Law Society of Scotland

Consultation Response

Digital Assets in Scots Private Law

February 2025

Photo: Aerial view of Aberdeen city centre

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Introduction

The Law Society of Scotland is the professional body for over 13,000 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.

The Banking, Company and Insolvency Law, Trusts and Succession and Tax Law Sub-committees welcome the opportunity to consider and respond to the consultation on Digital Assets in Scots Private Law.

Consultation Questions

1. Is primary legislation the most effective way to resolve uncertainty about the status of digital assets in Scots private law?

   If you do not agree, please explain your reasons.

   Yes, we agree that legislation is the most effective way of resolving uncertainty surrounding the status and characteristics of digital assets in Scots private law. The benefit of such an approach is that it provides certainty and clarity as to the legal position, particularly given the limited prospects of the Scottish courts issuing authoritative determinations on uncertain issues relating to digital assets due to lack of litigation in this area.

2. Should any possible future primary legislation have a narrow scope of application by being limited to a statutory definition of digital assets as property, rules governing

the transfer of ownership, and provisions confirming that the principles of Scots private law continue to apply to digital assets?

If you do not agree, please explain your reasons.

We agree that such legislation should have a narrow scope of application. A relatively high-level, "light-touch" approach is desirable to avoid creating future unforeseen problems and restricting the scope for future innovation. We note the legislation for England and Wales that is making its way through the UK Parliament, and its brevity and very general expression. However, it should be noted that some of the issues in English law in this area differ from Scots law and the English legislation focuses on one of these issues. There is already a reasonable volume of case law in England and Wales, unlike in Scotland, and it is less likely in Scotland than England that the courts will quickly clarify uncertainties. As such, a somewhat longer piece of legislation may be justified for Scotland, even though it should still be relatively brief and focused on specific issues identified relative to which existing legal principles do not provide relatively clear guidance.

We agree that the legislation should clarify the rules applicable to transfer of the ownership of digital assets and, to the extent required, and that general Scottish private law principles apply to digital assets. Great care would be required in framing any definition of digital assets if general principles of Scots law are not thought adequate to determine whether a given digital phenomenon constitutes property in accordance with those principles and future-proofing any definition framed would be particularly difficult.

3. For the purposes of Scots property law, should digital assets be classified as incorporeal moveable things?

If you do not agree, please explain your reasons.

Yes, we agree that they should be classified as incorporeal moveables. While we acknowledge that their characteristics distinguish them from other types of incorporeal moveables and they arguably share some characteristics with corporeal moveables, their intangibility means that they should be considered incorporeal moveables. It would seem counter-intuitive for them to be instead classified as corporeal moveables. The category of incorporeal moveable property seems flexible enough to accommodate digital assets, along with e.g. claims, intellectual property rights, and shares etc. It would also ensure that they are included in estates and remain subject to general principles of property law.

However, the novel features of digital assets mean that they are a special type of incorporeal moveable and will need bespoke rules in some circumstances, including those identified in the consultation paper and in the area of succession law and executory practice. Therefore, care should be taken not to impose overly prescriptive definitions so as to help maintain flexibility, especially as technology evolves, and avoid unintended gaps in the law.

4. Should any future statutory definition of the category of digital assets considered an object of property be technologically neutral and avoid being too prescriptive?

   If you do not agree, please explain your reasons.

   Yes, we agree. And see our comments in relation to questions 2 and 3 above.

5. The ERG proposed that digital assets be defined with reference to two limiting characteristics. The first characteristic would be that the digital asset is capable of independent existence. Should this be a defining criterion?

   If you do not agree, please explain your reasons.

We can understand the reasoning behind this but it may need to be defined or explained for clarity. It should also not restrict general principles of property law from being potentially applicable to an intangible without independent existence.

6. The second characteristic would be that the digital asset is of rivalrous nature, in that the use or consumption of the digital asset by one person will prejudice the use or consumption of that same asset by another person. Should this be a defining criterion?

   If you do not agree, please explain your reasons.

   Again, we can understand why this has been identified but, as it is not a term that is widely known, it would probably need to be explained or defined. It is also implicitly a general principle of property already, so the introduction of a new term or its definition might be seen to affect that principle. As such, great care must be taken if it is to be used in legislation and with respect to any definition.

7. Should any possible future primary legislation refer to the category of digital assets which are to be classed as objects of property for the purposes of Scots property law as "digital assets", without creating any other defined term to describe this category, such as "digital objects"?

   If you do not agree, please explain your reasons and what defined term or terms you would consider more appropriate to use.

   We believe that either of these terms would be suitable. "Digital assets" is a more widely known and used term, including outside Scotland. However, "digital objects" may be more technically precise in property law terms, and a distinction could be drawn with digital assets, which is often used in a wider sense.

8. Should control over a digital asset generally be the basis for establishing ownership of that asset?

   If you do not agree, please explain your reasons.

   While this would be contrary to the publicity principle of Scots property law (at least in some instances), it may be considered justifiable for these assets, given that control is widely agreed to be the critical concept and enables a party to transfer and otherwise dispose of the assets. As such, focusing on control is a recognition of the practical reality for such assets. However, attention will need to be given as to whether the relevant form of control is to be exclusive control. In addition, consideration will need to be given as to whether there are digital assets that could be property objects but for which control is not applicable or is not the sole criterion, and which rules would apply to them instead.

9. Should the voluntary transfer of the ownership of a digital asset require the transfer of control over that asset from the current owner to another person, coupled with the current owner intending to transfer ownership to that other person?

   If you do not agree, please explain your reasons.

   This seems reasonable. However, the point above regarding exclusive control also applies here.

10. Should a person who acquires control of a digital asset in good faith and for onerous consideration be recognised in Scots property law as acquiring the ownership of that digital asset, even where the transferor from whom they acquired the digital asset was not the owner?

    If you do not agree, please explain your reasons.

While this would be contrary to the nemo plus rule of Scots property law, it may be justifiable for digital assets. This is particularly so given how these assets are transferred and the practical (and evidential) problems that would exist in unravelling a series of transactions involving particular assets, and the consequent unfairness for good faith purchasers. A strict application of the nemo plus rule in this context may not be realistic.

11. Should any possible future primary legislation make provision confirming that the principles of Scots private law continue to apply to digital assets, so far as those principles are consistent with the characteristics of those assets?

    If you do not agree, please explain your reasons.

    It is not clear to what extent this is necessary; however, there would be no harm in doing so and it would put the matter beyond doubt.

12. Should any possible future primary legislation make provision to clarify that digital assets which qualify as property may be held on trust?

    If you do not agree, please explain your reasons.

    We believe that this is likely not necessary if there is clarification regarding the property status of digital assets. While we can understand why it might be perceived as desirable, it may raise questions as to why such provision is being included for digital assets. It could be interpreted to mean that certain other matters arising from general property law that are not explicitly covered are excluded by implication from applying in relation to digital assets. However, we do accept that a statutory statement could provide useful clarity for practitioners, particularly around transfer and valuation when administering estates or trusts.

13. Should any possible future primary legislation contain any other substantive provisions within devolved competence which are not set out in this consultation? If so, please explain what additional provisions you consider would be needed and why they would be needed.

Attention should be given to enforcement against digital assets and their treatment in insolvency. The current forms of diligence in Scots law are unsuitable for such assets. It would be desirable for there to be provision for diligence against digital assets. Even if wider reform of diligence is necessary to fully address the matter, and cannot be included in a short Bill on digital assets, there could be a mechanism to stop debtors from dealing with digital assets in a way that would defeat creditors (perhaps using an interdict power). For insolvency law, a requirement for the debtor to disclose details of digital assets they hold and to transfer control to the insolvency practitioner or the court may be desirable. While personal insolvency law is generally within devolved competence, that is only true for parts of corporate insolvency law, so that may produce some further reform challenges.

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 and executry practice, family law as well as civil procedure.

From a tax perspective (and recognising that taxation is a partially devolved matter), we note that wider implications may arise in Scotland with regards to both Personal Income and Capital Gains (**CGT**) taxes. We believe this will be further impacted by the control, ownership and change of control and / or ownership of digital assets. Additionally, we believe that further jurisdictional issues could arise in relation to where a tax dispute on digital assets is heard, as will be the tax residency of the person deemed to be in control or ownership of any such digital assets i.e. whether this individual (or business entity) is a Scottish Taxpayer or not. This would lead to further implications in terms of the Scottish General Anti-Abuse Rule, which may need to be revised.

We therefore believe that an attempt should be made to determine where a digital asset is located. A possible approach could be to classify those that are tied to Scottish owners as property being taken to be located in Scotland. We also note that HMRC currently try to determine a digital assets location (or "situs") for tax purposes when calculating CGT or Inheritance Tax Liabilities. This is through reference to wider statute such as the Taxation of Chargeable Gains Act 1992 and its provision for the location of intangible assets[1]. Therefore, we believe that a solution could lie in a similar approach. Alternatively, one may look to contractual rights that govern ownership of a digital asset, for example by looking to any provision detailing which jurisdiction a dispute over that asset is to be heard. Whilst we accept that there will be difficulties with any such approach (due to the inherent characteristics associated with a digital asset), we would welcome wider consideration of this point.

At this stage we would ask to reserve further comment until additional detail is provided as to what legislative provision on this area might look like. We would welcome the opportunity to review and comment on any such proposals.

If it would be helpful to discuss any of these points further, we would be pleased to do so.

[1] Cryptoassets for individuals: Capital Gains Tax: determining the location of exchange tokens - HMRC internal manual

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