

COVID-19 Emergency Response Act 2020-Schedule 1

Information sheet for protected persons, service providers and guardians

Restrictive practices during COVID-19 pandemic

During the COVID-19 pandemic there is a risk that protected persons will not have the capacity to:

- understand or comply with Guidance and Directions of the Chief Public Health Officer and Directions of the State Coordinator in relation to the COVID-19 pandemic; or
- otherwise take appropriate steps to protect themselves and the community from exposure to COVID-19.

As a consequence, supported accommodation providers including aged care, mental health and disability service providers may need to restrict the movement of protected persons to ensure they are not exposed to COVID-19 or spread the virus in the broader community.

The Guidance and Directions of the Chief Public Health Officer and Directions of the State Coordinator do not authorise service providers to use restrictive practises to enforce compliance with the guidance or directions.

In cases where a provider believes that restrictive practices are needed, the Government has developed a new scheme aimed at ensuring the practices take into account the needs of both the protected person and the broader community.

Applications to restrict an individual's movements will be assessed by a guardian or Authorised Officer, and will consider all relevant background when determining what measures should be put in place.

Service providers should not restrict the movement of protected persons without having first obtained appropriate authorisation for the restriction. Failure to do so may result in an unauthorised restrictive practice under South Australian law.

What is the new COVID-19 detention scheme?

To ensure that supported accommodation providers including aged care, mental health and disability services can take appropriate steps to legally help protected persons



comply with public health directions around COVID-19, Parliament has approved a new scheme to allow providers to apply for approval to restrict the movement of a protected person for up to 28 days.

The scheme provides a simplified, quick response process for the temporary detention of protected persons in specific circumstances related to the COVID-19 pandemic. It is intended to protect residents from COVID-19 by approving detention at the premises at which they usually reside, or other restrictive measures that are deemed appropriate in the circumstances.

Who can make an application?

Persons in charge of supported accommodation facilities

The new scheme primarily relates to people living in supported accommodation facilities.

The staff at these facilities will generally be the people best placed to make an application for detention, as they know the protected persons circumstances and whether they are likely to comply with the health guidance and directions. Clause 11 of the scheme therefore allows a **prescribed person** to seek approval for the temporary detention of a protected person.

The **prescribed person** is

- The person in charge of the operation of the premises for example the manager of the service provider organisation; or
- A person physically present at the relevant premises and in charge of the operation of the premises while they are present, for example (a senior manager/supervisor).

Other applicants

Clause 12 of the scheme also allows other people to apply for the detention of a protected person who is not already under guardianship.

The detention is not limited to the protected person's usual place of residence.

This type of detention may be sought if the person does not have a guardian and must be detained at a medical facility or at other accommodation away from their usual place of residence.

When an application for detention should be made

Applications should be made where there is concern that a protected person does not have the capacity to adhere to public health measures, such as social distancing, that are designed to minimise the risk of transmitting COVID-19.

Before making an application, you should first try and communicate with the protected person about the risks posed by COVID-19 and the need to practise social distancing and other public health measures.

If the protected person is unable to understand the risks posed by COVID-19, to both them and the community, or is unable or unwilling to comply with the public health measures, then you may consider making an application for approval to detain the person for purposes related to COVID-19.

Guidelines

The Attorney-General has published Guidelines on the exercise of powers of detention under the new scheme.

When making decisions about whether detention is required and how it will be implemented, the following must be taken into consideration:

- The measures are 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.
- Detention must not comprise seclusion except as an option of last resort.
Example- A protected person must not be confined to his or her room unless there are no other options to facilitate compliance with any direction or guidance of the State Co-ordinator or Chief Public Health Officer, or to manage the risks to the protected person and/or others arising from the COVID-19 pandemic.
- Any measures put in place must focus on the rights of the protected person, not the convenience of others (including the person exercising the power of detention).
Example – The nature and means of detention must not be based upon the

operational convenience of those operating premises at which a protected person resides.

- Measures must be assessed and implemented on a case by case basis.

Use of force to detain a person

The approval of detention is not a blanket approval for the use of force against the protected person.

Detention may include environmental restraints, or appropriate redirection of the protected person in relation to the risks posed by the COVID-19 pandemic. The nature and means of detention should be the least restrictive measures possible and proportionate to the risk posed to the protected person or the community by the COVID-19 pandemic.

If the applicant considers there is a need to use force to detain the protected person it may be more appropriate for the applicant to make an application to the SA Civil and Administrative Tribunal for special powers under section 32 of the Guardianship and Administration Act. It would be a matter for the Tribunal to determine if the application should be approved.

48 hour detention

If a service provider thinks it is necessary to detain a protected person at their usual place of residence, a prescribed person may commence the detention for an initial period of no more than 48 hours for the purposes of contacting the relevant approver to seek approval for the detention.

The initial 48 hour period of detention should only be used where it is necessary to take immediate steps to detain the person.

For example, a protected person may indicate they do want to comply with a direction to stay isolated in a room or premises. If there is a risk of harm to the person or other people, the prescribed person may detain the person for up to 48 hours while they contact the guardian or Authorising officer for the purposes of seeking approval of the detention.

Who do I ask to approve detention?

There are three people with power to approve detention under the new scheme. These are:

- A guardian
- The Authorising Officer
- South Australian Civil and Administrative Tribunal

If the protected person has the Public Advocate, a family, friend or other person appointed as a guardian, you may apply to that guardian

If there is no guardian appointed, you should apply to the Authorising Officer for approval.

Depending on the nature of the proposed detention, the guardian or Authorising Officer may also recommend that you apply direct to the SA Civil and Administrative Tribunal for approval.

Approval of detention by the guardian

Both private guardians and the Public Advocate have the power to approve the detention of a protected person at their usual place of residence for a period up to 28 days.

The approval can be made upon request by a person in charge of a premises at which the protected person usually resides. The guardian can only approve the detention if they have responsibility for accommodation arrangements.

The guardian does not require powers under section 32(1)(b) of the *Guardianship and Administration Act* in order to agree to the temporary detention of the person.

The SA Civil and Administrative Tribunal has no role in relation to this temporary approval by a guardian.

The power to approve temporary detention will apply to both the Public Advocate and private guardians.

If the guardian does not have accommodation powers, the guardian cannot approve detention under this new scheme. In this case, the guardian could apply to SACAT to vary the guardianship order to include accommodation powers or, it may be more efficient for the prescribed person to apply direct to SACAT for an order approving the detention of the protected person at their usual place of residence.

Where the Public Advocate is guardian:

The application form to seek approval of the temporary detention must be emailed to OPAMailbox@sa.gov.au providing information about the protected person, the nature of the proposed detention and why it is required.

The applicant must also provide information about positive behaviour support strategies to assist the protected person. When considering applications for orders, the guardian will want to be assured that the protected person's daily routine is maintained as much as possible. Positive behaviour support strategies may include:

- How any exercise that might be prevented by the detention is replaced
- How any personal development, such as might be provided in a day options programme, is replaced.
- Any changes to diet to reflect the changed circumstances of the person
- Any relationship issues with other residents

The guardian will endeavour to make a decision on whether to approve the proposed detention as soon as possible, and generally the same day as receiving the application.

If the guardian approves the detention, a written decision will be provided to the applicant, that must be kept in a register and be available for inspection (see **Keeping a register** below).

If the application is incomplete the guardian may ask for more information which may delay a decision.

Where a private guardian has been appointed:

If a family member, friend of some other person is appointed as a guardian (private guardian), they may also approve the detention of the protected person.

There is no prescribed process or form to apply to a private guardian for approval. A private guardian may choose to use the Public Advocate application form as an example of the information they should ask for and consider when deciding whether to approve temporary detention.

If the private guardian decides to approve detention that decision may be communicated to the applicant by phone, email or in writing however, the applicant must record the details of the approval in the register (see **Keeping a register** below).

Where there is no guardian:

A new role of Authorising Officer has been created to authorise applications for temporary detention of people.

The Authorising Officer must be satisfied that the protected person has a mental incapacity.

The Authorising Officer has the power to authorise the detention of a protected person at their usual place of residence for a period up to 28 days. The authorisation can be made upon request by a person in charge of a premises at which the protected person usually resides.

The Authorising Officer can also authorise applications by parties other than the service provider and approve detention of a person at a place other than their usual place of residence.

To apply, send a completed application form to AuthorisingOfficer@sa.gov.au, including Information about the protected person, the nature of the proposed detention and why it is required. The applicant must also provide information about the mental incapacity.

Like the guardian, the Authorising Officer will also want information about positive behaviour support strategies to assist the protected person. When considering applications for authorisation, the Authorising Officer will want to be assured that the protected person's daily routine is maintained as much as possible. Positive behaviour support strategies may include:

- How any exercise that might be prevented by the detention is replaced
- How any personal development, such as might be provided in a day options programme, is replaced.
- Any changes to diet to reflect the changed circumstances of the person
- Any relationship issues with other residents

The Authorising Officer will endeavour to make a decision on whether to approve the proposed detention as soon as possible, and generally the same day as receiving the application.

If the AO approves the detention, a written decision will be provided to the applicant. This decision must be kept in a register and be available for inspection (see **Keeping a register** below).

If the application is incomplete the AO may ask for more information which may delay a decision.

What factors will be considered in the decision

When considering an application, the guardian and the Authorising Officer will endeavour to consider all relevant background information. This would include:

- a protected person's history,
- how their capacity may impact on their interactions with others in public, and
- the health risk this might pose to the protected person or other people
- any other mitigation measures providers have introduced to try and address any concerns.

The goal will be to implement the least restrictive approach that balances the protected person's freedom with both the person and the broader community's right to be protected from the possible spread of COVID-19.

Keeping a register

The Guidelines require that if any person is detained under the new scheme at premises where they usually reside, the person in charge of that premises must keep a record of all actions and decision in relation to the detention. The record is called a *register*.

The register must contain the following information:

- the reasons for the detention;
- the date and time at which the protected person was first detained (if the person is detained for an initial 48 hour period, record the time that detention commenced)
- if approval for the detention has been granted by the protected person's guardian, the Authorising Officer or the Tribunal:
 - a copy of any document provided by the prescribed person to the protected person's guardian, the Authorising Officer or the Tribunal in which the approval was sought;
 - the date and time that the approval was granted and the means by which it was communicated to the prescribed person;

- if the approval has been granted by the protected person's guardian, the name of the guardian;
- a copy of any written approval, decision or order provided by the protected person's guardian, the Authorising Officer or the Tribunal;
- details of any withdrawal (including a copy of any written withdrawal) by the protected person's guardian of an approval to detain the protected person;
- details (including a copy of any written direction, decision or order) of any authorisation or direction given by the Authorising Officer or the Tribunal in respect of other action that might be taken by the prescribed person in respect of the protected person;
- details (including a copy of any written decision or order) of any extension of the detention period of the protected person granted by the Tribunal; and
- details (including a copy of any written decision or order) of the results of any review relating to the protected person undertaken by the Tribunal or Authorising Officer.

A template for the register is located at <https://covid-19.sa.gov.au/restrictions-and-responsibilities/at-risk-facility-residents>.

The register must be made available to community visitors (including the Principal Community Visitor) or the Authorising Officer upon request.

What if the protected person does not comply with a detention order?

If a protected person is detained under the new scheme and is unlawfully at large (for example, they leave their usual place of residence without approval), guardians and authorised officers (including police officers) can take action to detain and transport the person back to their usual place of residence.

If a protected person is unlawfully at large, the service provider or other concerned person should contact the relevant guardian or police to have the person detained and returned to their usual place of residence.

What happens after the temporary detention period ends?

Approval can be given to detain a protected person for up to 28 days. A person must apply to SA Civil and Administrative Tribunal for an extension of the detention, if that is required.

Right of review

Any person aggrieved by a decision of the prescribed person or guardian to detain a protected person may ask the Authorising Officer to review that decision.

Decisions of the Authorising Officer may be reviewed by the SA Civil and Administrative Tribunal.

Further information and application forms for review are located on the Public Advocate website.

Community Visitor Scheme

To ensure additional oversight of the temporary detention scheme, the Community Visitor Scheme has been expanded so that visitors have the ability to make contact with any residents and service providers and provide reports to the Principal Community Visitor through audio-visual/other electronic means.

The Community Visitor Scheme may be contacted on:

Email: cvvs@sa.gov.au

Phone: 1800 606 302

Substitute Decision Makers

A Substitute Decision Maker appointed under the Advance Care Directives Act does not have the authority to agree to or approve the detention of a protected person.

If a service provider proposes to detain a protected person for a purpose related to the COVID-19 pandemic, a Substitute Decision Maker cannot approve that detention.

The service provider could apply to the Authorising Officer or the SA Civil and Administrative Tribunal for an order approving the detention of the protected person at their usual place of residence.

Complaints

If a protected person, their family or others have concerns about how an order is being applied, they should contact the Authorising Officer at: AuthorisingOfficer@sa.gov.au