NSW Trustee & Guardian

Response to LRC Consultation Paper on access to digital assets on death or incapacity

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http://www.tag.nsw.gov.au

NSW Trustee & Guardian

NSW Law Reform Commission
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Dear Chairperson

Thank you for the opportunity to provide feedback on Consultation Paper 20 “Access to digital assets upon death or incapacity”.

NSW Trustee and Guardian (NSWTG) welcomes the findings of your review into this important area.

I hope that NSWTG feedback provides insight and support.

Should you have any questions or require further information please contact

Yours sincerely

Chief Executive Officer

NSW GOVERNMENT | NSW Trustee & Guardian

Response to 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?
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?

NSW Trustee and Guardian (NSWTG) supports the University of Newcastle Legal Centre submission that when setting up an account, service providers require users to advise what they wish to happen to their digital assets upon death. This should occur before being granted permission or access to an account. NSWTG supports the reasoning that this will empower users to decide how their affairs are dealt with. It also ensures they will make proactive decisions, rather than simply accepting the standard terms and conditions of the service provider, which are often not read or understood by users. It also ensures user's privacy will be maintained if that is their wish.

Otherwise, the user should have the choice to appoint a "digital executor" to carry out their wishes with respect to their digital assets on death. The powers of a digital executor should be set out in legislation and should be broad enough to ensure the digital executor is able to close, memorialise, download content, 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 then by default the executor should take on that role. Similarly if there is no executor appointed (e.g. in the case of intestacy) then the administrator of the estate would take on the role. If there is a conflict the last dated document or direction should prevail.

We note that the Law Society of NSW has submitted that for digital assets of sentimental value only and small estates where an application for a grant is not otherwise necessary, that probate should not be required in order to deal with digital assets. While NSWTG understands this position this gives rise to concerns about potential for fraudulent activity (due to the nature of the digital asset there is greater potential for fraud over and above 'offline' assets) and question whether service providers (particularly from overseas jurisdictions) would accept this position.

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?

NSWTG recognises that there are digital assets that fall within the realm of personal and lifestyle matters and/or within the realm of financial and legal matters. For example, photographs stored digitally and electronic medical records would be personal, health and lifestyle matters, while online purchasing accounts (such as Amazon and PayPal), blogs and sports gambling accounts would be financial and legal matters. An example of a digital asset that may fall into both categories could be social media accounts such as Facebook, Twitter and Instagram. Youtube channels set up by individuals may also earn income

due to the number of “hits” from visitors/subscribers. Some channels are sponsored by advertisers or other corporate sources – some channels are video-blogs where the channel creator/owner is reviewing products. While they are commonly used for social purposes, they can also be used to earn income (for example social media influencers who are paid for posts). These assets may need to be dealt with by either or both of the enduring attorney or guardian.

If the practice outlined in response to question 1 is adopted by service providers, this action could also require users to state what they wish to happen to their digital assets upon becoming incapacitated. Ensuring this happens prior to accessing a service would address the lack of clarity about the user’s wishes.

Otherwise, the user should have the choice to state in their power of attorney and/or appointment of enduring guardian that the appointed person may deal with their digital assets. The powers of the appointed person should be set out in legislation and should be broad enough to ensure the appointed person is able to close, continue to operate, download content, transfer content or ownership of the account where appropriate (subject to any contrary intention in the document). If there is a conflict the last dated document or direction should prevail.

If the person has not appointed an attorney and/or guardian then by default the financial manager, person responsible or guardian appointed by a tribunal or court should take on the role set out above.

There may be greater privacy concerns associated with the attorney/financial manager and/or guardian/person responsible having access (as opposed to the executor/administrator of a deceased person). In some cases it may be imperative for an attorney to be able to access the principal’s email account to enable them to access regular invoices (which could relate to personal financial or business matters). Similarly, a guardian may need to access documented previous views stored on digital assets to inform end of life decisions.

The principal would have the option while capable of specifying how they wish for their digital assets to be handled if they lose capacity, as set out in the first paragraph in response to this question.

There is currently concern about abuse of incapacitated persons by attorneys/financial managers and guardians. NSWTG recognises this may be of even greater concern in relation to digital assets and is an issue that must be grappled with.

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?

Yes. NSW should enact legislation that specifically provides for third party access because the current legislative framework in relation to Wills, estates and supported decision making is inadequate to deal with digital assets. This is evidenced by the difficulty Legal Personal Representatives (LPR) have in accessing digital assets. As stated in the NSW Law Reform Commission paper the definition of ‘property’ may not include digital assets for the purposes of the *Succession Act 2006* (NSW). This action would provide clarity to concerns about the application of criminal law when well-meaning LPRs attempt to deal with digital assets when not authorised.

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4. If NSW was 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"?

NSWTG sees that the Canadian definition has merit and recognises that the speed at which technology is developing requires a broad definition that may need to be regularly considered and amended. Consultation in developing a definition should include appropriate IT experts.

NSWTG notes the submission by the University of Newcastle that the definition contains examples of digital assets and exclusions. NSWTG is concerned that the speed at which technology develops may limit the definition by reference to the examples given.

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

Please refer to the first paragraph above in response to each of questions 1 and 2.

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

NSWTG supports the Canadian position and agree with STEP that the Canadian position is more consistent with Australian values.

(d) How can the law best overcome provisions in service agreements that apply the law of some other jurisdiction?

NSWTG supports the possible law reform process suggested in 5.12 of the Consultation Paper.

To ensure that any NSW legislation about third party access to digital assets has broad an application as possible, legislation should specify that NSW law is the proper law in all cases where the user is a NSW resident. This would be despite conflicting proper law clauses in service agreements.

(e) What else should the law provide for?

No comment

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

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

Questions 5 and 6: Refer to our responses to questions above which have covered off on these issues.