9 September 2022

NSW Department of Communities and Justice

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

Dear Colleagues,

Re: Access to Digital Records – Consultation Paper submission.

We the Society of Trust & Estate Practitioners Australia Pty Limited (STEP Australia) represent professionals from across Australia who are specialists in trusts, estate planning and in supporting the needs of families (young and old, wealthy and modest). The objective of a STEP Professional is to advance the interests of families across generations. This often involves us in identifying issues of relative importance to families and bringing these to the attention of those who can make a positive difference. This is the purpose of this submission.

STEP Australia's membership includes lawyers, accountants, financial wealth advisors and trustee company professionals from across Australia; our members bring a multi-disciplinary approach to the benefit of their clients. It is this unique multi-disciplinary approach that supports this submission.

The Society of Trust and Estate Practitioners (STEP) is pleased to provide the following submission in response to your Consultation Paper: A nationally consistent scheme for access to digital records upon death or loss of decision-making capacity.

Your primary point of contact is Kimberley Martin, who can be contacted at kimberley.martin@wmmlaw.com.au.

STEP Australia is keen to work with you, and our committee is very willing to respond to questions.

Yours sincerely,

Bryan Mitchell TEP
Chair of STEP Australia

CONTENTS

PART 1 – PRELIMINARY MATTERS

1.1 As set out in the Submission from STEP-Australia to the New South Wales Law Reform Commission (NSWLRC) dated 30 May 2018, STEP-Australia is strongly of the view that national model legislation/national scheme is the best (and only) way forward.

1.2 STEP-Australia supports the NSWLRC recommendations about the creation of a nationally consistent digital records access 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.

1.3 STEP-Australia are keen to participate further in the development of reform of the law governing this important area.

PART 2 – BACKGROUND & EXPERTISE

2.1 The Society of Trust and Estate Practitioners (STEP) is the global professional association for practitioners who specialise in family inheritance and succession planning. The majority of STEP members in Australia are lawyers who specialise in trusts & equity, wills, estates, guardianships and elder law. We also have members who are accountants or financial planners.

2.2 STEP works to improve public understanding of the issues families face in this area and promote education at high professional standards among our members.

2.3 STEP members help families plan for their futures, including estate planning, wealth devolution, guardianship, capacity and protection issues, delegations and directives, advising on issues concerning blended, same-sex and international families, protection of vulnerable individuals, family business succession, and philanthropic giving. Full STEP members, known as TEPs, are internationally recognised as experts in their field, with proven qualifications and experience.

2.4 STEP's international Digital Assets Special Interest Group (DASIG) was established in 2017 (its predecessor working group was established in 2013) in recognition of the emerging issues related to how practitioners effectively assist clients and their fiduciaries in planning for and administering the digital assets of individuals after the individual dies or loses capacity. The objective of the DASIG is to provide an international forum of debate, education and support on digital issues. Their work includes driving the need for and harmonisation of national and international legislation in relevant areas concerning digital issues.

Current members of the DASIG Steering Committee (as well as previous members) include several of the world's foremost authorities in these areas of law reform for digital assets, including many who have been heavily involved in law reform initiatives relating to digital assets in Canada and elsewhere. The DASIG Steering Committee has members from Australia, UK, Canada, the USA, Austria, Switzerland and South Africa. Tasmanian legal practitioner, Kimberley Martin is Australia's current representative on the DASIG Steering Committee.

PART 3 – RECENT STEP SURVEYS/PROJECTS

3.1 A recent survey undertaken by the Society of Trust and Estate Practitioners (STEP) in Australia revealed that "*The vast majority [71.25% of Australians] with digital assets ... were unaware of what will happen to their digital assets on death or disability.*"[1]

3.2 STEP and the Microsoft-funded Cloud Legal Project at Queen Mary University of London have recently collaborated on a joint research project into estate practitioner views on, and experiences with, digital assets. The aim of the project was to understand the extent to which practitioners deal with digital assets, the risks and challenges posed by digital assets to estate planning and administration, and the measures practitioners are taking to assist clients with digital assets.

The key findings[2] of the research project were as follows:

1. Digital assets have become a common part of modern estate planning and estate administration, with demand for advice expected to increase significantly in future.

2. Clients seek digital asset advice in relation to both estate planning and estate administration, with social media and email accounts topping the list of most-asked-about assets.

3. Clients frequently experience difficulties accessing digital assets on death or incapacity of a family member, causing distress and frustration.

4. Third-party service providers can present practical, procedural and legal obstacles to both estate planning and estate administration.

5. There is wide variation in policies, practices and tools for dealing with clients' digital assets, highlighting the need for more education for practitioners on best practices.

6. Law reform is needed to enable effective estate planning and estate administration for digital assets.[3]

1 Adam Steen, *The Elephant In The Room: People Just Don't Want To Think About Death And Disability*, 26 May 2021. Accessed from: https://stepaustralia.com/2021/05/26/death-and-disability/ (last accessed 15 July 2022).

2 The findings were drawn from a survey sent to STEP members globally, which elicited more than 500 responses from a range of practitioners across the estate and wealth planning sectors.

3 Johan David Michels, Sharon Hartung and Christopher Millard, *'Digital Assets: A Call to Action',* STEP and the Cloud Legal Project at Queen Mary University of London, 2021. Accessed from: https://www.step.org/research-reports/digital-assets-call-action (last accessed 15 July 2022).

PART 4 – SUBMISSIONS

– A STATUTORY SCHEME FOR ACCESS

Q1: ***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?***

STEP-Australia supports the recommendation of the NSWLRC about the introduction a statutory scheme that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances.

STEP-Australia is of the view that a national model legislation/national scheme is the best (and only) way forward given:

- the international/global nature of the internet and digital assets/accounts;
- the restrictive nature of most service agreements and custodian policies;
- the standard 'refusal to provide any access' approach taken by most custodians when contacted by an authorised person under Australian law; and
- the bargaining power that Australia as a whole would have against custodians, as compared to the power of individual states and territories.

A review of common service agreements and custodian policies reveals two common approaches, first an outright refusal to provide any access, and second a requirement that a subpoena and/or court order be obtained (usually in the jurisdiction where the custodian's headquarters is located) in order for an authorised person to be given access to a deceased or incapacitated person's digital records.

As was seen early in 2021, with Commonwealth Government's introduction of the News Media and Digital Platforms Mandatory Bargaining Code, the Australian Government has the ability to bring major custodians such as Microsoft, Facebook and Google to the table for discussions, compromise and cooperation. In response to the proposed code, Facebook blocked news to Australians and Google threatened to withdraw its primary search engine from Australia. However, after discussions with the Australian Government and a number of amendments to the proposed Code, Facebook and Google (and other custodians) conceded and entered into deals with local media companies.

If (as has historically been the case) each state and territory of Australia (or only some) adopts their own distinct legislation, regulations and policies relating to accessing a deceased or incapacitated person's digital records, the bargaining power (and the ability to bring custodians to the table) and likely recognition of those laws diminishes significantly.

The fierce backlash from custodians in response to the Uniform Fiduciary Access to Digital Assets Act (UFADAA) in the USA, and the eventual adoption of the

Revised UFADAA (RUFADAA) by over 48 States in the USA, is a great example of the significant power that custodians hold. Any attempt to introduce and enforce a scheme whereby the power of a custodian and the terms of their services agreements and/or policies are overwritten or ignored will require significant weight behind it, if it is going to have any chance of recognition and acceptance by custodians.

Q1(a): ***What, if any, legislative and non-legislative options currently facilitate access to such records?***

Legislative and non-legislative options do currently exist to facilitate access to such records. The law as it applies in every Australian jurisdiction should (in theory) apply to digital records in the same way it applies to other assets and records. That is when a person dies or loses capacity, an authorised person (usually the executor, administrator or attorney) 'steps into the shoes' of that person, and should (again in theory) have control those assets and access those records.

Although this may be a strong legal argument in Australia, with no formal legislative or judicial recognition of such powers, the problem in practice is securing the recognition of those laws by the relevant custodian. This can add to the estate administration costs and, in the worst-case scenario, result in assets that languish, unclaimed, dormant, and unused, in cyberspace.

As set out in the Submission from STEP-Australia dated 30 May 2018, there are many relevant examples of where custodians have refused to recognise grants and even court orders of other jurisdictions. Although there is no current Australian case law or reported matters, STEP practitioners all over Australia frequently report such refusals from custodians.

Q1(b): ***What other legislative or non-legislative options might be available as an alternative to the scheme recommended by the NSWLRC?***

Learning from our colleagues internationally, in particular those DASIG Members from the US and Canada, there is no other option (legislative or non-legislative) available given the vast reach of the application any scheme would need to have. Custodians are located in jurisdictions all over the world.

Q1(c): ***Should a scheme apply equally to records of deceased people and people who have lost decision-making capacity?***

Yes. STEP practitioners have reported that the most common reason and need for an authorised person to access a deceased or incapacitated person's digital records are:

- to identify, locate and take control of that person's assets (for example, an email account or online storage account that the person used to store important legal documents and/or other personal records and assets); and
- to obtain information relevant to the wishes/preference of the person about treatment, end of life care and/or burial/cremation.

If a person loses capacity, the importance of an authorised person having access their digital records is in many ways no different to the need for an authorised person to access those records upon their death. Security considerations, including potential theft, fraud and identity theft are all possibilities where digital assets and records are lost, unmaintained and/or inaccessible.

It is important that any attempt to limit access to digital records by an authorised person, either on incapacity or upon death, be enforced at an Australian level, and not by the custodians. Any attempt to have custodians have to assess what digital records are 'relevant' will be met with fierce refusal from custodians due to the time and costs in doing so.

Q1(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)?***

As has been seen with the proposal and commitment of the Commonwealth Government for a national Enduring Power of Attorney Register, there are significant complexities in introducing any national and/or uniform scheme or legislation in the area of wills and estate. This is because of the vast differences in the law across each Australian jurisdiction. Even basic terms relating to Enduring Powers of Attorney are defined in completely different ways across Australia.

To implement a nationally consistent scheme, STEP-Australia is of the view that the enactment of uniform state and territory laws is required. The scheme and the associated uniform laws:

- must be broad enough to cover differences in relevant terms, powers and laws in each jurisdiction;
- must be utilised and enforced in a way that is consistent nationally; and
- must not be overly complex,

otherwise they are doomed to fail. It would undermine the 'whole of Australia' bargaining power discussed earlier.

– SCOPE AND KEY TERMS

Q2: ***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?***

STEP-Australia supports the proposal that 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.

Any other application would leave Australians where we are now, that is with custodians retaining absolute discretion about access, and/ or requiring a subpoena and/or court order in the jurisdiction in which their headquarters are located, their servers are located, or the jurisdiction chosen in the service

agreement.

Q3: ***How would a scheme regulate access to joint user accounts where one person is domiciled in Australia and the other overseas?***

In the case of joint user accounts, upon the incapacity of a user, STEP-Australia is of the view that the scheme should provide an authorised person the same access to the digital records as single user accounts, subject to a requirement that:

- the other user (or their authorised person) agrees for the authorised person to have access; or
- a court or other regulatory body authorises the authorised person to have access.

In the case of joint user accounts, upon the death of a user, STEP-Australia is of the view that the law in Australia relating to joint tenancy should apply. That is, unless there is an intention to the asset be treated as being owned by the parties as tenants in common, the rights to the digital records/assets would pass to the surviving joint tenant. Where the digital records/asset is owned as tenants in common, STEP-Australia is of the view that the scheme should provide an authorised person the same access to the digital records as single user accounts, subject to a requirement that:

- the other user (or their authorised person) agrees for the authorised person to have access; or
- a court or other regulatory body authorises the authorised person to have access.

Q4: ***Please comment on the key terms of the statutory scheme recommended by the NSWLRC. In particular, stakeholder comment is invited on:***

- ***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).***

  STEP-Australia supports the proposed scope of the scheme, the relevant definitions, and is of the view that (to be effective) the scheme must apply to 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.***

  STEP-Australia is of the view that the proposed 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.***

STEP-Australia does not believe that there are any records that should be excluded from the scope of the scheme. This is largely due to the other proposed components of scheme which limit the extent of the authorised person's access rights and impose offences for improper disclosure.

- ***Other Comments***

  The current definition of 'incapacitated user' should be amended to remove the word 'adult'. STEP-Australia is of the view that to limit the application of the scheme to incapacitated adult fails to contemplate situations where it may be necessary for an authorised user to gain access to an incapacitated child's digital records. Indeed many of the cases cited in the Submission from STEP-Australia to the NSWLRC dated 30 May 2018 related to children.

– THE AUTHORISED PERSON AND THE EXTENT OF THEIR ACCESS

Q5: ***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?***

STEP-Australia supports the NSWLRC proposed statutory hierarchy of authorised persons entitled to access digital records of both a 'deceased user' and 'incapacitated user', subject to the following comments:

- real consideration should be given to removing 'a person appointed through an online tool' from the hierarchy (or at the very least, moving them further down the hierarchy). This is due to the fact that it creates a parallel succession regime, whereby those appointed and otherwise recognised at law (and who have duties to carry out those duties and administer assets) are surpassed and replaced by the person appointed by the terms of an online tool. The other issue with online tools is that they are usually more restrictive in what digital records they allow the nominated person to access, when compared with the authority proposed by the NSWLRC.

  Regardless of whether 'a person appointed through an online tool' is retained in the hierarchy, the national scheme should confirm:

  - whether the right to access digital records (as provided by the scheme) was limited by the terms of the online tool;
  - whether a person appointed through an online tool is subject to fiduciary duties; and
  - how information must be shared between 'a person appointed through an online tool' and an otherwise authorised person;
- if uniform state and territory laws are to be adopted as part of the

scheme, change would be required to ensure that the difference in all key terms/definitions between jurisdictions are covered, for example:

- Principal and Donor;
- Agent, Attorney, Donee and Attorney for financial matters (Attorney),
- Enduring Guardian and Attorney for personal (including health matters) (Enduring Guardian);

- if the scheme is to apply "in the case of a formal will, whether or not there has been a grant of representation of the will", further thought will need to be given to "the forum for a person to apply for an order that they are the authorised person" and what evidence would be required by that forum;
- the hierarchy should not allow for more than one category of authorised person. In circumstances where joint fiduciaries are appointed, normal operations of that appointment should apply;
- the scheme should expand the hierarchy to give priority as an authorised person to an Attorney, before an Enduring Guardian; and
- any conflict under the scheme should be dealt with in the same way as the current law deals with conflict, that is:
  - where there is conflict between different authorised persons in circumstances of an incapacitated person, the government body authorised to deal with general conflict (VACT, QCAT, TASCAT, Court etc) would have power to deal with that conflict; and
  - where there is conflict between different authorised persons in circumstances of a deceased person, the Court/Probate Registry would have power to deal with that conflict.

Q6: ***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 forum for a person to apply for an order that they are the authorised person?***

It is vital that the scheme does not change the legal framework of fiduciaries. It must confirm and enforce that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that extension may have. It should avoid creating new powers, and only apply to affirm and codify a fiduciary's existing authority to deal with all of the assets of the deceased or incapacitated person.

For this reason, STEP-Australia is of the view that existing mechanisms/avenues for enforcing the rights of fiduciaries must apply to, and be utilised by, authorised persons applying for access to digital records of a deceased or incapacitated user. Creating a separate body/forum to receive and process applications for an order that they are an authorised person is not recommended.

In the first instance, confirmation by way of statutory declaration/certification from

an Australian Legal Practitioner could be used to confirm that the person is an authorised person. If the custodian refuses to accept that certification/declaration, the order should be sought from the probate registry/court in the relevant Australian jurisdiction.

Q7+Q8: ***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?***

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?

STEP-Australia supports the NSWLRC recommendation about the extent of the authorised person's access right. It is important to remember that the authorised person, as defined by the NSWLRC, are limited to individuals who are subject to fiduciary duties. To the extent that they are not, the uniform laws could be amended to confirm that they were or to remove them as authorised persons. For this reason, further safeguards are not required.

The more complicated and technical the scheme is, and to the extent it places onerous obligation on custodians about what records can and cannot be released, the less likely it is that custodians will comply with any request. It will also see greater push back on the proposed scheme by those custodians.

Q9: ***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?***

STEP-Australia supports the other obligations of the authorised person as recommended by the NSWLRC. As set out above, confirmation should be included in the uniform laws that an authorised person is subject to fiduciary duties.

Q10: ***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?***

STEP-Australia supports the position that it should be an offence to disclose information except in limited circumstances as recommended by the NSWLRC.

– ACCESS PROCEDURES, LIABILITY LIMITS AND CONFLICTING TERMS IN CUSTODIAN AGREEMENTS AND POLICIES

Q11: ***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?***

STEP-Australia supports the proposal about the procedural requirements for access requests as recommended by the NSWLRC.

Q12: ***Should a nationally consistent scheme protect custodians from liability for acts or omissions done in good faith in compliance with the scheme?***

As set out in the Submission from STEP-Australia to the NSWLRC dated 30 May 2018, the uniform laws must:

- address the tension between the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act") and the General Data Protection Regulation ("GDPR") (EU) 2016/679 by prioritising consumer rights, such as the inclusion of the right to be forgotten; and
- protect custodians and fiduciaries from criminal and/or civil liability under USA federal and state laws (including the Electronic Communications Privacy Act and the Stored Communications Act), and similar laws that apply to custodians in other countries.

Custodians will not comply with an Australian national scheme where there is any risk of liability (criminal and civil) in other jurisdictions.

Q13: ***Should a nationally consistent scheme protect persons who purport to act as an authorised person and in good faith?***

STEP-Australia supports the proposal about the protection of persons who purport to act as an authorised person and in good faith as recommended by the NSWLRC. As part of STEP-Australia's view that the national scheme should (as much as possible) apply existing laws, the same protections (and also duty of care) should apply to persons who purport to act as an authorised person, as applies to fiduciaries generally.

Q14: ***What amendments to criminal laws would be needed to enable a nationally consistent scheme?***

Various laws regulate computer trespass and the unauthorised access of data. Offences generally cover 'hacking' into password protected data (for example, an email address or Facebook account). In most cases, under the legislation, there is no additional requirement of an intention to commit another offence, and no defence of "lawful excuse" (or similar), so the scope of this offence is considerably wide.

Consultation with legislative bodies in each Australian jurisdiction would be required to ensure that all appropriate amendments were made, however as a

starting point the following laws would require amendment to clarify that an authorised person is authorised to access the digital records if it is done in accordance with the scheme, and is not liable for so acting:

- s478.1 *Criminal Code 1995* (Cth);
- s247A and 247G *Crimes Act 1958* (Vic);
- s308H *Crimes Act 1900* (NSW);
- s44 *Summary Offences Act 1953* (SA);
- s420 *Crimes Act 1900* (ACT);
- s440A of the Schedule to the *Criminal Code Act 1913* (WA);
- s408D *Criminal Code 1899* (Qld); and
- s257D *Criminal Code Act 1924* (Tas).

Q15: ***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?***

STEP-Australia supports the proposal about conflicting provisions in custodian service agreements and policies as recommended by the NSWLRC.

To enable a system (like RUFADAA) that recognises and gives power to conflicting provisions in custodian service agreements will (as is currently being experienced in the USA):

- create uncertainty in the ability of the fiduciary to take action with respect to digital assets;
- empower custodians with complete discretion to insist on a fiduciary obtaining a court order before granting access to a digital asset (creating a potentially cost-prohibitive access issue); and
- empower custodians to select the manner of disclosure, leading in the end to potential administrative delays in the settlement of estates.

Since its introduction and adoption in 48 States in the USA, RUFADAA has seen many calls for amendments, supporting the position that any law that attempts to empower fiduciaries with the ability to access digital records must shift the balance of power away from custodians.

Q16: ***What should be the proper forum to resolve disputes in a nationally consistent scheme?***

STEP-Australia supports the NSWLRC recommendation that the scheme should provide that, despite any forum selection term in the relevant service agreement, the proper forum for disputes are Australian courts with the relevant jurisdiction. Any dispute under the scheme should be dealt with in the same way as the

current law deals with like disputes, that is:

- where there is dispute in relation to access to the digital records of an incapacitated person, the government body (in the jurisdiction in which the incapacitated person is domiciled) is authorised to deal with general conflict (VACT, QCAT, TASCAT, court etc) would have power to deal with that dispute; and
- where there is dispute in relation to access to the digital records of a deceased person, the court/probate registry (in the jurisdiction in which the incapacitated person was domiciled at the date of their death) would have power to deal with that dispute.

STEP-Australia does not support the view that a central body should be created to deal with such disputes because:

- the government body/courts with the relevant jurisdiction (in which the person is domiciled, or was domiciled at the date of their death) are best placed to apply the law of that jurisdiction given the differences in law across Australia;
- it is not clear what the demand for such orders from custodians will be once the national scheme is introduced; and
- a central body may be a barrier in terms of costs.

– CHANGES TO EXISTING LAWS AND OTHER ISSUES RELATED TO THE SCHEME

Q17, 18 & 19: ***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?***

What changes to privacy laws in Australian jurisdictions would be necessary or desirable in association with a nationally consistent scheme?

What other legislative amendments would be required to allow lawful access to digital records subject to an access scheme?

STEP-Australia supports the NSWLRC recommendation that amendments should be made to privacy laws about accessing and managing personal information, to allow for the operation of the scheme.

Consultation with legislative bodies in each Australian jurisdiction as part of the roll out of the uniform laws and national scheme would be required to ensure that all appropriate amendments were made, however as a starting point the following laws would require amendment:

- relevant wills, succession and probate and administration acts in each Australian jurisdiction;
- relevant powers of attorney acts in each Australian jurisdiction;
- relevant mental health acts in each Australian jurisdiction;

- relevant guardianship acts in each Australian jurisdiction;
- relevant trustee acts in each Australian jurisdiction;
- *Privacy Act 1988* (Cth);
- *Copyright Act 1968* (Cth);
- *Acts Interpretation Act 1901* (Cth); and
- *Anti-Money Laundering And Counter-Terrorism Financing Act 2006* (Cth).

Q20: ***What educational programs and materials would be appropriate for a nationally consistent scheme, and what institutions and organisations are best placed to provide these?***

STEP-Australia supports the NSWLRC recommendation about education about digital records and their management.

A joint education program and development of material by the state and territory governments, Law Societies and organisations such as STEP-Australia are most appropriate for the roll out of the national scheme.

Materials that would assist include information sheets for each Australian jurisdiction about:

- the general operations of the national scheme;
- the specifics of how the law applies in the relevant jurisdiction, how an application for an order can be made; and
- examples of how the scheme is intended to apply (similar to how the Australian Taxation Office provides examples in their rulings and determinations).

Q21: ***What information should custodians be required to make available about how access requests are handled under a nationally consistent scheme?***

STEP-Australia supports the NSWLRC recommendation that custodians should have transparent processes for handling access requests. Searching for a custodian policy or terms of service can be like searching for a needle in a hay stack.

A recent attempt to locate Microsoft's custodian policy took over 30 minutes, with the majority of result being on community notice boards. Upon finally finding the relevant 'support' page which contained what appears to be Microsoft's custodian policy, the following was all that could be obtained:

> *"Microsoft must first be formally served with a valid subpoena or court order to consider whether it is able to lawfully release a deceased or incapacitated user's information regarding a personal email account (this includes email accounts with addresses that end in Outlook.com, Live.com, Hotmail.com, and MSN.com), OneDrive storage, or any other aspect of*

their Microsoft account. ***Microsoft will only respond to non-criminal subpoenas and court orders served on Microsoft's registered agent in the requesting party's state or region and is unable to respond to faxed or emailed requests for such matters****.*

Any decision to provide the contents of a personal email or cloud storage account will be made only after careful review and consideration of applicable laws. ***Please understand that Microsoft may be unable to provide the account content, and sending a request or providing a subpoena or court order does not guarantee that we will be able to assist you****.*

[**Emphasis added**].[4]

This policy and lack of information is inappropriate, and poses a real barrier for almost all fiduciaries.

– CRYPTO ASSETS

Q22, 23 & 24: ***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?***

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?

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?

STEP-Australia is of the view that crypto assets such as Bitcoin and NFTs be considered digital records under the proposed scheme **where there is a clearly identifiable custodian**.

STEP-Australia supports the proposed definition of 'digital record', and is of the view that it is appropriate. Crypto assets managed by a clearly identifiable custodian (for example crypto exchange such as CoinBase, Binance, Kraken and Gemini) should be treated in exactly the same way as any other custodian who manages a digital asset.

Cryptocurrency, NFTs, and any other digital assets based on a decentralised model **where there is no clearly identifiable custodian** should be (and in reality, are) exempt from the national scheme as there is no one who can be compelled to provide access. This limitation is inherent in the technology and may defy effective regulation. Proper estate planning (including both a legal and

[4] See https://support.microsoft.com/en-us/office/accessing-outlook-com-onedrive-and-other-microsoft-services-when-someone-has-died-ebbd2860-917e-4b39-9913-212362da6b2f?ui=en-us&rs=en-us&ad=us.

access plan) is vital here, but outside the scope of the national scheme.

Q25 & 26: ***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?***

Are there other issues regarding accessing crypto assets should be considered?

As set out earlier in this submission, it is vital that the scheme does not change the legal framework that applies to fiduciaries. It must confirm and enforce that the usual powers and duties of fiduciaries extend to digital assets, with whatever practical implications that extension may have. It should avoid creating new powers and/or duties, and only apply to affirm and codify a fiduciary's existing authority to deal with all of the assets of the deceased or incapacitated person.

For this reason, STEP-Australia is of the view that existing mechanisms/avenues for enforcing the rights and implementing duties of fiduciaries must apply to, and be utilised by, authorised persons applying for access to crypto assets of a deceased or incapacitated user.

PART 5 – FURTHER WORK WITH YOU

5.1 STEP is committed to working with you on this reference. We would welcome the opportunity to meet, as needed. As the reference progresses, we would value your invitation to participate further.