

# New powers to make orders about the detention of persons with a mental incapacity during the COVID-19 Pandemic



In response to COVID-19, new laws affecting the lawful detention of ‘protected persons’ have been introduced in South Australia in the *COVID-19 Emergency Response Act 2020*.

‘Protected persons’ are persons already the subject of a guardianship order under the *Guardianship and Administration Act 1993* (the G&A Act), or other persons with a ‘mental incapacity’ (as defined by the Act).

Persons with a mental incapacity may not be able to understand the Government directives about COVID-19, or the need to comply with them, and may leave their home or facilities unattended.

The changes expand the powers of Guardians, the person in charge of prescribed premises where a protected person usually resides (*prescribed person*), an *Authorising Officer*, or the Tribunal to detain or authorise the detention of a protected person as necessary to follow the Government’s directives and to keep them safe during the pandemic.

The *Authorising Officer* has been appointed by the Minister to perform this and other functions during the course of the pandemic.

The laws will stop operating when all relevant declarations relating to the outbreak of the COVID-19 within South Australia have ceased OR on 8 October 2020 – whichever occurs first.

## Additional Powers of Guardian/s

► In urgent circumstances during the pandemic, if a protected person has left their usual place of residence, Guardians (with the responsibility to make accommodation arrangements) can now detain the person, and use reasonable force to take them back to that usual place of residence.

There are some published guidelines about how and when to exercise this power. You may wish to contact the Public Advocate or get some legal advice about how and when to exercise this power. (*Clause 10*)

► Guardians with the responsibility to make accommodation arrangements can give approval to the person in charge of the residential facility (a prescribed person) to detain a protected person for a maximum period of 28 days.

In such a case there is no need for the Guardian or the Prescribed Person to make an application to SACAT.

**NOTE:** A protected person may have a Substitute Decision Maker (SDM) appointed under an Advance Care Directive (ACD) instead of a guardian appointed under the G&A Act.

No additional powers have been granted to SDM's under this new law. In such a case authorization for detention will need to be sought from the *Authorising Officer*.

► Guardians and/or Substitute Decision Makers can still make an application to SACAT for special powers to authorise directed residence and detention of protected persons under section 32 of the *Guardianship and Administration Act 1993*.

## Prescribed Persons

The person in charge of the operation of residential premises, or other prescribed persons, can detain a person urgently (for 48 hours only in order to seek approval or authorisation), or with the approval of a Guardian with the responsibility to make accommodation arrangements, or the authorisation of the Authorising Officer, or of SACAT.

The detention of a protected person with the Guardian's approval or with the relevant authorisation will remain in place for 28 days.

► A 'prescribed person' can apply directly to SACAT to obtain the relevant authorisation for detention. The application must be made within 48 hours of detaining a protected person urgently.

Before making an application to SACAT, prescribed persons should first attempt to seek approval from the person's Guardian, if there is one, or from the *Authorising Officer*.

There are some published guidelines about how and when to exercise the power of detention and how to contact the *Authorising Officer*. You may wish to the Public Advocate or get some legal advice about how and when to exercise this power.

## Protected persons without Guardian with the responsibility to make accommodation arrangements

If a person does not have a guardian you do not need to apply to SACAT for the appointment of a guardian simply to detain for purposes relating to the pandemic.

When a protected person does not have a Guardian with decision making powers as to accommodation appointed under the *G&A Act*, the *Authorising Officer* will be able to authorise the detention of a protected person for up to 28 days.

The *Authorising Officer* can also order the detention of a protected person to cease, either immediately, or on a date they specify.

## Extending Detention: Application to SACAT

Prescribed Persons with approval or authorisation, and the Authorising Officer, may only detain or authorise the detention of a protected person for a purpose related to the pandemic for 28 days.

At the end of this period, on application from a prescribed person, SACAT may authorise the period for which a protected person is detained to be extended for a specified period.

To apply please refer to online application.

SACAT may also authorise the use of force if necessary to ensure the person receives proper medical or dental treatment and day-to-day care during the period of detention.

SACAT will retain its normal powers to authorise directed residence and detention of protected persons under section 32 of the *Guardianship and Administration Act 1993*.

For further information, please refer to:

Office of the Public Advocate

<http://www.opa.sa.gov.au/>

South Australian COVID-19 Directions for Residential Aged Care Facilities

<https://www.covid-19.sa.gov.au/emergency-declarations/aged-care>

*This fact sheet is general in nature. It does not constitute legal advice and does not relate to the circumstances of any individual matter. Legal advice should be sought independently.*