



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our Ref: ELCS:DHjl 1599556

19 October 2018

Mr Alan Cameron AO  
Chairperson  
NSW Law Reform Commission  
DX 1227 SYDNEY

By email: [nsw\\_lrc@agd.nsw.gov.au](mailto:nsw_lrc@agd.nsw.gov.au)

Dear Mr Cameron,

**Consultation Paper 20: Access to digital assets upon death or incapacity**

The Law Society of NSW appreciates the opportunity to comment on the NSW Law Reform Commission ("NSW LRC") review into access to digital assets upon death or incapacity ("the Review"). The Law Society's Elder Law, Capacity and Succession Committee have contributed to this submission.

The Law Society's has responded below to the questions posed in NSW LRC Consultation Paper 20: Access to digital assets upon death or incapacity ("the Consultation Paper").

**Question 1: Third-parties and digital assets after death**

The Law Society is of the view that the primary consideration when determining the boundaries of third-party access to the digital assets of a deceased person should be maintaining that person's privacy. The Law Society considers that third parties should only be granted access to the digital assets of a deceased person in circumstances where that person has proactively advised a service provider of their intention, and that access to third parties should only be granted in accordance with those express intentions. We consider that this process would be significantly aided by service providers giving users the option to specify how they wish their digital assets to be dealt with upon their death.

The Law Society supports individuals having the choice to appoint a "digital executor" who can carry out their wishes with respect to their digital assets upon death. We submit that the powers of a digital executor should be prescribed in legislation and should be broad enough to ensure that a digital executor has the ability to close, memorialise, download content, or transfer content or ownership of the account (subject to any contrary intention in the will). If the person has not appointed a digital executor in the will, we submit that by default the executor should be required to take on that role. Similarly, if no executor has been appointed (such as in the case of intestacy), we submit that the administrator of the estate should be required to take on the role. In circumstances where there is an apparent conflict of intentions, it is the view of the Law Society that the last dated document or direction should prevail.

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## **Question 2: Third parties and digital assets upon incapacity**

The Law Society notes that some digital assets fall within the classification of health, personal and lifestyle matters (such as digital photographs and electronic medical records), and that others fall within the classification of financial and legal matters (such as PayPal and online gambling accounts). We also note that in some cases, digital assets may fall into both categories – including social media accounts (such as Instagram and YouTube) that are a source of income for the user. We note that such assets may fall to be dealt with by either (or both) the enduring attorney or enduring guardian.

As noted above in relation to third-party access to digital assets after death, we consider that service providers should provide users with the option to specify how they wish for their digital assets to be dealt with upon becoming incapacitated. We also consider that users should have the choice to state in their power of attorney and/or appointment of enduring guardian that an appointed person may deal with their digital assets. We consider that the powers of the appointed person should be prescribed in legislation and should be broad enough to ensure that the appointed person is able to close, continue to operate, download content, or transfer content or ownership of the account where appropriate (subject to any contrary intention in the document). In circumstances where there is an apparent conflict of intentions, the Law Society submits that the last dated document or direction should prevail. We also submit that if a person has not appointed an attorney and/or guardian, that by default the financial manager or person responsible, or guardian appointed by a tribunal or court, should be required to take on the role outlined above.

The Law Society notes that there may be greater privacy concerns associated with the attorney/financial manager and/or guardian/person responsible having access to an incapacitated person's digital assets in comparison to an executor/administrator of a deceased person. We note however, that there are some circumstances in which it may be imperative for an attorney to have the ability to access a principal's digital asset accounts to enable the appropriate administration of that person's affairs. We note, however that this consideration should be balanced against the risk of abuse towards incapacitated persons by attorneys/financial managers and guardians.

## **Question 3: Legislating third-party access to digital assets**

The Law Society submits that New South Wales should enact legislation that specifically provides for third party access to digital assets upon death or incapacity. We consider that the current legislative framework in relation to wills, estates and supported decision making does not adequately address and cater for digital assets. We agree with the comments of the NSW LRC in the Consultation Paper that the definition of 'property' may not include digital assets for the purposes of the *Succession Act 2006*. We further submit that clarity also needs to be provided in relation to the application of the criminal law in respect of the actions of well-meaning legal personal representatives who attempt to deal with digital assets without an authorisation to do so.

## **Question 4**

The Law Society reiterates our earlier submission to the NSW LRC in relation to the definition of digital assets. As previously noted, we consider that digital assets should be defined in a way that is sufficiently broad to cover the types of assets currently in existence, but also flexible enough to encompass relevant classes or types of assets that may come into existence in the future as technology in this area continues to

develop. We consider that any definition of digital assets should contain examples of digital assets as well any relevant exclusions, however we note the difficulty of this in circumstances where technology in the area continues to develop rapidly.

The Law Society supports the possible law reform process suggested at 5.12 of the Consultation Paper, to the extent that any prospective legislation should specify that NSW law is the proper law in all cases where the user is a NSW resident, including in circumstances where a terms of service agreement nominates another jurisdiction under a "proper law" clause.

### **Questions 5 and 6**

The Law Society considers that our responses to the above questions address the issues raised by questions 5 and 6.

Thank you for considering this submission. Should you have any queries with regard to this submission, please contact [REDACTED]

Yours sincerely,

[REDACTED]

Doug Humphreys OAM  
**President**

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