

NSW Justice Law Reform Commission
GPO Box 31, Sydney NSW 2001
nsw-lrc@justice.nsw.gov.au

18 March 2019

Submission to the New South Wales Sentencing Council

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

The Sex Workers Outreach Project (SWOP) would like to thank the New South Wales (NSW) Justice Law Reform Commission for the opportunity to make a submission to Consultation Paper 20: Access to digital assets upon death or incapacity. SWOP is a non-government organisation that exists to provide NSW sex workers with the same access to health, safety, human rights and workplace protections as other Australian workers. SWOP has the highest level of direct contact with sex workers of any agency, government or non-government, in Australia.

While we are primarily funded by NSW Health to sustain the low rates of sexually transmitted infections amongst sex workers; sustain the virtual elimination of HIV transmission within the sex industry; and reduce hepatitis infections in sex workers, we take a holistic view of health. Social justice and equity are identified as prerequisites for health in the Ottawa Charter¹ and it is this that prompted our decision to submit to this particular inquiry.

Stigma and discrimination against sex workers

Stigma and discrimination against sex workers are the key reasons that sex workers consider all disclosure about their work very carefully. More than just an impact for the individual worker, the effects of stigma and discrimination levelled against sex workers, can extend to their children, partners, flatmates and family. Discrimination against sex workers can take many forms, from rental discrimination leading to homelessness; discrimination by body corporates against sex workers who own apartments; employment discrimination when sex work past is revealed, either intentionally or inadvertently; social exclusion of children of sex workers in educational settings due to having a sex working parent; to being excluded from our own families.

In order to avoid the negative impacts of stigma and discrimination, sex workers may utilise work pseudonyms; work for other people (sex services premises) so they don't need to have online advertisements featuring their face; or if they do have online ads, become (via necessity) an expert in the ever-shifting domain of online privacy.

The measures sex workers take to protect their identity online extend to having separate work and personal profiles on various social media platforms, and rigid policing between the two, from not having the same photo appear on both accounts, down to accessing the accounts from different telecommunication devices to avoid the platforms ever making any link (like Facebook friend suggestions) between the profiles.

It is SWOP's belief that if in life sex workers control who knows about their sex work rigidly, we are likely to have an equally strong desire to determine what happens to our digital assets upon death or incapacity. It is our view that sex workers who are not out to their family, would be unlikely to want their children, family or partner to find out about their occupation through the sharing of digital assets after their death.

This may be magnified for many culturally and linguistically diverse sex workers. In various cultures being a sex worker might be viewed as shameful. Some migrant workers report working in suburbs many kilometres away from their homes and communities in NSW, travelling to regional areas where they are unlikely to encounter anyone they know. They also report visiting sexual health clinics far from their homes, because even being seen to do that might be a source of shame within their community. It is our view that migrant workers would be likely to want even more rigid control over what happens to their digital assets in the event of their death or incapacity, in order to ensure their families and loved ones are protected from that perceived shame.

The importance of access

For sex workers who do share their occupation with family and friends, it is often a long process, involving many conversations. In the course of coming out to a family member or partner, many sex workers seek help from our service. This might involve modelling conversations with our trained counsellor, before broaching them with family/partners. While our primary focus is NSW sex workers, SWOP also offers limited services to family members or partners, including having their own session with our counsellor to address their fears and stigma about sex work without the worker being present. This connection to SWOP is usually made or encouraged by the sex worker.

Even with near complete disclosure, there might be aspects of sex work that sex workers choose to keep from those who aren't sex workers. This might include having a bad client/bad day at work, or excessive details about jobs that our partners might find hurtful to hear. In digital terms, we might choose not to share reviews of our services on client-focused websites; our advertisements; profiles we have in our sex work personas on dating sites like Grindr or Tinder; and our private client emails.

SWOP's peer-run service, SWOP Connect, is one-way sex workers debrief with other sex workers about aspects of sex work that non-sex workers might find it hard to understand. When conversations about these areas of our work do come up with family and partners, sex workers generally attempt to provide context useful to understanding the disclosed information. For example, if a family member stumbles upon a review of the worker's service, the worker is able to explain that these reviews are published by clients for other clients and contain a large fictional element boasting about sexual prowess; and thus, may differ widely from the service provider's account of the same job. Sex workers are also able to connect family members struggling with particular aspects of sex work to appropriate services, from SWOP to other non-stigmatising counselling services that we recommend.

It is our view that the sharing of digital assets relating to these areas after death or incapacity, would lack context and connection to services, and thus be likely to do more harm than good.

Privacy considerations

Many of sex workers' digital assets may refer to living people who could also be impacted by sex work stigma and discrimination. While sex workers consider it part of our job to afford our clients privacy and confidentiality, in the event of our deaths, an upset partner or parent, may not feel the same way. It is our view that any decision made with respect to the sharing of a sex workers' digital assets needs to balance the competing concerns of those seeking access and the privacy concerns of both the account holder and those featured in their accounts.

The law of wills

Stigma and discrimination against sex workers can be so extreme, that some sex workers are disinclined to have any official documentation of their sex working life. This is evidenced in the number of sex workers who choose silo health information, taking care of their sexual health needs anonymously at sexual health clinics, while taking care of other health needs in their legal name at a local GP. It is SWOP's view that discussing, or placing in writing, what to do with sex worker related digital assets would be a barrier to many sex workers using this route to declare their wishes about what happens to their digital assets after death.

When sex workers emigrate from countries where sex work is criminalised, it is a barrier to those sex workers disclosing their occupation to authorities. SWOP is cognisant that many recently arrived migrants are not aware that sex work is lawful in NSW. It is our view that migrant sex workers would have even more significant barriers to using a will to determine what happens to their digital assets that relate to sex work.

Impediments to access

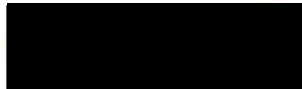
A further complicating factor which we are sure the NSW Justice Law Reform Commission has already considered, is that many digital assets are not held in the legal name of the deceased. This would not just affect the digital assets of NSW sex workers, but also digital assets pertaining to other Australian workers whose workplaces might require them to protect their identity when using social media. For example, this might include Government employees, political staff in electoral offices, teachers and police. In addition to this, there are many people who chose to be anonymous online for a plethora of reasons that do not relate to work. A good example of this might be a transgender person, who might not have fulfilled the legal requirements for their change of gender identity (or even intend to), but already use social media in their chosen gender via a name of their choosing.

When the deceased formerly used a pseudonym, family and partners might not be able to use ordinary mechanisms, like providing a funeral notice or death certificate to a social media platform, to have a pseudonym account disabled, memorialised or removed. For sex workers, how to resolve this might be even more complex, with no linking photos or documents between the two identities.

It is likely that the only way around this is for people using pseudonyms to be protected by ensuring service providers, such as Facebook and Twitters, ensure that users advise what they want to happen to their digital assets upon death or incapacity before using the platform. It's our view that this should also include some form of 'self-destruct' option after a certain time period of inactivity.

SWOP thanks the NSW Justice Law Reform Commission for the opportunity to submit to this important discussion about our digital assets. We would be happy to attest further to any of the issues outlined in this submission by phone or email.

Yours Sincerely,



Cameron Cox
Chief Executive Officer
Sex Workers Outreach Project Inc. (SWOP)

ⁱ World Health Organisation, *The Ottawa Charter for Health Promotion*, accessed online 19 February, 2019 at <https://www.who.int/healthpromotion/conferences/previous/ottawa/en/>.