



Dr John Brayley
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sent via email: healthocp@sa.gov.au

Dear John,

SUBMISSION

COVID-19 Emergency Response Act 2020 – Schedule 1 April 2020 – Attorney-General’s Department

Lived Experience Australia is the national representative organisation for mental health consumers and carers and has State Advisory Forums in all states and the ACT.

Lived Experience Australia, South Australia (LEA SA) wish to raise concerns in regard to the legislation above and to seek clarification on some of the issues that are concerning to us in relation to people with mental illness housed in supported residential facilities (SRF) . We understand your role as Chief Psychiatrist among others under the Mental Health Act, is to monitor the use of restrictive practices and we are hopeful that whilst this legislation is additional to that, you have the powers to oversee SRFs in this regard.

We note the term ‘COVID-19 detention scheme’ is a temporary control and risk mitigation measure. We understand that measures are required to stop the potential spread of COVID-19 and we understand the need to implement measures to restrict movement whilst also ensuring public health measures are followed.

LEA SA support efforts to keep the community safe during the pandemic. However, we must also ensure the rights under current national and state policies pertaining to restrictive practice and the human rights of vulnerable people are similarly protected. Additionally, there is a need to ensure they are not discriminated against because of their status.

We understand that under s 6 of the *COVID-19 Emergency Response Act 2020* the Minister must set a date as to when the provisions in Schedule 1 expire, being either the day on which all relevant declarations in relation to COVID-19 have ceased, or six months after enactment of the COVID Response Act. We note that as at the date of writing this letter, South Australia is doing well in containing COVID-19 with no active cases recorded.

We see very little in terms of safeguards or arrangements within the legislation for effective oversight to ensure that vulnerable people are protected from improper or unjust exercise of the powers and hence a violation of their rights. This is of concern for the people who experience mental illness, psychosocial disability and correlated mental incapacities who are most at risk of abuse, neglect, violence and exploitation.

We are concerned about the extent of the ‘power’ to detain persons in the SRFs (closed environments). This poses a significant risk, that people with mental illness can be detained

arbitrarily. In addition, rights of review and complaints are limited to the principal decision maker (the 'Authorising Officer') and the South Australian Civil and Administrative Tribunal (SACAT). We note that as there are often long wait times for SACAT hearings, this position is of very little practical value. Similarly, while the legislation talks about external oversight from the Community Visitor, we understand the Community Visitor is not authorised to enter a person's place of residence.¹

We note that the definition of a 'protected person' includes persons 'mentally incapacitated'² who are a resident in SRFs or other supported accommodation. As a result, this legislation does not reference the need for a formal diagnosis or other requirements to ensure due process has been followed in determining the mental capacity of the protected person. Rather, the legislation appears to enable persons without medical training to determine mental incapacity. We consider this significantly increases the risk for persons to be detained under this legislation.

LEA SA also understands that many SRF are also NDIS providers and we query the overlap between this legislation and that of the NDIS Act especially in terms of reportable incidents which are required for any restrictive practice of NDIS participants.

Further, we believe there is a lack of transparency surrounding the introduction of this legislation. In particular, although the legislation empowers the Minister to publish guidelines via a website, the Guidelines have been made available through the Gazette. We query whether an SRF manager, organisations or private guardians etc would know where and when to find these.

We understand the legislation pertains to a broader group than the SRFs and people can be detained in other premises. In all settings that the legislation can be applied, we are concerned about intimidation being used by others toward a protected person.

An ongoing concern is regarding the discrimination of people with mental illness and the lack of safety with no 'eyes' or direct oversight. More broadly, we note that concerns as to use of restrictive practices and ineffective supervision and oversight for vulnerable persons are key themes emerging from the Oakden inquiry and Royal Commission into Aged Care Quality and Safety. These concerns are echoed in the failures and a lack of independent oversight that culminated in the recent death of Ms Ann Marie Smith. As the media reported, a lack of oversight of the carer tending to her needs, coupled with prolonged, unsupervised access enable severe neglect and abuse to take place, using methods such as detention. Acknowledging that poor oversight is a recurring theme that underscores well-known instances of abuse and neglect of vulnerable persons within South Australia, we urge the Government to consider how to strengthen oversight of the legislation, with a view to preventing improper exercises of the power to detain and effective, ongoing monitoring of the welfare of those detained.

Apart from the generalised concerns outlined above, specific concerns are:

1. Schedule 1, Clause 11 allows person(s) in charge of an SRF, or a manager of the service provider organisation to be known as the **prescribed person** to seek approval for the temporary detention (restriction of movement) of a protected person up to 28 days.

We are concerned that the legislation could be misused for people who engage in or exhibit behaviours of concern and the Prescribed Person could apply for the right to detain the person based on this COVID 19 legislation.

¹ Schedule 1, s 9(1)(a)(i) which confers powers to detain protected person at their usual place of residence.

² *Guardianship and Administration Act 1993* (SA) (Guardianship Act).

We are concerned about the level of power the legislation affords the **prescribed person** and lack of oversight in how powers are used. Additionally, we fear that the attitudes towards people with mental illness and mental incapacity may cause misuse of detention where a **protected person** is assumed to not understand and be capable of carrying out social distancing practices.

We believe an independent person not related to a facility should have oversight of the prescribed person.

We seek clarification on a process which would see greater protection.

2. We note that the definition of a 'protected person' includes persons 'mentally incapacitated'

We request confirmation as to who decides this status and whether it is intended that people require a formal diagnosis of mental illness and subsequent capacity concerns by a psychiatrist or psychologist.

3. Clause 12, grants additional powers to other people to apply for detention of a protected person who is not already under the Guardianship of the Minister.

We seek clarification around the broadness of these additional powers of other people.

4. The Information Sheet says: *Detention is not limited to the protected person's usual place of residence and can be sought if the person does not have a guardian and must be detained at a **medical facility** or at **other accommodation** away for their usual place of residence.*

We seek clarification as to whether this implies that a protected person could be admitted to an acute unit under these provisions for up to 28 days (medical facility) and whether this action has the power to override the SA Mental Health Act.

5. The information also specifies that detention must not include **seclusion**, except as an option of last resort. Therefore, seclusion could be used and may mean that a protected person in any facility could be confined to their room or 'other such action' which in our opinion is too broad.

We seek clarification as to the specific processes of determination of 'seclusion' which we believe is very much open to misuse or abuse.

6. LEA SA is also concerned about practices by some SRFs permitted now under this legislation given South Australia has COVID-19 well contained with no active cases, as well as when the legislation is rescinded.

We seek clarification as to which body will monitor whether SRFs continue to unlawfully detain their residents. We cannot see any oversight requirements of SRF managers either within the legislation.

7. Of concern is that private guardians have the power to approve the detention of the person at their usual place of residence for a period of up to 28 days. An extension beyond this period will need to be considered by SACAT yet it does not refer to a further 28 days or any other period.

We seek clarification as to the term or days of any extended power of detention.

8. We also note from the Information Sheet that SACAT has **no role** in relation to this temporary approval. However, we also note (from the Office of the Public Advocate website) that where a prescribed person requests an order be extended beyond the initial 28 days, applications can be made to SACAT.

We seek clarification as to the involvement of SACAT as we see and support the need for an independent oversight body.

9. We hold similar concerns around the possible brief 48-hour detention enacted by a prescribed person (who could be a private guardian) to detain a protected person at their premises for the purposes of contacting the relevant approver for approval under the legislation.

We seek clarification as to what manner a protected person can be detained in their own home.

10. If the protected person is detained under the new legislation and leaves the premises, action can be taken by a guardian or prescribed person (which includes police officers) to transport them back to their usual place of residence.

We seek clarification as to the role of the police.

11. We have concerns around the powers and penalties associated with the definition of an 'Authorising Officer'. A new role has been created 'Authorising Officer' to authorise a prescribed person to submit applications for temporary detention of a protected person. Lived Experience Australia SA has concerns around the complaints process which sees a protected person, their family or others seeking to lay a complaint through contacting the Authorising Officer.

We note the Authorising Officer has the power to enforce the detention of a protected person in the first instance. We hold serious concerns that the same person approving an order for detention is the same person administering complaints and determining outcomes. This gives rise to further safeguarding risks with respect to conflict of interest and absence of independent advocacy to assist a person to navigate complaints and grievances mechanisms.

We seek clarification as to the issue of lack of independent oversight.

12. Clause 7(1)(b) also states the Authorising Officer may delegate functions or powers 'to any other specified person or body'. We believe this is a very broad clause.

We seek clarification around whether this could be a manager or staff at a supported residential facility.

13. We also note in terms of review of decisions that an application must be made within 7 days. This short time limitation rarely protects a person and often work against their interests. The scheduling of review is usually so far ahead that the appeal process is noted as meaningless anyway.

We seek clarification around a far more timely process of appeal.

14. Lived Experience Australia, South Australia notes and supports the expanded role of the Community Visitors Scheme to enable contact with residents and service providers, but do not believe these measures go far enough for independent oversight.

We seek clarification as to the role of the community visitors in connection with visiting the SRF or residence of a protected person should they have been detained in their own home.

As mentioned, we understand this legislation may not be required if COVID-19 remains contained or eliminated in South Australia but SRFs could use this now to restrict protected persons.

As a mental health consumer and carer systemic advocacy organisation, we have endeavoured to show a responsible balance between good public health practices which we strongly support, and concerns for some of the most vulnerable people in South Australia.

Thank you for considering our concerns, and we await your advices in due course.

Kind regards



Ms Janne McMahon OAM
Chair and Executive Director
On behalf
Lived Experience Australia, South Australia
10 June 2020

Cc Trudy Lisk,
RANZCP SA Branch Coordinator.