



information
and privacy
commission
new south wales




NSW Law Reform Commission
GPO Box 31
Sydney NSW 2001

By email: nsw-lrc@justice.nsw.gov.au

Dear Commissioners

Access to digital assets upon death or incapacity

I write to you in response to the NSW Law Reform Commission review in to 'Access to digital assets upon death or incapacity'. Thank you for the opportunity to provide a submission on this important and complex area of the law. I look forward to the completion of the review and your report on the issues.

Please do not hesitate to contact me if you have any queries. Alternatively, your officers may contact 

Yours sincerely



Samantha Gavel
Privacy Commissioner

Enclosed:

NSW Privacy Commissioner - Submission to the NSW Law Reform Commission on access to digital assets upon death or incapacity

Access to digital assets upon death or incapacity – Submission by the NSW Privacy Commissioner

Maintenance of current protections

As Privacy Commissioner, I am of the view individuals have a right to the protection of their personal and health personal information. This protection should continue after the person dies or becomes incapacitated. I would not support any legislative changes that erode the current protections for personal and health information. For this submission, I will use the term 'personal information' to encompass both personal and health personal information.

The legislative regime in NSW currently protects personal information held by public sector agencies and health service providers under the *Privacy and Personal Information Protection Act 1998* (PPIP Act) and the *Health Records and Personal Information Act 2002* (HRIP Act). The Privacy Commissioner's role is to make sure that privacy laws and principles are abided by and assist with resolving complaints. The Privacy Commissioner also has broader powers to investigate and research privacy issues. There are 12 Information Protection Principles (IPPs) and 15 Health Information Principles (HPPs) that set out the legal requirements that NSW public sector agencies (and private sector health organisations and organisations holding health information for HPPs) must abide. The PPIP Act and IPPs apply to NSW public sector agencies including government departments, local councils and universities. The HRIP Act and HPPs apply to NSW public sector agencies including government departments, local councils and universities, public and private sector health organisations, health service providers and large businesses that store health information.

The IPPs impose obligations on regulated bodies in relation to:

- collection
- storage
- access and accuracy
- use
- disclosure

The HPPs impose similar obligations, with the addition of obligations related to identifiers and anonymity; and, transferrals and linkage.

The IPPs and HPPs provide adequate protection for personal information as well as recourse to internal and external review to ensure oversight of these principals. It is appropriate the NSW Privacy Commissioner retains a role in the protection of personal information held by NSW public sector agencies after the death or incapacity of an individual.

The current NSW legislative regime provides a sound foundation for the protection of personal information, including the respective privacy protection principals contained in the relevant Acts, regulatory oversight and redress for non-compliance. Digital personal information assets should be offered the same level of protection after death or incapacity, within the limits currently imposed by the PPIP Act. The disclosure of this information has the capacity to do harm to the legitimate interests of the individual, as well as to others who may also have personal information contained in the digital assets, such as friends and family members.

Access to personal information

A person can access personal information of a deceased relative by contacting the holder of the information if it is held by NSW health service providers and public service agencies. The request should be in writing, with proof the person is deceased and the applicant is authorised to access the information. Currently, access to a third party's personal information is not guaranteed and the health service provider or agency may have grounds to refuse. There is a right of review if the request is refused. I would support the introduction of measures to allow individuals to explicitly consent to other persons accessing their personal information on death or incapacity where this is not currently part of the legislative regime.

Personal information not governed by NSW legislation

Individuals also give personal information to other organisations not governed by NSW legislation. Some of those organisations such as large businesses are governed by the Commonwealth *Privacy Act 1998*, while many, such as sporting clubs or small businesses are not. A case might arise where a small business may breach privacy or refuse access to personal information of a deceased or incapacitated person with few redress options available to the estate. The review should consider whether this is a regulatory failure that may be addressed through legislative change. The review should also consider protection of third party personal information that may be stored alongside personal information of the deceased or incapacitated persons. An example might be that a deceased spouse has had correspondence with their family member that contains personal information about the family member's financial affairs. This situation should be considered in the context of the privacy rights of the third parties and should consider the evolving nature of personal information storage with increasing reliance on technology.

Digital assets are more than personal information

I acknowledge 'digital assets' include much more than personal information. Even digital assets that do not contain personal information may, through aggregation make the identity of an individual reasonably ascertainable and therefore become 'personal information'. The digital content may include music, images, opinions and video. These digital assets will usually be subject to terms of service agreed to by the individual, which may or may not continue after death or incapacity. As individuals control their own digital assets, these individuals need to plan for the protection of these assets after death or incapacity. The review should consider whether current terms of service agreements provide adequate individual rights protection, particularly if they must be agreed to in order to obtain a service. The review should also consider situations where individuals have failed to plan for access requirements following death or incapacity. This consideration should allow for informed consent to enduring access after death or incapacity and possible legislative avenues to enable this.

Community education

This is a complex issue where there may be low public awareness. I would support a community education program to give individuals information about how to manage digital assets following death or incapacity.

Publication

I encourage and consent to the publication of this submission on the review website.