

# Consultation Paper

**A nationally consistent  
scheme for access to digital  
records upon death or loss of  
decision-making capacity**

August 2022

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## 1. Introduction

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- 1.1. Currently, no Australian jurisdiction has legislation that specifically deals with access to digital records in the event of death or loss of decision-making capacity, although some existing laws may enable access to information held digitally in these circumstances. Several countries have taken steps to introduce such a scheme, including the model law adopted in a number of states of the United States of America.
- 1.2. On 27 July 2020, the then Council of Attorneys-General agreed to form a Working Group to consider developing a nationally consistent approach to the regulation of access to digital records upon death or loss of decision-making capacity. In November 2021, the Meeting of Attorneys-General agreed that an access scheme for digital records after death or incapacity would be one of the work program priorities for 2022.
- 1.3. The NSW Law Reform Commission (**NSWLRC**) considered these issues in detail in its report, *Access to Digital Records Upon Death or Incapacity (Report 147, 2019)*. In Report 147, the NSWLRC identified numerous barriers that currently prevent people with a legitimate interest from accessing a user's digital records in the event of death or loss of decision-making capacity.
- 1.4. To overcome these barriers, the NSWLRC recommended the creation of a statutory scheme that would enable an authorised person to access the digital records of a person who has died or lost decision-making capacity in limited circumstances.<sup>1</sup> It also made recommendations that outline how such a scheme could operate in practice in NSW (**NSWLRC Scheme**). The NSWLRC also considered that there should be a nationally consistent digital records access scheme.
- 1.5. No position has yet been reached on whether there should be a national scheme to provide access to digital records upon death or loss of decision-making capacity. The NSW Department of Communities and Justice is leading a consultation process on behalf of the Commonwealth, States and Territories, to seek targeted stakeholder comment about a national access scheme. The recommendations of the NSWLRC are used as a basis for further consideration of both the need for and appropriate design of a nationally consistent scheme.
- 1.6. This Consultation Paper provides a short outline of the issues associated with a digital records access scheme and the recommended model developed by the NSWLRC.

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<sup>1</sup> The NSWLRC uses the term incapacity to refer to a person who requires assistance with decision-making and who has an appointed substitute decision-maker, such as a court or tribunal-appointed guardian or enduring power of attorney. This Consultation Paper generally uses the terminology of a 'loss of decision-making capacity'. However, we note that decision-making capacity is decision-specific, and may fluctuate, so that a person does not lose decision-making capacity once and for all.

## 2. Consultation process

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- 2.1. We welcome interested individuals and organisations to provide written submissions in response to the NSWLRC recommendations.
- 2.2. A table for providing responses to the recommendations accompanies this paper.
- 2.3. Some of the recommendations are legal and technical in nature. It is not expected that stakeholders respond to all recommendations.
- 2.4. Submissions are due by 12 September 2022 and should be sent to:  
[policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au). Please include in the subject of your email: 'Access to Digital Records – Consultation Paper submission'.
- 2.5. Submissions may be published on the NSW Department of Communities and Justice's website, unless you specifically ask us not to do so.
- 2.6. If you are interested in participating in the consultation but are unable to make a written submission, please contact us at [policy@justice.nsw.gov.au](mailto:policy@justice.nsw.gov.au).

### 3. Our growing digital legacy

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3.1. The growth of technology and infrastructure has enabled widespread access to the internet. In 2016-17, an estimated 86% of Australian households had access to the internet, including 97% of families with children under 15 years.<sup>2</sup> At the same time, digital platforms have developed and grown in type and popularity.

3.2. Because of these factors, people in Australia and throughout the world have been creating, storing and accessing an increasing amount of their information and records in digital formats for many years. It has been observed that:

Digital assets are gradually replacing stored documents, photograph albums, written letters and music collections as personal mementos which people traditionally pass on to their family and loved ones.<sup>3</sup>

3.3. Digital records is a term sometimes used interchangeably with 'digital assets', but does not have a settled definition. Digital records or assets could include, for example:

- emails
- photographs
- domain names
- social media profiles and blogs
- gaming accounts
- literary works stored online
- bank statements accessible through online banking services.

3.4. A person might have proprietary rights or interests in a digital record, such as intellectual property rights connected to digital photographs, digital artwork, or written work. Other types of digital records, although not the property of the user, can be important to manage and/or finalise a person's affairs and estate. For example, a person's online bank statement may be a digital record, as could records stored or maintained by government services. Generally, the service agreements of digital platforms will determine if a person has proprietary rights or interests in the digital accounts or services they provide. Whether or not a person has proprietary rights or interests in a digital record will be particularly relevant in the case of deceased estates, as succession law provides that a person can only dispose of that which is their property through their will.

3.5. Despite digital records forming an important and regular aspect of life for many individuals, Australian survey participants have reported that they do not know what

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<sup>2</sup> Australian Bureau of Statistics 8146.0 - [Household Use of Information Technology, Australia](#), 2016-17, 28 March 2018 .

<sup>3</sup> Conway, H., and Grattan, S., 'The 'New' New Property: Dealing with Digital Assets on Death' In H. Conway, & R. Hickey (Eds.), *Modern Studies in Property Law*, Volume 9 (1st ed., pp. 99-115). Hart Publishing, Oxford.

would happen to their digital assets (defined as including social media, email and banking records) if they were to die or lose decision-making capacity.<sup>4</sup>

- 3.6. Given the prevalence of digital records in people's lives, access to those records is increasingly necessary to deal effectively with the financial and personal affairs of people who have died or lost decision-making capacity.<sup>5</sup> Digital records can be both financially and sentimentally valuable for a person and their family, friends and beneficiaries, as the NSWLRC have outlined:

[A] person's email account may contain outstanding invoices or bills, or the person may use a social media account to earn an income. 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.<sup>6</sup>

- 3.7. At the same time, a person's digital records may contain highly sensitive or personal information that a person may not wish others to access. The law has not kept pace with how to balance these concerns in a period of rapid social and technological change. This has left considerable uncertainty, inconsistency and difficulty for individuals, families, beneficiaries and the advisors of these groups alike. These problems will likely affect a growing number of people in Australia, as more people die leaving many digital records behind.

## 4. Barriers to accessing digital records and their impacts

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- 4.1. People with a legitimate interest (such as executors/administrators of deceased estates and substitute decision-makers<sup>7</sup>) who seek to access the digital records of

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<sup>4</sup> Steen, A., D'Alessandro, S., Graves, C., Perkins, M., Genders, R., Barbera, F., Shi, H., McGrath, D., & Davis, N. (2017). [Estate Planning In Australia: Or: it will never happen to me](#) (commissioned by STEP (The Society of Trust and Estate Practitioners Australia) . This online survey of 1034 Australians conducted in April 2017 had 81.75% of respondents indicated that they had digital assets (predominantly social media, email and banking records). Of the 821 people who indicated they had digital assets, 71.25% 'indicated that they were unaware of what would happen to these assets' in the event of incapacity or death (p. 19).

<sup>5</sup> NSW Law Reform Commission, Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [2.12].

<sup>6</sup> NSW Law Reform Commission Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [1.23] – [1.24].

<sup>7</sup> Substitute decision-makers may be appointed by a court or tribunal or appointed personally. Terminology for these decision-makers varies around the country. Court and tribunal appointed decision-makers for personal decisions are generally referred to as guardians, and those for financial affairs as financial managers or administrators. Personally appointed decision-makers for personal decisions may be known as enduring guardians or attorneys appointed under enduring powers of attorney, or as decision makers appointed under an advance personal plan or advance care directive. Personally appointed decision makers for financial matters may be known as attorneys appointed under enduring powers of attorney, or decision-makers appointed under an advance personal plan.

a user who has died or lost decision-making capacity currently face the following common barriers:

- Passwords and access codes – if a user did not disclose access information before they died or lost decision-making capacity.
  - The service agreements of digital platforms that store or maintain users' digital records (defined as 'custodians' by the NSWLRC), including:
    - Prohibitions on sharing access information;
    - Prohibitions on transferring accounts;
    - Different policies on accessing the account of a user who has died or lost decision-making capacity; and
    - Users being unaware of or not understanding the service agreement's terms.
  - Laws that prohibit or restrict access to digital records:
    - Domestically, these include criminal laws that make it an offence to cause any unauthorised access to, or modification of, restricted data held in a computer, knowing that the access or modification is unauthorised.<sup>8</sup>
    - Laws in other jurisdictions can also pose a barrier to access. For example, the Stored Communications Act (United States) prohibits "knowingly divulging to any person or entity the contents of a communication which is carried or maintained on that service" unless there is "lawful consent" from the user, or a court order.<sup>9</sup>
- 4.2. The NSWLRC observed that, because of these barriers, a personal representative may be unable to access a person's digital records, even where a will contains a clause that explicitly states that a person's digital records are part of their estate. If a person has lost decision-making capacity, a substitute decision-maker may be unable to access digital records needed to perform their role effectively.
- 4.3. Although some digital platforms have some stipulations contained in their service agreements or policies about what would happen to a user's account or service in the event of death, differences can make administering estates difficult, and whether a person's digital records may be accessed can depend on the service agreements of custodians. Some of these make no provision for access by another person on death or loss of decision-making capacity.
- 4.4. Other countries have seen increasing litigation to resolve disputes about access to digital records. Cases have generally been brought by a family member of a deceased user against a digital platform who has refused the family member access to the digital records of the deceased user.<sup>10</sup> These cases have generally involved a parent or parents seeking to access the digital records of their deceased

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<sup>8</sup> *Criminal Code* (Cth) s 478.1; *Crimes Act 1900* (NSW) s 308H.

<sup>9</sup> 18 USC § 2702.

<sup>10</sup> NSW Law Reform Commission, Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [2.71]-[2.76].



child or adult child for the purposes of memorialisation or understanding more about the circumstances of the death or their child.

- 4.5. It appears that Australian courts have not yet dealt with such issues.<sup>11</sup>

## 5. A nationally consistent access scheme

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- 5.1. In November 2021, the Meeting of Attorneys-General agreed that an access scheme for digital records after death or incapacity would be one of the work program priorities for 2022.
- 5.2. The NSWLRC strongly endorsed the development of a nationally consistent scheme. The NSWLRC argued that a nationally consistent scheme would:
- resolve inconsistencies with other Australian laws that intersect with this area (such as privacy, telecommunications, estate administration and assisted decision-making laws).
  - have broader application, including to records held by other governments.
  - assist individuals to determine their rights and understand how to enforce them.
  - impose uniform obligations on the custodians of digital records, most of whom operate across jurisdictional boundaries.
- 5.3. The NSWLRC noted that the best way of achieving a nationally consistent approach would be for all Australian jurisdictions adopt the same scheme. This could be readily achieved by the introduction of uniform legislation across all jurisdictions. Other mechanisms of achieving consistency would be through agreed national principles implemented more flexibly across jurisdictions, or through a Commonwealth scheme.

## 6. The benefits of an access scheme

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- 6.1. Enacting a national scheme that regulates access to digital records would provide legal clarity, which will assist in the administration of deceased estates, and managing the affairs of a person who has lost decision-making capacity. Such a scheme would also benefit custodians that store or maintain digital records, by establishing clear rules about when access should be granted. Given the global nature of digital records, a nationally consistent approach to accessing digital records would ensure that organisations can better understand their legal obligations and individuals will not have to navigate through multiple complex

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<sup>11</sup> NSW Law Reform Commission, Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [2.71].

processes to access digital records belonging to a deceased or incapacitated family member.

6.2. In the case of administering the estate of a deceased user for example, an access scheme may help an executor/administrator:

- Ascertain knowledge of the estate – with digital records assisting to identify the extent of the assets and liabilities of the estate; and
- Collect assets of the estate and distribute these to beneficiaries – through enabling items of value that are stored digitally to be retrieved.

6.3. As a result, an executor/administrator may be in a better position to satisfy their legal obligations, including fiduciary duties, if they are able to access digital records.

6.4. Additionally, a scheme may enhance online security through enabling the closure and/or administration of a user's online accounts and services, which may be necessary to prevent identity theft or other security breaches.

6.5. Several jurisdictions have already taken steps to establish such an access scheme:

- In the United States, the Uniform Law Commission adopted the Revised Uniform Fiduciary Access to Digital Assets Act 2015. Most US states have enacted this model law.
- In Canada, the Uniform Law Conference of Canada adopted the Uniform Access to Digital Assets by Fiduciaries Act in 2016. In 2020, Saskatchewan introduced the *Fiduciaries Access to Digital Information Act*,<sup>12</sup> based on the model law. In Alberta, the *Estate Administration Act* makes reference to compiling a list of online accounts as one of the tasks of an estate trustee in identifying estate assets and liabilities.<sup>13</sup>
- In France, the Digital Republic Act of 2016 allows people to register with a certified third party or the service provider general or specific directives for the preservation, deletion and disclosure of their personal data after death.<sup>14</sup>
- In the UK, a private members Bill is being considered to grant a right of access to the digital devices of a dead or incapacitated person to their next of kin; and for connected purposes.<sup>15</sup>
- The UK Law Commission is currently working on a project to make recommendations for reform to ensure that the law is capable of accommodating digital assets, in particular considering whether they should be “possessable”.<sup>16</sup> This will build on the Commission's previous work which

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<sup>12</sup> *Fiduciaries Access to Digital Information Act*, SS 2020 c 6.

<sup>13</sup> *Estate Administration Act*, SA 2014 c E-12.5, Schedule, cl 1.

<sup>14</sup> See further NSW Law Reform Commission, [Consultation Paper 20 – Access to digital assets on death or incapacity](#) (August 2018) pp. 25-29.

<sup>15</sup> Digital Devices (Access for Next of Kin) Bill 2022 (UK) <https://bills.parliament.uk/bills/3097>

<sup>16</sup> [Digital Assets Interim Update](#), Law Commission (UK), 24 November 2021.

recommended trade documents in electronic form should be capable of being possessed, provided they meet certain criteria.<sup>17</sup>

- 6.6. Independent legal organisations have also initiated research to provide recommendations on an access scheme. For example, the European Law Institute is currently undertaking a project to clarify and facilitate the position of those claiming an entitlement to digital assets.<sup>18</sup> This will provide guidance for European legal development in the area.

## 7. Risks and challenges for an access scheme

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- 7.1. While there are a number of benefits of a scheme for access to digital records on death or loss of decision-making capacity, there are a number of issues to be considered. These include:
- The appropriate scope of such a scheme, including:
    - whether it should apply equally to persons who have died and persons who have lost decision-making capacity
    - how digital records should be defined. The scope of digital records, and thus the records that may be accessed through any scheme, is potentially very wide. It may be that some records should be explicitly excluded from the scope of an access scheme, such as records held by particular custodians, or where there is existing legislation that regulates access to particular kinds of records upon death or for persons who have lost decision-making capacity.
  - The risk of misuse by persons who are granted access to digital records, and what safeguards might be necessary to protect against this. Such safeguards might include:
    - the process for obtaining access to records, and establishing the requisite authority to do so on behalf of a person who has died or lost decision-making capacity.
    - the extent of access provided—for example, it may be that a person should be authorised to access only specific records.
    - civil and/or criminal penalties for misuse or improper disclosure of information.
  - In the case of access to the records of a person on loss of decision-making capacity, how the party granting access can satisfy itself as to the capacity of the user, that the person seeking to access digital records on the user's behalf is authorised to do so, and that the access extends only for the period in which the

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<sup>17</sup> [Electronic trade documents](#), Law Commission (UK), 9 February 2022.

<sup>18</sup> European Law Institute, Access to Digital Assets project, March 2019 – 2022:

<https://www.europeanlawinstitute.eu/projects-publications/current-projects/current-projects/access-to-digital-assets/>

user has impaired decision-making ability.

- Appropriate safeguards for the privacy of the user’s information as well as the information of any third party that may be disclosed through an access scheme—for example a third party who has communicated with the user who has died or lost decision-making capacity. Relevant to this issue is how a scheme would interact with human rights acts (in jurisdictions that have one) and privacy legislation.
- How a scheme would interact with existing legislation that regulates access to a person’s digital records, including legislation of foreign jurisdictions.
- The enforceability of any scheme, including questions about the application of the rules of private international law.

## 8. Key features of the access scheme recommended by the NSWLRC

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- 8.1. The NSWLRC recommended the creation of a statutory scheme that would enable an authorised person to access the digital records of a person who has died or lost decision-making capacity in limited circumstances. Its recommended scheme represents a considered attempt to balance the benefits of a scheme with the risks and challenges outlined above. As such, its recommendations provide a useful starting point for considering the appropriate elements of a nationally consistent scheme, if one were to be enacted. The NSWLRC recommendations, while informed by model laws in other jurisdictions, also differ in some important respects, including the classes of persons authorised to access digital records, and the extent of access to digital records provided to an authorised person.<sup>19</sup>
- 8.2. The NSWLRC Scheme is intended to align with the approach of existing trusts and estates law in NSW, which has at its core a respect for the intentions of a person who has died or lost decision-making capacity.
- 8.3. Specific comment is invited on the recommendations made by the NSWLRC, which outline the specific elements of the scheme. These are set out in the table below. Here, key elements of the NSWLRC scheme are briefly summarised. Further detail about the recommendations is available in the NSWLRC Report.

### Definition of ‘digital record’

- 8.1. Under the NSWLRC Scheme:

“Digital record” means a record that:

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<sup>19</sup> For further discussion, see NSW Law Reform Commission, Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [2.77]-[2.86].

- (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.

8.2. This definition would extend to digital records held by both private and government ‘custodians’. Examples of the former include email and social media accounts, online purchasing accounts and cloud services, among many others. Examples of records held by government custodians might include, for example, health, aged care, or taxation records that relate to the user.

### **Entities that would be required to provide access to digital records (‘custodians’)**

8.3. The NSWLRC Scheme would require ‘custodians’ to provide an authorised person with access to the digital records of a person who has died or lost decision-making capacity. Under the NSWLRC Scheme:

“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.

8.4. This definition would include both government entities and private sector entities. There are a range of existing processes to facilitate access to certain types of records held by government entities at both the state/territory and Commonwealth level. Stakeholders are invited to provide feedback on whether and how an access scheme as recommended by the NSWLRC could operate alongside these processes in their responses to the consultation questions. Similarly, stakeholder feedback is invited on the efficacy of existing mechanisms to enable access to digital records held by private sector custodians in the event of death or incapacity of the user.

### **Persons authorised to access digital records**

- 8.5. The NSWLRC Scheme would allow an ‘authorised person’ to access and deal with the digital records of a person who has died or lost decision-making capacity.
- 8.6. The NSWLRC recommends a statutory hierarchy to determine who would be an authorised person entitled to access digital records, as set out in the table below.

|   | Deceased person: authorised person hierarchy  | Persons who have lost decision-making capacity: authorised person hierarchy  |
|---|---|--|
| 1 | Person appointed in a will to manage digital records  | Personally appointed substitute decision maker (e.g. enduring guardian or attorney appointed under enduring power of attorney) |
| 2 | Person nominated through an online tool   | Court or tribunal appointed substitute decision maker (guardian or financial manager/administrator)                            |
| 3 | Executor  | Person nominated through an online tool  |
| 4 | Administrator   | (In limited circumstances) the person with access information for those digital records  |
| 5 | (In limited circumstances) a person to whom the deceased user has communicated the access information for those digital records |  |

### Extent of the authorised person's right to access digital records

- 8.7. An authorised person would be entitled to access and deal with a user's digital records only to the extent of the express terms, if any, of the instrument appointing them (e.g. a will, a Court or tribunal order, or enduring power of attorney document). If there are no such terms, then the person would be authorised to access and deal with the digital records only for the purpose of administering the person's estate or managing their affairs.
- 8.8. Access would also be subject to fiduciary duties and other applicable laws.

### Procedure for requesting access to digital records

- 8.9. The NSWLRC Scheme would standardise the process for an authorised person to request access and the timeframe for a custodian to grant access.
- 8.10. Under the Scheme, a person could request access to the digital records of a user directly from the custodian of those records, on proof of their authority to do so—that is, it is not a scheme requiring a court order to authorise access to digital records.
- 8.11. Under the recommended scheme, custodians would have an obligation to grant access to a person who is able to prove their authority within 30 days.

### Safeguards against the misuse or unauthorised access of digital records

- 8.12. Under the recommended scheme, it would be an offence for an authorised person to improperly disclose information obtained in accessing the digital records. The scheme would only permit disclosure of such information in specific circumstances

– for example, to manage the user’s affairs or administer their estate, or as otherwise required by law.

- 8.13. The scheme would protect from liability custodians who grant access in good faith and in compliance with the scheme.
- 8.14. The scheme would also ensure that a person is protected from liability if they purport to act as an authorised person in good faith without knowing that another person is entitled to be an authorised person.

### Measures to protect rights in the NSWLRC Scheme

8.15. The NSWLRC Scheme is intended to:

- **Respect existing proprietary rights** – The NSWLRC Scheme seeks to respect the property rights of both users and custodians.

The NSWLRC Scheme protects the property rights of users by enabling an authorised person to access the property of the user that is stored in digital records, provided the asset or liability is a digital record itself. In the case of a deceased user, that property could be distributed to beneficiaries under the user’s will or according to the rules of intestacy. In essence, the NSWLRC Scheme seeks to ensure that an individual’s right to dispose or deal with their property as they see fit applies to an individual’s property that is stored digitally (such as intellectual property rights that may exist in digital photographs, digital artwork, or written work).

The scheme also respects digital platforms’ right to decide the property status of the products they provide. The NSWLRC explained:

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. This means that they cannot bequeath these purchases to beneficiaries when they die.<sup>20</sup>

- **Include protections for privacy** – The NSWLRC Scheme would include protections for privacy by:
  - Limiting the extent of an authorised person’s access right by making it subject to fiduciary duties, other applicable laws, the terms of a will or otherwise for the purpose of administering the deceased user’s estate.
  - Providing an offence for an authorised person to disclose information about the deceased user, or another person, obtained in accessing those records, unless a specific exemption applies.

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<sup>20</sup> NSW Law Reform Commission, Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [1.28].

## 9. Digital records without custodians

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- 9.1. The NSWLRC's recommended scheme may not resolve all potential issues associated with access to digital records. The scheme envisages that an 'authorised person' would be able to gain access to digital records stored or maintained by a custodian. However, for some digital records such as crypto assets, there may not be custodian who stores the digital record on behalf of the deceased and is able to provide access to an authorised person.<sup>21</sup>
- 9.2. Crypto assets are a subset of digital assets that use cryptography to protect digital data, and distributed ledger technology to record transactions. They may run on their own blockchain or use an existing platform such as Ethereum. A blockchain is a form of secure digital ledger used to store a record of crypto transactions.
- 9.3. The term crypto assets can be used to describe something which is represented by certain data (often recorded on a distributed ledger such as a blockchain) which can only be updated upon the satisfaction of specific conditions.<sup>22</sup> These conditions usually involve a public-private key cryptography to evidence the authenticity of the participant proposing the update, and a mechanism to ensure the data has not been copied.
- 9.4. Crypto assets such as Bitcoin and non-fungible tokens (NFTs) 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.<sup>23</sup>

## 10. Stakeholder comment is invited

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- 10.1. The NSWLRC Report and its recommendations provide a useful starting point for considering a national scheme for access to digital records on death and incapacity.
- 10.2. Stakeholder comment is therefore invited on these recommendations, as well as on how any such scheme could operate nationally, to inform further consideration by

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<sup>21</sup> NSW Law Reform Commission, Report 147: [Access to digital records upon death or incapacity](#) (December 2019) [6.23].

<sup>22</sup> The Law Tech Delivery Panel, UK Jurisdiction Taskforce of the LawTech Delivery Panel, Public Consultation (May, 2019), p 21

<sup>23</sup> I Bond, "Advising Clients in a Digital World: Dealing with Digital Assets in Wills and Probate Matters" (2016) 20–21.



Australian Attorneys General of the need for a digital records access scheme, and the design of any such scheme.

- 10.3. Stakeholders are requested to provide comment in the accompanying table, in which the NSWLRC recommendations are extracted, along with additional questions targeted at understanding how such a scheme might operate nationally.

## Stakeholder feedback questions

Stakeholders are invited to provide feedback on the recommendations made by the NSWLRC in *Report 147 – Access to digital records upon death or incapacity* and related issues using the table below. Where appropriate, the questions seek feedback on how such recommendations could or should operate if there was to be a nationally consistent scheme.

| Consultation question   | Relevant NSWLRC recommendation  | Comment |
|---|---|---------|
| <b>A statutory scheme for access</b>  |   |         |
| <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><b>2.1: A statutory scheme for NSW</b></p> <p>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> |         |
| <b>Scope and key terms</b>  |   |         |
| <p>2. Should a nationally consistent scheme apply to a custodian, regardless of where the custodian is located, if the user is</p>  |   |         |

| Consultation question   | Relevant NSWLRC recommendation  | Comment |
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| <p>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 domiciled in Australia and the other overseas?</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"> <li>• 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).</li> <li>• Whether the definition of ‘digital record’ is sufficiently technology neutral to enable new or emerging technologies to be covered by the scheme.</li> <li>• Whether any records should be excluded from the scope of the scheme.</li> </ul> | <p><b>3.2: Key terms of the statutory scheme</b></p> <p>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 custodian, and</p> |         |

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

| Consultation question   | Relevant NSWLRC recommendation   | Comment |
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|   | <p>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>  |         |
| <b>The authorised person and the extent of their access</b>   |  |         |
| <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><b>4.1: Authorised person entitled to access a user’s digital records</b></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 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</p> |         |

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:

| Consultation question   | Relevant NSWLRC recommendation  | Comment |
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|   | <ul style="list-style-type: none"> <li>(iii) specified in the guardianship order or financial management order, or</li> <li>(iv) otherwise relevant to the person's role as guardian or financial manager</li> </ul> <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"> <li>(i) the incapacitated user has communicated the access information for those digital records to the person, or</li> <li>(ii) the person created those digital records on the incapacitated user's behalf</li> </ul> <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>6. If there were to be a nationally consistent scheme governing access to digital records on death or loss of decision-making capacity, what should be the appropriate</p> | <p><b>4.2: A person can apply to the Supreme Court of NSW for an order that they are the authorised person</b></p>  |         |



| Consultation question   | Relevant NSWLRC recommendation  | Comment |
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| <p>forum for a person to apply for an order that they are the authorised person?</p>  | <p>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.</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><b>4.3: Extent of the authorised person’s access right</b></p> <p>The scheme should provide that:</p> <p>(1) For the purposes of determining the extent of the authorised person’s right:</p> <ul style="list-style-type: none"> <li>(a) “administering the deceased user’s estate” includes informal administration of the deceased user’s estate</li> <li>(b) “managing the incapacitated user’s affairs” includes informal management of the incapacitated user’s affairs, and</li> <li>(c) “deal” or “dealing” includes transferring digital records to the person entitled to them, but does not include editing the content of digital records.</li> </ul> <p>(2) The authorised person entitled to access particular digital records of a deceased user</p> |         |

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:
  - (iii) the will (even where the authorised person is not the person named in the will), or
  - (iv) 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:

a. the online tool, or

b. an enduring guardianship or enduring power of attorney, which has effect, or

c. 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,

| Consultation question  | Relevant NSWLRC recommendation   | Comment |
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|  | <p>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> <ul style="list-style-type: none"> <li>(a) subject to applicable fiduciary duties, and</li> <li>(b) subject to applicable laws, and</li> <li>(c) subject to the terms of the following, as applicable: <ul style="list-style-type: none"> <li>(i) the online tool, or</li> <li>(ii) the enduring guardianship or enduring power of attorney, which has effect, or</li> <li>(iii) the guardianship or financial management order, or</li> </ul> </li> <li>(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs.</li> </ul> <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>9. Are the other obligations of the authorised person as recommended by the NSWLRC appropriate for a nationally consistent scheme? What, if any, changes are necessary?</p> | <p><b>4.4: Other obligations of the authorised person</b></p> <p>The scheme should provide that:</p> <ul style="list-style-type: none"> <li>(1) Where the authorised person entitled to access particular digital records of a</li> </ul>  |         |

| Consultation question   | Relevant NSWLRC recommendation   | Comment |
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|   | <p>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.</p> <p>(2) Where the authorised person entitled to access particular digital records of an incapacitated user is not appointed under:</p> <ul style="list-style-type: none"> <li>(a) an enduring guardianship, or</li> <li>(b) an enduring power of attorney, or</li> <li>(c) a guardianship order, or</li> <li>(d) under a financial management order,</li> </ul> <p>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.</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><b>4.5: Improper disclosure of information</b></p> <p>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 another</p>   |         |

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

| Consultation question   | Relevant NSWLRC recommendation   | Comment |
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|   | <p>(e) authorised by a court or tribunal in the interests of justice, or</p> <p>(f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.</p> |         |
| <b>Access procedures, liability limits and conflicting terms in custodian agreements and policies</b> |  |         |

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| <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><b>5.1: Procedural requirements for access requests</b></p> <p>The scheme should provide that:</p> <ol style="list-style-type: none"><li>(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.</li><li>(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:<ol style="list-style-type: none"><li>(a) proof of the user's death</li><li>(b) the formal will</li><li>(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</li><li>(d) the grant of representation</li><li>(e) proof of the authorised person's identity</li></ol></li><li>(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:<ol style="list-style-type: none"><li>(a) the enduring guardianship or enduring power of attorney</li><li>(b) the guardianship or financial management order</li></ol></li></ol> |  |
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| Consultation question  | Relevant NSWLRC recommendation   | Comment |
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|  | <p>(c) proof of the authorised person's identity.</p> <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 the custodian can show that access is not technically feasible.</p> |         |
| <p>12. Should a nationally consistent scheme protect custodians from liability for acts or omissions done in good faith in compliance with the scheme?</p> | <p><b>5.2: Protecting custodians from liability</b></p> <p>The scheme should protect custodians from liability for acts or omissions done in good faith to comply with the scheme.</p>   |         |

| Consultation question  | Relevant NSWLRC recommendation   | Comment |
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| <p>13. Should a nationally consistent scheme protect persons who purport to act as an authorised person and in good faith?</p> <p>14. What amendments to criminal laws would be needed to enable a nationally consistent scheme?</p> | <p><b>5.3: Protecting the authorised person from liability</b></p> <p>The scheme should provide that:</p> <p>(1) A person who:</p> <ul style="list-style-type: none"> <li>(a) purports to act as an authorised person under the scheme, and</li> <li>(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.</li> </ul> <p>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.</p> |         |
| <p>15. Are the NSWLRC recommendations in relation to conflicting provisions in custodian service agreements and policies appropriate for a nationally consistent scheme? What, if any changes are necessary?</p>                     | <p><b>5.4: Conflicting provisions in service agreements and policies</b></p> <p>The scheme should provide that:</p> <p>(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.</p> <p>Despite any provision, including a choice of law provision, in a relevant service agreement or custodian policy, the authorised person's</p>                    |         |

| Consultation question  | Relevant NSWLRC recommendation   | Comment |
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|  | <p>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.</p>   |         |
| <p>16. What should be the proper forum to resolve disputes in a nationally consistent scheme?</p>  | <p><b>5.5: NSW as the proper forum for disputes</b></p> <p>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.</p>  |         |
| <p><b>Changes to existing laws and other issues related to the scheme</b></p>  |  |         |
| <p>17. What changes to succession and estate laws, and assisted decision-making laws in Australian jurisdictions would be necessary or desirable in association with a nationally consistent scheme?</p> | <p><b>6.1: Clarify that NSW succession and estate laws, and assisted decision-making laws, extend to property in digital form</b></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</p> |         |

| Consultation question   | Relevant NSWLRC recommendation  | Comment |
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|   | be amended to include “property in digital or other electronic machine-readable form”.  |         |
| <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><b>6.2: Amendments to NSW privacy laws to allow for the operation of the scheme</b></p> <p>Amendments should be made to NSW privacy laws about accessing and managing personal information, to allow for the operation of the scheme.</p>  |         |
| <p>20. What educational programs and materials would be appropriate for a nationally consistent scheme, and what institutions and organisations are best placed to provide these?</p>   | <p><b>6.3: Education about digital records and their management</b></p> <p>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.</p> |         |
| <p>21. What information should custodians be required to make available about how access requests are handled under a nationally consistent scheme?</p>   | <p><b>6.4: Custodian procedures for access requests</b></p> <p>Custodians should have transparent processes for handling access requests.</p>   |         |
| <p><b>Crypto assets</b></p>   |   |         |

| Consultation question  | Relevant NSWLRC recommendation | Comment |
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| <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>23. Would the NSWLRC Scheme enable access to the crypto assets of a deceased or person who has lost decision-making capacity? Is there an identifiable custodian who may provide access to an authorised person as proposed under the scheme?</p> <p>24. If not, what other models or schemes can be applicable to enable an authorised person to access a deceased person or person who has lost decision-making capacity's crypto assets?</p> |                                |         |
| <p>25. Would the extent of the authorised person's access right, as recommended by the NSWLRC, be appropriate for crypto assets? What other safeguards and limitations should be imposed on an authorised person's access to crypto assets?</p>  |                                |         |
| <p>26. Are there other issues regarding accessing crypto assets should be considered?</p>  |                                |         |
| <p><b>Other comments</b></p>   |                                |         |

| Consultation question   | Relevant NSWLRC recommendation | Comment |
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| 27. What, if any, other considerations are relevant to assessing options for a nationally consistent scheme for access to digital records? For example, what human rights considerations (including privacy) are relevant to considering a digital records access scheme? |                                |         |
| 28. Stakeholders are invited to provide case studies or examples of current approaches to accessing digital records on death or loss of decision-making ability, as well as an assessment of their adequacy.  |                                |         |