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NSW Law Reform Commission
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Access to digital assets upon death or incapacity

Carers NSW would like to thank the NSW Law Reform Commission for the opportunity to make a submission to the review of access to digital assets upon death or incapacity in NSW. Our submission focuses on carers' access to, or control of, the digital assets owned by the individuals for whom they care.

A carer is any individual who provides care and support to a family member or friend who has a disability, mental illness, drug and/or alcohol dependency, chronic condition, terminal illness or who is frail. Carers NSW is the peak non-government organisation for carers in NSW. Our vision is an Australia that values and supports all carers, and our goals are to:

- Be a leading carer organisation in which carers have confidence
- Actively promote carer recognition and support
- Actively support carers to navigate a changing service landscape that will be characterised by ongoing policy reform
- Promote connected community experiences and opportunities for carers that are inclusive of diverse carer groups
- Lead and advocate for carer-specific and carer-inclusive policy making, research and service delivery
- Continue to be a quality-driven, responsive and carer-focused organisation.

Asset management in the event of death

In the event of death, Carers NSW believes that there is scope for digital assets to be handled similarly to other physical and financial assets outlined in a Will; that is, there should be legal mechanisms available to Will makers for digital assets to be named, gifted, destroyed/deleted and managed with guidance from a Will, and a person can be named to execute the preferences outlined in the will.

If no Will has been made, or no directions for the management of digital assets are included in the Will, Carers NSW supports an approach similar to the German legal systemⁱ whereby digital assets with sentimental value such as photos, artworks, letters and documents are treated in the same way as physical documents of the same nature. This approach recognises that while the method of storing these documents has become digitised, their function and value to family and friends remains largely the same.

Carers NSW understands that the preferences suggested above may not be enforceable given that relevant data is likely to be hosted internationally or in jurisdictions where NSW law holds little influence. However, creating formal processes and procedures relating to the management of digital assets is likely to hold some benefit, in that it could raise awareness of the need to include digital

assets in the making of a Will and may prompt individuals in NSW to take precautions in order to ensure important digital assets are available to carers, friends and family in the event of death or incapacity. This could also provide a basis for future resource development to support friends and family with information and guidance and minimise the stress and uncertainty associated with managing an estate.

In principal, Carers NSW believes that a definition of 'digital assets' should include a distinction between assets which generate an income or hold monetary value (such as online stores, online gambling accounts and e-wallets) and those that hold sentimental value (such as social media data, emails and data stored on external servers or a 'cloud'). Providing such a distinction may allow for streamlined access to digital assets with sentimental value for bereavement purposes, independent of any disputes or complications which may occur in regard to financial assets.

Asset management in the event of loss of (cognitive?) capacity

For digital assets with financial value, a reviewed Enduring Power of Attorney (PoA) and financial management arrangement with respect to digital assets may provide an adequate management framework. This may need to include a definition of digital assets of a financial nature and examples of such assets.

In contrast, digital assets that hold sentimental or social value appear to present more complications when the principal lacks the capacity to manage the asset or a carer considers use of the digital asset to be harmful. Situations that have been raised with our policy team include; carers managing the social media account of a the person they care for on behalf of that person, carers forbidding access to social media and other online accounts and carers who regularly monitor the social media account of the person they care for using the login details of that person to access the account.

Carers NSW is unsure as to the extent to which a guardianship appointment would give the guardian the right to monitor, create or restrict a person's social media accounts and more clarity is required in this area. However carers acting in all of the scenarios above will typically claim to be acting in the person's best interest.

One carer informed us that she closely monitors her adult son's internet usage because she felt that unmonitored use of chat rooms was the primary cause of previous suicide attempts. In this case the carer had no formal guardianship arrangements but she believed her son lacked the capacity to engage safely online. Similar reasoning may be given when a carer accesses the social media account of the person they care for, and often this kind of monitoring happens informally. There is clearly a need to strike a balance between the online autonomy of a person with impaired capacity and the carer's role in supporting their safety and wellbeing.

Current developments in supported decision making frameworks may be a possible answer to striking this balance. For instance, Carers NSW supports the NSW Law Reform Commission on its positive recognition of supported decision making in its draft proposals for the Guardianship Act review, and believes that there is scope for discussion regarding principles of supported decision making in relation to the management of digital assets.

To some extent, supported decision making is already facilitated in a number of government service accounts. The *My Aged Care* client portal, which is used to manage aged care services enables carers to be registered as 'representatives' with the consent of the person receiving care or if appropriate guardianship documents are produced. This function allows the representative to access data related to the person's care and make decisions on their behalf. Similarly, the *My Health Record* has a function that allows accounts to be linked, and the account owner can monitor and control what is accessed by third parties. These functions give carers access to necessary information related to their caring role and acknowledges them as partners in care, as per the NSW Carers (Recognition) Act 2010ⁱⁱ.

Interactions with digital account holding organisations

Issues relating to access to digital assets are not commonly raised through the Carers NSW Carer Line but we regularly receive complaints from carers who have been asked by a service to formalise their guardianship or power of attorney in order to manage or open accounts in the name of the person they care for, or access these accounts. These issues are commonly raised around household utility and other accounts that are essentially shared and paid for jointly, however only one account holder can be formally named. It is not uncommon for carers to be asked to formalise financial and guardianship management arrangements or produce death certificates in order to make changes to shared accounts.

In many cases Carers NSW has found that most services are not fully aware of their obligations and responsibilities in the event of an account holder losing capacity, and will default to requiring formal guardianship or PoA documents whether it is legally required or not. Carers NSW sees significant benefit in providing greater clarity around access to digital assets for people without formal guardianship or PoA, however this will only be effective if there is a clear reference point for both carers and businesses. This clarity not only has the potential to provide carers with greater confidence in enacting a person's will and preferences but clear guidelines and supporting documentation will assure businesses and services that they are acting responsibly and fulfilling their legal duty.

Should you require any further information about this submission, please contact [REDACTED].

Yours sincerely,

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ⁱ NSW Law Reform Commission, *Access to Digital Assets upon Death or Incapacity Consultation Paper 20*, 2018

ⁱⁱ NSW Carers (Recognition) Act 2010