

Call for Views

Digital Assets (Scotland) Bill

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Introduction

The Law Society of Scotland is the professional body for over 14,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Economy and Fair Work Committee of the Scottish Parliament's Call for Views¹ on the Digital Assets (Scotland) Bill (**Bill**)². We have the following comments to put forward for consideration.

General Remarks

We believe there is a need for new legislation to assist in resolving the uncertainty that exists surrounding the status of digital assets and applicable rules in Scots private law.

The benefit of this lies in providing certainty and clarity as to the legal position, which would be especially helpful given the increasing popularity of cryptocurrencies and other digital assets. Legislation is particularly desirable because it is unlikely that the Scottish courts will issue authoritative determinations on uncertain issues any time soon due to a lack of litigation on digital assets in Scotland.

Questions in the call for views

General

1. Does the definition of digital asset in the Bill meet the criteria of being technologically neutral and not too prescriptive? Do you have any suggested improvements?

We consider that the definition is largely technologically neutral and attempts to strike a balance between providing a workable definition of digital assets in Scots law whilst ensuring the definition can be applied to types of digital assets which are not yet developed or commonly known. We note that the meaning of

¹ [Digital Assets \(Scotland\) Bill - Scottish Parliament – Call for Views](#)

² [Digital Assets \(Scotland\) Bill as introduced](#)

“rivalrous” is defined in section 1(2) and further explained at paragraphs 16-19 of the Explanatory Notes³ to the Bill.

However, it may be queried whether the requirement for an “immutable” record is technologically neutral, as it seems to be devised with primarily blockchain technology in mind. This may be intentional, but it would be helpful to have further detail as to why other digital assets would be excluded merely because, for example, a system allows for authorised modification of records in limited circumstances (e.g. in cases of error).

An alternative approach would be to replace section 1 of the Bill with a simple provision such as:

A digital asset is a thing that

- (1) exists solely in an electronic system*
- (2) can be controlled, and*
- (3) cannot be replicated [or is incapable of being replicated]*

This could possibly be accompanied by a provision for specific “things” to be designated as such by statutory instrument to facilitate certainty.

If this approach is adopted, it may not be necessary to refer to “rivalrousness” or a thing “existing independently of the legal system”. We note that the legislation for the rest of the UK, currently going through the Westminster Parliament⁴, does not refer to such features or indeed seek to define digital assets. However, we acknowledge that there is a need to define digital assets in the Scottish legislation, due to the absence of authority in Scotland and the need for rules in the Bill to apply to such property.

2. What types of digital asset might be captured by the definition, both now and in the future? And are there wider implications for society to giving these legal recognition?

The definition appears to include cryptoassets, non-fungible tokens (**NFTs**), and various tokenised assets. However, we believe no attempt should be made to define which specific digital phenomena are “digital assets” in an exhaustive way, as this could create future complications, given that categories are likely to evolve with users’ behaviour and as technology develops. We consider that any attempt to define the only types of assets that would be captured by this legislation could risk restricting the scope for future innovation.

We would not, however, object to the inclusion of a power to clarify by statutory instrument that any given asset type could be designated as a digital asset for these purposes. We consider this as a helpful and practical way to take account of the development of technology and use of assets.

³ [Explanatory Notes](#)

⁴ [Property \(Digital Assets etc\) Bill \[HL\]](#)

3. The transfer provisions in the Bill favour an acquirer in good faith (someone who is not aware of any problems with the asset they are acquiring) over the actual owner of a digital asset. Is this justified? Are there alternative approaches which could better balance the interests of acquirers and owners?

We agree with the inclusion of a provision in the Bill specifying how ownership of a digital asset is transferred. However, we believe that describing digital assets as being corporeal moveables for the purposes of acquisition of ownership will create issues and is likely to lead to incompatibility with the (correct) general application of the law of incorporeal property. Without section 4(3), this characterisation for acquisition purposes would also have required carve outs from other (existing) legislation referring to the transfer of corporeal moveables.

Given the confirmation of digital assets as incorporeal moveables in section 2, the rules for transfer of ownership could simply have been provided, with reference to an intention to transfer ownership and the transfer of exclusive control (for voluntary transfers). This would have been preferable to using the legal fiction of digital assets as corporeal moveables and providing that exclusive control is treated as physical possession. Section 4 (1) of the Bill could be amended with wording along the lines of:

Ownership of a digital asset is transferred from one person (A) to another person (B) if:

- (a) A transfers exclusive control of that asset to B, and*
- (b) A intends to transfer ownership to B.*

Further wording would need to be inserted if there is also an intention to include involuntary transfer. This could be achieved by instead referring to where any enactment or rule or law otherwise permits B to become owner and B acquires exclusive control. This is because there would be no intention to transfer ownership if the transfer is involuntary.

The use of physical possession as an analogy for the (exclusive) control of some types incorporeal property, including potentially certain digital assets, on an ad-hoc exceptional basis can be useful. This is true for electronic trade documents which are treated under the Electronic Trade Documents Act 2023 (**ETDA 2023**) as equivalent to their paper counterparts, for which there is a clear body of law meaning that the possession analysis could be beneficial. In relation to electronic trade documents there is some uncertainty as to the applicable legal rules where the ETDA 2023 applies but the trade documents also qualify as digital assets under the Bill. This could be avoided if electronic trade documents are expressly excluded from the Bill's scope.

We agree with the provision in the Bill favouring a good faith acquirer of exclusive control for value over the pre-existing owner(s). We believe that the latter should have a basis for personal recovery against the wrongdoer(s) who caused them to

be deprived of the property. It may be queried whether the common law is currently adequate to provide such redress.

It is likely that the law will have to subsequently address the practical realities of control and it is not feasible to do this adequately in legislation. One point to note is that if anyone else has an ability to initiate any “use” of a digital asset, this may cause ownership doubts. However, we believe that the presumption of exclusive control would address such practical issues.

Where digital assets are held on an exchange, the exchange may have exclusive control and be presumed to be owner. However, this may be rebuttable by evidence to the contrary. The applicable legal position is likely acceptable in terms of how the transfer of ownership will work and what relevant parties would expect in relation to this, and the good faith acquisition rule provides a useful back-up. In any event, clarity on related points will need to be developed by wider case-law.

4. Do the provisions in the Bill create a framework for identifying and dealing with digital assets which is workable for businesses involved in this sector?

It is helpful to have the express confirmation that digital assets are to be recognised as incorporeal moveables, as this will allow for the application of the existing private law rules on these types of assets to be applied to digital assets. Please see our other comments above.

The Bill does not address other property rights in digital assets, including security rights. However, it should be relatively straightforward to use powers under the Moveable Transactions (Scotland) Act 2023 (**2023 Act**) to facilitate statutory pledges by registration or (analogously to statutory pledges over financial instruments) control.

In the meantime, transfer of ownership of digital assets can be used for secured transactions involving such assets, as is currently the case for claims under the 2023 Act.

5. Is there a need for wider reform to Scots law to enable disputes involving digital assets to be dealt with fairly?

We note that no provision has been included in the Bill in terms of diligence. Whilst we believe that creating a more effective system in this area is definitely achievable for digital assets, we also acknowledge that adding provision for this in the Bill could risk overburdening the legislation. Therefore, given that the areas of diligence and insolvency are not currently addressed, we would welcome assurances that these areas will be considered for reform as soon as possible.

In terms of civil procedure and dispute resolution (and given the cross-border dimensions of digital assets), we believe that the Bill naturally raises questions regarding its interaction with issues of private international law. This includes implications for jurisdiction and the applicable law (or governing law) in digital asset disputes. We note that many of these issues are being looked at in a number

of ongoing law reform projects, including a recent consultation by the Law Commission of England and Wales on Digital Assets and (Electronic) Trade Documents in Private International Law⁵. A copy of our response to this consultation can be found [here](#).

We believe that the questions around these important issues need to be addressed and considered further in Scotland too, in parallel to the developments in England and Wales and internationally on private international law aspects of digital assets. We are also aware that the issue of how the Scottish civil procedure and enforcement regimes can account for digital assets is becoming more relevant within practice in Scotland therefore strengthening a need for provision in that regard.

In addition, it would be desirable to also give some attention to whether there are useful limited and focused reforms that could be made in relation to areas such as succession law, executory practice and family law. Additionally, wider consideration of taxation issues may be appropriate, with particular consideration of the location of digital assets for tax purposes.

6. What other work is needed to enable the benefits of digital assets to be more widely realised across Scottish society?

We note that this question assumes that digital assets are mainly (if not wholly) of benefit to Scottish society. Whilst the development of legislation on digital assets is to be welcomed, we believe that such developments should be furthered in the context of consideration of the potential risks and drawbacks of widespread usage of an interest in such assets.

In terms of cryptoassets, for example, investments in cryptocurrencies remain volatile, and we are aware of instances where consumer funds have been lost in the context of both “legitimate” investments and cryptocurrency scams and fraudulent schemes. Similarly, NFTs provide new opportunities for artists and other digital content creators regarding ownership rights, proof of provenance, and traceability. However, the full impact on Scotland’s creative industries remains to be seen.

Ideally, guidance accompanying any resulting legislation should make clear that enhanced legal recognition of digital assets is not to be taken as an endorsement of digital assets as a type of investment, creative vehicle, or otherwise.

7. Should the Bill contain any mechanisms to monitor its impact and allow for changes to be made in the future?

We have mixed views about this. It does not immediately appear to be essential, as the Scottish Parliament can take steps to amend or update the legislation as necessary, assuming it is enacted. We would also want to avoid giving the

⁵ [Digital assets and electronic trade documents in private international law – Law Commission Consultation](#)

impression that the Bill may shortly become outdated due to technological advancements. However, given that other areas of law need to be considered further as regards digital assets, there may be some value in aligning a review of the Bill's impact with that wider consideration.

In any event, those operating in practice and in industry will appreciate that the technological landscape is in a state of flux and that not all developments can be foreseen, and that further primary or secondary legislation may need to follow.



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