

Submission: Digital Asset Reform

Portable response to *Access to digital assets upon death or incapacity Consultation Paper 20* for the NSW Law Reform Commission



About us

Portable is a design and technology company that tackles complex problems with government and for-purpose organisations. We are a team of 30 constantly-curious individuals with passion and active internal research and development into policy areas such as access to justice, mental health, education, government innovation, and the future of death and aging. Among reports we've published are [Hacking the Bureaucracy](#), [Design For Justice](#), and [The New Infrastructure](#). Visit us at portable.com.au.

Questions

(1) When a person dies what should it be possible for third parties to do in relation to the person's digital assets? In particular:

(a) Who should be able to access those assets?

We recommend providing similar access and rights to digital assets as is provided to physical assets. All consumers of digital products and services who create digital assets and identities should be able to choose who can access, own, and transfer their digital assets and information after they die.

(b) What assets should they be able to access?

An early influence on the development of property law was the concept of use and labour. Real property was considered to be owned by a person when they contributed to it through

improvement or use. This is now a formalised process, but we believe digital assets should follow similar principles.

Throughout a person's life, they may build a digital identity that can be monetised through social media, website content, and digital files. Social media identities, behavioral information, and online content can be monetised by the person who creates it or third parties. Further, a person's digital identity is being used throughout their lives by online services and products to advertise, collect information, and build value for companies who mine, track, and exploit personal data. A digital identity should be considered property and subject to the same rules. Personal data and information that was built by an individual during their life, in any form, should be made available to the family or fiduciary that a person designates in their will.

(c) For what purposes should they be able to access them?

As a part of our internal research project into death and aging, we conducted research with over 200 people through informal and formal interviews and surveys around how they would like to experience the aging process, their desires for their final days, and what wishes they have for their legacy. This includes the ability to memorialise social media accounts, delete accounts or take over ownership of a cloud storage account if this fulfills a person's wishes before they died. We believe strongly that the principles that guide policy should centre on giving autonomy and empowerment to individuals over what happens to assets or identities they create. This is also what we heard from members of the community. There was a strong desire to have autonomy, empowerment, and trust that their legacy would follow their wishes after they die. This thought provided many of the respondents of our surveys peace of mind.

(d) What documentation should be needed to authorise a person to access those assets?

Presently, identification showing the relationship of the person making the request to the deceased and proof of death is sufficient for closure, removal, deletion or takedown of a deceased person's digital assets in many cases. But for access we recommend viewing this in a similar way to property transfer, requiring a legally executed will or a court order.

(e) What restrictions should there be on that access?

No restrictions should apply. However, a deceased person should be able to give specific instructions in their will for a particular asset or account to be deleted, rather than transferred to a new owner.

~~(2) When a person otherwise becomes incapable of managing their digital assets what should it be possible for third parties to do in relation to those assets? In particular:~~

~~(a) Who should be able to access those assets?~~

~~(b) What assets should they be able to access?~~

~~(c) For what purposes should they be able to access them?~~

~~(d) What documentation should be needed to authorise a person to access those assets?~~

~~(e) What restrictions should there be on that access?~~

(3) Should NSW enact a law that specifically provides for third party access to a person’s digital assets upon death or incapacity? Why or why not?

In our experience with human-centered research in the death and aging space, we’ve learned that people want to be able to trust that the law will grant them empowerment and autonomy in how they are remembered and able to pass on their assets, both online and offline. The current lack of awareness of rights to digital assets upon death is the result of the lack of clarity in the legal processes. Although it’s unclear if onerous service agreements with digital service providers would trump existing estate and property law in court, the lack of awareness of the need to create digital wills and digital executors demonstrates the need for reform in this area. With a clear legislative framework, consumers can become more confident that the digital assets they create and use will be transferred or deleted as per their wishes upon death.

(4) If NSW were to legislate to provide specifically for third party access to a person’s digital assets upon death or incapacity:

(a) How should the law define “digital assets”?

We support including items listed in the NSW Law Reform Commission *Consultation Paper 20* (2.4) as the starting point for defining digital assets. As line between technology and the ‘real world’ blurs even further, the definition of digital assets will need to extend to the ways in which our personal information is monetised. Marketing companies will pay for the value of a person’s digital identity when sourcing data for marketing information online. Data collected through cookies can be packaged and sold. The way we conceive of ourselves as consumers of digital services will change as we grow to understand the value of our interaction in terms of data collection. As this changes, our understanding of digital assets will need to evolve to include the intentional as well as the non-intentional aspects of our digital footprints or breadcrumbs that may still be products of our digital lives and considered our assets, to be destroyed, transferred, accessed, or used in whatever format a person decides.

Data in aggregate provides greater value as it forms greater insights. As personal profiles are created through the aggregation of data for marketing and research use, rights should be extended to this data as a digital asset, capable of being transferred or deleted by the next of kin or executor. Like organ donation, data and digital biometric information should be capable of intentional transfer to organisations of a person’s choice.

~~**(b) How can the law appropriately balance privacy considerations with access rights?**~~

(c) How can the law best overcome conflicting provisions in service Agreements?

Australian Consumer Laws should be reformed to require that companies seek a person’s wishes upon sign on what happens to their digital personal information and assets when they die. This should be done upfront, possibly as part of the terms and conditions, but in a way that actively seeks a person's consent.

~~**(d) How can the law best overcome provisions in service agreements that**~~

~~apply the law of some other jurisdiction?~~

(e) What else should the law provide for?

After death, a person ceases to be engaging with or gaining value from companies that monetise your data in exchange for use of their services or products. At that point, a person's data should be considered property and subject to the same regulations as personal property.

(5) What alternative approaches might be desirable to deal with the issue of third party access to digital assets upon death or incapacity?

Legal reform requires education and trust-building outreach. A service that informs users about their rights be integrated into a law reform There should be a transparent and open process that educates online users of their digital rights. People need to know reform exists to be able to utilise their reforms, and to be educated in the value of benefits of determining their digital afterlife and asset disposal wishes.

~~(6) What amendments could be made to existing NSW laws to ensure appropriate third party access to digital assets upon death or incapacity?~~