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NSW Law Reform Commission  
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## NSW Law Reform Commission Review of the Guardianship Act 1987 (NSW)

Avant welcomes the opportunity to provide preliminary submissions on the review of the Guardianship Act.

We provide these comments based on our experience of assisting members through our Medico-Legal Advisory Service and in providing risk advisory and education services to members in NSW and throughout Australia.

### Terminology and decision-making authority

One major issue we have identified in providing advice to members is confusion among doctors about terminology and scope of powers and decision-making authority:

1. Many doctors (and patients) refer to “next of kin” and believe that the next of kin has decision-making authority in the case of incapacity. “Next of kin” is not used in the *Guardianship Act 1987* (NSW), the *Powers of Attorney Act 2003* (NSW), nor the *Mental Health Act 2007* (NSW) (but is used in the *Human Tissue Act 1983* (NSW)).
2. The differences between a power of attorney, enduring power of attorney, enduring guardianship and guardian are not clear and cause confusion. For example, many doctors believe that a person with a power of attorney under the *Powers of Attorney Act 2003* (NSW) has decision-making authority about health care for their incompetent patient.

## About Avant

Avant Mutual Group Limited (“Avant”) is Australia’s leading medical defence organisation. It is a mutual organisation, owed by its members, and offers a range of insurance products and expert legal advice and assistance to over 68,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals and practices, as well as private health insurance, which is offered through our subsidiary The Doctors’ Health Fund Pty Limited.

Our members have access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, and provide extensive risk advisory and education services to our members with the aim of reducing medico-legal risk and promoting good medical practice and patient safety.



3. We are often approached for advice by doctors who have been asked to provide a medical report about the patient's capacity for the purposes of a guardianship application in the Tribunal. Doctors are often caught in the middle of competing relatives and can be left in a difficult position regarding who is the appropriate person to consent to the release of confidential information about the patient.

As a national organisation, we favour national consistency of terminology in legislation. As a result of differing state and territory legislative regimes there are different terms for similar concepts around the country. For doctors who work across jurisdictions, differences in terminology and varied legal requirements causes confusion and can have significant implications.

### **Withdrawing and withholding life sustaining treatment**

The *Guardianship Act* lacks clarity about the ability of a guardian appointed by the Tribunal to make decisions withdrawing or withholding life sustaining treatment. Case law appears to have settled the question, but in our submission the position should be made explicit in the legislation.

We would be pleased to provide further detail in relation to these issues, and any other issues relevant to our members, during the course of the Commission's review.

Please contact me on the details below if you require any further information or clarification of the matters raised above.

Yours sincerely

A handwritten signature in black ink, appearing to read "Georgie", written over a white rectangular background.

Georgie Haysom  
Head of Advocacy

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