



New South Wales  
Council for Civil Liberties

## **NSWCCL SUBMISSION**

# **NSW LAW REFORM COMMISSION INQUIRY INTO ACCESS TO DIGITAL ASSETS UPON DEATH OR INCAPACITY**

**1 June 2018**

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### **About NSW Council for Civil Liberties**

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The Council for Civil Liberties (NSWCCL) thanks the NSW Law Reform Commission for its invitation to make a submission to concerning access to digital assets upon death or incapacity.

This submission addresses part d) of the Terms of Reference, though there is some overlap with the other considerations.

**d) Appropriate privacy protections for the electronic communications after a person dies or becomes incapacitated.**

Digital assets are described in the NSW Law Reform Commission's (NSWLRC) background material as "digital property and electronic communications" which "include photographs, videos, emails, online banking accounts, cryptocurrency, domain names, blogs and online gaming accounts."

Any definition of digital assets should be broad enough to include websites, e-commerce accounts, online auction accounts, documents in online storage accounts, online payments services, frequent flyer points, online personae and medical information. Digital assets should also include the codes and contractual rights to access the digital assets.<sup>1</sup>

Privacy concerns surrounding digital assets access after death revolve around online security of assets that are not monitored, familial privacy and privacy of the deceased person in relation to third parties (including family members).

*Privacy law in Australia*

It is generally accepted that a personal right to privacy does not survive death. The *Privacy Act 1988* (Cth) does not protect the personal information of a deceased person. However, the ALRC takes the view that the protections provided by that Act are intended to ensure that living individuals are confident to provide personal information, including sensitive information, in the knowledge that the information will not be disclosed in inappropriate circumstances after they die.<sup>2</sup>

New South Wales privacy covers personal information about individuals who have been dead for not more than 30 years (*Privacy and Personal Information Protection Act 1998* (NSW) s4(3)(a); *Health Records and Information Privacy Act 2002*(NSW) s5(3)(a))

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<sup>1</sup> Antoine, H (2016) Digital legacies: Who owns your online life after death *The Computer and Internet Lawyer* Vol33 No.4 pp 15-20; Reid, B (2017) Legal life after death: publicity, physical and digital assets *Southern Journal of Business and Ethics* Vol 9 pp 108-122; Banta. N.M (2014) Inherit the Cloud: the role of private contracts in distributing or deleting digital assets at death *Fordham Law Review* Vol 87 pp. 799-854

<sup>2</sup> For Your Information: Australian Privacy Law and Practice (ALRC Report 108) Chapter 8. Privacy of Deceased Individuals -Introduction  
<https://www.alrc.gov.au/publications/8.%20Privacy%20of%20Deceased%20Individuals/introduction>

The *Health Records and Information Privacy Act 2002* (NSW) (ss7&8), permit an 'authorised representative' to may make decisions on behalf of a deceased individual. 'Authorised representative' includes 'a person who is otherwise empowered under law to exercise any functions as an agent of or in the best interests of the individual', including an executor or administrator of a deceased estate.

### *Online Security*

In 2015 there were 30 million accounts belonging to deceased persons, leaving their identities open to hacking, trolling and security risks.<sup>3</sup> It is not uncommon to enable financial transactions through applications linking social networking accounts to other websites with stored financial and personal information, such as credit cards.<sup>4</sup> Blogs are susceptible to theft of content.<sup>5</sup> Deceased persons are at particularly high risk for identity theft since they cannot monitor the activity on their account or report misuse.<sup>6</sup>

Social media companies generate profits by providing services to living individuals who will eventually die. As part of that business, a service provider must deal with the termination and handling of digital assets and they are in the best position to aid personal representatives in managing and disposing of those assets.<sup>7</sup> Digital assets are given to the service provider on the understanding that when the user accesses the account the assets previously submitted will be available. Consequently, the service provider should be responsible for proper transfer of the assets to the estate.<sup>8</sup>

Uniformity and transparency in dealing with digital assets to ensure online security is therefore desirable. A user has the right to use digital assets, to exclude others from using them, and to destroy them by deleting or deactivating the account. Whatever the service provider agreement states, the question of whether digital assets should be prohibited or controlled by the service agreement conditions should be a matter of public policy.

When a user signs up for a digital service, a contractual agreement governing the terms of use is entered into, including limitations on what will happen to the account after death. Users rarely read these contracts and lack the ability to opt into or out of the set default rules. Often users lack an opportunity to choose what privacy protections they desire for their digital assets, in the event of death.<sup>9</sup> Service providers are free to change or update their policies regarding whether the assets are accessible after death, at any time. Even if an

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<sup>3</sup> Southward, J (April 2015) Death and your Digital Data *Law Society Journal (NSW)* pp 38-41

<sup>4</sup> Ray C (2013) 'Til death us do part: a proposal for handling digital assets after death *Real Property, Trust and Estate Law Journal* Vol 47. No.3 pp 583-615

<sup>5</sup> Edwards, L & Harbinja, E (2013) "What Happens to My Facebook Profile When I Die?: Legal Issues Around Transmission of Digital Assets on Death" in *Digital Legacy and Interaction Post-Mortem Issues* [Maciel & Pereira eds.: Springer] pp 115-144

<sup>6</sup> Ray op cit p.592

<sup>7</sup> Ray op cit p 613

<sup>8</sup> Kutler, N (2011) Protecting your online you: a new approach to handling your online persona after death *Berkeley Technology Law Journal* Vol 25 No.4 pp 1641-1670 at pp 1559-1660

<sup>9</sup> Banta, N.M. (2016) Death and Privacy in the Digital Age *North Carolina Law Review* Vol 94 pp. 927-990 at p. 965

asset was originally devisable, there is no guarantee that it will be at the time of the user's death.<sup>10</sup>

The terms of service provider agreements tend to either:

- (1) expressly prohibit account transferability upon death or transferability in general, e.g. Yahoo and itunes. itunes only provides a licence to access music and videos and the account is not transferable on death. Licenses grant personal rights to users and are not transmissible on death or form property in the estate of the deceased;<sup>11</sup>
- (2) generally prohibit transfer but allow transferability with permission from the service provider. Google has a free service called Inactive Account Manager that allows the user to decide what happens to Google operated accounts after death. The account may be deleted or Google will allow a designated person to view the account if there has been inactivity for a specified period;
- (3) expressly allow transferability upon death with certain proof. Velocity permits an executor to instruct transfer or redemption within 12 months of a member dying after which the point are then points are forfeited;
- (4) be silent on whether an account can be transferred upon death; or
- (5) limit transfer of assets at death. For example, some terms of service agreements allow a service provider to terminate an account at any time for any reason.<sup>12</sup> Qantas membership terminates automatically on death and points are cancelled. During a member's life, a member can usually use, give, or donate the miles earned. In many cases, however, the airline, not the member, determines how assets are distributed at a member's death and can change policies regarding distribution and without notice to their members.<sup>13</sup>

#### **NSWCCL recommends:**

- **disclosure laws ensuring that users know how their accounts will be treated at death.**
- **contractual choice about how digital assets should be treated at death, presented in a clear manner such that informed consent is freely given.**
- **that service provider agreements should only be valid when they facilitate transfer, according to the testamentary intent of a deceased person.**

#### *Familial privacy*

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<sup>10</sup> Banta (2014) op cit p821

<sup>11</sup> Edwards & Harbinjer op cit p. 126

<sup>12</sup> Banta (2014) pp. 817-818

<sup>13</sup> Banta (2014) pp 819-820

The family of the deceased person should be protected from distress caused by the inappropriate handling of a deceased individual's personal information and provided with a right of access to that information where such access is reasonable.<sup>14</sup> In particular, the prevalent use of social media among young children means that if a child should die, the probability of that child possessing some digital assets is quite high and should be treated with sensitivity.

The trend towards "memorialisation" of social network profiles, e.g. on Facebook, also raises issues of familial privacy. Specifically, who decides if the profile is memorialised and what content is appropriate?<sup>15</sup>

### **NSWCCL recommends:**

#### **Privacy protections should be available to a deceased person, based on concerns about familial privacy.**

##### *Access by third parties*

In NSW, if digital assets are to form part of the estate of a deceased person, they need to be characterised as "personal estate" for the purposes of the *Probate and Administration Act 1898* (NSW). "Personal estate" is defined in that Act to include "all other property whatsoever, which... by law devolved upon the executor or [administrator](#)." Letters, photos, videos, and music or book licences are digital goods that are replacing traditionally physical goods which are considered personal estate.<sup>16</sup> There is no reason why digital goods should receive greater protection than physical goods.

Access to online financial accounts is important and increasingly necessary for those trying to manage an incapacitated or deceased person's estate. Emails, photos, and other personal information stored online could be of great economic value to beneficiaries. Even where an executor has the authority of the court to access the deceased's assets, he may still not be authorised to access the account under the service providers agreement, and any such attempt may be construed as "unauthorised access" under criminal law. Such breaches might also trigger the service provider to close the account, destroying the assets.<sup>17</sup>

Users can specifically deny access to certain accounts through their will. Otherwise, upon a user's death, it is highly desirable to permit the transfer of digital assets or postpone termination of the account for a specified period (6mths - 2 years).<sup>18</sup> Such a system

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<sup>14</sup> For Your Information: Australian Privacy Law and Practice (ALRC Report 108) Chapter 8. Privacy of Deceased Individuals -Introduction

<https://www.alrc.gov.au/publications/8.%20Privacy%20of%20Deceased%20Individuals/introduction>

<sup>15</sup> Edwards & Harbinjer op cit p.117

<sup>16</sup> Banta (2014) op cit p. 829

<sup>17</sup> Edwards & Harbinjer op cit p.131

<sup>18</sup> Tarney, T.G. (2012) A call for legislation to permit the transfer of digital assets at death *Capital University Law Review* Vol 40 pp773-802

provides the beneficiaries with adequate time to archive past messages, videos and other digital assets.

Emails, however, pose a particular problem because ownership is not exclusive. The possibility exists that even willing disclosure of emails left by a deceased person may invade the privacy of unwilling third parties.<sup>19</sup> Under the US RUFADAA, this is resolved by permitting access to a catalogue of the deceased person's communications, but not the content, unless consent is obtained.

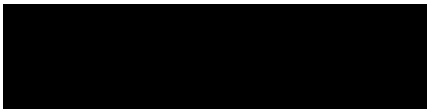
If intestate a deceased person's digital assets should be deleted but still provide an opportunity for any potential beneficiaries to demonstrate the deceased's intent, challenge this deletion and apply for control over a particular digital asset.<sup>20</sup> The beneficiaries' desires and needs should receive preference over the service provider's default policy of prohibiting access.<sup>21</sup>

**NSWCCL recommends:**

**The legitimate interests of beneficiaries should receive preference over the service provider's default policy of prohibiting access.**

This submission was prepared by Michelle Falstein on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the NSW Law Reform Commission.

Yours sincerely,



**Therese Cochrane  
Secretary  
NSW Council for Civil Liberties**



**Contact in relation to this submission**



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<sup>19</sup> Edwards & Harbinjer op cit p.141

<sup>20</sup> Kutler op cit p.1644 ;

<sup>21</sup> Banta (2014) op cit p. 803