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Ante mortem interventions for organ donations in NSW
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Ante mortem interventions for organ donation in NSW

Avant welcomes the opportunity to provide input into the Ministry's discussion paper on this issue.

Avant does not wish to comment on questions one and two in the discussion paper, other than to say that as a matter of general principle:

- Legislation should not be a barrier to appropriate and ethically acceptable clinical practice. Where it does present a barrier, it should be amended so it is in line with acceptable clinical practice.
- It is preferable to have a nationally consistent approach to this issue. NSW should bring itself in line with the practice in other jurisdictions.

Avant would like to comment on question three:

3. If ante mortem interventions were to be permitted in NSW, should the *Human Tissue Act 1983* be amended to allow the patient's senior available next of kin to act as a substitute decision maker for patients who lack capacity and consent to ante mortem interventions?

If ante mortem interventions are permitted in NSW, then we agree that the *Human Tissue Act* should be amended to allow the appropriate substitute decision maker to make decisions on behalf of patients who lack the capacity to consent to ante mortem interventions.

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 70,000 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.



We do not agree however that the patient's senior available next of kin as defined in the *Human Tissue Act* should be the appropriate decision maker for this decision, or indeed any decision, under the *Human Tissue Act*.

Our view is that the *Human Tissue Act* should be amended so that it is consistent with the substitute decision-making provisions in the *Guardianship Act* and gives power to the *person responsible* under that Act to be the substitute decision maker for ante mortem interventions.

The reasons for this are:

- The use of the phrase "next of kin" in the *Human Tissue Act* can be a source of confusion, for both patients and their families, and for practitioners having to apply the law. A person's "next of kin" has no legal status at common law, but the use of the phrase in the Act in our experience leads many practitioners to believe that the next of kin has legal status generally.
- As noted in the discussion paper, in NSW, the *Guardianship Act* contains the hierarchy of substitute decision-makers who can make health care decisions for a patient who lacks the capacity to do so.
- A patient's senior available next of kin under the *Human Tissue Act* may be different from the person responsible under the *Guardianship Act*.
- This can lead to the situation where one person has the power to make decisions about end of life care and another has the power to make decisions about organ donation.
- In our experience the different terminology and different tests for the correct decision-maker can cause confusion for health practitioners, patients and their families.
- If ante mortem interventions are to be permitted, allowing the senior available next of kin under the *Human Tissue Act* to be a substitute decision maker would not solve the problem of having two potential substitute decision makers. It could lead to the situation where a person responsible under the *Guardianship Act* is the appropriate substitute decision maker for end of life decisions but not for ante mortem interventions. There could be two persons with legal authority to make decisions at the end of a patient's life and this could be difficult to implement in practice, with the potential to lead to unnecessary escalation to a court or tribunal to resolve any confusion.

We recommend that the term "next of kin" not be used at all in the Act, but instead be replaced by the terminology and hierarchy used in the *Guardianship Act* of "person responsible".

As an alternative, the definitions of “next of kin” and “senior available next of kin” should be amended so that they reflect the definition of “person responsible” under the *Guardianship Act*.

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

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Georgie', followed by a long horizontal flourish.

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