www.legislation.sa.gov.au/LZ/C/R/COVID-19%20Emergency%20Response%20%28Commercial%20Leases%29%20Regulations%202020.aspx) (defines ‘financial hardship’ in context of commercial leases changes – noted above)
* [COVID-19 Emergency Response (Schedule 1) Regulations 2020](https://www.legislation.sa.gov.au/LZ/C/R/COVID-19%20Emergency%20Response%20%28Schedule%201%29%20Regulations%202020.aspx) (establishes Community Visitor scheme for protected persons detained pursuant to Schedule 1)
* [COVID-19 Emergency Response (Section 16) Regulations 2020](https://www.legislation.sa.gov.au/LZ/C/R/COVID-19%20Emergency%20Response%20%28Section%2016%29%20Regulations%202020.aspx) (concerning statutory declarations
* [COVID-19 Emergency Response (Section 17) Regulations 2020](https://www.legislation.sa.gov.au/LZ/C/R/COVID-19%20Emergency%20Response%20%28Section%2017%29%20Regulations%202020.aspx) (concerning witnessing documents)

**List of Declarations as at 24 April 2020**

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| --- | --- | --- | --- |
| 23/3/2020 |  | Declaration of Major Emergency |  |
| 2/4/2020 |  | Extension of Major Emergency Declaration |  |
| 22/3/2020 |  | Appointment of Assistant State Co-Ordinator |  |
| 28/3/2020 |  | Emergency Management (Continuation of Overseas Travel Self-Quarantine)(COVID-19) Direction 2020 |  |
| 28/3/2020 |  | Emergency Management (COVID-19)(Isolation Following Diagnosis or Close Contact) Direction 2020 |  |
| 2/4/2020 |  | Emergency Management (Prohibition of Point of Care Serology Tests) (COVID-19) Direction 2020 |  |
| 3/4/2020 |  | Emergency Management (Appropriate Surgery During COVID-19 Pandemic No 3) Direction 2020 |  |
| 15/4/2020 |  | Emergency Management (Non-Essential Business and Other Activities No 4)(COVID-19) Direction 2020 |  |
| 16/4/2020 |  | Emergency Management (Gatherings No 2)(COVID-19) Direction 2020 |  |
| 16/4/2020 |  | Emergency Management (Cross Border Travel Direction 2020 No.3) (COVID-19) Direction 2020 |  |
| 21/4/2020 |  | Emergency Management (Residential Aged Care Facilities No 3)(COVID-19) Direction 2020 |  |

**Further Information**

* Legislation and Regulations can be found [here](https://www.legislation.sa.gov.au/LZ/C/A/COVID-19%20EMERGENCY%20RESPONSE%20ACT%202020.aspx)
* Information about Directions can be found [here](https://www.legislation.sa.gov.au/Web/Information/CV19/CV19.aspx)
* Information about SAPOL’s role can be found [here](https://www.police.sa.gov.au/covid-19-information)
* Information about the SA Parliament’s Select Committee on COVID-19 can be found [here](https://www.parliament.sa.gov.au/Committees/Committees-Detail)

**Local Contacts**

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