

16 September 2022

NSW Department of Communities and Justice

By email: policy@justice.nsw.gov.au

Submission on a nationally consistent scheme for access to digital records upon death or loss of decision-making capacity

About us

The **UNSW Allens Hub for Technology, Law and Innovation** ('UNSW Allens Hub') is an independent community of scholars based at UNSW Sydney. As a partnership between Allens and UNSW Law and Justice, the Hub aims to add depth to research on the diverse interactions among technology, law, and society. The partnership enriches academic and policy debates and drives considered reform of law and practice through engagement with the legal profession, the judiciary, government, industry, civil society and the broader community. More information about the UNSW Allens Hub can be found at <http://www.allenshub.unsw.edu.au/>.

The **UNSW Private Law Policy and Research Group** undertake high-quality research at the forefront of commercial practice, founded on the continued pursuit of social justice.

About this Submission

We are grateful for the opportunity to make a submission on the Consultation Paper. Our submission reflects our views as researchers; they are not an institutional position. This submission can be made public on the Department's website. Our responses are attached, following the proposed table format but for convenience deleting rows on which we have no specific comment.

Yours sincerely,

Lyria Bennett Moses (UNSW Allens Hub)

Prue Vines (UNSW Private Law Policy & Research Group)

Consultation question	Relevant NSWLRC recommendation	Comment
A statutory scheme for access		
<p>1. Should Australian jurisdictions introduce a statutory scheme that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances? In particular:</p> <p>(a) What, if any, legislative and non-legislative options currently facilitate access to such records?</p> <p>(b) What other legislative or non-legislative options might be available as an alternative to the scheme recommended by the NSWLRC?</p> <p>(c) Should a scheme apply equally to records of deceased people and people who have lost decision-making capacity?</p> <p>(d) How might a nationally consistent scheme be achieved (for example, a Commonwealth scheme; enactment of uniform state and territory laws or adopting agreed national principles)?</p>	<p>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.</p>	<p>We support the NSWLRC's recommendation. We note, however, that there are important scoping issues adjacent to this project that relate to relieving administrative burdens on legal personal representatives more broadly, beyond access to digital records. For example, it could be useful to have an easy, recognisable, secure mechanism to obtain the ability to transact on a bank account.</p> <p>On (c), there are some issues that are in common and some issues that are distinct. While the scheme could include both, it may need to have different provisions for some matters. One difference relates to the privacy rights of a living person, which requires additional care in determining what access might be appropriate.</p> <p>On (d), independent of the method by which uniformity is achieved, uniformity is important. The scheme will require relevant digital platforms to make specific provision to comply with Australian law in this regard; from a practical perspective, that is more likely if we are nationally uniform.</p>
Scope and key terms		
<p>2. Should a nationally consistent scheme apply to a custodian, regardless of where the custodian is located, if the user is domiciled in an Australian jurisdiction or was domiciled in an Australian jurisdiction at the time of their death?</p> <p>3. How would a scheme regulate access to joint user accounts where one person is</p>		<p>Given most relevant custodians are outside Australia, it would be necessary to include them regardless of their location in contexts where Australian users are affected. Practically, however, custodians without any local base in Australia may not comply.</p> <p>In the context of joint accounts, it is unclear whether the question is referring to a situation</p>

Consultation question	Relevant NSWLRC recommendation	Comment
<p>domiciled in Australia and the other overseas?</p>		<p>where both account-holders are dead or incapacitated. Assuming that is the question, it will not only be NSW law involved, so difficult to determine how the scheme (alone) could resolve the conflict. Ideally, there would be coordination among jurisdictions.</p>
<p>4. Please comment on the key terms of the statutory scheme recommended by the NSWLRC. In particular, stakeholder comment is invited on:</p> <ul style="list-style-type: none"> • The proposed scope of the scheme, including the scope of the definitions of ‘digital record’ and ‘custodian’ (noting that this definition would include records held by both private entities and government entities). • Whether the definition of ‘digital record’ is sufficiently technology neutral to enable new or emerging technologies to be covered by the scheme. • Whether any records should be excluded from the scope of the scheme. 	<p>3.2: Key terms of the statutory scheme The scheme should include the following definitions:</p> <p>(1) “Authorised person” means the person with the right, under this scheme, to access particular digital records of the user.</p> <p>(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.</p> <p>(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</p>	<p>We broadly support these definitions, subject to:</p> <ol style="list-style-type: none"> 1) the question of whether it might be useful to link these to existing definitions in, for example, guardianship law. 2) the question as to whether “online tool” is constructed too narrowly to block a system/database that is not always directly connected to the internet (so is not always ‘online’) for cyber security reasons. Some clearer wording may help clarify what precisely needs to be ‘online’ to fall within the definition (for example, a webpage for accessing the service).

	<p>custodian, and applies whether or not the user is alive or has capacity.</p> <p>(4) “Digital record” means a record that:</p> <p>(a) exists in digital or other electronic machine-readable form, and</p> <p>(i) was created by or on behalf of the user, in whole or in part, or</p> <p>(ii) relates to the user, and the user had access to it while the user was alive, or</p> <p>(iii) relates to the user, and their representative had access to it during any period of incapacity, but</p> <p>(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.</p> <p>(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.</p> <p>(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</p>	
--	---	--

Consultation question	Relevant NSWLRC recommendation	Comment
	<p>the user stored or maintained by that custodian.</p> <p>(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.</p> <p>(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.</p>	
The authorised person and the extent of their access		
<p>5. Would the statutory hierarchy of authorised persons entitled to access digital records of both a ‘deceased user’ and ‘incapacitated user’, as recommended by the NSWLRC, be appropriate for a nationally consistent scheme? What, if any, changes are necessary? For example, should the hierarchy allow for more than one authorised person? How should conflict between different authorised persons be addressed under the scheme?</p>	<p>4.1: Authorised person entitled to access a user’s digital records</p> <p>The scheme should provide that:</p> <p>(1) The authorised person entitled to access particular digital records of a deceased user is:</p> <p>(a) the person specifically appointed by the user’s will to manage those digital records:</p> <p>(i) in the case of a formal will, whether or not there has been a grant of</p>	<p>Developing a specific order is complicated by the variety in the nature of ‘digital records’. If one considers digital records that may be required to administer an estate, then the executor or administrator is the appropriate person. Having an additional person who can access digital records, and possibly deny an executor access to the information they need, could lead to unnecessary disputes or even litigation. It complicates the administration of an estate. On the other hand, if one considers digital records of sentimental value (such as personal photo libraries), it makes sense to focus on the intentions of the deceased/incapacitated individual with regards to those specific records. That seems to underlie the order in the NSWLRC recommendation.</p> <p>On balance it may be better to go to the executor/administrator first, but on the basis that</p>

	<p>representation of the will, or</p> <p>(ii) in the case of an informal will, only if there has been a grant of representation</p> <p>(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</p> <p>(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:</p> <p>(i) in the case of a formal will, whether or not there has been a grant of representation of the will, or</p> <p>(ii) in the case of an informal will, only if there has been a grant of representation</p> <p>(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</p> <p>(e) if no provision or order has been made, a person to whom the deceased user has communicated</p>	<p>they can transfer access to the more specifically nominated individual as part of the administration. If online tools are to be used, one possibility is for the scheme to require the person authorised by the tool to facilitate access where required to execute legal functions (eg administering an estate).</p>
--	---	--

	<p>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.</p> <p>(2) The authorised person entitled to access particular digital records of an incapacitated user is:</p> <p>(a) any person appointed under:</p> <ul style="list-style-type: none">(i) an enduring guardianship arrangement that has effect, or(ii) an enduring power of attorney that has effect, <p>but only in relation to those records that are:</p> <ul style="list-style-type: none">(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	
--	--	--

	<p>(b) if there is no person appointed under an enduring guardianship or enduring power of attorney, any person appointed under:</p> <ul style="list-style-type: none"> (i) a guardianship order, or (ii) a financial management order, <p>but only in relation to those records that are:</p> <ul style="list-style-type: none"> (iii) specified in the guardianship order or financial management order, or (iv) otherwise relevant to the person's role as guardian or financial manager <p>(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</p> <p>(d) if no provision or order has been made, the person with access information for those digital records, either because:</p> <ul style="list-style-type: none"> (i) the incapacitated user has communicated the access information for 	
--	--	--

Consultation question	Relevant NSWLRC recommendation	Comment
	<p>those digital records to the person, or</p> <p>(ii) the person created those digital records on the incapacitated user's behalf</p> <p>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.</p>	
<p>7. Would the extent of the authorised person's access right, as recommended by the NSWLRC, be appropriate for a nationally consistent scheme? What, if any, changes are necessary? For example, are further safeguards required to ensure that access is provided only to those limited records which are strictly necessary? What safeguards are required to protect the rights and interests of the deceased person or adult with impaired capacity?</p> <p>8. To what extent should a nationally consistent scheme prescribe how an authorised person should be able to deal with the digital records of a deceased person or person who has lost decision-making capacity?</p>	<p>4.3: Extent of the authorised person's access right The scheme should provide that:</p> <p>(1) For the purposes of determining the extent of the authorised person's right:</p> <p>(a) "administering the deceased user's estate" includes informal administration of the deceased user's estate</p> <p>(b) "managing the incapacitated user's affairs" includes informal management of the incapacitated user's affairs, and</p> <p>(c) "deal" or "dealing" includes transferring digital records to the person entitled to them, but does not</p>	<p>As noted above, there is a tension between different situations, being the situation where the digital records are necessary for administering an estate or managing a person's affairs and where access to digital records is given for more sentimental reasons. It makes sense to talk about what might be 'strictly necessary' in the first context, but not the second. It might be worth considering these two situations separately, so that, for example, an executor has more limited rights to access for particular purposes than someone nominated specifically to benefit from access to digital records (in a will or digital tool).</p>

Consultation question	Relevant NSWLRC recommendation	Comment
	<p>include editing the content of digital records.</p> <p>(2) The authorised person entitled to access particular digital records of a deceased user may access and deal with those digital records:</p> <p>(a) subject to applicable fiduciary duties, and</p> <p>(b) subject to other applicable laws, and</p> <p>(c) subject to any terms of the following, as applicable:</p> <p style="padding-left: 40px;">(iii) the will (even where the authorised person is not the person named in the will), or</p> <p style="padding-left: 40px;">(iv) the online tool, or</p> <p>(d) if there are no such terms, only for the purpose of administering the deceased user's estate.</p> <p>(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</p>	

	<p>property and digital records of the user stored on it:</p> <ul style="list-style-type: none"> (a) subject to applicable fiduciary duties, and (b) subject to applicable laws, and (c) subject to the terms of the following, as applicable: <ul style="list-style-type: none"> (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. <p>(4) The authorised person entitled to access particular digital records of an incapacitated user may access and deal with those digital records:</p> <ul style="list-style-type: none"> (a) subject to applicable fiduciary duties, and (b) subject to applicable laws, and (c) subject to the terms of the following, as applicable: <ul style="list-style-type: none"> a. the online tool, or b. an enduring guardianship or enduring power of 	
--	---	--

	<p>attorney, which has effect, or</p> <p>c. the guardianship or financial management order, or</p> <p>(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.</p> <p>(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:</p> <p>(a) subject to applicable fiduciary duties, and</p> <p>(b) subject to applicable laws, and</p> <p>(c) subject to the terms of the following, as applicable:</p> <p>(i) the online tool, or</p> <p>(ii) the enduring guardianship or enduring power of attorney, which has effect, or</p>	
--	--	--

Consultation question	Relevant NSWLRC recommendation	Comment
	<p>(iii) the guardianship or financial management order, or</p> <p>(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.</p> <p>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.</p>	
<p>10. Should an offence of disclosing information except in limited circumstances as recommended by the NSWLRC be included in a nationally consistent scheme? What, if any, changes are necessary?</p>	<p>4.5: Improper disclosure of information The scheme should provide that:</p> <p>(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</p>	<p>This provision assumes good drafting of the 'relevant instrument or order'. Will this include digital tools? Perhaps that can be made explicit. Otherwise, standard language should be made available that provides a broad authorisation, particularly in the context of a person being appointed for sentimental reasons.</p>

	<p>another person, obtained in accessing those records, unless the disclosure is:</p> <ul style="list-style-type: none"> (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. <p>(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:</p> <ul style="list-style-type: none"> (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 	
--	--	--

Consultation question	Relevant NSWLRC recommendation	Comment
	<ul style="list-style-type: none"> (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. 	
<p>Access procedures, liability limits and conflicting terms in custodian agreements and policies</p>		

<p>11. Are the procedural requirements for access requests as recommended by the NSWLRC appropriate for a nationally consistent scheme? What, if any, changes are necessary? For example, what consequences, if any, should there be for failure to provide access within the prescribed timeframe?</p>	<p>5.1: Procedural requirements for access requests The scheme should provide that:</p> <p>(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.</p> <p>(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:</p> <ul style="list-style-type: none"> (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 <p>(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:</p>	<p>The requirements in relation to identity should be clearer, particularly if there are consequences for failing to comply. It is important to bear in mind here that identity can be difficult to establish where the only communication is digital. There are mechanisms (such as facial recognition involving tests for movement), but none is flawless. While it will be important that custodians comply with the scheme, it would be undesirable if the pressure to do so overrode concerns around security and identity theft. On a related point, it is not clear whether the custodian is entitled to demand that the copy provided be certified in some way.</p>
---	---	---

	<ul style="list-style-type: none"> (a) the enduring guardianship or enduring power of attorney (b) the guardianship or financial management order (c) proof of the authorised person's identity. <p>(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.</p> <p>(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.</p> <p>(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).</p> <p>(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</p>	
--	--	--

Consultation question	Relevant NSWLRC recommendation	Comment
	the custodian can show that access is not technically feasible.	
12. Should a nationally consistent scheme protect custodians from liability for acts or omissions done in good faith in compliance with the scheme?	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.	In reality, it will be difficult for Australian law to protect custodians from liability they might face under the laws of another jurisdiction, particularly in the context of poor security practices and identity fraud. Even within Australian context, any protection from liability should be framed as being subject to good security practices, lest incentives skew towards insufficient checks.
13. Should a nationally consistent scheme protect persons who purport to act as an authorised person and in good faith? 14. What amendments to criminal laws would be needed to enable a nationally consistent 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. For the purposes of s 308H of the <i>Crimes Act 1900</i> (NSW), access to or modification of restricted data held in a computer is authorised if it is done in accordance with the scheme.	Note that the mention of NSW computer crime laws ought to mention all such national laws (Commonwealth and each state and territory). All are virtually identical and the jurisdiction invoked may depend on individuals' location from time to time. This will require each jurisdiction to make consequential amendments to relevant criminal provisions (as one state can interpret the law of another directly).
Changes to existing laws and other issues related to the scheme		
17. What changes to succession and estate laws, and assisted decision-making laws in Australian jurisdictions would be	6.1: Clarify that NSW succession and estate laws, and assisted decision-making laws, extend to property in digital form	I am not clear as to the purpose of changing the definition of property. It is worth noting here that digital information or "data" is not property per say.

Consultation question	Relevant NSWLRC recommendation	Comment
<p>necessary or desirable in association with a nationally consistent scheme?</p>	<p>(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”.</p> <p>(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”.</p> <p>(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”.</p>	<p>The nature of data, and the appropriate terminology for it, is a vexed question. In many places throughout the discussion paper, data is described as an “asset”. We assume that term is used to highlight that it has value, which is fine.</p> <p>However, data is not necessarily a “thing” under Australian law. Indeed, a wide variety of Australian case law, including from the High Court, confirms that information itself is not property.¹ This renders problematic terms such as “ownership” in relation to data (see eg p 13 of the Discussion Paper).</p> <p>The following can be the object of property rights in Australia:</p> <ul style="list-style-type: none"> • physical media on which data is stored; • copyright in literary works, artistic works, etc (which will sometimes be the case for data, but not always); • contractual rights, including a right correlated to an obligation to keep a secret; • equitable rights, including a right correlated to an equitable obligation of confidence. <p>There are better words that can be used to describe the relationship between an entity and information than “ownership”, which may confuse those familiar with the use of that term in the context of property. But introducing the definition of ‘property’ here is potentially confusing. It also</p>

¹ For a fuller discussion of this issue, see Lyria Bennett Moses, 'Who Owns Information? Law Enforcement Information Sharing as a Case Study in Conceptual Confusion', (2020) 43 *University of New South Wales Law Journal* 615 - 641, <https://search.informit.org/doi/10.3316/agispt.20200710033134>.

Consultation question	Relevant NSWLRC recommendation	Comment
		risks wrongly confirming the popular view that individuals have property in digital files such as music and e-books which are provided under a limited licence.
<p>18. What changes to privacy laws in Australian jurisdictions would be necessary or desirable in association with a nationally consistent scheme?</p> <p>19. What other legislative amendments would be required to allow lawful access to digital records subject to an access scheme?</p>	<p>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.</p>	NSW privacy laws do not deal with the privacy of information held by (most) private corporations, such as (most) custodians.
Crypto assets		

Consultation question	Relevant NSWLRC recommendation	Comment
<p>22. Should crypto assets such as Bitcoin and NFTs be considered digital records under the NSWLRC Scheme? If so, would the proposed definition of digital assets need to be revised to accommodate this?</p>		<p>The proposed definition of ‘digital record’ neatly distinguishes records in digital form from the underlying asset. That distinction is less clear for cryptoassets – The key to a cryptocurrency wallet is what facilitates the ability to transact with the underlying asset. There is a notional distinction (between having the information and using it to deal with the cryptocurrency) but this may be difficult to police in practice, particularly given the difficulty for third parties (without that key) discovering transactions.</p> <p>If the definition were to exclude crypto assets, specific penalties may need to be created, particularly given it may be difficult to identify a ‘crime’ in some contexts.</p> <p>If the definition were to include crypto assets, that would resolve that issue but (given the current proposed order) create issues where a will and a digital tool (for example) point in different directions.</p>
<p>26. Are there other issues regarding accessing crypto assets should be considered?</p>		<p>The challenges around crypto-assets suggest a clear benefit for alignment between a will or power of attorney and the scheme. Problems are created where a will points in a different direction to a digital tool (for example). Given the solemnity of will-making in the context of what might be quite valuable assets, it would be preferable for there to be consistency (both broadly and especially in the context of cryptoassets).</p>

