Access to digital records upon death or incapacity

147

New South Wales
Law Reform Commission

REPORT

December 2019

NSW GOVERNMENT

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23 December 2019

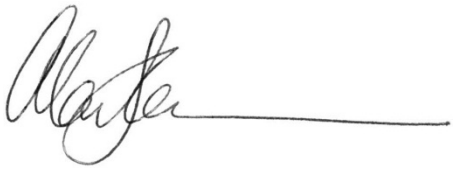
Hon M Speakman SC MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney

Access to digital records upon death or incapacity

We make this report – Report 147: *Access to digital records upon death or incapacity* – pursuant to the reference to this Commission received on 26 March 2018.

Yours sincerely



Alan Cameron AO

Chairperson

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967*, the NSW Law Reform Commission is asked to review and report on:

1. Laws that affect access to a NSW person's digital assets after they die or become incapacitated.

2. Whether NSW should enact legislation about who may access a person's digital assets after they die or become incapacitated and in what circumstances.

3. What should be included in any such legislation.

In particular, the Commission is to consider:

a) Relevant laws including those relating to intellectual property, privacy, contract, crime, estate administration, wills, succession and assisted decision-making.

b) Policies and terms of service agreements of social media companies and other digital service providers.

c) Relevant jurisdictional issues, including the application of NSW laws, Commonwealth laws and the laws of other jurisdictions.

d) Appropriate privacy protections for the electronic communications after a person dies or becomes incapacitated.

e) The Uniform Law Conference of Canada's *Uniform Access to Digital Assets by Fiduciaries Act* (2016) and the American Uniform Law Commission's *Revised Uniform Fiduciary Access to Digital Assets Act* (2015).

f) Any other matters the NSW Law Reform Commission considers relevant.

[*received 26 March 2018*]

Recommendations

2. NSW needs a digital access scheme

2.1: A statutory scheme for NSW

NSW should enact a statutory scheme that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances.

3. Scope and key terms of the statutory scheme

3.1: The scheme should apply where users are domiciled in NSW

The scheme should apply to a custodian, regardless of where the custodian is located, if the user is domiciled in NSW or was domiciled in NSW at the time of their death.

3.2: Key terms of the statutory scheme

The scheme should include the following definitions:

(1) **"Authorised person"** means the person with the right, under this scheme, to access particular digital records of the user.

(2) **"Custodian"** means a person or service that has, or had at the time of the user's death, a service agreement with the user to store or maintain particular digital records of the user.

(3) "**Custodian policy**" means a statement of policy by the custodian, not otherwise incorporated in a service agreement, which relates to the digital records of the user stored or maintained by that custodian, and applies whether or not the user is alive or has capacity.

(4) **"Digital record"** means a record that:

  (a) exists in digital or other electronic machine-readable form, and

    (i) was created by or on behalf of the user, in whole or in part, or

    (ii) relates to the user, and the user had access to it while the user was alive, or

    (iii) relates to the user, and their representative had access to it during any period of incapacity, but

  (b) does not include an underlying asset (such as money in a bank account or the copyright in a literary work) or liability, unless the asset or liability is itself a digital record.

(5) **"Incapacitated user"** means an adult user who requires or chooses to have assistance with decision-making in relation to particular digital records of the user.

(6) **"Online tool"** means a tool provided by a custodian online that allows the user to give directions or permissions to a third party for managing the digital records of the user stored or maintained by that custodian.

(7) **"Service agreement"** means an agreement between a user and a custodian that relates to the digital records of the user stored or maintained by that custodian.

(8) **"User"** means a natural person who has entered into a service agreement with a custodian to store or maintain particular digital records of the user.

4. The authorised person and the extent of their access

4.1: Authorised person entitled to access a user's digital records

The scheme should provide that:

(1) The authorised person entitled to access particular digital records of a deceased user is:

(a) the person specifically appointed by the user's will to manage those digital records:

(i) in the case of a formal will, whether or not there has been a grant of representation of the will, or

(ii) in the case of an informal will, only if there has been a grant of representation

(b) if there is no person specifically appointed by the user's will to manage those digital records, the person nominated through an online tool to manage those records

(c) if there is no person specifically appointed by the user's will or nominated through an online tool to manage those digital records, the executor of the user's will:

(i) in the case of a formal will, whether or not there has been a grant of representation of the will, or

(ii) in the case of an informal will, only if there has been a grant of representation

(d) if there is no will or no executor willing or able to act, and no person nominated through an online tool to manage those digital records, the administrator of the user's estate

(e) if no provision or order has been made, a person to whom the deceased user has communicated the access information for those digital records, but not where that person holds the access information as part of an employment or other contractual relationship involving remuneration for the activity, unless the user has indicated that the arrangement is to have effect after their death.

(2) The authorised person entitled to access particular digital records of an incapacitated user is:

(a) any person appointed under:

(i) an enduring guardianship arrangement that has effect, or

(ii) an enduring power of attorney that has effect,

but only in relation to those records that are:

(iii) specified in the enduring guardianship arrangement or enduring power of attorney, or

(iv) otherwise relevant to the person's role either as enduring guardian or attorney

(b) if there is no person appointed under an enduring guardianship or enduring power of attorney, any person appointed under:

(i) a guardianship order, or

(ii) a financial management order,

but only in relation to those records that are:

(iii) specified in the guardianship order or financial management order, or

(iv) otherwise relevant to the person's role as guardian or financial manager

(c) if there is no person appointed under an enduring guardianship, enduring power of attorney, guardianship order or financial management order, the person nominated through an online tool to manage those digital records

(d) if no provision or order has been made, the person with access information for those digital records, either because:

(i) the incapacitated user has communicated the access information for those digital records to the person, or

(ii) the person created those digital records on the incapacitated user's behalf

but not where the person holds the access information as part of an employment or other contractual relationship involving remuneration for the activity, unless that relationship is a paid carer relationship.

4.2: A person can apply to the Supreme Court of NSW for an order that they are the authorised person

The scheme should provide that a person can apply to the Supreme Court of NSW for an order that they are the authorised person entitled to access particular digital records of the deceased or incapacitated user under Recommendation 4.1.

4.3: Extent of the authorised person's access right

The scheme should provide that:

(1) For the purposes of determining the extent of the authorised person's right:

(a) "administering the deceased user's estate" includes informal administration of the deceased user's estate

(b) "managing the incapacitated user's affairs" includes informal management of the incapacitated user's affairs, and

(c) "deal" or "dealing" includes transferring digital records to the person entitled to them, but does not include editing the content of digital records.

(2) The authorised person entitled to access particular digital records of a deceased user may access and deal with those digital records:

(a) subject to applicable fiduciary duties, and

(b) subject to other applicable laws, and

(c) subject to any terms of the following, as applicable:

(i) the will (even where the authorised person is not the person named in the will), or

(ii) the online tool, or

(d) if there are no such terms, only for the purpose of administering the deceased user's estate.

(3) If the authorised person entitled to access particular digital records of a deceased user also has authority over the user's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital record, they are authorised to access and deal with the property and digital records of the user stored on it:

(a) subject to applicable fiduciary duties, and

(b) subject to applicable laws, and

(c) subject to the terms of the following, as applicable:

(i) the will (even where the authorised person is not the person named in the will), or

(ii) the online tool, or

(d) if there are no such terms, only for the purpose of administering the deceased user's estate.

(4) The authorised person entitled to access particular digital records of an incapacitated user may access and deal with those digital records:

(a) subject to applicable fiduciary duties, and

(b) subject to applicable laws, and

(c) subject to the terms of the following, as applicable:

(i) the online tool, or

(ii) an enduring guardianship or enduring power of attorney, which has effect, or

(iii) the guardianship or financial management order, or

(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.

(5) If the authorised person entitled to access particular digital records of an incapacitated user also has authority over the user's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital record, they are authorised to access and deal with the property and digital records of the user stored on it:

(a) subject to applicable fiduciary duties, and

(b) subject to applicable laws, and

(c) subject to the terms of the following, as applicable:

(i) the online tool, or

(iii) the enduring guardianship or enduring power of attorney, which has effect, or

(iv) the guardianship or financial management order, or

(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.

(6) In all such cases, the authorised person is deemed to have the consent of the deceased or incapacitated user for the custodian to disclose the content of the digital records to the authorised person.

4.4: Other obligations of the authorised person

The scheme should provide that:

(1) Where the authorised person entitled to access particular digital records of a deceased user is not the executor or the administrator of the user's estate, they must do all things reasonably necessary to provide relevant information to the executor or administrator for the purposes of administering the user's estate.

(2) Where the authorised person entitled to access particular digital records of an incapacitated user is not appointed under:

  (a) an enduring guardianship, or

  (b) an enduring power of attorney, or

  (c) a guardianship order, or

  (d) under a financial management order,

  they must do all things reasonably necessary to provide relevant information to a person so appointed for the purpose of managing the user's affairs.

4.5: Improper disclosure of information

The scheme should provide that:

(1) It is an offence for an authorised person entitled to access particular digital records of the deceased user to disclose information about the deceased user, or another person, obtained in accessing those records, unless the disclosure is:

  (a) in accordance with the relevant instrument or order appointing the authorised person

  (b) for the purpose of administering the deceased user's estate

  (c) necessary for legal proceedings

  (d) authorised by law

  (e) authorised by a court or tribunal in the interests of justice, or

  (f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

(2) It is an offence for an authorised person entitled to access particular digital records of the incapacitated user to disclose information about the deceased user, or another person, obtained in accessing those records, unless the disclosure is:

  (a) in accordance with the relevant instrument or order appointing the authorised person

  (b) for the purpose of managing the incapacitated user's affairs

  (c) necessary for legal proceedings

  (d) authorised by law

  (e) authorised by a court or tribunal in the interests of justice, or

  (f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

5. Access procedures, liability limits and conflicting terms in custodian agreements and policies

5.1: Procedural requirements for access requests

The scheme should provide that:

(1) The authorised person entitled to access particular digital records of a deceased or incapacitated user may request access to those records stored or maintained by a custodian by contacting the custodian and providing proof of their authority.

(2) In relation to a deceased user's digital records, the authorised person will prove their authority by providing the custodian with a copy of the following, as applicable:

  (a) proof of the user's death

  (b) the formal will

  (c) in the case of a formal will that has not been proved, a statutory declaration establishing that the will is the user's last valid will

  (d) the grant of representation

  (e) proof of the authorised person's identity

(3) In relation to an incapacitated user's digital records, the authorised person will prove their authority by providing the custodian with a copy of the following, as applicable:

  (a) the enduring guardianship or enduring power of attorney

  (b) the guardianship or financial management order

  (c) proof of the authorised person's identity.

(4) For the purposes of Recommendation 5.1(2) and 5.1(3), a "copy" includes a copy in digital or other electronic machine-readable form.

(5) If, and only if, the authorised person is unable to provide proof of authority in accordance with Recommendation 5.1(2) or 5.1(3), authority will be proved by an order from the Supreme Court of NSW that states that they are the authorised person.

(6) A custodian may choose not to require the particular proof of authority set out in Recommendation 5.1(2) or 5.1(3). If the custodian chooses to require proof of authority, the custodian can only require a Supreme Court order where the authorised person does not provide proof in accordance with Recommendation 5.1(2) or 5.1(3).

(7) A custodian who receives a request from an authorised person, in accordance with Recommendation 5.1, must provide access to the authorised person within 30 days of receipt of the request, unless the custodian can show that access is not technically feasible.

5.2: Protecting custodians from liability

The scheme should protect custodians from liability for acts or omissions done in good faith to comply with the scheme.

5.3: Protecting the authorised person from liability

The scheme should provide that:

(1) A person who:

(a) purports to act as an authorised person under the scheme, and

(b) does so in good faith, and without knowing that another person is entitled to be the authorised person in accordance with the scheme,

is not liable for so acting.

(2) For the purposes of s 308H of the *Crimes Act 1900* (NSW), access to or modification of restricted data held in a computer is authorised if it is done in accordance with the scheme.

5.4: Conflicting provisions in service agreements and policies

The scheme should provide that:

(1) Despite any other applicable law or a choice of law provision in a relevant service agreement or custodian policy, a provision in that service agreement or custodian policy that limits the authorised person's access to particular digital records of the deceased or incapacitated user, contrary to the scheme, is unenforceable.

(2) Despite any provision, including a choice of law provision, in a relevant service agreement or custodian policy, the authorised person's access to particular digital records of a deceased or incapacitated user, in accordance with the scheme, does not require the consent of the custodian and is not a violation or breach of any provision of the service agreement or relevant custodian policy.

5.5: NSW as the proper forum for disputes

The scheme should provide that, despite any forum selection term in the relevant service agreement, the courts of NSW with the relevant jurisdiction are the proper forum for disputes concerning the access to particular digital records of a deceased or incapacitated user, where the user is domiciled in NSW or was domiciled in NSW at the time of their death.

6. Changes to existing laws and other issues related to the scheme

6.1: Clarify that NSW succession and estate laws, and assisted decision-making laws, extend to property in digital form

(1) The definition of "property" in s 3 of the *Succession Act 2006* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

(2) The definition of "personal estate" in s 3 of the *Probate and Administration Act 1898* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

(3) The definition of "property" in s 3(1) of the *Powers of Attorney Act 2003* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

(4) The definition of "estate" in s 3(1) of the *Guardianship Act 1987* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

6.2: Amendments to NSW privacy laws to allow for the operation of the scheme

Amendments should be made to NSW privacy laws about accessing and managing personal information, to allow for the operation of the scheme.

6.3: Education about digital records and their management

Institutions and organisations already educating the community and legal practitioners about succession law, administration of estates, and assisted decision-making laws, should incorporate into their education programs information about digital records, and how they can be managed following a person's death or incapacity.

6.4: Custodian procedures for access requests

Custodians should have transparent processes for handling access requests.

1. Overview

In brief

This report recommends a new statutory scheme for NSW, which would allow access to a deceased or incapacitated person's digital records in limited circumstances. In this chapter, we provide an overview of the recommended scheme and the policy behind it. We also describe our review process.

1.1 The NSW Law Reform Commission is an independent statutory body. We provide independent, expert law reform advice to the Government on matters the NSW Attorney General refers to us.

1.2 In May 2018, the Attorney General asked us to review and report on the laws that affect access to a NSW person's digital assets when they die or are incapacitated.

1.3 In this report, we recommend a new statutory scheme for NSW that allows access to a deceased or incapacitated person's digital records in limited circumstances. Such circumstances include when a deceased or incapacitated person has nominated someone to manage their digital records and, in the absence of a nomination, when access is necessary to administer their estate or manage their affairs.

1.4 The scheme seeks to balance the wishes of the deceased or incapacitated person, the needs of estate administrators and managers to fulfil their obligations, privacy and security of information concerns, and the commercial imperatives of the digital landscape.

Scope of our review

1.5 The Attorney General asked us to review and report on:

- the laws that affect who can access a person's digital assets and records when they die or are incapacitated
- whether NSW needs new laws in this area, and in what circumstances, and
- what should be included in any such laws.

Impetus for our review

1.6 The world is seeing an increase in the production and use of digital records. Most people now have at least some items and communications stored digitally, either on a tangible electronic device (such as a laptop or phone) or on a third party's server. These might include, for example, emails, online bank accounts, social media profiles and photographs.

1.7 If a person has digital records (and in particular, if those records equate to an asset), it is likely that, upon their death or incapacity, other people (an executor or attorney, for example) will need access to these records to deal effectively with their financial and personal affairs.

1.8 There are practical and legal problems in managing the digital records of people who have died. Similar problems arise if someone can no longer manage their digital records because of, for example, a brain injury, dementia or a serious illness. People with digital records may not consider the fate of these records when they can no longer manage them. Even when they do, their instructions may conflict with the terms of service agreements that they enter into when they set up online accounts, or with laws that prohibit another person to access someone's data.

1.9 In our view, the current law in NSW does not effectively ensure that people with a legitimate interest can access a person's digital records, including digital assets, when they die or are incapacitated. For this reason, we are recommending a new statutory scheme.

1.10 The recommended scheme could be adopted by the Commonwealth and other Australian states and territories. In the absence of similar, comprehensive schemes elsewhere, it could also be adopted in other countries.

Terms we use in this report

What we mean by "digital assets" and "digital records"

1.11 In our consultation paper, to reflect the terms of reference and keep the discussion broad, we employed the commonly used term "digital assets" to refer to anything that can be accessed and stored in digital form. However, during the course of our review, it became clear that the term "digital assets" did not accurately reflect what we wished to discuss.

1.12 In other contexts, "asset" is understood to mean "property". However, we are also interested in items in a digital format more broadly, including items that the user has created, or that relate to the user, but that the user does not necessarily own as their property. We agree with Bennett Moses and co-authors that "it is potentially confusing to use 'property' language that falls outside its standard legal meaning".[1]

1.13 For this reason, in this report, we use two distinct terms: "digital records" and "digital assets".

1.14 "Digital records" encompasses digital assets, but also includes items that are not strictly the property of the user. For example:

- social media accounts and profiles
- digital music and eBook collections
- online purchasing accounts, such as Amazon and eBay
- loyalty program benefits, such as frequent flyer points
- sports gambling accounts, and
- online gaming accounts and avatars.

1.15 We only use the term "digital assets" to refer to digital material in which users have proprietary rights or interests. "Digital assets" include, for example:

- cryptocurrencies, such as Bitcoin,[2] and
- certain digital material in which users have intellectual property rights, such as digital photographs, digital artwork, or written work.[3]

Other terms we use

1.16 Below are some of the other terms we use in this report:

- **Incapacitated:** refers to the situation where someone is incapable of making decisions for themselves, for example, because of a cognitive impairment. An incapacitated person may receive decision-making assistance, for example, from a guardian, attorney or financial manager.
- **Authorised person:** refers to the person who, under the recommended scheme, would have the authority to access particular digital records of a deceased or incapacitated user for limited purposes.
- **Custodian:** refers to digital platforms that store or maintain users' digital records. For example, Facebook and Google are custodians.

1. L Bennett Moses, P Vines, J Gray and S Logan, *Preliminary Submission PDI11,* 1–2.
2. Bitcoin has been recognised as "property" under Australian law: see Australian Taxation Office, *Income Tax: Is Bitcoin a "CGT Asset" for the Purposes of Subsection 108-5(1) of the Income Tax Assessment Act 1997?* (TD 2014/26, 17 December 2014) 3–4.
3. See, eg, England and Wales Law Commission, *Making a Will,* Consultation Paper 231 (2017) [14.13].

- **Service agreements:** refers to the agreements between users and custodians, which govern users' rights in relation to their digital records. Users generally agree to the terms of service agreements when they create online accounts.
- **Custodian policies:** refers to statements of policy by custodians that relate to a user's digital records stored or maintained by that custodian, but exist separately to service agreements. For example, some custodian policies say that a user's account will be terminated when they die.
- **Online tool:** refers to a tool, provided by a custodian, that allows the user to give directions or permissions to a third party for managing their digital records stored or maintained by that custodian. For example, Facebook's "Legacy Contact" and Google's "Inactive Account Manager" are online tools.

Overview of the recommended scheme

1.17 The recommended scheme would allow an "authorised person" to access and deal with particular digital records of a deceased or incapacitated person. A statutory hierarchy would determine who the authorised person is in most circumstances.

1.18 We intend the hierarchy to give effect to the wishes of the deceased or incapacitated person where possible. For example, if a deceased user nominated a person in a will to manage their digital records, that person would generally be the authorised person ahead of anyone else.

1.19 The authorised person's right to access digital records would be subject to any limitations set out in the instrument appointing the person. In the absence of any appointment in an instrument, the scheme would authorise access only for the purpose of administering the user's estate or managing their affairs.

1.20 The authorised person's right would be subject to applicable fiduciary duties. The scheme would also forbid them from improperly disclosing information they have obtained in accessing the digital records.

1.21 Custodians would be obliged to grant access within 30 days to a person who is able to prove their authority. The scheme would protect from liability custodians who grant access in good faith and in compliance with the scheme.

The policy behind the recommended scheme

1.22 The recommended scheme would be the first of its kind in Australia. In this section, we explain the policy behind it.

It recognises the role digital records play in our lives

1.23 People now manage important aspects of their lives online. This means that when a person dies or is incapacitated, those involved in administering their estate or managing their affairs need to be able to access their digital records.

1.24 For example, a person's email account may contain outstanding invoices or bills, or the person may use a social media account to earn an income.[4] They might have photos of sentimental value saved on their phone. Access to these accounts and storage devices is therefore necessary to ensure that items of value can be retrieved, and to identify the extent of their assets and liabilities. The recommended scheme provides a simple legal framework that allows people with legitimate interests to access a person's digital records when necessary, and with appropriate safeguards to ensure that records are not misused.

It applies the existing law's approach to physical assets and records

1.25 We see no reason to adopt a different philosophy in relation to digital assets and records than to other types of assets and records. The practical access issues might be different, but the approach should be the same.

1.26 For this reason, the recommended scheme aligns broadly with the approach of existing trusts and estates law, which has at its core a respect for the deceased or incapacitated person's intentions.[5] Similarly, under the scheme, an authorised person's right to access and deal with a deceased or incapacitated user's digital records is subject to the stated intentions of the person. Where possible, the user's wishes concerning the management of their digital records would be given full effect.

1.27 This approach applies regardless of whether the user's digital records constitute financially valuable assets or, for example, have only sentimental value.

It respects the right of digital platforms to decide the property status of products

1.28 The scheme does not interfere with service agreements that restrict a user's property rights. For example, when a person purchases movies, music and eBooks online, an agreement will typically state that they acquire a non-transferable licence to use this content during their lifetime, rather than full ownership.[6] This means that they cannot bequeath these purchases to beneficiaries when they die.

1.29 The recommended scheme respects the right of digital platforms to decide the property status of the products they provide, and leaves these arrangements in place.

It standardises the obligations of custodians

1.30 Companies like Facebook and Google currently have different policies about what happens to a user's account upon their death or incapacity, and who can access the information in the account. For example, some custodians will terminate a user's account when they die. Others deactivate or delete an account after a period of inactivity.

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4. NSW Trustee and Guardian, *Submission DI09,* 3–4.
5. See, eg, Law Society of NSW, *Preliminary Submission PDI14,* 1.
6. See, eg, G W Beyer, "Web Meets the Will: Estate Planning for Digital Assets" (2015) 42(3) *Digital Assets* 28, 31–33; ACCAN, *Preliminary Submission PDI10*, 8.

1.31 These differences can make administering estates difficult, and make it hard for friends, family, executors and administrators to know what records they are able to access. The lack of regulation in this field also means that, theoretically at least, custodians can deny access to a person's digital records based upon purely commercial interests without accommodating, for example, an executor's need to administer a person's estate.

1.32 Under the recommended scheme, the authorised person would have the right to access particular digital records of a deceased or incapacitated person for limited purposes, regardless of what the custodian's service agreement or policy provides. If a term in the relevant agreement or policy prevents access, contrary to the scheme, it would be unenforceable.

It accommodates privacy concerns

1.33 One of the chief concerns we heard during the course of our review was that allowing others to access a person's digital records after death or incapacity interferes with their right to privacy.

1.34 In fact, there is no right to privacy enshrined in the Australian Constitution, and there are gaps in the coverage of privacy laws at the Commonwealth and state levels. The current laws regulate the handling of personal information by public sector agencies and some corporations, not individuals, and not all of them extend protection to deceased people.

1.35 Nevertheless, we understand that enabling unfettered access to a person's digital records is unacceptable to many, particularly considering the potential breadth of personal information a person can keep online. This is why the recommended scheme prioritises a person's stated wishes (contained in a will, for example). These wishes would determine the breadth of the rights another person has.

1.36 If a person has not made their wishes clear, an authorised person's right to deal with that person's digital records would be strictly limited. The authorised person would not be able to do anything with the information unless necessary for administering the estate or managing the person's affairs. Again, this approach aligns with the way that executors, administrators, attorneys, guardians and financial managers must treat physical assets and records.

1.37 The recommended scheme also:

- makes it an offence for an authorised person to disclose information about the user, or another person, obtained while accessing the digital records of the user, unless specific exceptions apply, and
- imposes fiduciary duties upon the authorised person, to ensure that they act in good faith.

It minimises the need for legal action

1.38 The recommended scheme minimises the formal legal steps that a person with a legitimate interest must take to gain access to a deceased or incapacitated person's digital records. Because the scheme identifies who the authorised person is in most circumstances, it limits the cases in which interested parties would have to seek a court order to gain access.

1.39 This approach also relieves the burden on custodians like Facebook and Google, who must examine requests and decide whether to disclose digital records. A custodian would be entitled to rely on the proof of authority provided by a person authorised under the scheme. The scheme also provides protections for custodians for acts or omissions done in good faith in compliance with the scheme.

It builds on similar schemes elsewhere

1.40 We have based some aspects of the scheme on the model laws in the US and Canada,[7] and added other aspects to improve the operation of the scheme.

1.41 For example, the US and Canadian model laws only confer a right of access on four types of fiduciaries: legal personal representatives (executors and administrators), attorneys acting under a power of attorney, guardians and trustees. We think this approach fails to recognise the informal arrangements people make with each other. Our research suggests that some people share their passwords with another person so that person can access or operate their online accounts in the event that something happens to them.[8] The law should recognise this.

1.42 Under the recommended scheme, the person to whom the deceased or incapacitated user communicated their access information for particular digital records, would qualify as the authorised person entitled to access those records, where no one else is authorised to do so. This would allow a person's digital records to be managed informally, particularly in cases where, for example, a formal grant of probate is otherwise unnecessary.

How we conducted this review

1.43 During our review, we consulted widely by:

- inviting submissions from a range of different people, including individuals, academics, legal professionals, community groups and government agencies
- conducting roundtable discussions with those who made submissions, and smaller consultations with interested stakeholders, and
- conducting online surveys among members of the community and the NSW legal profession.

1.44 We are grateful to everyone who spoke to us, wrote submissions and answered our online surveys.

1.45 You can find a full list of the submissions we received and the consultations we held in Appendices A, B and C.

7. Uniform Law Commission, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)*; Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016).
8. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.28] Table 3.9.

Preliminary submissions and background information

1.46 To help us identify issues and concerns, we invited preliminary submissions on our terms of reference. We received 17 preliminary submissions, listed in Appendix A and available on our website.

Consultation paper

1.47 We released a consultation paper in August 2018, which:

- described the current laws affecting access to digital records in NSW
- described practices being used to overcome the legal impediments to access
- considered recent innovative changes to the law in other jurisdictions, and
- sought people's views about what, if anything, needed to change.

1.48 We received 12 submissions in response, listed in Appendix B and available on our website.

Consultations

1.49 In November 2018, we held roundtable discussions with a range of people, including legal practitioners, academics, advocacy group representatives, government representatives, and digital platform representatives (see Appendix C).

Surveys

1.50 Between December 2018 and October 2019, we carried out two online surveys.

1.51 One survey, *What should happen to your social media when you die?* was conducted among members of the public. We asked people about:

- their use of social media and other online accounts, and
- what they would like to happen to their accounts if something happened to them.

1.52 We received 488 responses to this survey. The questions and survey results are set out in our accompanying research report.[9]

1.53 We conducted a second survey, *Access to Digital Assets and Records after Death or Incapacity,* among NSW legal practitioners. We asked lawyers who provide advice on estate planning and administration, and/or guardianship and power of attorney arrangements, about their experiences in dealing with digital assets and records in these contexts.

1.54 We received 74 responses to this survey. The questions and survey results are set out in our accompanying research report.[10]

9. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019).

Draft proposals

1.55 In May 2019, we released draft proposals to a group of interested stakeholders. We also conducted smaller consultations to discuss the proposals. These consultations helped us to develop and test our ideas.

1.56 In response to the feedback we received, we released a revised version of the draft proposals in August 2019 to interested stakeholders. The additional comments helped us formulate our recommendations for reform, which we explain in this report.

Outline of our report

1.57 In **Chapter 2 – NSW needs a digital access scheme**, we recommend a new statutory scheme for NSW that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances. We explain why it might be necessary to access a person's digital records upon their death or incapacity, and outline the access barriers that currently exist.

1.58 In **Chapter 3 – Scope and key terms of the statutory scheme**, we recommend that the scheme apply where users are domiciled in NSW, and explain the key definitions that underpin the recommended scheme.

1.59 In **Chapter 4 – The authorised person and the extent of their access**, we explain the process for determining who is the "authorised person" entitled to access particular digital records under the scheme. We also explain the extent of the authorised person's right to access and deal with a user's digital records and the other obligations that would apply. Finally, we recommend that the scheme forbids the authorised person from improperly disclosing information they have obtained in accessing the digital records.

1.60 In **Chapter 5 – Access procedures, liability limits and conflicting terms in custodian agreements and policies**, we set out the procedures that an authorised person should follow when making an access request to a custodian. We recommend protections from liability for both custodians and authorised persons if they act in good faith. We also recommend that when terms in a service agreement or custodian policy conflict with the operation of the scheme, the scheme should prevail.

1.61 In **Chapter 6 – Changes to existing laws and other issues related to the scheme**, we recommend changes to succession and estate laws, and assisted decision-making laws, to clarify that they apply to a person's digital property as well as to other types of property. We also recommend that NSW privacy laws are amended to allow for the operation of the recommended scheme. We list some notable issues that are not dealt with by the scheme and discuss the importance of community and professional education. Finally, we explain why the scheme should be adopted by other Australian jurisdictions.

10. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019).

2. NSW needs a digital access scheme

In brief

There are several reasons why it might be necessary to access a person's digital records upon their death or incapacity. However, barriers to access often exist. We recommend a new statutory scheme for NSW that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances.

2.1 In this chapter, we recommend a new statutory scheme for NSW that allows an authorised person to access a person's digital records upon their death or incapacity in limited circumstances.

2.2 While there are a number of legitimate reasons for accessing a person's digital records when someone dies or is incapacitated, barriers to access often exist. These include password restrictions, and prohibitions in service agreements and criminal laws. Individuals and companies have developed digital tools to facilitate access, but they are not always effective.

2.3 Other parts of the world have seen an increase in the number of people taking legal action to gain access to a person's digital records when they die or are incapacitated. This can be costly for parties and is not always effective. The US and Canada have responded to these developments by designing model laws. NSW has an opportunity to build on these models and enact its own statutory scheme.

A new statutory scheme for NSW

Recommendation 2.1: A statutory scheme for NSW

NSW should enact a statutory scheme that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances.

2.4 We recommend enacting a statutory scheme that accommodates the relevant principles that already govern the administration of estates, and provides a specific regime for digital records within that existing framework.

2.5 The recommended scheme could be set out in a new Act or in existing legislation, such as the *Probate and Administration Act 1898* (NSW) and the *Guardianship Act 1987* (NSW).

2.6 The scheme could reasonably apply nationally. One way to achieve a nationally consistent approach would be for other states and territories and the Commonwealth to use the NSW scheme as a model and enact their own legislation.

2.7 The scheme could also apply in other countries, should overseas jurisdictions choose to adopt it.

The importance of accessing digital records after death or incapacity

2.8 There are several reasons why it is important to ensure that someone can access a person's digital records when they die or are incapacitated. In this section, we discuss some of these reasons.

The value of certain digital records

2.9 The creation of digital accounts, and the use of digital media and services is now commonplace. People regularly access photographs, videos, music, e-books, blogs, movies, emails, social media, games, bank accounts and even medical records online.

2.10 Research commissioned by the Australian Competition and Consumer Commission ("ACCC") found that many Australian digital platform users use these types of services daily. For example, 58% of users surveyed use Facebook every day.[1]

2.11 With this increased usage, people are assembling a "digital legacy" of considerable volume and importance.[2] Some of the digital records they create will have sentimental value to friends and family. Some will have financial value. For example:

1. R Varley and N Bagga, *Consumer Views and Behaviours on Digital Platforms,* Final Report (Roy Morgan, 2018) [4.1].
2. C Bellamy and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (Australian Communications Consumer Action Network, 2013) 1.

- domain names can be "crucial to the branding and thus the profitability of a business"[3]
- social media profiles and personal blogs can generate income through advertising
- a user's gaming account, the assets they "own" in a game, and the currency used in the game can be traded for money,[4] and
- a user may have a valuable copyright interest in a literary work that only exists online.

2.12 When records of value exist, access to a deceased or incapacitated user's digital records will be necessary to manage their financial affairs or to distribute their estate to their beneficiaries.

Obligations when administering a person's estate

2.13 Those involved in administering a deceased person's estate may need access to the person's digital records to satisfy their legal responsibilities and obligations under principles of equity.[5]

2.14 An executor is the person appointed in the will to administer the deceased's estate. The executor can apply to the Supreme Court of NSW for a grant of probate, which confirms:

- the formal validity of the deceased's will,[6] and
- the executor's title to, and authority to deal with, the estate assets.[7]

2.15 Where there is no formal will, no executor named in a formal will, or no executor willing or able to act, the Supreme Court appoints an administrator to administer the deceased's estate. The Court grants "letters of administration", which gives the administrator the title to, and authority to deal with, the estate assets.

2.16 A person applying for a grant of probate or letters of administration (that is, a grant of representation) must disclose the assets and liabilities of the deceased.[8] Executors and administrators ("legal personal representatives") also have statutory

3. L Edwards and E Harbinja, "'What Happens to My Facebook Profile When I Die?': Legal Issues Around Transmission of Digital Assets on Death" in C Maciel and V C Pereira (ed) *Digital Legacy and Interaction: Post-Mortem Issues* (Springer, 2013) 116.
4. E van der Nagel and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (Australian Communications Consumer Action Network, 2nd ed, 2017) 23–24. See also H Antoine, "Digital Legacies: Who Owns Your Online Life After Death?" (2016) 33(4) *The Computer and Internet Lawyer* 15, 15.
5. See, eg, Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 6.
6. A grant of probate of a will is evidence of the due execution and content of the will: *Evidence Act 1995* (NSW) s 92(1)(b).
7. *Probate and Administration Act 1898* (NSW) s 44.
8. *Probate and Administration Act 1898* (NSW) s 81A.

obligations to verify and file an inventory of the deceased's estate,[9] and pay the deceased's debts.[10]

2.17 Legal personal representatives may need access to the deceased's digital records to identify the extent of the deceased's assets and liabilities.[11] These records may, for example, include information about balances in PayPal or online bank accounts, or about online bills and debts.[12]

2.18 Legal personal representatives are also subject to fiduciary duties. If a legal personal representative cannot access some of the relevant digital records, they may not satisfy these duties. These include duties to:

- "call in" (that is, take control of) the assets of the deceased person's estate
- maintain assets or preserve their value,[13] and
- exercise the care, skill and diligence of a prudent person.[14]

2.19 In the digital context, this might involve ensuring that domain names do not expire, that literary or artistic works are preserved, or that websites are maintained. Beneficiaries are also entitled to a properly administered estate.[15]

Obligations when managing a person's affairs

2.20 Under the *Powers of Attorney Act 2003* (NSW) ("*Powers of Attorney Act*") and the *Guardianship Act 1987* (NSW) ("*Guardianship Act*"), "attorneys" and "financial managers" can be appointed to manage a person's property and financial affairs when the person does not have the decision-making ability to do so. Guardians can be appointed to make decisions about the person's lifestyle or health issues.

2.21 Enduring guardians and attorneys are appointed under enduring guardianships and enduring powers of attorney respectively. Financial managers and guardians are appointed by the Guardianship Division of the NSW Civil and Administrative Tribunal.

2.22 Guardians, financial managers and attorneys may need access to an incapacitated user's digital records to manage their affairs.[16] The NSW Trustee and Guardian observes:

> 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

9. *Probate and Administration Act 1898* (NSW) s 85.
10. *Probate and Administration Act 1898* (NSW) s 46.
11. Law Society of NSW, *Preliminary Submission PDI14,* 1. See also Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 6.
12. D L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act,* Progress Report (Uniform Law Conference of Canada, 2015) [14].
13. See, eg, *Re Hayes' Will Trusts* [1971] 1 WLR 758, 765.
14. *Trustee Act 1925* (NSW) s 14A.
15. *Kennon v Spry* [2008] HCA 56, 238 CLR 366.
16. See, eg, NSW Council of Civil Liberties, *Preliminary Submission PDI08,* 6; Law Society of NSW, *Submission DI08,* 2.

to access documented previous views stored on digital assets to inform end of life decisions.[17]

2.23 If a guardian, attorney or financial manager is prevented from accessing particular digital records of an incapacitated user, they may be unable to satisfy their obligations.

Protecting privacy and security of information

2.24 Online accounts may contain significant amounts of personal and confidential information that certain other people should be restricted or prevented from seeing.[18] Access to a deceased or incapacitated user's accounts may therefore be necessary to close them down or delete certain content in accordance with the user's wishes.

2.25 In addition, the user's accounts may need to be terminated, or their passwords changed, to prevent identity theft. If a user's accounts are left unmonitored, it becomes easier for others to hack them and impersonate the user.[19]

Current barriers to access

2.26 Despite the many legitimate reasons for seeking access to a person's digital records upon their death or incapacity, significant barriers exist. In this section, we discuss some of the common barriers to access.

Passwords and access codes

2.27 Unlike many physical records, digital records are often subject to access restrictions. Most online accounts are password-protected, and devices such as smartphones and tablets are often protected by access codes. Access restrictions for physical records, such as filing cabinet keys, are not of the same nature as passwords or access codes, especially since service agreements may prohibit the sharing of passwords and codes.

2.28 If the user did not disclose the access information for their digital records before they died or became incapacitated, an authorised person may be able to request access from the custodian, but whether the custodian provides the information will often depend on the custodian's policy.

Custodian service agreements and policies

2.29 Whether a person can access another person's digital records upon their death or incapacity often depends on the terms of the custodian's service agreement or policies.

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17. NSW Trustee and Guardian, *Submission DI09,* 4.
18. L McCarthy, "Digital Assets and Intestacy" (2015) 21 *Boston University Journal of Science and Technology Law* 384, 401; Society of Trust and Estate Practitioners, Digital Assets Working Group, *Digital Assets: A Guide for Professionals* (2017) 1.
19. S Brown Walsh, N Cahn and C L Kunz, "Digital Assets and Fiduciaries" in J A Rothchild (ed) *Research Handbook on Electronic Commerce Law* (Edward Elgar, 2016) 94; NSW Council for Civil Liberties, *Preliminary Submission PDI08*, 4.

2.30 Users generally enter into service agreements when they sign up for an online account or service. Service agreements are contracts that govern the rights and responsibilities of the user and the custodian, including using or transferring digital records.[20]

2.31 Some custodians have specific policies about what happens to a user's account upon their death or incapacity. These policies may be incorporated in the custodian's general service agreement with users. For example, Twitter's service agreement includes "all incorporated policies".[21] Other custodian policies exist outside of service agreements between users and custodians, and apply to third parties seeking access to a user's digital records.

2.32 Service agreements and custodian policies can prevent third parties from accessing digital records by prohibiting or restricting:

- the sharing of usernames and passwords
- the transfer of the user's account to anyone else, and/or
- third party access to a user's account upon their death or incapacity.

Prohibitions on sharing access information

2.33 Service agreements often prohibit users from sharing the access information for their accounts.[22] For example, LinkedIn's service agreement provides:

> You will keep your password a secret.
>
> You will not share an account with anyone else …[23]

2.34 If a user gives their access information to another person, so that person can access their account upon their death or incapacity, this may constitute a breach of the service agreement.[24] If the other person uses the password to access the account, and the custodian becomes aware of this, the custodian may change the password[25] or terminate the account.

Prohibitions on transferring accounts

2.35 Service agreements often provide that a user's account is non-transferable or non-assignable. This is because the agreement is a personal contract between the user and the custodian.[26]

2.36 For example, Twitter's service agreement provides:

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20. England and Wales Law Commission, *Making a Will,* Consultation Paper 231 (2017) [14.16].
21. Twitter, "Twitter Terms of Service" (25 May 2018) <twitter.com/en/tos> (retrieved 18 December 2019).
22. STEP Australia, *Preliminary Submission PDI06* [11]. See also L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 6.
23. LinkedIn, "User Agreement" (8 May 2018) <www.linkedin.com/legal/user-agreement> (retrieved 18 December 2019).
24. STEP Australia, *Preliminary Submission PDI06* [11].
25. See, eg, "Facebook May Become Part of Your Digital Estate" (15 March 2012) *CNBC* <https://www.cnbc.com/id/46750736> (retrieved 18 December 2019).
26. F K Hoops, F H Hoops and D S Hoops, *Family Estate Planning Guide* (Thomson Reuters, 4th ed, 2019) 4–5.

> Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you as part of the Services. This license has the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms.[27]

2.37 As the user's Twitter account is "personal" and "non-assignable", it may be terminated upon the user's death.[28]

Different policies on accessing a deceased or incapacitated user's account

2.38 Custodians have different policies about what happens to a user's account upon their death or incapacity – there is no standard approach.[29] This means that there is:

> a completely different set of rules for each service that can only be found and (hopefully) understood by reading through many pages of "fine-print" terms and conditions.[30]

2.39 Some custodians will terminate a user's account when the user dies.[31] Others, such as Microsoft, will deactivate or delete the account after a period of inactivity.[32]

2.40 Even though custodians have significant discretion over how users' data is used and disclosed to other businesses and organisations,[33] many will not provide access to family members or other third parties upon a user's death or incapacity.[34] For example, Microsoft's policy states:

> We understand that these might be difficult times for those seeking access to their loved one's email or storage accounts, but for privacy and other legal reasons, we are unable to provide any information about any accounts in question. We take our customers' privacy concerns and our legal obligations very seriously.[35]

2.41 The differences between the policies of custodians creates uncertainty. STEP Australia observes:

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27. Twitter, "Twitter Terms of Service" (25 May 2018) <https://twitter.com/en/tos> (retrieved 18 December 2019).
28. F K Hoops, F H Hoops and D S Hoops, *Family Estate Planning Guide* (Thomson Reuters, 4th ed, 2019) 5.
29. H Conway and S Grattan, "The 'New' New Property: Dealing with Digital Assets on Death" in H Conway and R Hickey (ed) *Modern Studies in Property Law* (Hart, 2017) vol 9, 99, 102.
30. STEP Australia, *Preliminary Submission PDI06* [24].
31. STEP Australia, *Preliminary Submission PDI06* [12]; Law Society of NSW, *Preliminary Submission PDI14,* 2.
32. See, eg, Microsoft, "Inactive Account" (15 December 2019) <answers.microsoft.com/en-us/outlook_com/forum/oemail-orestoremail/inactive-account/7e2ebe2d-c554-4934-995f-6f1185f289fc> (retrieved 18 December 2019).
33. Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 23.
34. E van der Nagel and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (Australian Communications Consumer Action Network, 2nd ed, 2017) 8.
35. Microsoft, "Accessing Outlook.com, OneDrive and other Microsoft Services when Someone has Died" <support.office.com/en-us/article/accessing-outlook-com-onedrive-and-other-microsoft-services-when-someone-has-died-ebbd2860-917e-4b39-9913-212362da6b2f?ui=en-US&rs=en-US&ad=US> (retrieved 18 December 2019).

> The inconsistency in policies has made it more difficult for people (and their professional advisors) to understand, and apply in practice, a general approach on how digital assets fit within accepted principles of estate planning, how to attempt to deal with them and how to keep up with the fact that they are subject to frequent change. It has also made it very difficult for clients, who are attempting to make provision within their estate plan or who are administering an estate, because they have no idea what to do or where to find information.[36]

2.42 Some custodians have developed online tools for users to give instructions about the management of their account upon their death or incapacity.[37] For example, Facebook users can choose to:

- appoint a "Legacy Contact" to look after their "memorialised" account after they die, or
- have their account permanently deleted from Facebook.[38]

2.43 A "memorialised" account shows the word "remembering" next to the user's profile name. If no Legacy Contact was nominated, the account cannot be changed.[39] If a Legacy Contact was nominated, they can (among other things):

- share a final message on behalf of the deceased user
- provide information about a memorial service
- respond to new friend requests
- update the user's profile and cover pictures, and/or
- request the removal of the user's account.[40]

2.44 However, the Legacy Contact cannot log into the user's account, remove existing friends or make new friend requests, or read the user's messages.[41]

2.45 Like Facebook, Google has an online tool that allows users to give instructions about managing their account.[42] Under Google's Inactive Account Manager policy, users can nominate up to 10 contacts to be emailed if their account has been inactive for a certain period of time.[43] The email may contain instructions on what the user would like to happen to their account, and links to download data.[44]

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36. STEP Australia, *Preliminary Submission PDI06* [24].
37. University of Newcastle Legal Centre, *Preliminary Submission PDI05,* 2; DIGI, *Submission DI10,* 1.
38. Facebook, "Memorialized Accounts" (2019) <www.facebook.com/help/1506822589577997> (retrieved 18 December 2019).
39. Facebook, "Memorialized Accounts" (2019) <www.facebook.com/help/1506822589577997> (retrieved 18 December 2019).
40. Facebook, "What is a legacy contact and what can they do with my Facebook account?" (2019) <www.facebook.com/help/1568013990080948> (retrieved 18 December 2019).
41. Facebook, "What is a legacy contact and what can they do with my Facebook account?" (2019) <www.facebook.com/help/1568013990080948> (retrieved 18 December 2019).
42. DIGI, *Submission DI10,* 1.
43. L Bennett Moses, P Vines, J Gray and S Logan, *Preliminary Submission PDI11,* 5.
44. C Bellamy and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (Australian Communications Consumer Action Network, Sydney, 2017) 18–19; Google, "Google Account Help" (2019) <www.support.google.com/accounts/answer/3036546?hl=en > (retrieved 18 December 2019).

2.46 If a user does not nominate an Inactive Account Manager, Google may permit family members or executors to obtain certain data from the account or close the account. However, this process is discretionary and Google does not promise that requests will be granted.[45]

Users are not aware of or do not understand the service agreement's terms

2.47 A further barrier to access is that users are often unaware of, or do not understand, the terms of a service agreement that they seemingly agree to. Users may consent to the terms of service agreements and custodian policies without realising they can prevent other people accessing their digital records after their death or incapacity.

2.48 One reason for this is the format of service agreements. There are two main types:

- A **clickwrap agreement** presents the user with the terms of the agreement before they access the service or website. The user may be required to click a button or a checkbox to indicate assent.[46]
- A **browsewrap agreement** does not require the user to assent to the terms, which are usually available through a hyperlink or simply listed on some part of a website.[47] These terms are accepted by continued use of the service or website.[48]

2.49 Many custodians, including Google, Facebook and Twitter, use clickwrap agreements. This means that users agree to terms without being asked or required to review them.[49]

2.50 Most users may also be unaware of the terms of service agreements because they do not read them.[50] A survey commissioned by the ACCC found that:

- less than one in five users surveyed (18%) read the privacy policies or terms of use for online sites or apps most or every time, and
- three in five users (60%) rarely or never do so.[51]

2.51 Users may also be unaware of, or not understand, the terms of service agreements and custodian policies because of their length and complexity. During their inquiry into digital platforms, the ACCC reviewed the policies of various digital platforms and found that:

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45. E Harbinja, *Preliminary Submission PDI11,* 3.
46. C Connolly, "Electronic Contracts" in G Masel (ed) *The Laws of Australia* (Thomson Reuters, 2018) [8.9.30], [8.9.200]; P Mallam, *Media and Internet Law and Practice* (Thomson Reuters, 2017) [25.224].
47. C Connolly, "Electronic Contracts" in G Masel (ed) *The Laws of Australia* (Thomson Reuters, 2018) [8.9.30], [8.9.210]. See also K Manwaring, "Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the U.S. and the U.K." (2011) 5 *Studies in Ethics Law and Technology* 1, 1.
48. N S Kim, "Wrap Contracting and the Online Environment: Causes and Cures" in J A Rothchild (ed) *Research Handbook on Electronic Commerce Law* (Edward Elgar, 2016) 11.
49. Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 395.
50. NSW Council for Civil Liberties, *Preliminary Submission PDI08,* 4.
51. R Varley and N Bagga, *Consumer Views and Behaviours on Digital Platforms,* Final Report (Roy Morgan Research, 2018) 25–26.

- the privacy policies were between 2,500 and 4,500 words, and would take an average reader between 10 and 20 minutes to read
- the privacy policies of Google, Facebook, Apple, WhatsApp, Instagram and Twitter required a university education to understand
- a number of policies contained broad, vague statements relating to the collection, use and disclosure of user data, and
- many terms and conditions were difficult to navigate, with numerous separate, interlinked policies.[52]

Laws that prohibit or restrict access to digital records

Criminal laws

2.52 Under NSW and Commonwealth law, it is an offence for a person to cause any unauthorised access to, or modification of, restricted data held in a computer, knowing that the access or modification is unauthorised.[53] This means that a person who accesses and/or deals with a deceased or incapacitated user's digital records stored on a computer, knowing that they are not authorised to do so, could be prosecuted.

2.53 The NSW and Commonwealth offences have wide scope. For both offences, any files stored on a device that has a login password would be considered "restricted data". This is because "restricted data" means any data that is subject to an access control system.[54]

2.54 A person can "access" a deceased or incapacitated user's data stored on a computer in a variety of ways. "Access to data held in a computer" includes displaying, copying or moving the data, or executing a program.[55] Essentially, any contact with the data that causes the computer to respond will amount to "access".[56]

2.55 A person can also "modify" a deceased or incapacitated person's data held in a computer in a variety of different ways, because "modification" is also defined broadly. It includes altering, removing, or adding to, the data.[57]

2.56 A general power to deal with a user's personal property under a will (or other instrument) may not be enough to authorise access to or modification of the user's data held in a computer. This is because being authorised to deal with a physical computer is not the same as being authorised to access or modify the data stored on it.[58]

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52. Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 402–406, appendix H 597–604.
53. *Criminal Code* (Cth) s 478.1; *Crimes Act 1900* (NSW) s 308H.
54. *Criminal Code* (Cth) s 478.1(3); *Crimes Act 1900* (NSW) s 308H(3). See J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 49, 96.
55. *Criminal Code* (Cth) s 476.1(1) definition of "access to data held in a computer"; *Crimes Act 1900* (NSW) s 308A(1).
56. J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 60.
57. *Criminal Code* (Cth) s 476.1(1) definition of "modification"; *Crimes Act 1900* (NSW) s 308A(2).
58. See, eg, J Clough, *Principles of Cybercrime* (Cambridge University Press, 2012) 72.

Laws in other jurisdictions

2.57 Laws in other jurisdictions can also pose barriers to accessing another person's digital records upon their death or incapacity.[59]

2.58 In some cases, a user's digital records may be located in the United States ("US"), and the custodians that store or maintain those records might be subject to US state and federal laws.[60] For example, the data processing provided by Facebook is carried out in the US.[61]

2.59 The US *Stored Communications Act* ("SCA")[62] prohibits public providers of "electronic communication services" or "remote computing services" from "knowingly divulging to any person or entity the contents of a communication which is carried or maintained on that service",[63] unless there is:

- "lawful consent" from the user, or
- a court order.[64]

2.60 The SCA defines an "electronic communication service" as any service that allows its users to "send or receive wire or electronic communications".[65] It includes email services, such as Gmail.[66]

The limitations of non-legal tools that try to facilitate access

2.61 Individuals and companies have developed tools to overcome the barriers to access that exist. However, they are not always effective.

Digital registers

2.62 A digital register is something that a person creates, often on the advice of a lawyer, which lists their online accounts, along with passwords and instructions about using and managing these accounts.[67]

2.63 Digital registers are typically not included in a person's will, but accompany it. Wills become public documents once they are admitted to probate, and including a

59. STEP Australia, *Preliminary Submission PDI06* [13].
60. D L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act,* Progress Report (Uniform Law Conference of Canada, 2015) [6].
61. This was determined by the Berlin District Court in Landgericht Berlin, Urteil vom 17.12.2015, Az. 20 O 172/15. See also M Dittman, "Berlin District Court: Facebook Must Grant Heirs Access to a Deceased Person's Account" <www.ihde.de/index.php/de/publikationen/aktuelles/711-berlin-district-court-facebook-must-grant-heirs-access-to-a-deceased-person-s-account> (retrieved 18 December 2019).
62. 18 USC § 2701–2711.
63. 18 USC § 2702.
64. 18 USC § 2702(b)(3); 18 USC § 2703(c)(1)(B).
65. 18 USC § 2510(15).
66. C J Borchert, F M Pinguelo and D Thaw, "Reasonable Expectations of Privacy Settings: Social Media and the Stored Communications Act" (2015) 13 *Duke Law and Technology Review* 36, 42, citing *Warshak v United States* 532 F 3d 521, 523 (6th Cir 2008).
67. See, eg, Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 9.

person's usernames, passwords and answers to security questions in their will would expose this information to the public.[68]

2.64 One problem with digital registers is that a person may change their passwords and not think to update the list they prepared when they made their will.[69]

2.65 While a digital register can allow other people to access the user's accounts, it does not grant them the legal right to access or use them.[70] In addition, sharing access information through a digital register may contravene the terms of a service agreement.[71] Therefore, a custodian, upon becoming aware of a person's death or incapacity,[72] may still deny access to the nominated party or even change the password to the person's account.

Digital legacy services

2.66 Another approach to managing access to digital records upon death or incapacity is to use a digital legacy service. These are websites on which users may store passwords and instructions to allow nominated individuals to access their digital records and carry out their wishes.[73]

2.67 For example, "After.me" is a service that allows users to share their "text or video Will, email messages and information about bank details/passwords", as well as their funeral plans, with nominated recipients after they die. Users are sent an email every 30 days to confirm that they are still alive. If they fail to respond to the original email and three reminder emails, the user's information is transmitted to nominated recipients.[74]

2.68 However, these sites have a tendency to develop and disappear quickly, so there is no guarantee that they will still exist when the person dies.[75] Further, like digital registers, using digital legacy services to share access information may violate the

68. See, eg, Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 9–10.
69. England and Wales Law Commission, *Making a Will,* Consultation Paper 231 (2017) [14.8]. See also L McKinnon, "Planning for the Succession of Digital Assets" (2011) 27 *Computer Law and Security Review* 362, 365.
70. See J Conner, "Digital Life After Death: The Issue of Planning for a Person's Digital Assets After Death" (2011) 3 *Estate Planning and Community Property Law Journal* 301, 306–307, 318.
71. E Harbinja, *Preliminary Submission PDI12,* [21].
72. A custodian could, for example, detect that a user has died through artificial intelligence: see B Ortutay, "Facebook says it will use A.I. to detect profiles of people who have died" (9 April 2019) The Associated Press <globalnews.ca/news/5149079/facebook-detecting-dead-users/> (retrieved 18 December 2019).
73. C Bellamy and others, "Life Beyond the Timeline: Creating and Curating a Digital Legacy" (Paper presented at Nexus, Confluence, and Difference: Community Archives Meets Community Informatics, CIRN Conference, Prato, 28–30 October 2013) 9.
74. After.me, "Site Features" <http://after.me/site-features> (retrieved 18 December 2019).
75. D M Lenz, "Is the Cloud Finally Lifting? Planning for Digital Assets" (2017) *ALI CLE Estate Planning Course Materials Journal* 35, 38. See also E Harbinja, *Preliminary Submission PDI12* [23].

terms of service agreements,[76] meaning that a nominated person may still be denied access.[77]

Digital archives

2.69 A person may enable access to their digital records upon their death or incapacity by creating and maintaining a personal digital archive. Custodians such as Facebook and Twitter allow users to download a record of their personal data,[78] and users may then store the files on external storage devices.

2.70 This practice relies on individual users taking responsibility for regularly preserving their digital records and/or assets.[79] In the UK Digital Legacy Association's 2018 survey:

- 26.71% of respondents said it is "extremely unlikely" that they would download their "digital assets" (such as their emails and social media) to make these files available to family and friends
- 20.18% said that it is "somewhat unlikely" that they would do this
- 31.75% are unsure if they would do this
- 17.51% said that it is "somewhat likely" that they would do this, and
- only 3.86% said that it is "extremely likely" that they would do this.[80]

The rise of litigation

2.71 While Australian courts have not yet dealt with this issue, it is increasingly common in other parts of the world for family members, and other third parties, to take legal action against custodians, after facing difficulties in accessing the digital records of a loved one who has died.[81]

2.72 In the earliest case about access to digital records, the parents of a US soldier who died in 2004 brought legal proceedings against Yahoo! after being denied access to his email account. Yahoo!'s service agreement provided that the account was non-transferable and any rights to the account and its contents terminated on the death of the user.

2.73 The applicants claimed that the account may contain information relevant to administering the deceased's estate, including information that could have assisted

76. L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 6. See also L McKinnon, "Planning for the Succession of Digital Assets" (2011) 27 *Computer Law and Security Review* 362, 366.
77. G W Beyer, "Web Meets the Will: Estate Planning for Digital Assets" (2015) 42(3) *Digital Assets* 28, 33.
78. Facebook, "Accessing and Downloading Your Information" <www.facebook.com/help/1701730696756992> (retrieved 18 December 2019); Twitter Inc, "How to Download Your Twitter Archive" <help.twitter.com/en/managing-your-account/how-to-download-your-twitter-archive> (retrieved 18 December 2019).
79. E van der Nagel and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (University of Melbourne, 2nd ed, 2017) 13.
80. Digital Legacy Association, *The Digital Death Report 2018* (c2019) 19.
81. B Carey, "Logging Off for Life" (2013) 51(3) *Law Society Journal* 36.

in identifying the deceased's assets and liabilities, or in preparing tax returns. The Oakland County Probate Court in Michigan ordered Yahoo! to provide copies of the emails, but the applicants were not given access to the account itself.[82]

2.74 In 2012, surviving family members of a deceased British woman filed a subpoena in California to access records from her Facebook account, which they believed contained critical evidence of her state of mind at the time of her death. The court in California granted Facebook's motion to quash the subpoena, on the ground that it violated the SCA. Because of its limited jurisdiction, the court did not decide whether the deceased's family could offer consent instead. However, the court noted that nothing prevented Facebook from making its own conclusion on that issue.[83]

2.75 In 2017, the German Federal Court of Justice upheld a Berlin District Court decision that Facebook must grant heirs access to a deceased person's account. The parents of a deceased 15-year-old girl had tried to access her Facebook account, including her private messages, to determine whether she had taken her own life. However, the account had already been memorialised by Facebook. The Berlin District Court decided that the service agreement between the deceased and Facebook transferred to her heirs under German law.[84]

2.76 In Canada, a woman requested access to her deceased son's social media accounts and email, in an attempt to find out why he died. In 2017, a court directed the various custodians to provide the woman with access. However, only some of these custodians have complied with the court order.[85]

Other places have already introduced similar schemes

2.77 While the growth of digital records and assets has outpaced state and Commonwealth legislation in Australia, other jurisdictions have been quicker to respond. In the US and Canada, uniform law committees have developed model legislation to balance the rights of certain people to access a deceased or incapacitated person's digital assets with the privacy of users and the interests of custodians.

82. *Re Ellsworth*, (Michigan Probate Court, Moore J, No 2005-296,651-DE, 11 May 2005).

83. *Re Facebook Inc,* 923 F Supp 2d 1204 (N D Cal 2012) 1205.

84. M Dittman, "Berlin District Court: Facebook Must Grant Heirs Access to a Deceased Person's Account" (2016) <www.ihde.de/index.php/de/publikationen/aktuelles/711-berlin-district-court-facebook-must-grant-heirs-access-to-a-deceased-person-s-account> (retrieved 18 December 2019); M Dittman, "Berlin Court of Appeals: Facebook is Not Obliged to Grant Heirs Access to a Deceased Person's Account" (2017) <www.ihde.de/index.php/de/aktuelles/dr-marcus-dittmann/829-berlin-court-of-appeals-facebook-is-not-obliged-to-grant-heirs-access-to-a-deceased-person-s-account> (retrieved 18 December 2019); M Dittman, "German Federal Court of Justice: Facebook Must Grant Heirs Full Access to a Deceased Person's Account" (2017) <www.ihde.de/index.php/de/publikationen/aktuelles/855-german-federal-court-of-justice-facebook-must-grant-heirs-full-access-to-a-deceased-person-s-account> (retrieved 18 December 2019).

85. S Hartung, "Digital Privacy for the Living and the Dead", *The Lawyer's Daily* (30 September 2019); CBC Radio, "Ottawa Mother's Quest for her Late Son's Passwords an Uncharted Legal Road, Say Experts" (24 November 2019) *CBC* <www.cbc.ca/radio/outintheopen/diy-justice-1.5351892/ottawa-mother-s-quest-for-her-late-son-s-passwords-an-uncharted-legal-road-say-experts-1.5366292> (retrieved 18 December 2019).

United States

2.78 In 2016, the Uniform Law Commission in the US adopted the *Revised Uniform Fiduciary Access to Digital Assets Act 2015* ("US model law"). It replaced the previous version: the *Uniform Fiduciary Access to Digital Assets Act 2014.*

2.79 Most US states have enacted the US model law.[86] It restricts a fiduciary's access to the deceased or incapacitated person's digital assets unless the person expressly consented to such access in a will, trust agreement, power of attorney or other legal document.[87] It does not address the distribution of digital assets.[88]

2.80 The US model law definition of "digital asset" only includes electronic records in which the individual has a property right or interest.[89] Where an individual's instructions address the ability of third parties to access their digital assets, these instructions are prioritised over the terms of service agreements. An instruction provided through an online tool, such as Facebook's Legal Contact tool, will override a contrary direction in an estate plan.[90]

2.81 If there are no explicit instructions, the terms of the service agreement will be followed. If the service agreement does not address fiduciary access, then the default rules of the US model law will apply. Under these rules, fiduciaries can only access a catalogue of the person's electronic communications and not their content.[91] A "catalogue" is essentially "log-type" information, such as the email addresses of the sender and the recipient, and the date and time that the communication was sent.[92]

2.82 The US model law covers four types of fiduciaries.

- personal representatives of deceased estates
- appointed guardians
- attorneys acting under a power of attorney, and
- trustees.[93]

It does not cover family members and friends who are not fiduciaries.[94]

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86. Uniform Law Commission, "Fiduciary Access to Digital Assets Act, Revised" <www.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22> (retrieved 18 December 2019). To date, it has been enacted by 44 US states and introduced into 3.
87. M D Walker, "The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age" (2017) 52 *Real Property, Trust and Estate Law Journal* 51, 59.
88. N Cahn, "Probate Law Meets the Digital Age" (2014) 67 *Vanderbilt Law Review* 1697, 1721–1722.
89. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* prefatory note; STEP Australia, *Preliminary Submission PDI06* [30].
90. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 4(a)–(c).
91. See National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 7, § 9, § 11, § 13, § 14.
92. See National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(4) and comment to § 2.
93. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(14).

Canada

2.83 In 2016, the Uniform Law Conference of Canada adopted the *Uniform Access to Digital Assets by Fiduciaries Act* ("Canadian model law"), which draws on the 2014 version of the US model law. Before this, only Alberta had legislated to address some of the issues about access to digital assets.[95] It appears that no Canadian province has enacted the model law.[96]

2.84 The Canadian model law defines a "digital asset" more broadly than the US model law. Essentially, fiduciaries have access to all relevant electronic communications and online accounts that provide evidence of ownership or similar rights. A "digital asset" is defined as "a record that is created, recorded, transmitted or stored in digital or other intangible form by electronic magnetic or optical means or by any other similar means".[97] The definition refers to any type of electronically stored information, such as information stored on a computer and other digital devices, content uploaded onto websites, and rights in digital property.[98]

2.85 Unlike the US model law, the Canadian model law does not distinguish between a catalogue of an account holder's electronic communications and the content of those communications. Therefore, a fiduciary who has a default right to access a digital asset of an account holder "is deemed to have the consent of the account holder for the custodian to divulge the content of the digital asset to the fiduciary".[99] This default position can only be changed by the terms of a power of attorney, trust, will or a grant of administration, a court order, or instructions in an agreement separate to the general service agreement.[100] If there is more than one such instruction, the "last-in-time" instrument or order takes precedence.[101]

2.86 Like the US model law, the Canadian model law applies to "fiduciaries": personal representatives, guardians, attorneys and trustees. Friends and family members of a deceased or incapacitated account holder are not included.

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94. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* 1.
95. *Estate Administration Act 2014* (Alberta) sch 1(b).
96. See F L Woodman, "Fiduciary Access to Digital Assets: A Review of the Uniform Law Conference of Canada's Proposed Uniform Act and Comparable American Model Legislation" (2017) 15 *Canadian Journal of Law and Technology* 193, 197; S Hartung, "Digital privacy for the living and the dead", *The Lawyer's Daily* (30 September 2019).
97. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 1 definition of "digital asset".
98. See Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) comment to s 1.
99. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(1), s 5(1)(b).
100. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(2).
101. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(4) and comment to s 3.

3. Scope and key terms of the statutory scheme

In brief

We recommend that the statutory scheme applies where users are domiciled in NSW. We also describe the terms that underpin the scheme.

3.1 In this chapter, we recommend that the statutory scheme apply where users are domiciled in NSW.

3.2 A number of key terms underpin the scheme. These terms determine the scope and application of the scheme. Some of the terms are similar to those used in the National Conference of Commissioners on Uniform State Laws *Revised Uniform Fiduciary Access to Digital Assets Act 2015* ("US model law") and the Uniform Law Conference of Canada *Uniform Access to Digital Assets by Fiduciaries Act 2016* ("Canadian model law"). Others are unique to the scheme. We describe the recommended terms and our reasons for choosing them.

Scheme applies where users are domiciled in NSW

Recommendation 3.1: The scheme should apply where users are domiciled in NSW

The scheme should apply to a custodian, regardless of where the custodian is located, if the user is domiciled in NSW or was domiciled in NSW at the time of their death.

3.3 Many custodians are located in other countries, potentially placing them outside the legislative ambit of NSW and Australian law. There is a presumption that the legislation of a particular state only applies in that state (known as the presumption against extraterritoriality).[1]

3.4 However, this presumption is subject to any contrary intention expressly provided for in the law. Moreover, a state is able to legislate extraterritorially if there is a general connection between:

1. See, eg, *Acts Interpretation Act 1901* (Cth) s 21; *Interpretation Act 1987* (NSW) s 5(2), s 12. See also *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J).

- that state, and
- the circumstances or subject matter to which the law applies.[2]

3.5 Therefore, the scheme should expressly provide that it applies to a custodian, even if the custodian is not located in NSW, so long as the user is domiciled in NSW or was domiciled in NSW at the time of their death. The relevant connection between the custodian and NSW is that the custodian stores or maintains digital records of a NSW user.

3.6 We have chosen to use the term "domiciled" rather than the term "resides", which is used in the US model law.[3] This is because "residence" is not a fixed concept, and can give rise to uncertainty. We heard concerns that it could potentially capture travellers or others who briefly resided in NSW before they died or became incapacitated.[4]

3.7 On the other hand, the concept of "domicile" is well established. In Australia, a person's domicile is largely governed by legislation in each state and territory. In NSW, the relevant Act is the *Domicile Act 1979* (NSW).

3.8 A person can only have, and must at all times have, one domicile.[5] This can be a "domicile of origin" (their place of birth) or a "domicile of choice" (the place where the person intends to reside indefinitely).[6] Therefore, for the recommended scheme to apply to the custodian of a NSW user's digital records, the user's domicile of origin or domicile of choice must be, or have been at the time of their death, NSW.

Key terms of the scheme

Recommendation 3.2: Key terms of the statutory scheme

The scheme should include the following definitions:

(1) **"Authorised person"** means the person with the right, under this scheme, to access particular digital records of the user.

(2) **"Custodian"** means a person or service that has, or had at the time of the user's death, a service agreement with the user to store or maintain particular digital records of the user.

(3) "**Custodian policy**" means a statement of policy by the custodian, not otherwise incorporated in a service agreement, which relates to the digital records of the user stored or maintained by that custodian, and applies whether or not the user is alive or has capacity.

(4) **"Digital record"** means a record that:

(a) exists in digital or other electronic machine-readable form, and

2. See, eg, *Pearce v Florenca* (1976) 135 CLR 507, 517–518 (Gibbs J); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14.
3. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 3(b).
4. Group 4, *Consultation DI05.*
5. See, eg, *Mark v Mark* [2006] 1 AC 98 [37].
6. *Domicile Act 1979* (NSW) s 9.

(i) was created by or on behalf of the user, in whole or in part, or

(ii) relates to the user, and the user had access to it while the user was alive, or

(iii) relates to the user, and their representative had access to it during any period of incapacity, but

(b) does not include an underlying asset (such as money in a bank account or the copyright in a literary work) or liability, unless the asset or liability is itself a digital record.

(5) **"Incapacitated user"** means an adult user who requires or chooses to have assistance with decision-making in relation to particular digital records of the user.

(6) **"Online tool"** means a tool provided by a custodian online that allows the user to give directions or permissions to a third party for managing the digital records of the user stored or maintained by that custodian.

(7) **"Service agreement"** means an agreement between a user and a custodian that relates to the digital records of the user stored or maintained by that custodian.

(8) **"User"** means a natural person who has entered into a service agreement with a custodian to store or maintain particular digital records of the user.

"Authorised person"

3.9 Under the scheme, an "authorised person" is the person with the right to access particular digital records of a deceased or incapacitated user.[7] Recommendation 4.1 provides a hierarchy for determining who qualifies as the authorised person in any given circumstance.

3.10 We use the term "authorised person" instead of "fiduciary", which is the term the US and Canadian model laws use.[8] This is because some people who may qualify as an authorised person under the scheme are not traditionally regarded as "fiduciaries". For example, a person to whom the deceased or incapacitated user has given their passwords for particular digital records will be the authorised person in some circumstances,[9] even though this person traditionally would not be considered a fiduciary outside of the scheme.

3.11 We note that under the recommended scheme, the authorised person's right to access particular digital records of a deceased or incapacitated user will be subject to fiduciary duties,[10] irrespective of whether they would strictly be considered a fiduciary in other circumstances.

7. Recommendation 3.2(1).
8. See Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 1 definition of "fiduciary"; National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(14) definition of "fiduciary".
9. Recommendation 4.1(1)(e), 4.1(2)(d)(i).
10. Recommendation 4.3(2)(a), 4.3(3)(a), 4.3(4)(a), 4.3(5)(a).

"Custodian" and "user"

3.12 The scheme would apply to "custodians" who have (or had, in the case of a deceased user) service agreements with users to maintain or store particular digital records of the user.[11] This definition of "custodian" would include online service providers with whom users create online accounts, such as Google, Facebook and Microsoft. It would also include NSW government sector agencies that provide access to government services through an online account or mobile app, such as:

- the Service NSW online account and mobile app, and
- the Revenue NSW online platform.[12]

3.13 The recommended definition of "custodian" is not intended to include employers with whom employees have email accounts. Employers would not fall under the definition of "custodian" in the statutory scheme, since employees do not enter into service agreements with employers to maintain or store the employee's digital records.

3.14 Although people may use email accounts provided by an employer for personal communications as well as for employment communications, we do not think that it is feasible to allow an authorised person access to these accounts. Before providing access to an authorised person, a user's employer (as the holder of the digital records) would need to separate confidential business emails from the user's personal emails. This could prove particularly burdensome for employers, as it may involve the exercise of difficult judgment. We think that allowing access to work email accounts would needlessly complicate the scheme.

3.15 A "user" should be defined as a natural person who has entered into a service agreement with a custodian to store or maintain the particular digital records of the user.[13] This definition does not include a "legal person" (a company) that has a service agreement with a custodian. A company has perpetual succession, and would therefore have no need for a scheme to facilitate access to its digital records after death or incapacity.

"Digital record"

3.16 "Digital record" would be defined as a record that exists in digital or other electronic machine-readable form, and:

- was created by or on behalf of the user, in whole or in part, or
- relates to the user, and the user had access to it while they were alive, or
- relates to the user, and their representative had access to it during any period of incapacity, but

would not include an underlying asset (such as money in a bank account or the copyright in a literary work) or liability, unless the asset or liability was itself a digital record.[14]

11. Recommendation 3.2(2).
12. Information provided by the Information and Privacy Commission NSW (25 November 2019).
13. Recommendation 3.2(8).
14. Recommendation 3.2(4).

3.17 This definition uses language consistent with that in the *Copyright Act 1968* (Cth).[15] It is intended to include records created, recorded, transmitted or stored in digital or other electronic machine-readable form, by electronic, magnetic, optical or other similar means.[16]

3.18 Digital records that the user "created … in whole or in part"[17] would include, for example, emails, instant messages and photographs.

3.19 Digital records created "on behalf of the user"[18] would include an account set up by a user's representative after they have become incapacitated.

3.20 Digital records that "relate" to the user, and to which the user had access while alive,[19] would include, for example, bank statements accessible through online banking services.

3.21 Digital records that "relate" to the user, and to which the user's representative had access to during any period of the user's incapacity,[20] would include, for example, the user's My Health Record account, which was linked to the representative's own account.[21]

3.22 A "digital record" may or may not constitute "property" in the legal sense, depending on the type of record and the terms of the applicable service agreement. For example, when a person downloads a song from a music streaming service, they acquire a licence to listen to it, instead of full ownership. This is because the content belongs to the copyright owner.[22] Similarly, eBook files are usually licensed for individual use, so they are not the user's property. The ownership of the file remains with the publisher.[23]

3.23 Social media accounts are also not the user's property.[24] However, the text of a social media post might be considered a literary work, which is the user's property under copyright law.[25] Users generally retain ownership in the content they create and share on the platform but, under the service agreement, the custodian acquires a licence in order to host that content.[26]

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15. See, eg, *Copyright Act 1968* (Cth) s 21(1A).
16. See Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 1 definition of "digital asset".
17. Recommendation 3.2(4)(a)(i).
18. Recommendation 3.2(4)(a)(i).
19. Recommendation 3.2(4)(a)(ii).
20. Recommendation 3.2(4)(a)(iii).
21. See, eg, Carers NSW, *Submission DI07,* 2.
22. E van der Nagel and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (Australian Communications Consumer Action Network, 2nd ed, 2017) 22.
23. E van der Nagel and others, *Death and the Internet: Consumer Issues for Planning and Managing Digital Legacies* (Australian Communications Consumer Action Network, 2nd ed, 2017) 23.
24. L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 6.
25. A George, *Preliminary Submission PDI15,* 4.
26. R Wichtowski, "Increasing Copyright Protection for Social Media Users by Expanding Social Media Platforms' Rights" (2017) 15 *Duke Law and Technology Review* 253, 254. See also L McKinnon, "Planning for the Succession of Digital Assets" (2011) 27 *Computer Law and Security Review* 362, 363–364.

3.24 The recommended scheme does not deem a user's digital records to be their property when they would not otherwise legally constitute property. That is, the scheme does not interfere with the terms of valid service agreements that avoid creating property rights.

3.25 What the recommended scheme *does* do is give an authorised person the right to access the user's digital records, irrespective of whether those records are property. This overcomes the problem that executors and administrators may have in accessing and dealing with digital records that are not property.

3.26 Generally, if a digital record is an "asset" of the deceased person's estate (that is, the deceased person's property), the legal personal representative has the authority to deal with it. But if the person's rights to a digital record terminate on their death, it is not their property,[27] and their legal personal representative might *not* be authorised to deal with it.[28]

3.27 Some wills currently state that a person's digital records are part of their estate, and their executor has authority to deal with them on this basis. For example:

> All digital rights, accounts, assets, and device content which is not otherwise personal property or the subject of a specific bequest, shall form part of the residue of my estate and my executor is empowered to deal with these assets.[29]

3.28 However, it is unclear whether this clause actually gives an executor the authority to deal with the person's digital records. If the records are "not otherwise personal property" (for example, because of the terms of the applicable service agreement), they do not form part of the person's estate. Under the recommended scheme, an executor would have access to the records, if such access was authorised by the instrument appointing them, or otherwise necessary for the purpose of administering the deceased's estate.

3.29 The recommended definition of "digital record" does not include underlying assets or liabilities that are not, themselves, digital records.[30] This is consistent with the US model law.[31]

3.30 The definition of "digital record" would include virtual currency, for example. This means the authorised person's right to access and deal with the user's digital records[32] would include the right to deal with the user's virtual currency.

3.31 However, the definition would not include the underlying, tangible asset of any online banking records, which is money in the user's bank account. Therefore, an authorised person's right to access and deal with the user's online banking records would not include the right to deal with money in the user's bank account.

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27. L McKinnon, "Planning for the Succession of Digital Assets" (2011) 27 *Computer Law and Security Review* 362, 363.
28. F K Hoops, F H Hoops and D S Hoops, *Family Estate Planning Guide* (Thomson Reuters, 4th ed, 2019) 9.
29. See M-A de Mestre and H Morrison, "Technology and Probate" (2016) 43 *Australian Bar Review* 8, 9.
30. Recommendation 3.2(4)(b).
31. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(10) definition of "digital asset" and comment to § 2.
32. See Recommendation 4.3.

The definition should not include examples or categories

3.32 We considered whether the definition of "digital record" should include specific examples, such as social media accounts, photo or video storage accounts, and email accounts.[33] We decided against this approach because it could limit the definition, particularly given the speed with which technology develops.[34] Instead, the recommended definition is broad enough to cover the types of digital records that currently exist, and flexible enough to cover others that may exist in the future.[35]

3.33 Some submissions suggest that the definition should be divided into two basic categories, depending on whether the digital records are of financial or sentimental value. They argue that this would allow for specific considerations and rules to apply to each of the categories.[36] We do not think that it is necessary or helpful for digital records to be categorised in this way. One reason is because some digital records, such as social media accounts, can have both financial and sentimental value. The NSW and Trustee and Guardian gives an example:

> 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).[37]

3.34 In circumstances where a user's digital records have both financial and sentimental value, it would be difficult to determine which rules apply.

There should not be specific exclusions from the definition

3.35 Some submissions suggest that the definition should contain exclusions.[38] For example, a user's personal messages or communications could be excluded from the definition of "digital record", so that an authorised person could not access these communications.

3.36 We think that having such exclusions would limit the usefulness of the scheme. Often a user's ostensibly "social" communications will include financial or business information. For example, in a recent case, there was evidence that a New Zealand man used Facebook Messenger to buy and sell car parts.[39] There is no way of identifying which communications contain financial information without access to all communications.

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33. University of Newcastle Legal Centre, *Preliminary Submission PDI05,* 2. See also E Harbinja, *Preliminary Submission PDI12,* 1.
34. NSW Trustee and Guardian, *Submission DI09,* 5.
35. Law Society of NSW, *Preliminary Submission PDI14*, 2.
36. See, eg, Law Society of NSW, *Preliminary Submission PDI14,* 2; Carers NSW, *Submission DI07,* 2.
37. NSW Trustee and Guardian, *Submission DI09,* 3–4.
38. See, eg, University of Newcastle Legal Centre, *Preliminary Submission PDI05,* 2; E Harbinja, *Preliminary Submission PDI12,* 1; Law Society of NSW, *Submission DI08,* 3.
39. B Deguara, "Kiwi Mum Pleads with Facebook for Deceased Son's Private Messages" (16 September 2019) <www.stuff.co.nz/technology/digital-living/115721373/kiwi-mum-pleads-with-facebook-for-deceased-sons-private-messages> (retrieved 18 December 2019).

"Incapacitated user"

3.37 "Incapacitated user" should be defined as an adult user who requires or chooses to have assistance with decision-making in relation to particular digital records.[40] The definition would not include a person who lacks capacity because they are a minor.

"Online tool"

3.38 "Online tool" should be defined as a tool provided online by a custodian that allows the user to give directions or permissions to a third party for managing their digital records stored or maintained by that custodian.[41] This definition is similar to the definition in the US model law.[42]

3.39 Examples of "online tools" are Facebook's Legacy Contact tool and Google's Inactive Account Manager tool.[43] Both tools enable users to give directions about how they would like their accounts to be dealt with upon their death or incapacity. The recommended definition is broad enough to cover other online tools that could affect third party access and that custodians may offer in future.

3.40 The recommended definition is not intended to include digital legacy services. These are services that allow users to store their usernames and passwords, and give instructions for how they would like their accounts to be dealt with upon their death or incapacity.[44] These are operated by third parties, not custodians. They occupy a different place in the scheme.

"Service agreement" and "custodian policy"

3.41 As discussed in Chapter 2, service agreements and custodian policies arise and operate in different ways. Sometimes custodian policies are incorporated in the custodian's general service agreement with users. At other times, they exist independently of service agreements between users and custodians and can apply to third parties seeking access to a user's digital records. Therefore, the scheme deals with service agreements and custodian policies separately. This is different to the US and Canadian model laws, which only deal with service agreements and do not address custodian policies specifically.

3.42 "Service agreement" should be defined as an agreement between a user and a custodian that relates to the digital records of the user.[45]

3.43 "Custodian policy" should be defined as a statement of policy by the custodian, not otherwise incorporated in a service agreement, which relates to the digital records of the user stored or maintained by that custodian and applies whether or not the user is alive or has capacity.[46]

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40. Recommendation 3.2(5).
41. Recommendation 3.2(6).
42. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(16) definition of "online tool" and comment to §2.
43. [2.42]–[2.46].
44. [2.66].
45. Recommendation 3.2(7).
46. Recommendation 3.2(3).

4. The authorised person and the extent of their access

In brief

The recommended scheme establishes a process for determining who is the "authorised person" entitled to access particular digital records of a deceased or incapacitated user. It also sets out the extent of the authorised person's right to access and deal with a user's digital records, and other obligations that would apply. Finally, we recommend that the scheme forbids the authorised person from improperly disclosing information they have obtained in accessing the digital records.

4.1 In this chapter, we outline the recommended statutory hierarchy for determining who is the "authorised person" entitled to access particular digital records of a deceased or incapacitated user. We also outline what steps a person can take to gain access if they are not in the hierarchy, or to confirm their "authorised person" status if they are.

4.2 We recommend that the scheme impose certain limits on the authorised person's right to access and deal with digital records and other obligations on an authorised person acting under the scheme. Finally, we recommend that the scheme makes it an offence for an authorised person to disclose information about the user, or another person, obtained while accessing the digital records of the user, unless specific exceptions apply.

The authorised person entitled to access a user's digital records

Recommendation 4.1: Authorised person entitled to access a user's digital records

The scheme should provide that:

(1) The authorised person entitled to access particular digital records of a deceased user is:

(a) the person specifically appointed by the user's will to manage those digital records:

(i) in the case of a formal will, whether or not there has been a grant of representation of the will, or

(ii) in the case of an informal will, only if there has been a grant of representation

(b) if there is no person specifically appointed by the user's will to manage those digital records, the person nominated through an online tool to manage those records

(c) if there is no person specifically appointed by the user's will or nominated through an online tool to manage those digital records, the executor of the user's will:

(i) in the case of a formal will, whether or not there has been a grant of representation of the will, or

(ii) in the case of an informal will, only if there has been a grant of representation

(d) if there is no will or no executor willing or able to act, and no person nominated through an online tool to manage those digital records, the administrator of the user's estate

(e) if no provision or order has been made, a person to whom the deceased user has communicated the access information for those digital records, but not where that person holds the access information as part of an employment or other contractual relationship involving remuneration for the activity, unless the user has indicated that the arrangement is to have effect after their death.

(2) The authorised person entitled to access particular digital records of an incapacitated user is:

(a) any person appointed under:

(i) an enduring guardianship arrangement that has effect, or

(ii) an enduring power of attorney that has effect,

but only in relation to those records that are:

(iii) specified in the enduring guardianship arrangement or enduring power of attorney, or

(iv) otherwise relevant to the person's role either as enduring guardian or attorney

(b) if there is no person appointed under an enduring guardianship or enduring power of attorney, any person appointed under:

(i) a guardianship order, or

(ii) a financial management order,

but only in relation to those records that are:

(iii) specified in the guardianship order or financial management order, or

(iv) otherwise relevant to the person's role as guardian or financial manager

(c) if there is no person appointed under an enduring guardianship, enduring power of attorney, guardianship order or financial management order, the person nominated through an online tool to manage those digital records

(d) if no provision or order has been made, the person with access information for those digital records, either because:

(i) the incapacitated user has communicated the access information for those digital records to the person, or

(ii) the person created those digital records on the incapacitated user's behalf

but not where the person holds the access information as part of an employment or other contractual relationship involving remuneration for the activity, unless that relationship is a paid carer relationship.

4.3 Recommendation 4.1 sets out a hierarchy for determining who the authorised person is in relation to particular digital records of a deceased or incapacitated user.

4.4 The scheme seeks to give effect, as far as reasonably possible, to the deceased or incapacitated user's wishes about their digital records. For example, if a deceased user appointed a person in their will to manage particular digital records, that person would be the authorised person entitled to access those records, ahead of all others. This would be the case even where the will limits the scope of the person's authority, and another person lower in the hierarchy is not subject to any specific limitations.

4.5 Several submissions support users having the choice to nominate someone to manage their digital records.[1] This choice would include a right to nominate different people to manage different digital records. The hierarchy also accommodates those who have not been specifically nominated by the deceased or incapacitated user, but may require access to the user's digital records to administer their estate or manage their affairs.

4.6 Since the nature of a hierarchy is to prioritise certain people over others, it is our view that in the majority of cases, it would settle the question of who is authorised to access the digital records without the matter needing to be resolved in court.

1. See, eg, A Yardi, *Preliminary Submission PDI02,* 1; Combined Pensioners and Superannuants Association of NSW, *Submission DI03,* 5; Portable, *Submission DI05,* 1. See also Carers NSW, *Submission DI07,* 1.

Authorised person who can access a deceased user's digital records

The person specifically appointed in the user's will

4.7 Where the deceased user specifically appointed someone in their will to manage particular digital records, this person would be the "authorised person" entitled to access those records under the scheme.[2] By "specifically appointed", we mean that the deceased user has expressly selected a person to manage one, more or all of the deceased's digital records. The recommended scheme is intended to give effect to the deceased user's explicit wishes and intentions.

4.8 The person specifically appointed in the user's will might be the same person as the executor of the user's estate. For example, the user's will could authorise their executor "to access, control, modify, transfer, delete, close or otherwise deal" with their digital records.[3] If there is more than one executor, the user's will could authorise both of them to manage the user's digital records.

4.9 Alternatively, the user's will may appoint a separate person, whose only responsibility is to manage the user's digital records (sometimes referred to as a "digital executor").[4]

4.10 The person specifically appointed in the will could even be subject to certain restrictions in relation to particular digital records (for example, the will may only allow them access to those records for the purpose of deleting them). Another person in the hierarchy might not be subject to any restrictions in relation to the same records. Nevertheless, we think that the person specifically appointed in the user's will should still qualify as the authorised person, ahead of all others, because the user's actions suggest that they wanted this person to have access (in accordance with the terms of the will).

4.11 Where the person was specifically appointed in a **formal will**, they should qualify as the authorised person whether or not there has been a grant of representation.[5] A formal will is one that meets the requirements under s 6 of the *Succession Act 2006* (NSW) ("*Succession Act*") – that is:

- the will was signed by the person making it (the testator), or some other person
- in front of at least two other people as witnesses, and
- at least two of those witnesses attested and signed the will in the testator's presence.[6]

4.12 If a deceased user's will complies with these statutory requirements, we do not think that a grant of representation to "prove" the will should be necessary before the person appointed in the will can qualify as the authorised person. However, in proving their authority to the custodian of the deceased user's digital records, the

2. Recommendation 4.1(1)(a).
3. Slater and Gordon Lawyers, Will, ref SGO 75306, 2.
4. See, eg, Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 13; P Stokes, *Submission DI01,* 2; Law Society of NSW, *Submission DI08,* 1; NSW Trustee and Guardian, *Submission DI09,* 3.
5. Information provided by the Law Society of NSW (3 October 2019).
6. *Succession Act 2006* (NSW) s 6(1).

person would have to provide a statutory declaration establishing the validity of the will.[7] We discuss this in Chapter 5.

4.13 Where the person was specifically nominated in an **informal will**, we think that they *should* have to acquire a grant of representation before they can qualify as the authorised person. An informal will is a document that:

- does not meet the statutory requirements for a valid will, but
- "purports to state the testamentary intentions" of the deceased person (that is, how they want their estate to be dealt with after their death), and
- was intended by the deceased to form their will.[8]

4.14 The person nominated in the informal will should have to obtain a grant of representation, as this means that the Supreme Court has dispensed with the formal requirements and declared the document as valid.[9]

4.15 If the deceased user gave conflicting instructions in their will and an online tool (for example, one person was appointed in the will to manage particular digital records, and another person was nominated through an online tool to manage the same records), we think that the authorised person should be the person appointed in the will. This aligns with the traditional approach of wills and estates law, which is to give effect to the user's wishes as expressed in their will.

4.16 The recommended approach is different from the approach of the US model law, which gives priority to the user's wishes as expressed in an online tool.[10] It is also different from the Canadian model law, which gives priority to the most recent instruction.[11]

4.17 In our view, the user's wishes as expressed in a formal or informal will should have priority because:

- in the case of a formal will, it has been signed and witnessed in accordance with the *Succession Act,* and
- in the case of an informal will, the Supreme Court has declared the validity of the document.

4.18 We do not think that a nomination through an online tool should, by directly contradicting a deceased user's will, have the effect of a codicil to that will (that is, a change to the will). Making a specific direction in a will suggests a considered intention on the part of the user, whereas a nomination in an online tool could be a spontaneous decision. If a user wishes to alter a will specifically to give a person access to particular digital records, they could do this by remaking their will or by adding a codicil.

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7. See Recommendation 5.1(2)(c).
8. *Succession Act 2006* (NSW) s 8.
9. *Succession Act 2006* (NSW) s 8.
10. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 4(a); Comment to § 4.
11. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 3(4).

4.19 However, we accept that a person nominated through an online tool, who is not the authorised person, may nevertheless have access to particular digital records of the user, in accordance with the online tool arrangements. We do not intend to limit this person's access to those records unless and until the person specifically appointed in the will approaches the custodian to assert their authority. In the absence of such an approach, it is our intention that the scheme would leave the rights of access via an online tool in place. We do not want to create a situation whereby custodians are in breach of the scheme simply by allowing their online tools to operate as intended.

4.20 The NSW Parliamentary Counsel may advise that this should be specifically articulated when the scheme is enacted in legislation.

The person nominated through an online tool

4.21 Where there is no nomination in the deceased user's will (that is, the will is silent on the management of particular digital records), the person nominated through an online tool to manage those digital records should be the "authorised person" with the right of access.[12] For example, a user's will could authorise the executor to manage the user's digital records in a general sense, and not refer to the user's Facebook account specifically. If someone else had been nominated through Facebook's Legacy Contact tool, then that person would qualify as the authorised person, but only in relation to the Facebook account. Our approach is meant to ensure that, in the absence of a specific contrary intention in a will, the person's intentions for the management of their digital records, as expressed in the online tool, are "respected by the law" and given effect.[13]

The executor of the user's will

4.22 Where a user has not appointed anyone in their will or an online tool to manage particular digital records, the executor of the user's will should be the authorised person with the right to access those records.[14] That is, the executor appointed by the user's will to administer the user's estate should have the right, by virtue of the scheme, to access the user's digital records. The US and Canadian model laws both confer a right of access on executors,[15] and some submissions support this approach.[16]

4.23 The results of our survey among members of the public indicate that few people specifically nominate someone to manage their digital records. We asked respondents if they had ever nominated a "Legacy Contact" to deal with their Facebook account if something happens to them, and of the 460 respondents who answered this question, 76.96% said they had not done this. We also asked respondents if they had nominated an "Inactive Account Manager" to deal with their

12. Recommendation 4.1(1)(b).
13. L Edwards and E Harbinja, *Submission DI06,* 5.
14. Recommendation 4.1(1)(c).
15. See Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 1 definition of "fiduciary", s 3; National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(14) definition of "fiduciary", § 3, § 7, § 8.
16. See, eg, NSW Trustee and Guardian, *Submission DI09,* 3; Law Society of NSW, *Submission DI08,* 1.

Google+ account if something happens to them. Of the 459 people who answered this question, 75.16% said they had not done this.[17]

4.24 We also asked respondents if they have a will, and of the 448 people who answered this question, 93 (20.76%) said that they do.[18] We asked those who have wills whether they have included any details about:

- what they want to happen to their social media profiles or websites
- the passwords to their computer, phone and/or online accounts, or
- details about their password manager or vault.

Of the 91 respondents who answered this question, the majority (92.31%) said their wills do not include such details.[19]

4.25 The executor of a will might need access to the digital records of a user to administer their estate. Therefore, the executor should be able to access these records when no one else has been nominated to do so.

4.26 In the case of a **formal will**, we think that the executor should qualify as the authorised person whether or not there has been a grant of representation of the will. In the case of an **informal will**, however, we think that there should be a grant of representation. This is consistent with Recommendation 4.1(1)(a).

The administrator of the user's estate

4.27 Where the deceased user has not nominated someone, either in a will or an online tool, to manage their digital records, and does not have an executor (because, for example, they died without a will), the administrator of the user's estate should be the "authorised person" entitled to access their digital records.[20] The US and Canadian model laws both confer a right of access on administrators.[21] Some submissions support this approach.[22]

4.28 The administrator of a deceased user's estate may require access to particular digital records of the user for the purposes of estate administration. Therefore, the administrator should be able to access these records when no one else is authorised to do so.

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17. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.30] Table 3.10, [3.32] Table 3.11.
18. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.37] Table 3.15.
19. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.39] Table 3.16.
20. Recommendation 4.1(1)(d).
21. See Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 1 definition of "fiduciary", s 3; National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 2(14) definition of "fiduciary", § 3, § 7, § 8.
22. See, eg, Law Society of NSW, *Submission DI08,* 1; NSW Trustee and Guardian, *Submission DI09,* 3.

The person with the deceased user's access information

4.29 Where no one else is authorised, the authorised person should be the person to whom the deceased user has communicated the access information for those records.[23] This recognises that it is common practice for people to disclose their passwords to family and friends. In this respect, the scheme differs to the US and Canadian model laws, which do not confer an access right in such circumstances.

4.30 This recommendation covers the common scenario where a person discloses their passwords, either orally or in writing, to loved ones before they die. This recommendation also envisages the situation where a person receives a loved one's access information through a "digital legacy service"[24] that the user engaged with, or even paid for, before they died.

4.31 The recommendation expressly excludes a person who holds the deceased user's access information as part of an employment or other contractual relationship involving remuneration for the activity, unless the user specifies that the arrangement is to have effect after their death. This ensures, for example, that a person who has the passwords to their employer's accounts would not qualify as an "authorised person" simply because it was a part of their employment arrangement (for example, as a personal assistant). However, by allowing the user to make express provision that an arrangement is to have effect after their death, we are leaving open the possibility that a user might, for example, communicate a list of passwords to a lawyer or accountant as part of a succession plan. This may be beneficial in cases where there is likely to be a delay in obtaining a grant of letters of administration or there is no need for a grant of probate.

4.32 The authors of one submission believe that only legal personal representatives (executors and administrators) should be able to access a deceased user's digital records. They believe that legal personal representatives are "best equipped legally and practically" to strike a balance between the interests of the deceased's heirs "in remembering the deceased and receiving economic benefits from them, with the privacy interests of the deceased".[25]

4.33 We think that the person to whom the deceased user has given their access information for particular digital records should be able to access those records when no one else is authorised to do so, because the user's actions suggest that they wanted this person to have access. Even though service agreements often provide that sharing access information is a breach of the agreement that entitles the service provider to terminate the account,[26] the results of our survey among members of the public suggest that sharing passwords is common practice.

4.34 We asked survey respondents if they had ever shared their passwords for their social media accounts (or other online accounts) with someone else. Of the 468 people who answered this question, 195 (41.67%) said that they had.[27]

4.35 We also asked respondents why they had given their passwords to someone else. Of the 194 respondents who answered this question:

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23. Recommendation 4.1(1)(e).
24. [2.66].
25. L Edwards and E Harbinja, *Submission DI06,* 2.
26. STEP Australia, *Preliminary Submission PDI06,* 6.
27. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.25] Table 3.8.

- 138 (71.13%) reported sharing their passwords with another person so that the other person can access their accounts
- 45 (23.2%) said that they did so to allow the other person to access or operate their accounts if something happened to them, and
- 35 (18.04%) said that they did so for another reason.[28]

4.36 Including in the statutory hierarchy the person to whom a user has communicated their passwords would allow them to administer the user's estate informally, without having to:

- make a formal access request to the service provider, or
- apply for administration of the user's estate.

4.37 Importantly, they would be able to use the deceased user's password without violating a service agreement and risking termination of the user's account.[29]

Authorised person who can access an incapacitated user's digital records

The person appointed by enduring guardianship or enduring power of attorney

4.38 In the case of an incapacitated user, the authorised person should be any person appointed under:

- an enduring guardianship arrangement that has effect, or
- an enduring power of attorney that has effect,

but only in relation to those records that are specified in the relevant instrument or are otherwise relevant to the person's role either as enduring guardian or attorney.[30]

4.39 A person may appoint both an enduring guardian and an attorney to manage their affairs.[31] An enduring guardian can make any lifestyle and health decisions that the appointer has approved them to make, such as the health care and personal services they will receive.[32] An attorney has authority to manage the person's legal and financial affairs.

4.40 The enduring guardianship arrangement or enduring power of attorney could, for example, authorise the enduring guardian or attorney to access and manage certain digital records, even when these records are not strictly relevant to their role. Nevertheless, we think such directions should be given effect under the recommended scheme, as they reflect the incapacitated user's wishes.

4.41 Where there are no specific directions, however, the enduring guardian or attorney should still be authorised to access those records that are relevant to their role. We

28. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.28] Table 3.9.
29. See Recommendation 5.4(2).
30. Recommendation 4.1(2)(a).
31. Information provided by the Law Society of NSW (3 October 2019).
32. *Guardianship Act 1987* (NSW) s 6E(1).

note that certain digital records could be relevant to both roles.[33] The Law Society of NSW observes:

> 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.[34]

4.42 Therefore, in certain circumstances, the enduring guardian and the attorney could both qualify as the authorised person entitled to access particular records.[35] In the event of a dispute, there is always the option for them to apply to the Supreme Court of NSW for an order identifying one of them as the authorised person in relation to particular records.[36] In such cases, Supreme Court processes, including mediation provisions, could also be engaged to resolve the dispute.

4.43 Some submissions support a right of access for enduring guardians and attorneys.[37] However, one submission says that they should not be able to access an incapacitated user's digital records unless the instrument specifically gives them this power. That is, according to this submission, they should not have an automatic right to access the incapacitated user's digital records simply because they are an enduring guardian or enduring attorney.[38]

4.44 We think that enduring guardians and attorneys should be able to access the digital records of an incapacitated user that are relevant to their roles, even where the instrument does not give them this power expressly. This is because, in some cases, access to digital records may be necessary to administer the user's affairs.[39] The only exception should be if the user has stated expressly that they do not want the enduring guardian or attorney accessing their digital records.

The person appointed by a guardianship or financial management order

4.45 Where no specific person has been appointed under an enduring guardianship or enduring power of attorney, the authorised person should be any person appointed under:

- a guardianship order made by the NSW Civil and Administrative Tribunal ("Tribunal"), or
- a financial management order

but only in relation to those records that are specified in the relevant order or are otherwise relevant to the person's role as guardian or financial manager.[40]

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33. Law Society of NSW, *Submission DI08,* 2; NSW Trustee and Guardian, *Submission DI09,* 3–4.
34. Law Society of NSW, *Submission DI08,* 2.
35. Information provided by the Law Society of NSW (3 October 2019).
36. See Recommendation 4.2.
37. See, eg, L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 2–3; Law Society of NSW, *Submission DI08,* 2*;* NSW Trustee and Guardian, *Submission DI09,* 4.
38. L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 2–3.
39. Law Society of NSW, *Submission DI08,* 4.
40. Recommendation 4.1(2)(b).

4.46 Typically, guardians are given the authority to make personal decisions, such as accommodation and healthcare decisions. Financial managers are given the authority to manage the person's "estate" – that is, "the property and affairs of the person".[41]

4.47 The guardianship or financial management order could expressly authorise the guardian or financial manager to access specific digital records. Alternatively, it could be expressed in more general terms. In this case, the guardian or financial manager should only be entitled to access those records that are relevant to their role.

4.48 Where particular digital records are relevant to both roles, however, this means that the guardian and the financial manager could both qualify as the authorised person entitled to access those records. As discussed in relation to enduring arrangements, the Supreme Court could resolve a dispute between guardians and financial managers if necessary.[42]

The person nominated through an online tool

4.49 If there is no person appointed under an enduring guardianship, enduring power of attorney, guardianship order or financial management order, the authorised person entitled to access particular digital records should be the person nominated through an online tool to manage those records.[43] A nomination through an online tool indicates which person the user has chosen to manage particular digital records in the event that they are no longer able to.

4.50 Guardians, attorneys and financial managers should qualify as the authorised person ahead of the person nominated by an online tool because they represent formal appointments for the management of a person's affairs.

The person with the incapacitated user's access information

4.51 Where none of the above arrangements or nominations exist, the authorised person should be the person who has in their possession the access information for their digital records, either because:

- the incapacitated user has communicated the access information for those digital records to the person, or
- the person made those digital records on the incapacitated user's behalf.[44]

4.52 A person who holds the incapacitated user's access information as part of an employment or other contractual relationship involving remuneration for the activity will not qualify as the authorised person, unless they are the paid carer of the user. This recognises that, in some cases, the incapacitated user could be paying someone to provide decision-making assistance, and this person could hold the user's access information as part of this arrangement.

4.53 As mentioned above, a person may share their passwords with another person as a way of expressly permitting that person to access their accounts. In the case of

41. *Guardianship Act 1987* (NSW) s 3(1) definition of "estate".
42. See Recommendation 4.2.
43. Recommendation 4.1(2)(c).
44. Recommendation 4.1(2)(d).

incapacitated users, it is often so they can manage, or help manage, the user's affairs.

4.54 Express recognition that this person is the authorised person could give them greater confidence in enacting the user's preferences.[45] It would also mean that they would be able to access the relevant records without having to make a formal access request to the custodian or apply for a formal order, and without fear of violating a service agreement or risking termination of the user's account.[46]

4.55 Some online government services already permit people acting under an informal arrangement to access an incapacitated user's digital records. According to Carers NSW:

> 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 ...[47]

4.56 Where informal arrangements are operating fairly and effectively they should be allowed to continue.

Where a person is outside the "authorised person" hierarchy

4.57 In rare circumstances, a person will not fit into any of the categories within the "authorised person" hierarchy. We do not intend the existence of the hierarchy to preclude other action an applicant may wish to take to obtain access; for example:

- by approaching the custodian to exercise its discretion to grant access, or
- seeking a court order.

Clarifying the authorised person's status

Recommendation 4.2: A person can apply to the Supreme Court of NSW for an order that they are the authorised person

The scheme should provide that a person can apply to the Supreme Court of NSW for an order that they are the authorised person entitled to access particular digital records of the deceased or incapacitated user under Recommendation 4.1.

4.58 A person should be able to apply to the Supreme Court of NSW for an order that they are the "authorised person" entitled to access particular records of a deceased or incapacitated user under one of the categories in Recommendation 4.1.[48]

4.59 It is appropriate for the Supreme Court to have the power to make this order. The Supreme Court already has jurisdiction in respect of the estates of deceased

45. Carers NSW, *Submission DI07,* 3.
46. See Recommendation 5.4(2).
47. Carers NSW, *Submission DI07,* 2.
48. Recommendation 4.2.

people, including the power to grant probate of a deceased person's will and the administration of an estate.[49]

4.60 The Supreme Court also has the power to deal with people who may need its protection. These powers come from the Court's inherent protective jurisdiction (known as its *parens patriae* jurisdiction),[50] and through various Acts including the *Guardianship Act 1987* (NSW) and the *NSW Trustee and Guardian Act 2009* (NSW).

4.61 We envisage that the need for a court order will be rare, since the hierarchy in Recommendation 4.1 should, in the majority of cases, clarify who the authorised person is for particular digital records. However, a court order may be necessary in exceptional cases to resolve uncertainty.

4.62 For example, a person may need to apply for an order where:

- they were appointed by an instrument (for example, the user's will or an enduring power of attorney) but are unsure of the extent of their right (for example, whether it extends to a particular online account)
- they are unable to provide the custodian of particular digital records with proof of their authority (in accordance with Recommendation 5.1(2) or (3)), or
- there is a dispute among potential authorised people – in such cases, Supreme Court processes, including mediation provisions, could be engaged to resolve the dispute.

Ombudsman scheme

4.63 In its *Digital Platforms Inquiry* report, the Australian Competition and Consumer Commission recommended establishing an independent ombudsman scheme to resolve issues specific to digital platforms.[51] Under the recommendation, if complaints or disputes cannot be resolved by digital platforms through their own dispute resolution processes, people could approach the ombudsman to resolve these issues and make binding decisions.[52]

4.64 If an ombudsman scheme were to be established, it would be well-placed to deal with issues arising in relation to the recommended hierarchy and would be an appropriate alternative to using the Supreme Court.

Extent of the authorised person's access right

Recommendation 4.3: Extent of the authorised person's access right

49. *Probate and Administration Act 1898* (NSW) s 33, s 40.
50. Derived from *New South Wales Act 1823* (Imp), the Third Charter of Justice, and the *Australian Courts Act 1828* (Imp); preserved and reinforced by *Supreme Court Act 1970* (NSW) s 22, s 23; *A v A* [2015] NSWSC 1778 [43].
51. Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) rec 23.
52. Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 507.

The scheme should provide that:

(1) For the purposes of determining the extent of the authorised person's right:

  (a) "administering the deceased user's estate" includes informal administration of the deceased user's estate

  (b) "managing the incapacitated user's affairs" includes informal management of the incapacitated user's affairs, and

  (c) "deal" or "dealing" includes transferring digital records to the person entitled to them, but does not include editing the content of digital records.

(2) The authorised person entitled to access particular digital records of a deceased user may access and deal with those digital records:

  (a) subject to applicable fiduciary duties, and

  (b) subject to other applicable laws, and

  (c) subject to any terms of the following, as applicable:

    (i) the will (even where the authorised person is not the person named in the will), or

    (ii) the online tool, or

  (d) if there are no such terms, only for the purpose of administering the deceased user's estate.

(3) If the authorised person entitled to access particular digital records of a deceased user also has authority over the user's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital record, they are authorised to access and deal with the property and digital records of the user stored on it:

  (a) subject to applicable fiduciary duties, and

  (b) subject to applicable laws, and

  (c) subject to the terms of the following, as applicable:

    (i) the will (even where the authorised person is not the person named in the will), or

    (ii) the online tool, or

  (d) if there are no such terms, only for the purpose of administering the deceased user's estate.

(4) The authorised person entitled to access particular digital records of an incapacitated user may access and deal with those digital records:

  (a) subject to applicable fiduciary duties, and

  (b) subject to applicable laws, and

  (c) subject to the terms of the following, as applicable:

    (i) the online tool, or

    (ii) an enduring guardianship or enduring power of attorney, which has effect, or

    (iii) the guardianship or financial management order, or

(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.

(5) If the authorised person entitled to access particular digital records of an incapacitated user also has authority over the user's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital record, they are authorised to access and deal with the property and digital records of the user stored on it:

(a) subject to applicable fiduciary duties, and

(b) subject to applicable laws, and

(c) subject to the terms of the following, as applicable:

(i) the online tool, or

(iii) the enduring guardianship or enduring power of attorney, which has effect, or

(iv) the guardianship or financial management order, or

(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.

(6) In all such cases, the authorised person is deemed to have the consent of the deceased or incapacitated user for the custodian to disclose the content of the digital records to the authorised person.

4.65 Recommendation 4.3 sets out the extent of the authorised person's right to access and deal with particular digital records of the deceased or incapacitated user. Importantly, under the recommended scheme, the authorised person's right is not a property right. It is purely a right to take such actions as the instrument allows for, or as are necessary to administer the user's estate or manage their affairs.[53]

The authorised person's right is subject to applicable fiduciary duties

4.66 Like the US[54] and Canadian model laws,[55] we recommend that an authorised person's right to access and deal with particular digital records of a deceased or incapacitated user be subject to applicable fiduciary duties.[56] When administering a person's estate, fiduciary duties include the duty to:

- avoid conflicts of interest and personal profit[57]
- preserve assets and ensure they are not wasted[58]
- exercise the care, skill and diligence of a prudent person[59]

53. L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 2.
54. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 15(a).
55. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 4.
56. Recommendation 4.3(2)(a), 4.3(3)(a), 4.3(4)(a), 4.3(5)(a).
57. See, eg, *Re Hayes' Will Trusts* [1971] 1 WLR 758, 764–765; *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694, 707–708.
58. See, eg, *Re Hayes' Will Trusts* [1971] 1 WLR 758, 765.
59. *Trustee Act 1925* (NSW) s 14A.

- act in the best interest of all present and future beneficiaries,[60] and
- act impartially between beneficiaries.[61]

4.67 When managing an incapacitated person's affairs, the applicable fiduciary duties include:

- a "foundational duty to act … in good faith"
- the duty to avoid conflicts of interests, and
- the duty not to make an "unsanctioned profit" from the role.[62]

4.68 Depending on the circumstances, an authorised person could be entitled to access a range of digital records, including those containing personal, financial or business information. Fiduciary duties are necessary to ensure that the authorised person acts in good faith when accessing and dealing with these records.

The authorised person's right is subject to other applicable laws

4.69 We recommend that an authorised person's right to access and deal with a deceased or incapacitated user's digital records be subject to other applicable laws.[63] This approach is similar to the approach taken in US model law.[64]

4.70 It would mean, for example, that the authorised person's right is subject to criminal and copyright law. "Applicable law" would also include probate law, where the authorised person has obtained a grant of probate or letters of administration.

4.71 It also means that an authorised person does not, under the recommended scheme, acquire any rights or powers that the user did not have originally, under existing laws. Therefore, we see no inconsistency between the scheme and, for example, existing laws that permit:

- a person to access their health records, or
- another person to access these records on their behalf, if they are incapable of doing so.[65]

The authorised person's right is subject to the terms of the instrument

4.72 We recommend that an authorised person's right to access and deal with a deceased or incapacitated user's digital records be subject to the terms of the relevant instrument.[66] In other words, full effect should be given to the user's wishes

60. *Trustee Act 1925* (NSW) s 14B(2)(a).
61. *Trustee Act 1925* (NSW) s 14B(2)(c).
62. *Ability One Financial Management v JB by his Tutor AB* [2014] NSWSC 245 [113].
63. Recommendation 4.3(2)(b), 4.3(3)(b), 4.3(4)(b), 4.3(5)(b).
64. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 15.
65. *Health Records and Information Privacy Act 2002* (NSW) s 7(2), s 26.
66. Recommendation 4.3(2)(c), 4.3(3)(c), 4.3(4)(c), 4.3(5)(c).

as expressed in their will or another instrument. This aligns with the traditional approach of trusts and estates law, which respects the person's intentions.[67]

4.73 The user may wish to confer broad powers on the authorised person. For example, a deceased user's will could provide:

> Subject to the terms and conditions of individual providers, I authorise and direct my executor:
>
> (i) to access, control, modify, transfer, delete, close or otherwise deal with any digital assets in accordance with this clause;
>
> (ii) to carry out any instructions I leave with my record of digital assets for dealing with them.[68]

4.74 Instructions might relate to management of financial assets, or they might be instructions of a personal nature; for example, to ensure that particular email correspondence with sentimental value is printed for a family member.

4.75 Alternatively, the user may wish to protect their privacy by instructing the authorised person to delete their digital records.[69] For example, a deceased user's will could provide:

> my executor will do all things reasonably necessary and possible to:
>
> (i) have all emails deleted from my email accounts;
>
> (ii) subject to the terms and conditions of individual providers, have all, or any part of, my Digital resources and Digital Accounts which are published or stored on the internet closed.[70]

4.76 Under Recommendation 4.3(2)(c)(i) and 4.3(3)(c)(i), the authorised person's right to access and deal with the digital records of a deceased user would be subject to the terms of the will, "even where the authorised person is not the person named in the will". We mean this to cover the situation where the user's will imposes restrictions on an executor or another nominated person who, for whatever reason, is not willing or able to act (for example, they died before the deceased user). The restrictions set out in the will would still bind the person who qualifies as the authorised person under a lower category in the hierarchy (for example, the person who became the administrator of the user's estate).

4.77 Alternatively, a user's will may not impose specific restrictions on the executor or another nominated person, but instead state that they do not want anyone to access their digital records.[71] This restriction should bind the person who qualifies as the authorised person by default (in accordance with the hierarchy in Recommendation 4.1). That is, the authorised person would not have the right to access the user's digital records.

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67. Law Society of NSW, *Preliminary Submission PDI14,* 1.
68. Slater and Gordon Lawyers, Will, ref SGO 75306, 2.
69. See, eg, Portable, *Submission DI05,* 3.
70. Slater and Gordon Lawyers, Will, ref SGO 75306, 2.
71. See, eg, NSW Council for Civil Liberties, *Preliminary Submission PDI08*, 6.

The authorised person's right is for limited purposes

4.78 If there is no instrument, or no specific terms in the relevant instrument concerning the user's digital records, the authorised person should be able to access and deal with the user's digital records only for the purpose of administering the user's estate (if deceased) or managing their affairs (if incapacitated).[72] This would include informal administration where the authorised person entitled to access particular digital records is the person:

- specifically appointed in a formal will, or is the executor of a formal will, but no grant of representation has been obtained, or
- to whom the user communicated the access information for those records.

4.79 The authorised person's right to "access and deal with" a deceased or incapacitated user's digital records is worded broadly, to encompass the range of actions that may be necessary for administering the user's estate or managing their affairs. However, it does not include editing the content of such records.[73] That is, an authorised person's right to "deal" does not include a right to edit. This means that an authorised person cannot edit existing content on a user's social media page, for example.

Why limited access should be allowed, even without express user permission

4.80 Some argue that there should be no right to access a deceased or incapacitated user's digital records unless there is express permission from the user in their will or other document.[74] However, the results of our survey among members of the public indicate just how few people make specific arrangements for managing their digital records upon death or incapacity.[75]

4.81 Given how many people now manage important aspects of their lives in the digital environment, and given how few people think to give express access permission in case of death or incapacity, denying access without such permission would prevent the proper administration and management of a user's records in a significant number of cases.

4.82 We therefore recommend that an authorised person should be able to access a deceased or incapacitated user's digital records, even without a specific nomination, for the limited purpose of administering the user's estate or managing their affairs. Otherwise, in many cases no one will have authority to access these records. The records could disappear or become lost.[76] Alternatively, they might continue to exist unchecked; potentially causing distress to family and friends, and being open to fraudulent use by third parties.

4.83 We appreciate the concerns that this approach interferes with a user's privacy. It is conceivable, if not likely, that when accessing a user's digital records, an authorised person will come across personal information about the user or even, in some

72. Recommendation 4.3(2)(d), 4.3(3)(d), 4.3(4)(d), 4.3(5)(d).
73. Recommendation 4.3(1)(c).
74. Information provided by Facebook (30 July 2019); Law Society of NSW, *Submission DI08,* 1.
75. See K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.30], Table 3.10 [3.32], Table 3.11 [3.39], Table 3.16.
76. D L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act,* Progress Report (2015) [27].

cases, a third party.[77] This is why we recommend strictly limiting how the authorised person can use the information. They would not be entitled to do anything with it unless this is necessary for administering the user's estate or managing their affairs.

4.84 Under the recommended scheme, it would also be an offence for an authorised person to disclose information about the user, or another person, obtained while accessing the digital records of the user, unless specific exceptions apply.[78]

The extent of access should not depend on the value of the digital record

4.85 Some submissions suggest that the extent of the authorised person's right to access a deceased or incapacitated user's digital records should depend on whether the records have financial value or sentimental value.[79]

4.86 For example, an authorised person could have a default right to access digital records with financial value, but be restricted from accessing digital records with sentimental value, unless they have express permission from the user. However, we believe that there are significant problems with this approach:

- **Some digital records, such as social media accounts, can have both financial value and sentimental value.**[80] It would therefore be difficult to determine the extent of the authorised person's right to access and deal with these records.
- **In many cases, it is not possible to determine whether a particular digital record has financial value or sentimental value until it is accessed.** For example, a person's email account may contain digital records with both financial value (such as an unpublished literary work) and sentimental value (such as personal correspondence), but it is not always possible to know this until access is granted.

4.87 For these reasons, the extent of the authorised person's right to access and deal with the user's digital records should be determined by the terms of the relevant instrument, or the purpose of the access (that is, to administer the user's estate or manage their affairs), rather than the value of a digital record.

Limits on the potential use (and re-use) of a digital record

4.88 One submission raised concerns about the use that could be made of digital records once access is granted. For example, it is now possible to use a person's digital records to create what is known as an interactive personality construct. This is when information about a deceased person, taken from sources like their social media page, is used to inform an artificial intelligence system, which can then interact with surviving family and friends in the same way the deceased person communicated when they were alive.[81]

4.89 Recommendation 4.3 limits not only what records an authorised person can access, but also how they can deal with those records. Unless a user has given a person

77. See, eg, NSW Privacy Commissioner, *Preliminary Submission PDI09,* 3.
78. Recommendation 4.5.
79. See, eg, L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 4; L Edwards and E Harbinja, *Submission DI06,* 2–3; Carers NSW, *Submission DI07,* 2.
80. Law Society of NSW, *Submission DI08,* 2; NSW Trustee and Guardian, *Submission DI09,* 3–4.
81. P Stokes, *Preliminary Submission PDI04,* 4. See, for example, http://eterni.me.

express permission to use their information in a particular way, this use would be outside the scope of the authorised person's authority.

Where the authorised person has authority over the user's devices

4.90 Under Recommendation 4.1(3) and 4.1(5), the authorised person would be able to access and deal with the deceased or incapacitated user's digital records stored on their devices (such as laptops, computers or smartphones), if they also have authority over the user's personal property.

4.91 If, for example, the executor of the user's will or the administrator of the user's estate is the "authorised person" entitled to access their digital records, and they have the authority over the user's personal property as an executor or administrator, they would also be authorised to access and deal with digital records stored on the user's computer. However, this right is subject to relevant terms of the will. If there are no such terms, the authorised person would only be able to access and deal with the user's digital records on their computer for the purpose of administering the user's estate.

4.92 Importantly, an authorised person's access under Recommendation 4.1(3) or 4.1(5) would not amount to a breach of the criminal law prohibiting unauthorised access to and modification of restricted data held in a computer.[82]

Deemed consent of the deceased or incapacitated user

4.93 Under Recommendation 4.3(6), the authorised person would be deemed to have the consent of the deceased or incapacitated user for the custodian to disclose the content of the digital records to them. This is consistent with the Canadian model law.[83]

4.94 Recommendation 4.3(6) is necessary because in some cases:

- a user's digital records may be located in the United States ("US"), and
- the custodian of those records may be subject to US state and federal laws.[84]

4.95 The US *Stored Communication's Act* ("SCA") prohibits public providers of an "electronic communication service" or "remote computing service" from disclosing the content of users' electronic communications without "lawful consent" from the user or a court order.[85] However, providers are allowed to disclose non-content information, such as the date and time that an electronic communication was sent.

4.96 In a 2017 US case, the court held that the deceased's personal representatives could, for the purposes of the SCA, lawfully consent to disclosure of the content of the deceased's electronic communications.[86] Recommendation 4.3(6) goes a step further than this. The "authorised person", who may or may not be the user's personal representative, is *deemed* to have the user's consent for disclosure. This

82. See Recommendation 5.3(2).
83. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 5(1)(b), s 5(3)(b).
84. D L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act,* Progress Report (2015) [6].
85. 18 US Code §2701–2712.
86. *Ajemian v Yahoo! Inc* 84 NE 3d 766 (Mass, 2017).

is meant to avoid any doubt about whether the authorised person can access the content of these records.

Other obligations of the authorised person

Recommendation 4.4: Other obligations of the authorised person

The scheme should provide that:

(1) Where the authorised person entitled to access particular digital records of a deceased user is not the executor or the administrator of the user's estate, they must do all things reasonably necessary to provide relevant information to the executor or administrator for the purposes of administering the user's estate.

(2) Where the authorised person entitled to access particular digital records of an incapacitated user is not appointed under:

(a) an enduring guardianship, or

(b) an enduring power of attorney, or

(c) a guardianship order, or

(d) under a financial management order,

they must do all things reasonably necessary to provide relevant information to a person so appointed for the purpose of managing the user's affairs.

4.97 Where the authorised person entitled to access particular digital records of the deceased user is not the executor or administrator of the user's estate, they must do all things reasonably necessary to provide relevant information to the executor or administrator for the purposes of administering the user's estate.[87] This means, for example, that the authorised person would have to provide information from the user's accounts that is relevant for estate administration purposes. However, they would not be required to give the executor or administrator access to the account itself.

4.98 Similarly, where the authorised person entitled to access particular digital records of the incapacitated user is not the user's guardian, attorney, or financial manager, they must do all things reasonably necessary to provide relevant information to the user's guardian, attorney, or financial manager for the purpose of managing the user's affairs.[88]

Improper disclosure of information

Recommendation 4.5: Improper disclosure of information

The scheme should provide that:

87. Recommendation 4.4(1).
88. Recommendation 4.4(3).

(1) It is an offence for an authorised person entitled to access particular digital records of the deceased user to disclose information about the deceased user, or another person, obtained in accessing those records, unless the disclosure is:

(a) in accordance with the relevant instrument or order appointing the authorised person

(b) for the purpose of administering the deceased user's estate

(c) necessary for legal proceedings

(d) authorised by law

(e) authorised by a court or tribunal in the interests of justice, or

(f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

(2) It is an offence for an authorised person entitled to access particular digital records of the incapacitated user to disclose information about the deceased user, or another person, obtained in accessing those records, unless the disclosure is:

(a) in accordance with the relevant instrument or order appointing the authorised person

(b) for the purpose of managing the incapacitated user's affairs

(c) necessary for legal proceedings

(d) authorised by law

(e) authorised by a court or tribunal in the interests of justice, or

(f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.

4.99 It should be an offence for an authorised person entitled to access particular digital records to disclose information about the user, or another person, obtained in accessing those records, unless specific exceptions apply.[89]

4.100 Recommendation 4.5 responds to concerns about the disclosure of personal information contained in a deceased or incapacitated user's digital records.[90] It is intended to protect against the authorised person acting without lawful authority by disclosing personal information of the deceased or breaching the privacy of the incapacitated user, or another person, whose personal information is contained in the user's digital records.

4.101 The offence in Recommendation 4.5 would not, for example, apply where an authorised person provides personal information to a beneficiary in accordance with the due administration of a deceased estate. The offence is also only intended to apply to the authorised person and not, for example, to a person entitled to a particular digital record, such as the user's beneficiary.

89. Recommendation 4.5.

90. Information provided by Facebook (30 July 2019); Information provided by DIGI (11 October 2019).

5. Access procedures, liability limits and conflicting terms in custodian agreements and policies

In brief

When making an access request, an authorised person should follow certain procedures. The scheme should protect both custodians and authorised persons from liability if they act in good faith. When terms in a service agreement or custodian policy conflict with the requirements of the scheme, the scheme should prevail.

5.1 In this chapter, we recommend that an authorised person should meet certain procedural requirements when requesting access to digital records held by a custodian. We also recommend that the statutory scheme limit the liability of both the custodian and authorised person if they act in good faith when attempting to comply with the scheme.

5.2 We recognise that the requirements of the scheme will sometimes conflict with the terms of a custodian's service agreement or policy. We explain the circumstances in which the scheme should prevail over the agreement or policy and our reasons for this.

Procedural requirements for access requests

Recommendation 5.1: Procedural requirements for access requests

The scheme should provide that:

(1) The authorised person entitled to access particular digital records of a deceased or incapacitated user may request access to those records stored or maintained by a custodian by contacting the custodian and providing proof of their authority.

(2) In relation to a deceased user's digital records, the authorised person will prove their authority by providing the custodian with a copy of the following, as applicable:

  (a) proof of the user's death

  (b) the formal will

  (c) in the case of a formal will that has not been proved, a statutory declaration establishing that the will is the user's last valid will

  (d) the grant of representation

  (e) proof of the authorised person's identity.

(3) In relation to an incapacitated user's digital records, the authorised person will prove their authority by providing the custodian with a copy of the following, as applicable:

  (a) the enduring guardianship or enduring power of attorney

  (b) the guardianship or financial management order

  (c) proof of the authorised person's identity.

(4) For the purposes of Recommendation 5.1(2) and 5.1(3), a "copy" includes a copy in digital or other electronic machine-readable form.

(5) If, and only if, the authorised person is unable to provide proof of authority in accordance with Recommendation 5.1(2) or 5.1(3), authority will be proved by an order from the Supreme Court of NSW that states that they are the authorised person.

(6) A custodian may choose not to require the particular proof of authority set out in Recommendation 5.1(2) or 5.1(3). If the custodian chooses to require proof of authority, the custodian can only require a Supreme Court order where the authorised person does not provide proof in accordance with Recommendation 5.1(2) or 5.1(3).

(7) A custodian who receives a request from an authorised person, in accordance with Recommendation 5.1, must provide access to the authorised person within 30 days of receipt of the request, unless the custodian can show that access is not technically feasible.

5.3 An authorised person should be able to request access to digital records stored or maintained by a custodian by contacting the custodian and providing proof of their authority.[1]

1. Recommendation 5.1(1).

5.4 Custodians would be required to accept electronic copies of the relevant documentation.[2] The authorised person should not be required to provide paper or original copies.[3] For example, they could provide a scanned version of the user's death certificate or of a guardianship order.

Requirements for accessing a deceased user's digital records

Where the authorised person is identified in a formal will

5.5 Where the authorised person is the person specifically appointed in, or the executor of, the user's will, and the will is a "formal" will (that is, it complies with the statutory requirements for a valid will), they should be able to prove their authority whether or not the will is subject to a grant of representation.

5.6 So, for example, where a will is subject to a grant of representation, the authorised person can prove their authority by providing the custodian with a copy of:

- the formal will
- the grant of representation, and
- proof of their own identity.[4]

5.7 Where the will is not subject to a grant of representation (for example, because there is no need for a grant), the authorised person can prove their authority by providing the custodian with a copy of:

- proof of the user's death
- the formal will
- a statutory declaration establishing that the will is the user's last valid will, and
- proof of their own identity.[5]

5.8 We do not think that the authorised person appointed by a formal will should have to obtain a grant of representation, and provide the custodian with a copy of this grant, before they can access the digital records. If the user's will complies with the requirements under the *Succession Act 2006* (NSW) for a valid will, we think that a grant of probate "proving" the will would be unnecessary; especially if the user's estate can otherwise be administered informally.

5.9 However, we think that, in the absence of a grant of representation, the authorised person should have to provide the custodian with a copy of a statutory declaration establishing the validity of the will. This would provide sufficient assurance to the custodian that:

- the will is the last will of the user (that is, it has not been superseded by another will)

2. Recommendation 5.1(4).
3. Information provided by R Genders (29 August 2019).
4. Recommendation 5.1(2)(b), 5.1(2)(d), 5.2(2)(e).
5. Recommendation 5.1(2)(a)–(c), 5.1(2)(e).

- it is still valid (that is, it has not been revoked), and
- its validity is not the subject of contest.

5.10 A similar process applies in Queensland, in relation to real property. A person who is entitled to be the deceased's personal representative, but has not obtained a grant of representation, can make an application for transmission of the deceased's real property to the Land Titles Registry.[6] The Registrar will require a supplementary statutory declaration to establish the validity of the will in appropriate cases.[7]

Where the authorised person is identified in an informal will, or is the administrator of the user's estate

5.11 Where the authorised person is specifically nominated in, or is the executor of, an "informal" will (that is, it does not meet the statutory requirements for a valid will), or is the administrator of the user's estate (following an intestacy), they should be able to prove their authority by providing the custodian with a copy of:

- the grant of representation (that is, a grant of probate or letters of administration), and
- proof of their own identity.[8]

5.12 To minimise formality, we considered whether the person could provide documentation demonstrating their eligibility to apply for a grant of representation,[9] rather than a copy of the grant itself. An advantage of this approach is that a person who would not otherwise apply for letters of administration (for instance, because the user's estate is small, or consists of assets jointly owned with someone else) does not have to do so purely to gain access from the custodian to the user's digital records.

5.13 However, multiple people (for example, the user's spouse, one or more of the next of kin, or both)[10] could be eligible to apply for letters of administration, and have documentation supporting this eligibility. In the event of conflict, it would be difficult for the custodian to know who should be given access.

5.14 For this reason, the authorised person should have to obtain a grant of representation, and provide a copy of this grant to the custodian, before they can access the digital records.

5.15 We note that applications for a grant will require information on the value of the deceased user's estate and, without access to the deceased user's digital records, the applicant may not be able to determine the full extent of the deceased person's assets and liabilities.[11] However, if the administrator identifies additional assets after

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6. See Queensland Titles Registry, "Transmission Application by Personal Representative (No Grant in Queensland or no Queensland Recognised Grant)", Form 5A (version 8, 27 April 2018).
7. J K de Groot, *Wills, Probate and Administration Practice (Queensland)* (Queensland Law Society at 12 December 2019) [432.1].
8. Recommendation 5.1(2)(d)–(e).
9. See, eg, D L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act,* Progress Report (2015) [48].
10. See *Probate and Administration Act 1898* (NSW) s 63.
11. D L Molzan, *Uniform Access to Digital Assets by Fiduciaries Act,* Progress Report [47].

they have accessed the user's digital records, they can disclose these to the court in an affidavit of additional assets.[12]

Where the authorised person is the person nominated through an online tool

5.16 Where the authorised person is nominated through an online tool, they will normally have access to the digital records and therefore not need to approach the custodian for access. However, in the event that they need to prove their authority, they should be able to do so by providing a copy of:

- proof of the user's death, and
- proof of their own identity.[13]

Where the authorised person has the deceased user's access information

5.17 Where the "authorised person" is the person to whom the deceased user has communicated their access information for particular digital records, we do not anticipate that they will need to make a formal access request to the custodian. They already have the means of accessing those records.

5.18 A custodian could, however, become aware that someone is using the deceased user's password, and purport to terminate the account or change the password. In such a case, the authorised person would be able to prove their authority by providing a copy of proof of the user's death.[14]

Requirements for accessing an incapacitated user's digital records

Where the authorised person is appointed by an enduring guardianship or enduring power of attorney

5.19 Where the authorised person is appointed by an enduring guardianship or enduring power of attorney, they should be able to access the digital records in question by providing the custodian with a copy of:

- the enduring guardianship arrangement or enduring power of attorney, and
- proof of their own identity.[15]

5.20 The enduring guardianship or enduring power of attorney must have effect at the time of the access request.

Where the authorised person is appointed by a guardianship or financial management order

5.21 Where the authorised person is appointed by a guardianship or financial management order, they should be able to prove their authority by providing the custodian with a copy of:

12. *Supreme Court Rules 1970* (NSW) r 91.
13. Recommendation 5.1(2)(a), 5.1(2)(e).
14. Recommendation 5.1(2)(a).
15. Recommendation 5.1(3)(a), 5.1(3)(c).

- the relevant order, and
- proof of their identity.[16]

Where the authorised person is the person nominated through an online tool

5.22 Where the authorised person is nominated through an online tool, they will normally have access to the digital records and therefore not need to approach the custodian for access. However, in the event that they need to prove their authority, they should be able to do so by providing proof of their own identity.[17]

Where the authorised person has the incapacitated user's access information

5.23 Where the incapacitated user has communicated their access information for particular digital records to the authorised person, they would not, in most cases, need to make a formal access request to the custodian of those records.

5.24 In some cases, a person with access information could be the user's attorney, guardian or financial manager, but they had not applied for access because it was unnecessary. If the custodian purported to terminate the account or otherwise prevent access, the person could produce proof that they are an attorney, guardian or financial manager and, therefore, an authorised person.

5.25 In other cases, the person with access information could be acting under an informal arrangement, and be unable to prove their authority. As a measure of last resort, they could obtain an order from the Supreme Court of NSW that states they are the authorised person (see below).[18]

Custodians should only require a court order to prove authority when no other proof is available

5.26 We recommend that if, and only if, the authorised person is unable to provide proof of authority in accordance with Recommendation 5.1(2) or 5.1(3), authority can be proved by an order from the Supreme Court of NSW that states that they are the authorised person.[19]

5.27 In some situations, a custodian may choose not to require the particular proof of authority set out in Recommendation 5.1(2) or 5.1(3). If the custodian chooses to require *some* form of proof of authority, they would only be able to require a Supreme Court order where the authorised person does not provide proof in accordance with Recommendation 5.1(2) or 5.1(3).[20]

5.28 Our approach is intended to ensure that seeking a court order is a measure of last resort, as such processes can be costly and time-consuming.[21] If the scheme required or permitted an authorised person to obtain a court order for access, even where proof of authority has been provided, we think this would impose an unnecessary burden on the authorised person, the custodian and the courts.

16. Recommendation 5.1(3)(b)–(c).
17. Recommendation 5.1(3)(c).
18. Recommendation 4.2; Recommendation 5.1(6).
19. Recommendation 5.1(5).
20. Recommendation 5.1(6).
21. Law Society of NSW, *Preliminary Submission PDI14,* 1–2.

5.29 Under the US model law, where a personal representative (executor or administrator) seeks access to the contents of a deceased user's electronic communications, the custodian can request a court order confirming any of the following:

- the user had a specific identifiable account with the custodian
- disclosure would not violate US or other applicable laws
- the user consented to the disclosure though an online tool, or
- disclosure "is reasonably necessary for administration of the estate".[22]

5.30 This approach has reportedly resulted in court orders being required in most, if not all, cases.[23] Recommendations 5.1(5) and 5.1(6) are intended to avoid this outcome.

Access granted within 30 days of a request

5.31 We recommend that a custodian who receives a request from an authorised person, in accordance with Recommendation 5.1, should provide full access within 30 days of receipt of the request, unless the custodian can demonstrate that access is not technically feasible.[24]

5.32 Our approach is different to the US model law, where a custodian has the discretion to grant full or partial access to a user's account.[25] In addition, the custodian need not disclose a user's digital assets if:

- a user directs, or a fiduciary requests, a custodian to disclose some, but not all, of a user's digital assets, and
- segregating these assets would impose an undue burden on the custodian.[26]

5.33 If the custodian believes that the direction or request imposes an undue burden, the custodian or fiduciary can seek a court order for the custodian to disclose:

- a subset of the user's digital assets, limited by date
- all of the user's digital assets to the fiduciary, or another designated recipient
- none of the user's digital assets, or
- all of the user's digital assets to the court.[27]

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22. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 7(5)(C).
23. See, eg, *Matter of White* (Suffolk County Sur Ct, No 2017-812/A, 11 October 2017); *Matter of Serrano*, 56 Misc 3d 497(NY Sur Ct, 2017); *Matter of Scandalios* (NY Sur Ct, No 2017-2976/A, 14 January 2019) slip op 30113(U); *Matter of Coleman* 63 Misc 3d 609 (NY Sur Ct, 2019).
24. Recommendation 5.1(7)
25. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 6(a).
26. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 6(d).
27. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 6(d)(1)–(4).

5.34 For example, a request for the custodian to disclose the user's emails pertaining to financial matters may be considered unduly burdensome, as this would require a custodian to sort through the full list of emails and remove any irrelevant messages before disclosure. The custodian may decline to disclose the emails, and either the fiduciary or custodian may seek guidance from a court.[28]

5.35 We do not support such an approach. We are concerned that it could impose a significant burden on the authorised person, custodians and the courts.

5.36 Instead, we recommend that the custodian be required to give the authorised person access to the user's digital records, upon receipt of a valid request. We believe that the only exception should be where the custodian can demonstrate that access is not technically feasible. This is because in some situations, such as where a user's digital records have been encrypted, a custodian may be unable to provide complete access to the records.[29]

Protecting custodians from liability

Recommendation 5.2: Protecting custodians from liability

The scheme should protect custodians from liability for acts or omissions done in good faith to comply with the scheme.

5.37 We recommend that the scheme protect custodians from liability for acts or omissions done in good faith in compliance with the scheme.[30] This is similar to the US and Canadian model laws.[31] Various NSW statutes also grant qualified immunity to certain officials and administrators.[32]

5.38 Recommendation 5.2 is intended to ensure that a custodian who makes an attempt in good faith to comply with the statutory scheme but, for example, provides access to a person who is not in fact an authorised person, is not liable for that mistake.

Protecting the authorised person from liability

Recommendation 5.3: Protecting the authorised person from liability

The scheme should provide that:

(1) A person who:

(a) purports to act as an authorised person under the scheme, and

28. National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* comment to § 6(d).
29. Facebook, *Consultation DI07*; Information provided by Facebook (30 July 2019).
30. Recommendation 5.2.
31. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 9; National Conference of Commissioners on Uniform State Laws, *Revised Uniform Fiduciary Access to Digital Assets Act (2015)* § 16(f).
32. See, eg, *Community Justice Centres Act 1983* (NSW) s 27(1); *Farm Debt Mediation Act 1994* (NSW) s 18.

(b) does so in good faith, and without knowing that another person is entitled to be the authorised person in accordance with the scheme,

is not liable for so acting.

(2) For the purposes of s 308H of the *Crimes Act 1900* (NSW), access to or modification of restricted data held in a computer is authorised if it is done in accordance with the scheme.

Protecting someone who purports to act as an authorised person

5.39 The scheme should provide limited protection from liability to someone who purports to act as an authorised person under the scheme:

- in good faith, and
- without knowing that someone else qualifies as the authorised person, in accordance with the hierarchy in Recommendation 4.1.[33]

5.40 To avoid doubt, this recommendation is not intended to protect an authorised person or a purported authorised person against claims of negligence, for example. Nor is it intended to exclude liability for any breach of applicable fiduciary duties by the authorised person, which would be imposed by Recommendation 4.3.[34]

Protecting an authorised person from some criminal laws

5.41 As discussed in Chapter 2, it is an offence under NSW and Commonwealth criminal law for a person to cause any unauthorised access to, or modification of, restricted data held in a computer, knowing that the access or modification is unauthorised. This could result in the prosecution of a person who accesses or deals with a deceased or incapacitated user's digital records held in a computer, knowing that they do not have clear authorisation to do so.[35] Submissions have expressed concerns about how an access scheme would interact with these laws.[36]

5.42 For the purposes of the criminal law, access to or modification of restricted data should be "authorised" if done in accordance with the scheme.[37] The recommended scheme permits the authorised person to access and deal with the deceased or incapacitated user's digital records stored on their devices if they also have authority over the user's personal property.[38]

5.43 Regardless of whether the Commonwealth adopts the recommended scheme, the NSW government should seek a similar amendment to Commonwealth law. Ideally, for the purposes of s 478.1 of the *Criminal Code* (Cth), access to or modification of data held in a computer would be authorised if done in accordance with the recommended scheme.

33. Recommendation 5.3(1).
34. Information provided by T Catanzariti (3 September 2019).
35. [2.52].
36. See, eg, Law Society of NSW, *Submission DI08,* 2; NSW Trustee and Guardian, *Submission DI09,* 4.
37. Recommendation 5.3(2).
38. Recommendation 4.3(3), 4.3(5).

Conflicting provisions in service agreements and policies

Terms in service agreements and policies that conflict with the scheme

Recommendation 5.4: Conflicting provisions in service agreements and policies

The scheme should provide that:

(1) Despite any other applicable law or a choice of law provision in a relevant service agreement or custodian policy, a provision in that service agreement or custodian policy that limits the authorised person's access to particular digital records of the deceased or incapacitated user, contrary to the scheme, is unenforceable.

(2) Despite any provision, including a choice of law provision, in a relevant service agreement or custodian policy, the authorised person's access to particular digital records of a deceased or incapacitated user, in accordance with the scheme, does not require the consent of the custodian and is not a violation or breach of any provision of the service agreement or relevant custodian policy.

Terms that prevent access by the authorised person are unenforceable

5.44 We recommend that, despite any other applicable law or choice of law provision, a provision in the relevant service agreement or custodian policy that limits the authorised person's right to access particular digital records of a deceased or incapacitated user, contrary to the scheme, should be rendered unenforceable.[39] This approach is supported by some submissions[40] and is similar to the Canadian model law.[41]

5.45 Our approach is intended to ensure that a term in a service agreement or custodian policy that prohibits third party access to the user's account would not prevent the authorised person's access. This should be the case even if the chosen law for the service agreement is the law of a jurisdiction that does not allow third party access to a user's digital records.

5.46 Some custodians identify in their service agreement the law that they want to apply to any court cases arising from it. For example, YouTube's service agreement provides:

> All claims arising out of or relating to these terms or the Service will be governed by California law, except California's conflict of law rules...[42]

39. Recommendation 5.4(1).
40. See, eg, STEP Australia, *Preliminary Submission PDI06*, 4; Law Society of NSW, *Submission DI08*, 3; NSW Trustee and Guardian, *Submission DI09*, 5.
41. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 6.
42. YouTube, "Terms of Service" (10 December 2018) <www.youtube.com/t/terms> (retrieved 18 December 2019).

5.47 However, under Australian private international law, "choice of law" terms can be superseded if the legislation of the forum (the place hearing the case) overrides either:

- the express choice of law, or
- its effect.[43]

5.48 For example, consumer protections in the *Australian Consumer Law* ("ACL") apply to all contracts that would be governed by the law of any part of Australia "but for a term of the contract that provides otherwise".[44] Therefore, a choice of law term in a contract cannot be applied if it would lead to a result that is inconsistent with the ACL.[45]

5.49 If the recommended scheme is implemented, NSW would be the forum for disputes concerning access to particular digital records of a deceased or incapacitated user (where the user is or was, at the time of their death, domiciled in NSW).[46] The scheme would override a choice of law term, if its effect would be to prevent an authorised person from accessing the user's records.[47]

5.50 If a particular term is rendered unenforceable under Recommendation 5.4(1), this should not affect the enforceability of the remainder of the service agreement.

Custodian's consent to access is not required

5.51 We recommend that, despite any provision in the relevant service agreement or custodian policy, the custodian's consent to the authorised person's access is not necessary.[48]

5.52 This recommendation is intended to prevent custodians from refusing access to the authorised person, in accordance with their service agreement or policy, when the authorised person would otherwise be permitted under the scheme. This approach is similar to the Canadian model law.[49]

Access by the authorised person is not a breach of the service agreement

5.53 We also recommend that, despite any provision in the relevant service agreement or custodian policy, the authorised person's access to the digital records of a deceased or incapacitated user, in accordance with the scheme, is not a violation or breach of that agreement or policy.[50]

5.54 The "relevant custodian policy" could include a policy that did not apply before the user's death or incapacity, but applied subsequently.

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43. R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) [17.12].
44. *Competition and Consumer Act 2010* (Cth) sch 2, "Australian Consumer Law" s 67(a).
45. R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) [17.12].
46. See Recommendation 5.5.
47. Recommendation 5.4(1).
48. Recommendation 5.4(2).
49. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 5(2)(b).
50. Recommendation 5.4(2).

5.55 Some service agreements and custodian policies prohibit third party access to the digital records of a deceased or incapacitated user, or will only permit access if a court order is sought. For example, Microsoft's policy provides that:

> Microsoft must first be formally served with a valid subpoena or court order to consider whether it is able to lawfully release a deceased or incapacitated user's information regarding a personal email account.[51]

5.56 We do not consider this type of policy to be fair or practical. In our view, such policies make third party access exceedingly complex and difficult.

5.57 Our approach should ensure that the authorised person can access the digital records of a deceased or incapacitated user even if such access would be contrary to a term in the relevant service agreement or custodian policy. This approach is similar to the Canadian model law.[52]

5.58 As discussed in Chapter 2, many service agreements provide that sharing access information is a breach of the agreement, and entitles the custodian to terminate the account.[53] This restricts a user's ability to plan for the management of their digital records.[54] Therefore, the recommendation is also intended to enable the authorised person to use the deceased or incapacitated user's password, without violating a service agreement and risking termination of the user's account.

NSW as the proper forum for disputes

Recommendation 5.5: NSW as the proper forum for disputes

The scheme should provide that, despite any forum selection term in the relevant service agreement, the courts of NSW with the relevant jurisdiction are the proper forum for disputes concerning the access to particular digital records of a deceased or incapacitated user, where the user is domiciled in NSW or was domiciled in NSW at the time of their death.

5.59 We recommend that the scheme specify that the courts of NSW, with relevant jurisdiction, are the proper forum for disputes about access to particular digital records of a deceased or incapacitated user, where the user:

- is domiciled in NSW, or
- was domiciled in NSW at the time of their death.[55]

5.60 This should be the case even where the service agreement nominates another court in a forum selection clause.

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51. Microsoft, "Accessing Outlook.com, OneDrive and other Microsoft Services when Someone has Died" (2019) <www.support.office.com/en-us/article/accessing-outlook-com-onedrive-and-other-microsoft-services-when-someone-has-died-ebbd2860-917e-4b39-9913-212362da6b2f?ui=en-US&rs=en-US&ad=US> (retrieved 18 December 2019).
52. Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act* (2016) s 5(2).
53. [2.33]–[2.34].
54. STEP Australia, *Preliminary Submission PDI06* [11].
55. Recommendation 5.5.

5.61 Service agreements often include a clause that refers disputes to a court in a jurisdiction outside NSW. For example, Apple's service agreement provides:

> You and Apple agree to submit to the personal and exclusive jurisdiction of the courts located within the county of Santa Clara, California, to resolve any dispute or claim arising from this Agreement.[56]

5.62 If a person brings an action in a court that is not nominated in the forum selection clause, that court may decline to hear the case.

5.63 Arguably, a forum selection clause in a standard form contract that nominates a foreign court could be an "unfair contract term" under the ACL, and therefore void and unenforceable, as it could make proceedings too costly for the size of the claim.[57] Terms that may be considered unfair include those that limit, or have the effect of limiting, a right to sue.[58]

5.64 It is also possible that a court would not uphold a forum selection clause in a service agreement against a person seeking access to a deceased or incapacitated user's digital records. In one case, a Massachusetts state court refused to uphold a forum selection clause in the Yahoo! service agreement that nominated the courts of California.[59] The court concluded that the administrators of the deceased user's estate could not be bound by the service agreement because they were not parties to it.

5.65 In another case, the Canadian Supreme Court found there was "strong cause" not to enforce Facebook's forum selection term, which nominated the courts of California. Among other things, the court found that there were public policy reasons not to enforce the term, including:

- the inequality of bargaining power between Facebook and its users,[60] and
- the "automatic nature of the commitments made within online contracts", which may prevent users' from accessing remedies.[61]

5.66 Where there is a dispute about access to particular digital records of a NSW user, our approach is intended to:

- resolve doubt about the enforceability of forum selection terms in service agreements, and
- ensure an authorised person would not have to bring costly and inconvenient legal proceedings in a foreign court.

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56. "Apple Media Services Terms and Conditions" (13 May 2019) <www.apple.com/au/legal/internet-services/itunes/au/terms.html> (retrieved 18 December 2019).
57. *Competition and Consumer Act 2010* (Cth) sch 2, "Australian Consumer Law" s 23(1); Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 437; K Manwaring, "Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the US and the UK (2011) 5(1) *Studies in Ethics, Law and Technology* 1, 13.
58. *Competition and Consumer Act 2010* (Cth) sch 2, "Australian Consumer Law" s 25(k).
59. *Ajemian v Yahoo! Inc,* 83 Mass App Ct 565, 572–573, 577 (Mass, 2013).
60. *Douez v Facebook Inc* [2017] 1 SCR 751, 754 (Karakatsanis, Wagner and Gascon JJ).
61. *Douez v Facebook Inc* [2017] 1 SCR 751, 755–756 (Abella J).

6. Changes to existing laws and other issues related to the scheme

In brief

We recommend changes to succession and estate laws, and assisted decision-making laws, to clarify that they apply to a person's digital property. We also recommend that NSW privacy laws are amended to allow for the operation of the statutory scheme. We list some notable issues that are not covered by to the scheme. We discuss the importance of community and professional education about the scheme and digital records generally. Finally, we explain why the scheme should be adopted by other Australian jurisdictions.

6.1 In this chapter, we recommend some changes to existing laws that will enable the recommended scheme to operate effectively.

6.2 Succession, estates and assisted decision-making laws contain a narrow conception of property. We recommend amendments to these to clarify that "property" includes property in digital form. We also recommend that NSW privacy laws about accessing and managing information are amended to allow for the operation of the statutory scheme.

6.3 The recommended scheme does not specifically address digital records without custodians, and the unfair practices and contract terms of some custodians. We explain why.

6.4 We discuss the need for community and professional education in order for the scheme to be effective.

6.5 Finally, we explain why other jurisdictions within Australia should adopt the scheme.

Changes to existing laws

Recommendation 6.1: Clarify that NSW succession and estate laws, and assisted decision-making laws, extend to property in digital form

(1) The definition of "property" in s 3 of the *Succession Act 2006* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

(2) The definition of "personal estate" in s 3 of the *Probate and Administration Act 1898* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

(3) The definition of "property" in s 3(1) of the *Powers of Attorney Act 2003* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

(4) The definition of "estate" in s 3(1) of the *Guardianship Act 1987* (NSW) should be amended to include "property in digital or other electronic machine-readable form".

Changes to succession and estate laws

6.6 We recommend amending the definition of "property" in s 3 of the *Succession Act*, and the definition of "personal estate" in s 3 of the *Probate and Administration Act* to include "property in digital or other electronic machine-readable form".[1]

6.7 This will clarify that a person's digital records that constitute "property" form part of their estate, and can be:

- disposed of according to a will, or
- distributed to a person's beneficiaries under the rules of intestacy, if there is no will.

6.8 The *Succession Act* governs the laws of wills and intestacy. Currently, it is unclear whether digital property is "property" under the Act. The Act simply states that property "includes any valuable benefit".[2]

6.9 Because it is unclear whether digital property is "property" under the *Succession Act*:

- it can be difficult for people to know what digital property they can give away by will,[3] and
- a provision in a will relating to the disposition of digital property may be ineffective.[4]

1. Recommendation 6.1(1)–(2).
2. *Succession Act 2006* (NSW) s 3 definition of "property".
3. England and Wales Law Commission, *Making a will,* Consultation Paper 231 (2017) [14.14].
4. L Edwards and E Harbinja, "'What Happens to My Facebook Profile When I Die?': Legal Issues Around Transmission of Digital Assets on Death" in C Maciel and V C Periera (ed) *Digital Legacy and Interaction: Post-Mortem Issues* (Springer, 2013) 126. See also L McKinnon, "Planning for the Succession of Digital Assets" (2011) 27 *Computer Law and Security Review* 362, 363.

6.10 The *Succession Act* also governs the rules of intestacy, which apply when a person dies without having made a will or without having made a will that effectively disposes of their whole estate.[5] An "intestate estate" includes the "property left by an intestate".[6] Currently, is unclear whether this includes property in digital form.

6.11 Under the *Probate and Administration Act*, the Supreme Court may grant probate to an executor or letters of administration to an administrator. Upon the grant:

- the deceased person's "real and personal estate" vests in the executor or administrator,[7] and
- the executor or administrator becomes entitled to distribute the estate to those entitled to it under the will or under a scheme of distribution in an intestacy.

6.12 In the *Probate and Administration Act,* "personal estate" extends to:

> leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever, which … by law devolved upon the executor or administrator.[8]

6.13 While it is clear that "personal estate" means the deceased person's personal property, it is not clear whether this includes their property in digital form.

6.14 As already discussed, not all digital records satisfy the legal definition of property.[9] Whether or not a digital record satisfies the legal definition of property often depends on the terms of the applicable service agreement. This contractual arrangement may have created an asset that is transferable, or merely a license that expires on the person's death.[10]

6.15 Recommendation 6.1 is not intended to interfere with the terms of valid service agreements that avoid creating proprietary rights. It is simply meant to clarify that digital records which meet the legal definition of property form part of the deceased's estate, and can be validly transferred to beneficiaries.

Changes to assisted decision-making laws

6.16 We also recommend amending the definition of "property" in the *Powers of Attorney Act,* and the definition of "estate" in the *Guardianship Act,* to clarify that they include "property in digital or other electronic machine-readable form".[11] These two statutes establish assisted decision-making schemes that allow for the appointment of a person to make decisions for someone who is unable to do so themselves.

5. See *Succession Act 2006* (NSW) ch 4.
6. *Succession Act 2006* (NSW) s 101.
7. *Probate and Administration Act 1898* (NSW) s 44.
8. *Probate and Administration Act 1898* (NSW) s 3 definition of "personal estate".
9. [3.22]–[3.23].
10. H Conway and S Grattan, "The 'New' New Property: Dealing with Digital Assets on Death" in H Conway and R Hickey (ed), *Modern Studies in Property Law* (Hart, 2017) 102.
11. Recommendation 6.1(3)–(4).

6.17 The *Guardianship Act* defines a person's "estate" as "the property and affairs of the person".[12] In the *Powers of Attorney Act,* "property" includes:

(a) real and personal property, and

(b) any estate or interest in any real or personal property, and

(c) any debt, thing in action or other right or interest.[13]

6.18 It is not clear whether these definitions include an incapacitated person's property that exists in digital or other electronic machine-readable form.

6.19 Recommendation 6.1 is intended to clarify that an incapacitated person's digital records, which legally constitute property, are:

- part of their "estate" (for the purposes of the *Guardianship Act*), or
- their "property" (for the purposes of the *Powers of Attorney Act*), and
- can be managed by their attorney or financial manager.

Changes to NSW privacy laws

Recommendation 6.2: Amendments to NSW privacy laws to allow for the operation of the scheme

Amendments should be made to NSW privacy laws about accessing and managing personal information, to allow for the operation of the scheme.

6.20 We recommend that amendments are made to NSW privacy laws about accessing and managing personal information, to allow the recommended scheme to operate as intended.

6.21 For example, the *Privacy and Personal Information Protection Act 1998* (NSW) and *Health Records and Information Privacy Act 2002* (NSW) apply to the personal information of a person who has been dead for less than 30 years.[14] This means that NSW public sector agencies must comply with the information privacy protection principles and health privacy principles, including those that apply to access requests, when handling the information of a deceased person.[15] There are, however, exemptions in both Acts.[16] These exemptions may need to be extended to include where a person is authorised to access this information under the recommended scheme.

12. *Guardianship Act 1987* (NSW) s 3(1) definition of "estate".
13. *Powers of Attorney Act 2003* (NSW) s 3(1) definition of "property".
14. *Privacy and Personal Information Protection Act 1998* (NSW) s 4(3)(a); *Health Records and Information Privacy Act 2002* (NSW) s 5(3)(a).
15. Information provided by the Information and Privacy Commission NSW (25 November 2019). See also *Privacy and Personal Information Protection Act 1998* (NSW) div 1; *Health Records and Information Privacy Act 2002* (NSW) sch 1.
16. See, eg, *Privacy and Personal Information Protection Act 1998* (NSW) div 3; *Health Records and Information Privacy Act 2002* (NSW) s 14, s 17, s 17A.

What is not covered by the scheme

6.22 While the purpose of the recommended scheme is to facilitate access to the digital records of deceased or incapacitated users in appropriate circumstances, it will not resolve all potential issues associated with access to digital records. We discuss some of these below.

Digital records without custodians

6.23 Under the recommended scheme, an "authorised person" would be able to access relevant records stored or maintained by a custodian by contacting the custodian and providing proof of their authority.[17] However, for some digital records, there is no one to contact for access.

6.24 For example, cryptocurrencies such as Bitcoin operate without the backing or management of a central authority. Bitcoin is stored in a "wallet", and only the person who has the private key can access the wallet. If the user did not share their key with anyone before they died or became incapacitated, no one else can grant access to the user's wallet.[18]

6.25 For this reason, the scheme has no practical application in relation to digital records without custodians. It is especially important for users to make adequate arrangements for managing such records. Otherwise, their cryptocurrency may become "lost in the network".[19]

Issues associated with service agreements and custodian policies

6.26 During the consultation phase of this review, we canvassed a number of issues associated with service agreements and custodian policies that potentially disadvantage a person seeking access to digital records. These include unfair trading practices engaged in by custodians, and unfair or unjust contract terms in service agreements.

Unfair trading practices

6.27 The recommended scheme does not seek to address all unfair trading practices that custodians may engage in.

6.28 The ACCC's *Digital Platforms Inquiry* has identified a number of issues with the trading practices of digital platforms:

- Many digital platforms use clickwrap agreements,[20] which contributes to users' tendency not to read terms of service agreements or privacy policies, and creates a significant "information asymmetry" between users and digital platforms.

17. Recommendation 5.1(1).
18. I Bond, "Advising Clients in a Digital World: Dealing with Digital Assets in Wills and Probate Matters" (2016) 20–21.
19. I Bond, "Advising Clients in a Digital World: Dealing with Digital Assets in Wills and Probate Matters" (2016) 20.
20. [2.48]–[2.49].

- Users are generally presented with a standard set of "take-it-or-leave-it" terms, which means they have no opportunity to negotiate on any specific term.
- Digital platforms hold significant bargaining power, as they can unilaterally vary the terms of service agreements and privacy policies.
- Digital platforms often "bundle" users' consents (that is, seek one consent from a user for numerous data practices), which means users may be inadequately informed about all the practices they are consenting to.
- Many privacy policies are long, complex, vague and difficult to navigate, which can impede users' ability to understand them.[21]

6.29 We recognise that these factors can prevent users from making informed choices and giving meaningful consent to custodians' practices. While these are important issues, the recommended scheme seeks to facilitate access to digital records in very specific circumstances. It does not deal with these broader concerns.

Unfair contract terms

6.30 Certain terms in custodian service agreements could be considered:

- unfair as part of a standard form consumer contract under the ACL,[22] or
- unjust under the *Contracts Review Act 1980* (NSW).[23]

6.31 The scheme is not intended to deal with unfair or unjust terms in service agreements. It only affects the terms of a custodian's service agreement or policy to the extent that they interfere with the operation of the scheme.

What is needed to support the scheme

Education

Recommendation 6.3: Education about digital records and their management

Institutions and organisations already educating the community and legal practitioners about succession law, administration of estates, and assisted decision-making laws, should incorporate into their education programs information about digital records, and how they can be managed following a person's death or incapacity.

6.32 We have heard that any changes made to legislation as a result of this review should be accompanied by an education campaign.[24] We agree, and recommend

21. See Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 394–407.
22. *Competition and Consumer Act 2010* (Cth) sch 2, "Australian Consumer Law" s 23(1), s 24, s 27. See also Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 497.
23. *Contracts Review Act 1980* (NSW) s 4 definition of "unjust", s 7, s 9.
24. L Bennett Moses, P Vines, J Gray, S Logan and K Manwaring, *Submission DI04,* 9.

that institutions and organisations already educating the community and legal practitioners about wills and succession law, and trustee and guardianship law, should (if they have not done so already) incorporate information about how to manage digital records following a person's death or incapacity. This includes universities as part of their law courses, and organisations such as the College of Law, the Law Society of NSW, and the NSW Trustee and Guardian.

6.33 Community education is needed to:

- ensure that users understand their rights in relation to their digital records,[25] and
- encourage users to give instructions about the management of their digital records in their will or in another instrument.[26]

6.34 Legal practitioners should also be educated so that they:

- are aware of the issues concerning the management of a deceased or incapacitated person's digital records and/or digital assets, and
- can appropriately advise clients on these matters.

6.35 Below, we discuss the specific topics that education campaigns should cover.

Educating users about their rights

6.36 Many digital users have not thought about what will happen to their digital records upon their death or incapacity. In a national survey by Charles Sturt University and the University of Adelaide, 82% of participants reported that they had digital assets of some kind. Of those that had digital assets, 71% did not know what would happen to those assets if they died or were incapacitated.[27]

6.37 In our survey of members of the public, conducted as a part of this review, we asked participants whether they had ever spoken to friends or family about what they would like to happen to their online accounts or profiles, should anything happen to them. Of the 349 people who answered this question, only 26 people (7.45%) said they had done this.[28]

6.38 Users may not know that service agreements might prevent others from accessing their digital records if they die or are incapacitated.[29] Community education is also needed so that "people understand what they own or do not own".[30] Research indicates that the majority of users are unaware that the rights they retain over their data are often limited by service agreements. A survey commissioned by the Australian Competition and Consumer Commission found that almost one in three digital platform users surveyed (29%) believed that a user owned the data they shared online.[31]

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25. Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 13.
26. A Malik, *Submission DI02,* 1.
27. A Steen and others, *Estate Planning in Australia* (Charles Sturt University, 2017) 18–19.
28. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.42] Table 3.17.
29. Australian Communications Consumer Action Network, *Preliminary Submission PDI10,* 13.
30. L Bennett Moses, P Vines, J Gray, S Logan, K Manwaring, *Submission DI04,* 9.
31. R Varley and N Bagga, *Consumer Views and Behaviours on Digital Platforms,* Final Report (Roy Morgan, 2018) 31.

6.39 In a Western Australian study of older users, participants expected that they would be able to bequeath their e-books to a beneficiary. None of them understood the transfer restrictions on digital e-books, believing that they could be transferred in the same way that printed books can.[32]

6.40 Participants in this study also believed that they could successfully bequeath their digital photographs to another person by giving that person access to their Facebook account. However, Facebook does not allow accounts to be transferred to another person.[33]

Educating users about how to make plans for their digital records

6.41 Community education is particularly necessary to encourage people to make plans for their digital records after their death or incapacity. The results of our survey among members of the public indicate that few people have done so.[34]

6.42 These findings are similar to the findings of other studies. For example, the NSW Trustee and Guardian's online survey found that 89% Australians have social media accounts, but 83% have not discussed with their friends or relatives what they want to happen to their accounts when they die.[35] Only 3% of participants who have a will had specifically decided what to do with their social media accounts when they die.[36]

6.43 In a Western Australian study of older users, 87% of participants had a will but 84% had not considering including their "digital assets" in their will.[37]

6.44 The recommended scheme prioritises giving effect to the wishes of the deceased or incapacitated user where possible. It will work best if users are encouraged to articulate those wishes.

Educating legal practitioners how to best advise clients

6.45 As a part of our review, we conducted a survey among NSW solicitors who provide advice on estate planning and administration, and guardianship and power of attorney arrangements. We wanted to find out whether and how solicitors deal with issues relating to digital records.

6.46 The responses we received indicate that, while there is some awareness among practitioners about issues relating to digital records, further education would be

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32. D N Dissanayake and D M Cook, "Social Computing and Older Adults Challenges with Data Loss and Digital Legacies" (Paper presented at the 2019 International Conference on Cyberworlds, 2 October 2019) 172.
33. D N Dissanayake, "The Challenges of Digital Legacy Management on the Value of Digital Objects to Older Australians" (Master of Science (Computer Science) Thesis, Edith Cowan University, 2019) 114.
34. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [3.30] Table 3.10, [3.32] Table 3.11, [3.39]–[3.40] Table 3.16.
35. NSW Trustee and Guardian, "Digital Assets Webinar" (27 October 2015) <www.tag.nsw.gov.au/digital-assets.html> 07:41 (retrieved 18 December 2019).
36. NSW Trustee and Guardian, *Digital Assets Webinar* (27 October 2015) <www.tag.nsw.gov.au/digital-assets.html> 09:28 (retrieved 18 December 2019).
37. D N Dissanayake, "The Challenges of Digital Legacy Management on the Value of Digital Objects to Older Australians" (Master of Science (Computer Science) Thesis, Edith Cowan University, 2019) 108.

beneficial; especially to educate practitioners about the recommended scheme if introduced.

6.47 Seventy-four solicitors responded to the survey. We asked them whether they ever ask clients what they wish to do with their digital records when taking instructions for a will. Of the 63 respondents who answered this question, around half (55.56%) said that they do.[38]

6.48 We asked these solicitors what specific actions they take in relation to the client's digital records. Of the 34 respondents who answered this question:

- 26 said that they ask clients what they want to happen to their digital records
- 19 said they advise clients to list their usernames and passwords in a document or password storage app
- 18 said they ask clients if they want to appoint a specific person to manage or control their digital records
- 15 said they seek instructions on how to find and access the digital records when they die
- 10 said they advise clients to use an online tool to nominate someone to manage their accounts
- 5 said they ask clients if they want their computers and other devices cleared of content before they pass to beneficiaries, and
- 3 said they advise clients to download content from their online accounts so their executor or another person can find it.[39]

6.49 We also asked solicitors if they ever include a clause in a will that specifically authorises someone to manage or deal with a client's digital records. Of the 62 who answered this question, 29 solicitors (46.77%) said that they do.[40]

6.50 In addition, we asked solicitors if they ever have to deal with issues relating to digital records when advising personal representatives about administering a deceased estate. Of the 51 solicitors who answered this question, 21 (41.18%) said that they do.[41]

6.51 We asked about the advice they give to personal representatives about digital records. Of the 20 solicitors who answered this question:

- 13 said they ask whether the deceased person prepared a list of their digital records
- seven said they advise, if there is no list, that the personal representative makes one

38. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [4.6] Table 4.2.
39. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [4.8]–[4.9] Table 4.3.
40. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [4.10] Table 4.4.
41. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [4.28] Table 4.10.

- 13 said they advise on options for dealing with the digital records (for example, deleting, selling or transferring them)
- 13 said they advise the personal representative to find out if there are any liabilities relating to the online accounts, and pay them together with other liabilities, and
- nine said they advise the personal representative to consider whether they need to download account content for distribution to beneficiaries, or for other administrative purposes, before closing online accounts, and
- eight said they advise the personal representative to take steps to protect the privacy and security of some records (such as changing the passwords).[42]

6.52 By contrast, few solicitors reported addressing issues about digital records and assets when drafting enduring powers of attorney or enduring guardianship arrangements:

- 15 said that they have included a clause in an enduring power of attorney that specifically authorises the agent to manage or deal with the principal's digital records or assets, and
- six said that they have included such a clause in an enduring guardianship arrangement.[43]

Custodian procedures for access requests

Recommendation 6.4: Custodian procedures for access requests

Custodians should have transparent processes for handling access requests.

6.53 Under Recommendation 5.1(1), the authorised person entitled to access particular digital records of a deceased or incapacitated user will be able to access those records stored or maintained by a custodian by contacting the custodian and providing proof of their authority. It is therefore essential that custodians have clear, definitive processes for handling requests.[44]

6.54 Users should also be able to find out easily what the processes are. During the ACCC's *Digital Platforms Inquiry,* users and businesses raised the difficulty of contacting Google or Facebook in Australia, so they could speak with a representative and have issues resolved.[45] Custodians' contact information (for example, an email address to which people can send access requests) should be prominently located on their website.

42. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [4.30] Table 4.11.
43. K Birtwistle, *Access to Digital Records upon Death or Incapacity: Survey Results*, Research Report 15 (NSW Law Reform Commission, 2019) [4.35] Table 4.13, [4.42] Table 4.17.
44. Confidential, *Preliminary Submission PDI07.*
45. Australian Competition and Consumer Commission, *Digital Platforms Inquiry,* Final Report (2019) 508.

The case for a nationally consistent scheme

6.55 We are recommending a statutory scheme be enacted in NSW to facilitate access to a deceased or incapacitated user's digital records in limited circumstances. It would apply to the digital records of NSW users and to the custodians who store or maintain those digital records.

6.56 However, we are strongly of the view that a nationally consistent scheme should be adopted. Submissions support this approach.[46] Below we explain why we hold this view.

A nationally consistent scheme would resolve inconsistencies with other laws

6.57 Given the extraterritorial application of the recommended scheme,[47] there is a risk of inconsistency with Commonwealth laws, and other state and territory laws that intersect with this area (such as privacy, telecommunications, estates and assisted decision-making laws).

6.58 For example, we envisage that the scheme's definition of "digital record" would include records stored or maintained by Commonwealth government services, such as myGov, My Aged Care and My Health Record. These services are governed by Commonwealth statutes, which:

- authorise the collection, use and disclosure of information from individuals for specific purposes, and
- prohibit the use or disclosure of such information for other purposes.[48]

6.59 Certain aspects of the recommended scheme could be directly inconsistent with these statutes and rendered inoperative (that is, suspended) under s 109 of the Australian Constitution. This section allows for Commonwealth laws to prevail over inconsistent state laws, to the extent of the inconsistency.

6.60 There could also be conflicts between the scheme and the law of another state or territory. For example, the *Guardianship and Administration Act 2000* (Qld) provides that guardians and administrators have a right to access "all the information the adult would have been entitled to", provided this is "necessary to make an informed exercise of the power" for the particular matter. A person with custody or control of the information must give it to the guardian or administrator in the absence of a reasonable excuse.[49] This is different to the recommended scheme, where:

- an "authorised person" would have the right to access and deal with particular digital records of an incapacitated user, and

46. STEP Australia, *Preliminary Submission DI06* [33], [50]; Law Society of Tasmania, *Preliminary Submission PDI16,* 1; Law Society of South Australia, *Preliminary Submission PDI17,* 1.
47. See Recommendation 3.1.
48. See, eg, *Health Insurance Act 1973* (Cth); *My Health Records Act 2012* (Cth); *Social Security Administration Act 1999* (Cth).
49. *Guardianship and Administration Act 2000* (Qld) s 44(1)–(2).

- a "custodian" of those records would be required to provide access upon receipt of a valid request and proof of authority, unless the custodian can demonstrate that such access is not technically feasible.

6.61 The Australian Constitution does not include an express rule for resolving inconsistencies between the laws of different states. In the event of conflict, a court may apply the law with the strongest connection to the particular subject matter or circumstances.[50]

6.62 One way to resolve these issues, is for the NSW government to request that amendments be made to existing laws in other jurisdictions, particularly at Commonwealth level, which may conflict with the scheme.

6.63 However, our preference would be for other Australian jurisdictions to adopt the scheme, for the reasons set out below.

A nationally consistent scheme would have broader application

6.64 If a nationally consistent scheme was adopted by each of the states and territories, and by the Commonwealth, then it would apply to other governments. This is preferable, since the records held by the government entities of one jurisdiction may contain information necessary for administering the estate or managing the affairs of a user in another jurisdiction.

6.65 For example, a NSW user's myGov account, which is maintained by the Commonwealth Department of Human Services, could contain taxation information of that user. Their executor or administrator may need access to that information to deal with outstanding tax returns.[51]

6.66 If enacted in NSW, the scheme would apply to the NSW government, in that:

- the definition of "digital record" would include records accessible online through NSW government services, and
- the definition of "custodian" would include NSW government entities that store or maintain digital records of NSW users.[52]

6.67 However, it may not be applicable to other governments. A principle of constitutional law, known as the "*Melbourne Corporation* principle", prevents Commonwealth and state governments from restricting each other's powers or interfering with each other's' operations.[53] This means:

50. *Port MacDonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340, 374; *Brownlie v State Pollution Control Commission* (1992) 27 NSWLR 78, 87; *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1 [143].
51. See, eg, N Khadem, "Australia Doesn't Have a Death Tax, but Someone Has to Pay your Bills After you Die" (9 December 2019) *ABC News* <www.abc.net.au/news/2019-12-09/new-review-into-deceased-estates-death-taxes/11769118> (retrieved 10 December 2019).
52. Information provided by Information and Privacy Commission NSW (25 November 2019).
53. *Melbourne Corporation v The Commonwealth* (1957) 74 CLR 31, 74 (Starke J) quoting *Graves v New York* (1939) 306 US 466, 488.

- a Commonwealth law cannot impose a "special disability or burden" on the powers of functions of states, which effects their ability to function as governments,[54] and
- state laws cannot do the same to the Commonwealth.[55]

6.68 If enacted in NSW, a court could find that the scheme infringes the *Melbourne Corporation* principle. It could restrict the Commonwealth's ability to manage information it has collected from its subjects, as it would:

- require the Commonwealth government (as a "custodian") to allow access to a deceased or incapacitated person's digital records in certain circumstances, and
- render unenforceable any term in a custodian service agreement or policy that prevents access contrary to the scheme.

6.69 We think that this issue would best be resolved by other Australian jurisdictions adopting the scheme.

54. *Fortescue Metals Group Ltd v The Commonwealth* [2013] HCA 34, 250 CLR 548 [130] (Hayne, Bell and Keane JJ).
55. *Spence v Queensland* [2019] HCA 15 [103], [106]–[108].

Appendix A
Preliminary submissions

PDI01 Alan Corven (29 March 2018)
PDI02 Anay Yardi (2 April 2018)
PDI03 Marcellus Dignam (9 April 2018)
PDI04 Dr Patrick Stokes (25 May 2018)
PDI05 University of Newcastle Legal Centre (30 May 2018)
PDI06 STEP Australia (30 May 2018)
PDI07 Confidential (31 May 2018)
PDI08 NSW Council for Civil Liberties (1 June 2018)
PDI09 NSW Privacy Commissioner (1 June 2018)
PDI10 Australian Communications Consumer Action Network (1 June 2018)
PDI11 Associate Professor Lyria Bennett Moses, Professor Prue Vines, Dr Janice Gray and Sarah Logan (1 June 2018)
PDI12 Dr Edina Harbinja (1 June 2018)
PDI13 Carers NSW (14 June 2018)
PDI14 Law Society of NSW (19 June 2018)
PDI15 Dr Alexandra George (24 June 2018)
PDI16 Law Society of Tasmania (10 September 2018)
PDI17 Law Society of South Australia (2 October 2018)

Appendix B
Submissions

DI01 Dr Patrick Stokes (3 October 2018)

DI02 Dr Alex Malik (9 October 2018)

DI03 Combined Pensioners and Superannuants Association of NSW (12 October 2018)

DI04 Associate Professor Lyria Bennett Moses, Professor Prue Vines, Dr Janice Gray, Dr Sarah Logan and Kayleen Manwaring (12 October 2018)

DI05 Portable (12 October 2018)

DI06 Dr Edina Harbinja and Professor Lilian Edwards (15 October 2019)

DI07 Carers NSW (19 October 2018)

DI08 Law Society of NSW (23 October 2018)

DI09 NSW Trustee and Guardian (31 October 2018)

DI10 DIGI (27 November 2018)

DI11 Sex Workers Outreach Project (18 March 2019)

DI12 Robert Dean (23 October 2019)

Appendix C
Consultations

Group 1 (DI01)

19 November 2018

Professor Prue Vines, University of NSW
Professor Filippo Viglione, University of Padua

Group 2 (DI02)

26 November 2019

Mr Michael Bacina, Partner, Piper Alderman
Ms Lise Barry, Macquarie University
Mr Angus Cameron, Senior Lawyer and Privacy Officer, Australian Broadcasting Corporation
Ms Therese Catanzariti, Barrister, 13 Wentworth Chambers
Ms Natalie Darcy, Law Society of NSW
Ms Michelle Falstein, NSW Council of Civil Liberties
Ms Mia Garlick, Director of Policy Australia and New Zealand, Facebook
Ms Samantha Gavel, Privacy Commissioner, Information and Privacy Commission NSW
Dr Janice Gray, University of NSW
Mr Rod Genders, Managing Director, Genders and Partners (by phone)
Ms Rachel Jinku, Senior Project Officer, Information and Privacy Commission NSW
Mr Peter Leonard, Principal, Data Synergies
Dr Sarah Logan, Australian National University
Mr Robert Neely, Partner, Lander and Rogers Lawyers
Dr Patrick Stokes, Deakin University
Ms Katherine Sainty, Director, Sainty Law
Ms Elizabeth Tydd, Information Commissioner, Information and Privacy Commission NSW
Professor Kimberlee Weatherall, University of Sydney
Mr James Whiley, Partner, Hall and Wilcox

Ms Kara Hinesley (DI03)

6 December 2018

Ms Kara Hinesley, Head of Public Policy and Government Affairs, Australia and New Zealand, Twitter

Ms Kathleen Cunningham (DI04)

21 March 2019

Ms Kathleen Cunningham, Executive Director, British Columbia Law Institute

Group 3 (DI05)

22 May 2019

Dr Patrick Stokes, Deakin University
Professor Kimberlee Weatherall, University of Sydney

Group 4 (DI06)

23 May 2019

Ms Sunita Bose, Managing Director, DIGI
Ms Therese Catanzariti, Barrister, 13 Wentworth Chambers
Ms Natalie Darcy, Law Society of NSW
Mr Rod Genders, Managing Director, Genders and Partners (by phone)

Facebook (DI07)

4 July 2019

Ms Mia Garlick, Director of Policy, Australia and New Zealand, Facebook
Mr Josh Machin, Public Policy Manager, Australia and New Zealand, Facebook