

Submission to the NSW Law Reform
Commission's *Access to Digital Assets upon
Death or Incapacity* Consultation Paper

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CPSA receives funding support from the New South Wales and Australian Governments



CPSA is a non-profit, non-party-political membership association founded in 1931 which serves pensioners of all ages, superannuants and low-income retirees. CPSA has 95 branches and affiliated organisations with a combined membership of over 23,000 people living throughout NSW. CPSA's aim is to improve the standard of living and well-being of its members and constituents. CPSA receives funding support from the NSW Government Departments of Family & Community Services and Health and the Australian Government Department of Social Service.

Summary of Recommendations:

- **Recommendation 1:** NSW laws should enable people to specify how they wish their digital assets to be managed after death or incapacity.
- **Recommendation 2:** That NSW laws that enable people to specify how they wish their digital assets to be managed after death or incapacity take precedence over individual account provider policy.
- **Recommendation 3:** That the misuse of digital assets after death or incapacity be recognised as a criminal offence.
- **Recommendation 4:** That the NSW Government enact a law that requires service providers to give third parties access to a person's digital assets after death or incapacity to the extent that that access has been specified by the individual before their death or incapacity.

This submission is reflective of a survey undertaken by CPSA. The survey was sent via email to over 3,000 people who are recipients of the electronic version of CPSA's monthly publication *THE VOICE of Pensioners & Superannuants*. 79 people responded to the survey.

For the purpose of this submission and the accompanying survey, CPSA divided digital assets into three categories. These categories are: private assets (assets only the account holder can see), public assets (assets that the public or 'friends' can see), and financial assets (accounts used to manage money digitally or make online purchases):

- **Private assets:** Emails and email accounts, text messages, messages sent 'privately' through social media (e.g. Facebook Messenger), your YouTube account (e.g. search history or uploaded videos set to private), digital photograph accounts (e.g. Flickr with settings as private).
- **Public assets:** Social media profiles (i.e. the public 'wall' of Facebook, twitter or Instagram), blogs you own, websites you own, publically accessible YouTube videos you have uploaded, publically accessible photo sharing accounts (e.g. Instagram).
- **Financial assets:** Online bank accounts and online purchasing accounts (e.g. Amazon and PayPal), online store accounts (e.g. Ebay and Spotify), orders made online including addresses and payment information, sports gambling accounts, online gaming accounts, digital music and ebook collections and loyalty programs (e.g. frequent flyer points).

Demographics

The majority of the survey respondents (88%) were aged over 60. 12% were aged 40-59 years old.

Options for digital assets upon death or incapacity

87% of respondents wished for a person they previously nominated to access their digital assets to undertake their wishes to delete, manage or view the digital asset after their death or incapacity.

4% responded that they would like the service provider to acquire control of the account to either delete it (if it is a private asset, public asset or a financial asset) or create a public record (if it is a public asset) according to the individual service provider's policy.

9% responded 'other', with the majority stating that the executor of their estate should have access.

Nominating someone to manage digital assets upon death or incapacity

Public

41% of respondents would like their next of kin or executor of their estate to have default access to their public digital assets. 33% would like to nominate someone in their will, trust agreement, power of attorney or other legal record. 14% said they would like to be prompted to nominate a person when they are going through the initial process of setting up the account, and 8% that they would like to be able to nominate someone in 'settings' of the website or account at any time.

Private

For private assets, 38% for next of kin or executor of my estate to have default access to private digital assets and 35% wished to nominate someone in their will, trust agreement, power of attorney or other legal record. 13% wished to nominate someone in 'settings' of the website or account at any time and 12% wished to be prompted to nominate a person when initially setting up the account.

Financial

In terms of financial assets, 41% respondents wished to nominate someone in their will, trust agreement, power of attorney or other legal record. 36% wished for their next of kin or executor of their estate to have default access to their financial digital assets. 12% wished to be prompted to nominate a person when going through the initial process of setting up the account and 9% wished to nominate someone in 'settings' of the website or account at any time.

- **Recommendation 1:** NSW laws should enable people to specify how they wish their digital assets to be managed after death or incapacity

The nominated persons responsibilities and perimeters

Public

45% of respondents wished for the nominated person to simply delete their public accounts. 41% wanted the nominated person to create and save a private record (archive) of the account (e.g. download its contents to their computer and delete the online account). There was limited support (4%) for creating a public record or for the nominated person to manage the account (6%). One of the reasons this survey result is significant is because 'memorialisation' is the default action of Facebook, whereby anything on the profile remains on Facebook and is visible to the people who could already see it before the profile was memorialised. The results do not indicate that this would be the preferred option for many of the survey respondents.

Private

In terms of private assets, 50% of respondents wished for the nominated person to create and save a private record of the account and delete the online account. 35% wished for the account to be deleted and 12% wished for the nominated person to look at the account and its contents. It appears in this instance that individuals recognise the sentimental value of private assets and a desire for them to be preserved offline.

Credits and purchases

65% of respondents wished for credits and purchases with digital media accounts such as Google Play Store or iTunes, or online reward account points, to be transferred to a nominated person. However, 31% believed that they should be deleted.

Risk of hacking and identity theft

In order to gauge our members and constituents awareness of the danger of accounts being hacked upon death or incapacity we asked if they thought there is more of a danger of accounts being hacked or for identity theft to occur upon death or incapacity. 71% of respondents agreed or strongly agreed. 27% neither agreed nor disagreed and only 1% disagreed. No respondents strongly disagreed. This indicates that the majority of respondents recognise the risk associated with hacking and identity theft upon death or incapacity.

Misuse of digital assets as a criminal offence

82% of respondents strongly agreed and 17% agreed that misuse of digital assets after death or incapacity should be a criminal offence. 1% neither agreed nor disagreed. No respondents disagreed that misuse of digital assets should be a criminal offence.

At the Commonwealth level and in NSW, the criminal law prohibits "unauthorised access" to restricted data held in a computer (*Criminal Code 1995 (Cth) s478.1; Crimes Act 1900 (NSW) s308H*). However, there is no additional requirement of an intention to commit another offence and no defence of 'lawful excuse'. Whilst the majority of respondents agreed that it should be a criminal offence, one respondent emphasised that what it means to misuse digital assets needs clarification 'so that trivial matters or misunderstandings are exempted'.

Recommendation 2: That the misuse of digital assets after death or incapacity be recognised as a criminal offence.

The nature of digital assets

The German Supreme Court recently decided that digital assets should be treated the same as private diaries or letters, and be inherited by heirs. 82% of respondents strongly agreed or agreed with this decision. 12% neither agreed nor disagreed. 7% disagreed or strongly disagreed.

Some respondents emphasised that "the only difference between a digital archive and a physical one is the media it's stored on". However, others emphasised personal choice

and that "it should be left to the individual to decide who gets to see your digital assets" and that "every case should [be] assessed separately. Thus everything starts with the Will." Another stated that "ownership of digital assets is no different to ownership of physical assets, they are both very real. They could have emotional significance to an inheritor and is a part of the history of the dead person and the family. Only the inheritors can decide about what should be discarded and what is part of family history or significance."

Issues of privacy

55% of respondents disagreed or strongly disagreed that granting another person access to the digital assets upon death or incapacity amounts to an invasion of privacy. 30% agreed or strongly agreed. 14% neither agreed nor disagreed.

Respondents emphasised that there can be no invasion of privacy if it is an action that they previously specified; one respondent stated that "if I give them the right while I am alive, there is no privacy invasion". Another respondent stated that they would want their wishes to be able to supersede "privacy laws", stating that "if I have left instructions for my executor or person with power of attorney to access my digital assets and delete them then I want my wishes to supersede privacy laws".

One respondent emphasised that the question of privacy will differ whether someone has died or become incapacitated, stating that it "depends on the asset, and also whether the owner of the assets is dead or incapacitated - for example, as my elderly father becomes more incapacitated mentally, I will need to manage his online bank accounts to ensure that credit card debts are paid etc. After his death I assume the person who has power of attorney will close them".

Service provider policy vs. the law

83% of respondents stated that NSW laws should be able to override the policy of the service provider and grant access to the nominated person in line with the level of access that has been previously specified by the account holder. 17% believed that the service provider's policy should be honoured.

Respondents stated that there needs to be an overriding law as "in the event that social media changes their policies, as they tend to do, people will be protected by law." Similarly, another stated that they "think the more significant issue is that the assets are

treated according to the legal jurisdiction of the deceased ... [and that] the issue dealt with under Australian law and not that of the USA or "facebook's" whim".

- **Recommendation 3:** That NSW laws that enable people to specify how they wish their digital assets to be managed after death or incapacity take precedence over individual account provider policy.

Conclusion

The findings of this survey indicate that respondents have a desire to plan ahead and have their digital assets administered as they wish. The respondents were overall of the view that the ability to stipulate wishes should be supported by NSW laws that can override service provider policy.

CPSA is of the view that a clear legal framework with the rights and responsibilities of both people and service providers is necessary, particularly as the increasing amounts of services and aspects of our lives move online and as the population ages.

- **Recommendation 4:** That the NSW Government enact a law that requires service providers to give third parties access to a person's digital assets after death or incapacity to the extent that that access has been specified by the individual before their death or incapacity.