THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCSC/PDL:JvdPsh090922

9 September 2022

Mr Stephen Bray
Director, Civil Justice, Vulnerable Communities & Inclusion
Policy, Reform and Legislation Branch
Department of Communities and Justice
GPO Box 31
Sydney NSW 2001

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

Dear Mr Bray,

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

The Law Society appreciates the opportunity to provide feedback in response to the consultation on *A nationally consistent scheme for access to digital records upon death or loss of decision-making capacity*. The Law Society's Elder Law, Capacity and Succession and Privacy and Data Law Committees contributed to this submission.

Our feedback on relevant consultation questions is provided in the **attached** comments table.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Joanne van der Plaat
President

Encl.

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

Consultation question	Relevant NSWLRC recommendation	Law Society Comments
A statutory scheme for access		
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: (a) What, if any, legislative and non- legislative options currently facilitate access to such records? (b) What other legislative or non-legislative options might be available as an alternative to the scheme recommended by the NSWLRC? (c) Should a scheme apply equally to records of deceased people and people who have lost decision-making capacity? (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)?	**2.1: A statutory scheme for NSW** NSW should enact a statutory scheme that enables an authorised person to access a deceased or incapacitated person's digital records in limited circumstances.	Yes, the Law Society expresses in-principle support for such a scheme. (a) Agreements with, or nominations to, custodians, and informal sharing of access details. (c) Yes, the scheme should apply equally to records of deceased people and people who have lost decision-making capacity. There is a need for a consistent approach in both contexts. (d) The enactment of uniform state and territory laws is the most practical and achievable approach.
Scope and key terms		
2. Should a nationally consistent scheme apply to a custodian,		Yes, although consideration would need to be given to whether the scheme is capable of

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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?		operating extra-territorially. There may also be questions as to where a custodian is 'located' in the case of multi-national organisations.
3. How would a scheme regulate access to joint user accounts where one person is domiciled in Australia and the other overseas?		We are uncertain as to whether or how this could be achieved.
4. 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). • Whether the definition of 'digital record' is sufficiently technology neutral to enable new or emerging technologies to be covered by the scheme. • Whether any records should be excluded from the scope of the scheme.	**3.2: Key terms of the statutory scheme** The scheme should include the following definitions: (1) "Authorised person" means the person with the right, under this scheme, to access particular digital records of the user. (2) "Custodian" means a person or service that has, or had at the time of the user's death, a service agreement with the user to store or maintain particular digital records of the user. (3) "Custodian policy" means a statement of policy by the custodian, not otherwise incorporated in a service agreement, which relates to the digital records of the user stored or maintained by that custodian, and applies whether or not the user is alive or has capacity. (4) "Digital record" means a record that: (a) exists in digital or other electronic machine-readable form, and (i) was created by or on behalf of the user, in	We note that the term "digital record" is used rather than "digital assets". It would be helpful to clarify further what is intended to be covered in the definition of "digital record". It appears it is intended to cover both (a) pure information and (b) digital assets in the sense of digital forms of property which are capable of being valued and traded. We note that the distinction between the two can be somewhat blurred, in that pure digital information can be both important and valuable. It appears cryptocurrency is one example that is regarded in common law jurisdictions as straddling both categories: see for example, *Ruscoe v Cryptopia Ltd (in Liquidation)* [2020] NZHC 728; *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03; *Robertson v Persons Unknown* (2019) unreported, High Court of England and Wales, CL-2019-000444. As noted below in our response to Question 5, we suggest the hierarchy in the scheme that determines who will be the authorised person should be consistent with laws that apply to the

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	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. "Service agreement" means an agreement between a user and a custodian that relates to the digital records of the user stored or maintained by that custodian. (7) "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.	management or administration of more traditional forms of property in deceased and managed estates. In that context, it would seem appropriate that the definition of "digital record" incorporates information which is also a digital asset. We note also that there is a difference between the record of the asset and the private key (usually a PIN or password) that enables the information about the asset to be changed and for the asset to be transferred to another. Given this is a complex and highly dynamic area, extreme care should be taken in developing a definition that is both clear and flexible.
The authorised person and the extent of their access		
5. Would the statutory hierarchy of authorised persons entitled to access digital records of both a 'deceased user' and 'incapacitated user', as recommended by	**4.1: Authorised person entitled to access a user's digital records** The scheme should provide that: (1) The authorised person entitled to access particular digital records of a deceased user is:	We have concerns about the hierarchy determining the authorised person and prefer an order which is consistent with the current Australian legal framework for dealing with assets of deceased persons and incapable persons.

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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?	(a) the person specifically appointed by the user's will to manage those digital records: (i) in the case of a formal will, whether or not there has been a grant of representation of the will, or (ii) in the case of an informal will, only if there has been a grant of representation (b) if there is no person specifically appointed by the user's will to manage those digital records, the person nominated through an online tool to manage those records (c) if there is no person specifically appointed by the user's will or nominated through an online tool to manage those digital records, the executor of the user's will: (i) in the case of a formal will, whether or not there has been a grant of representation of the will, or (ii) in the case of an informal will, only if there has been a grant of representation (d) if there is no will or no executor willing or able to act, and no person nominated through an online tool to manage those digital records, the administrator of the user's estate (e) if no provision or order has been made, a person to whom the deceased user has communicated the access information for those digital records, but not where that person holds the access information as part of an employment or other contractual relationship involving remuneration for the activity, unless the user has indicated that the arrangement is	In relation to deceased estates, we do not object to placing first in the hierarchy a person who has been appointed by a testator in their will to manage digital records, as this preserves the testator's testamentary freedom and intention. It will be a matter for the testator and their legal advisor as to whether this is an appropriate arrangement in each case. The will-making process itself also provides a degree of independent oversight of the appointment. However, in our view, a person nominated through an online tool should not take priority over an executor or administrator. That person may be different from the executor or administrator, who may need to access those digital records before a grant of probate or administration is obtained, for the purpose of preparing an inventory of assets for inclusion in the grant application. Whether or not the digital records have a proprietary aspect, access to them is required for the purpose of administering the estate, and if access is granted to a person who is not the executor or administrator, this may be inconsistent with the executor's or administrator's duties to manage and preserve the estate. We suggest this increases the risk of conflict arising. It would be simpler if the executor or administrator managed the digital records together with the rest of the estate. At the very least, if priority were given to a

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	to have effect after their death. (2) The authorised person entitled to access particular digital records of an incapacitated user is: (a) any person appointed under: (i) an enduring guardianship arrangement that has effect, or (ii) an enduring power of attorney that has effect, but only in relation to those records that are: (iii) specified in the enduring guardianship arrangement or enduring power of attorney, or (iv) otherwise relevant to the person's role either as enduring guardian or attorney (b) if there is no person appointed under an enduring guardianship or enduring power of attorney, any person appointed under: (i) a guardianship order, or (ii) a financial management order, but only in relation to those records that are: (iii) specified in the guardianship order or financial management order, or (iv) otherwise relevant to the person's role as guardian or financial manager (c) if there is no person appointed under an enduring guardianship, enduring power of attorney, guardianship order or financial management order, the person nominated through an online tool to manage those digital records	person nominated by online tool, there would need to be strong, clear emphasis on the nominated person's fiduciary duties to the estate and duty to cooperate with, and provide information to, the executor or administrator. It may also be difficult to determine whether there is a person nominated through an online tool and who they might be, particularly in light of the increasing use of third party digital exchange platforms associated with the management of digital information and assets. We have concerns that there may be greater risk of a testator being vulnerable to undue influence in regard to nominating a person through an online tool than in regard to appointing an executor, which is a familiar and well-understood appointment, and which usually involves a degree of independent oversight. In summary, prioritising an executor or administrator over a person nominated through an online tool would make for a simpler scheme, which is easier to understand, less prone to conflict and more consistent with the approach to estate administration generally. In our view, a person to whom access information is communicated should not be part of the hierarchy in the context of a deceased estate. It would be consistent with the position regarding other assets (such as bank accounts) that the ability to access another person's digital

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	(d) if no provision or order has been made, the person with access information for those digital records, either because: (i) the incapacitated user has communicated the access information for those digital records to the person, or (ii) the person created those digital records on the incapacitated user's behalf but not where the person holds the access information as part of an employment or other contractual relationship involving remuneration for the activity, unless that relationship is a paid carer relationship.	records (if not authorised in their will) should cease upon their death. This would also reflect the privacy right of the person to withhold digital information from others after their death. In our view, the hierarchy should be: 1. Person appointed under a will, if any 2. Executor, if any 3. Administrator, if any 4. Person nominated through an online tool, if any. For similar reasons, in cases involving incapacity, we support placing a person nominated through an online tool lower in the hierarchy than an appointed guardian, attorney or financial manager or person who is specified in a guardianship order or financial management order. However, in our view, a person to whom access information is communicated should not have access after capacity is lost. We suggest the best interests of the person lacking capacity will be served if their substitute decisionmaker is also authorised to manage digital records.
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 forum for a person to apply for an order that they are	**4.2: A person can apply to the Supreme Court of NSW for an order that they are the authorised person** The scheme should provide that a person can apply to the Supreme Court of NSW for an order that they are the authorised person entitled to access particular digital records of the deceased or incapacitated user under	We suggest the state and territory tribunals (such as NCAT) would be best placed to hear applications, as they provide an accessible, affordable, informal format that encourages self-representation. Alternatively, the Supreme Court jurisdiction

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the authorised person?	Recommendation 4.1.	may be appropriate if provision were made for reduction or waiver of a filing fee and if there were access to free legal representation in appropriate cases.
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?	**4.3: Extent of the authorised person's access right** The scheme should provide that: (1) For the purposes of determining the extent of the authorised person's right: (a) "administering the deceased user's estate" includes informal administration of the deceased user's estate (b) "managing the incapacitated user's affairs" includes informal management of the incapacitated user's affairs, and (c) "deal" or "dealing" includes transferring digital records to the person entitled to them, but does not include editing the content of digital records. (2) The authorised person entitled to access particular digital records of a deceased user may access and deal with those digital records: (a) subject to applicable fiduciary duties, and (b) subject to other applicable laws, and (c) subject to any terms of the following, as applicable: (i) the will (even where the authorised person is not the person named in the will), or (ii) the online tool, or (b) if there are no such terms, only for the purpose of	Yes, we consider the recommended scheme regarding the extent of the authorised person's access right would be generally appropriate. In all cases involving the digital assets of a person who lacks capacity, the best interests of that person should be the paramount consideration. If the authorised person is not the guardian, attorney or financial manager, or appointed under a guardianship order or financial management order, it should be possible for an interested person to make an application to the tribunal to have the authorised person's authority removed. We note that fraud perpetrated by the authorised person under this scheme may be difficult to detect, and therefore to prevent or address. The scheme would need to operate for some years before its effectiveness in preventing fraud could be assessed. We recommend provision be made for a five year statutory review of the scheme in each jurisdiction.

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	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	

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	(d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs. (5) If the authorised person entitled to access particular digital records of an incapacitated user also has authority over the user's tangible personal property that is capable of holding, maintaining, receiving, storing, processing or transmitting a digital record, they are authorised to access and deal with the property and digital records of the user stored on it: (a) subject to applicable fiduciary duties, and (b) subject to applicable laws, and (c) subject to the terms of the following, as applicable: (i) the online tool, or (ii) the enduring guardianship or enduring power of attorney, which has effect, or (iii) the guardianship or financial management order, or (d) if there are no such terms, only for the purpose of managing the incapacitated user's affairs. 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.	
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		We suggest the authorised person should be empowered to take necessary steps to protect the security and value of digital records. As noted above, we support imposing clear obligations on the authorised person to cooperate with any person authorised to

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has lost decision- making capacity?		manage or distribute the estate.
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?	**4.4: Other obligations of the authorized person** The scheme should provide that: (1) Where the authorised person entitled to access particular digital records of a deceased user is not the executor or the administrator of the user's estate, they must do all things reasonably necessary to provide relevant information to the executor or administrator for the purposes of administering the user's estate. (2) Where the authorised person entitled to access particular digital records of an incapacitated user is not appointed under: (a) an enduring guardianship, or (b) an enduring power of attorney, or (c) a guardianship order, or (d) under a financial management order, they must do all things reasonably necessary to provide relevant information to a person so appointed for the purpose of managing the user's affairs.	Yes, we consider these provisions appropriate. Again, this obligation on the authorised person should be enforceable via an application to the tribunal.
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?	**4.5: Improper disclosure of information** The scheme should provide that: (1) It is an offence for an authorised person entitled to access particular digital records of the deceased user to disclose information about the deceased user, or	Yes, we support this aspect of the scheme.

Consultation question	Relevant NSWLRC recommendation	Law Society Comments
	another person, obtained in accessing those records, unless the disclosure is: (a) in accordance with the relevant instrument or order appointing the authorised person (b) for the purpose of administering the deceased user's estate (c) necessary for legal proceedings (d) authorised by law (e) authorised by a court or tribunal in the interests of justice, or (f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence. (2) It is an offence for an authorised person entitled to access particular digital records of the incapacitated user to disclose information about the deceased user, or another person, obtained in accessing those records, unless the disclosure is: (a) in accordance with the relevant instrument or order appointing the authorised person (b) for the purpose of managing the incapacitated user's affairs (c) necessary for legal proceedings (d) authorised by law (e) authorised by a court or tribunal in the interests of justice, or	

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	(f) disclosed to authorities as necessary to prevent serious risk to life, health or safety or to report a suspected serious indictable offence.	
Access procedures, liability limits and conflicting terms in custodian agreements and policies		
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?	**5.1: Procedural requirements for access requests** The scheme should provide that: (1) The authorised person entitled to access particular digital records of a deceased or incapacitated user may request access to those records stored or maintained by a custodian by contacting the custodian and providing proof of their authority. (2) In relation to a deceased user's digital records, the authorised person will prove their authority by providing the custodian with a copy of the following, as applicable: (a) proof of the user's death (b) the formal will (c) in the case of a formal will that has not been proved, a statutory declaration establishing that the will is the user's last valid will (d) the grant of representation (e) proof of the authorised person's identity (3) In relation to an incapacitated user's digital records, the authorised person will prove their authority by providing the custodian with a copy of the following, as applicable:	Yes, we consider these procedural requirements to be appropriate. Difficulties may also arise before a grant is obtained in cases where the validity of the will is contested, raising doubt as to whether the person specifically appointed in the alleged last will is the authorised person. As noted above, there may also be practical difficulties determining the existence and identity of a person nominated through an online tool, particularly since the advent of third party digital exchange platforms used to store digital records.

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	(a) the enduring guardianship or enduring power of attorney (b) the guardianship or financial management order (c) proof of the authorised person's identity. (4) For the purposes of Recommendation 5.1(2) and 5.1(3), a "copy" includes a copy in digital or other electronic machine-readable form. (5) If, and only if, the authorised person is unable to provide proof of authority in accordance with Recommendation 5.1(2) or 5.1(3), authority will be proved by an order from the Supreme Court of NSW that states that they are the authorised person. (6) A custodian may choose not to require the particular proof of authority set out in Recommendation 5.1(2) or 5.1(3). If the custodian chooses to require proof of authority, the custodian can only require a Supreme Court order where the authorised person does not provide proof in accordance with Recommendation 5.1(2) or 5.1(3). (7) A custodian who receives a request from an authorised person, in accordance with Recommendation 5.1, must provide access to the authorised person within 30 days of receipt of the request, unless the custodian can show that access is not technically feasible.	
12. Should a nationally consistent scheme protect custodians from liability for acts or omissions done in good faith in compliance with the scheme?	**5.2: Protecting custodians from liability** The scheme should protect custodians from liability for acts or omissions done in good faith to comply with the scheme.	Yes.
13. Should a nationally	**5.3: Protecting the authorised person from liability**	Yes, we agree that a nationally consistent

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consistent scheme protect persons who purport to act as an authorised person and in good faith? 14. What amendments to criminal laws would be needed to enable a nationally consistent scheme?	The scheme should provide that: (1) A person who: (a) purports to act as an authorised person under the scheme, and (b) does so in good faith, and without knowing that another person is entitled to be the authorised person in accordance with the scheme, is not liable for so acting. For the purposes of s 308H of the *Crimes Act 1900* (NSW), access to or modification of restricted data held in a computer is authorised if it is done in accordance with the scheme.	scheme should protect persons who purport to act as an authorised person and in good faith.
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?	**5.4: Conflicting provisions in service agreements and policies** The scheme should provide that: (1) Despite any other applicable law or a choice of law provision in a relevant service agreement or custodian policy, a provision in that service agreement or custodian policy that limits the authorised person's access to particular digital records of the deceased or incapacitated user, contrary to the scheme, is unenforceable. Despite any provision, including a choice of law provision, in a relevant service agreement or custodian policy, the authorised person's access to particular digital records of a deceased or incapacitated user, in accordance with the scheme, does not require the consent of the custodian and is not a violation or breach of any provision of the service agreement or relevant custodian policy.	Yes, in our view these recommendations are appropriate.

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16. What should be the proper forum to resolve disputes in a nationally consistent scheme?	**5.5: NSW as the proper forum for disputes** The scheme should provide that, despite any forum selection term in the relevant service agreement, the courts of NSW with the relevant jurisdiction are the proper forum for disputes concerning the access to particular digital records of a deceased or incapacitated user, where the user is domiciled in NSW or was domiciled in NSW at the time of their death.	As noted above, we suggest the state and territory tribunals are the proper forum to determine these disputes.
Changes to existing laws and other issues related to the scheme		
17. What changes to succession and estate laws, and assisted decision-making laws in Australian jurisdictions would be necessary or desirable in association with a nationally consistent scheme?	**6.1: Clarify that NSW succession and estate laws, and assisted decision-making laws, extend to property in digital form** (1) The definition of "property" in s 3 of the Succession Act 2006 (NSW) should be amended to include "property in digital or other electronic machine-readable form". (2) The definition of "personal estate" in s 3 of the Probate and Administration Act 1898 (NSW) should be amended to include "property in digital or other electronic machine-readable form". (3) The definition of "property" in s 3(1) of the Powers of Attorney Act 2003 (NSW) should be amended to include "property in digital or other electronic machine-readable form".	We suggest that each state jurisdiction would need to conduct a full audit of relevant legislation to ensure that legislation relating to property law, succession and decision making contemplates its application to digital assets and digital records.
18. What changes to privacy laws in Australian jurisdictions would be necessary or desirable in association with a nationally consistent scheme?	**6.2: Amendments to NSW privacy laws to allow for the operation of the scheme** Amendments should be made to NSW privacy laws about accessing and managing personal information, to allow for the operation of the scheme.	Yes, amendments will be needed to state and territory privacy laws. Some of these laws currently have provisions allowing an executor to access a deceased person's physical records (for example, access to health records under the *Health Records (Privacy and Access) Act 1997* (ACT); *Health Records Act 2001* (Vic)). Should amendments be made nationally to allow for the operation of the scheme, there

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		should be consistency as far as practicable. Many digital records are held by organisations that are not subject to state / territory privacy laws but Commonwealth privacy laws. The current definition of 'personal information' in the *Privacy Act 1988* (Cth) does not capture information about deceased persons. If amendments are made to the definition following the current review of the *Privacy Act* (as recommended by the Office of the Australian Information Commissioner), these need to be considered in the context of the operation of the scheme.
19. What other legislative amendments would be required to allow lawful access to digital records subject to an access scheme?		There are potentially a number of amendments required to other laws in addition to privacy laws. For instance, the definition of 'digital record' would include digital health records. Amendment would be required to the *My Health Records Act 2012*.
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?	**6.3: Education about digital records and their management** Institutions and organisations already educating the community and legal practitioners about succession law, administration of estates, and assisted decision-making laws, should incorporate into their education programs information about digital records, and how they can be managed following a person's death or incapacity.	We agree that raising awareness of the scheme via programs and materials to educate the public and the legal profession would be important. Organisations such as law societies, public trustees / public guardians, and other professional organisations such as STEP may have a role.
21. What information should custodians be required to make available about how access requests are handled under a nationally consistent scheme?	**6.4: Custodian procedures for access requests** Custodians should have transparent processes for handling access requests.	At the very least, the processes that apply to persons appointed under the scheme should be clearly accessible on custodians' websites.
Crypto assets		

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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?		See our response to Question 4.
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?		As per our response to Question 4, we consider it should.
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?		In our view, a single uniform legislative scheme should deal with the issue.
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?		As discussed above, the extent of access should be governed by the duties of the authorised person regarding administration of the estate or the incapacitated person's best interests.
26. Are there other issues		The authorised person should be protected

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regarding accessing crypto assets should be considered?		from liability if the digital record is not available.
Other comments		
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.		Relevant case studies are provided in the following article: "Why everyone should future-proof access to their data", Keely McDonough, *LSJ Online*, 25 August 2022. We note also the following resources published via STEP: A Steen & J Murray, "Death, disability and digital service agreements". *STEP Trust Quarterly Review*, 26 March 2021. S Hartung & J Zegel, "The digital tsunami meets estate administration", *STEP Journal*, 14 December 2020. R Belhomme, "Crypto as property", *STEP Journal*, 10 February 2020. STEP Digital Assets Special Interest Group, *Digital Assets: Practitioner's Guide Australia* (2017).