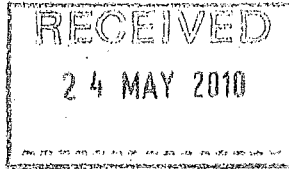


Submission No. 49a



Law Reform Commission  
Review of Guardianship and Administration Act  
PO Box 4637, GPO  
Melbourne 3001

20 May 2010

## Review of Victoria's Guardianship and Administration Laws

Council on the Ageing (COTA) Victoria welcomes the Review of the Guardianship and Administration Act 1986 being undertaken by the Victorian Law Reform Commission, and the opportunity to provide a response to its Information Paper.

COTA's mission is to enable older people to age well in a just society. It is committed to human rights, social justice and the eradication of ageism.

We welcome the Government's commitment to ensuring that vulnerable Victorians receive the safeguards that they need to ensure that their rights are respected and carried out through the conferring of a Guardian, and through other related instruments such as Powers of Attorney.

As the peak body representing older people in Victoria, Council on the Ageing (COTA) Victoria engages with over 60,000 senior Victorians annually. As a result of our work with older people and on the issues that impact on them and their quality of life, COTA Victoria is able to track emerging or continuing issues being faced by older Victorians and to inform the policy processes of the Government.

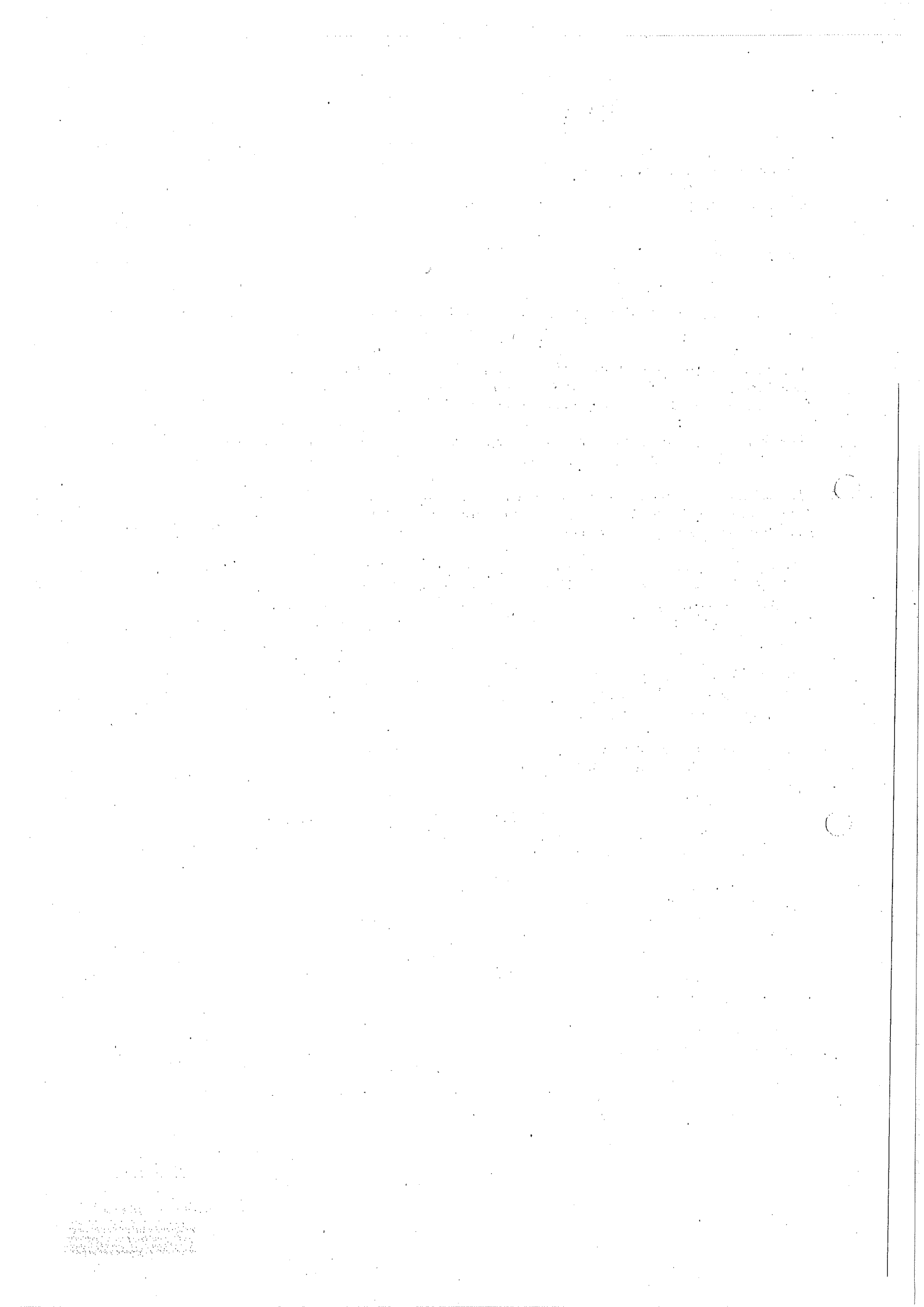
We are the key management agency for Seniors Right Victoria, and through this service and its programs have real knowledge and concern for the abuse older people experience at the hands of people they trust.

We look forward to working with the Commission during the Review process, and contributing to recommendations that will enhance the rights of senior Victorians, and particularly those vulnerable to abuse.

Please contact Debra Parnell, Manager, Policy Unit if you have any queries in relation to this submission.

Yours sincerely

Sue Hendy  
Chief Executive Officer



## Response to Guardianship and Administration Act Review Information Paper

COTA welcomes the scope of the review, and in particular the recognition of changing demographics, the needs of an ageing population, and the need to comply with human rights principles.

COTA is particularly concerned that Guardianship and other related instruments under a variety of Acts should safeguard the rights of the individual, and ensure that their wishes and preferences are carried out, even when they no longer have capacity to contribute to decision making processes.

With increasing numbers of older people now being subject to VCAT orders for guardianship and administration due to changing demographics and prevalence of age related disabilities that impact on capacity to make decisions, there is increasing concern about how the interests of the older person is interpreted and carried out. A determination of 'lack of capacity' should not become a means to override the rights of the person to take 'risks' or make decisions that others do not approve of.

In addition to COTA's focus on the rights of the older person and the promotion of their autonomy and preferences in any decision-making process, we wish to highlight the following in particular:

- While the Acts governing these instruments attempt to balance protection of the individual with promotion of their autonomy, it is often the case that the rights of the individual are secondary in the focus on 'the best interests' of the person. Particularly in the case of older people who are deemed to have lost decision-making capacity there is danger that the rights of the older person will be diminished.
- Advocates to assist and represent the older person who may have capacity but may be physically vulnerable or disadvantaged, or have other disabilities which precludes them from making their wishes known, should be appointed. In the tug of war that might arise from competing parties acting in the interests of the older person, the rights and preferences of the older person themselves may be eroded.
- Lack of legislation for recognition of advance directives, means that the wishes of the older person may be overlooked or not incorporated into decision-making that impacts on them. The Respecting Patients Choices model is gaining widespread recognition, but applies to people in health care situations, rather than broader lifestyle and care decisions.
- The complexity of the legislation and provisions under EPoA/Gs, Medical Treatment Act and Guardianship and Administration Act, make them very difficult to understand. There is considerable confusion, for donors as well as those acting as attorneys and guardians, about what they cover, when they are activated and their legal status.

EPoAs and Guardianship and Administration mechanisms are commonly used to perpetrate the abuse of older people through financial mismanagement, fraud and coercion. The review of the Guardianship and Administration Act, and the related instruments of PoAs and PoAGs, should ensure the rights of older people are respected, promoted and safeguarded by removing ambiguity, confusion, better defining responsibilities and accountabilities of guardians and administrators, and making provision for monitoring through greater accountability measures.

In relation to some of the questions raised in the Information Paper, COTA makes the following comments:

**What parts of the law work well?**

It is a positive that VCAT is relatively easy to access when concerns about decision-making capacity and vulnerability of an older person are identified, and that it is free. These arrangements mean that concerned family members and friends can make an application for a guardian to be appointed without undue burden in terms of paperwork and administrative processes.

**What parts of the law don't work well?**

Some aspects of the positive elements identified above can also be negatives, as 'interested parties' can have an application made and heard fairly quickly, with the possibility of lack of due process, and of the older person being inadequately represented. In addition there are some concerns that an independent guardian or administrator may be appointed without proper consideration of alternative arrangements that would be better for, and more in line with the wishes of the older person.

**Is there an adequate understanding of the guardianship laws in the community? What could be done to improve this?**

There is considerable confusion in the community about EPoAs, EPoGs and Guardianship both for donors and attorneys/guardians.

COTA's Seniors' Information Service regularly runs information sessions on PoAs and they are always well attended. The questions and concerns raised by participants at the sessions and callers to the service indicate the level of confusion.

Community education and awareness raising is essential to improve the uptake of EPoAs and better understanding of the roles and responsibilities of attorneys and guardians.

**Best Interests**

There is some confusion over the term 'best interests' with it being understood differently under various Acts.

While the G&A Act attempts to balance protection with 'best interests', and promotes the principle of the wishes of the person with a disability being followed wherever possible, there is the danger of the rights of the older person being undermined in a process in which their voice can be overlooked.

**Substitute Decision Making**

COTA supports the concept of supported decision making in general.

For the majority of older people, informal arrangements in which another person assists them to make or carry out their decisions work well, and similarly most PoAs or Gs in which the appointed person works with the older person to ensure their wishes are carried out, more than adequately meet the needs and interests of the older person, whether capacity is diminished or not.

However the suggestion that PoA and Gs should come into force immediately upon signing, to enable a process of supported decision making to develop, may lead to many people not choosing to appoint an attorney or guardian for fear of losing control of their decisions and lives.

**Review**

VCAT should have the power to review individual decisions made by guardians and administrators, and a review should be able to be requested by the represented person or other concerned parties. Furthermore, VCAT should have wide-ranging powers including the power to refer to police for investigation, and to be able to order and enforce restitution in cases where misappropriation is proven.