Law Society of Scotland

Stage 1 Brief

Digital Assets (Scotland) Bill

January 2026

Photo: Skye Bridge

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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 Digital Assets (Scotland) Bill (**"the Bill")** was introduced by the Deputy First Minister and Cabinet Secretary for Economy and Gaelic, Kate Forbes MSP, on 30 September and comprises 9 sections.

We submitted written evidence on the Bill to the Economy and Fair Work Committee (**"the Lead Committee"**) on 12 November 2025 and provided oral evidence as part of the Lead Committee's Stage 1 consideration of the Bill on 03 December 2025. The Lead Committee Report on the Bill at Stage 1[1] ("**Stage 1 Report"**) was published on 15 January 2026. We note that the Lead Committee recommends that the Parliament agrees to the general principles of the Bill.[2]

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 22 January 2026.

Our briefing includes the following key points:

- 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.
- We believe certainty and clarity as to the legal position is required given the increasing popularity of cryptocurrencies and other digital assets.
- We believe that legislation is particularly desirable because it is unlikely that the Scottish courts will issue authoritative determinations on uncertain issues due to a lack of litigation on digital assets in Scotland.
- The Bill will provide greater clarity regarding property aspects of digital assets, however, further reform will be needed to address other areas of law. The narrow purpose of the Bill and the need for further legislation are acknowledged by the Lead Committee.[3]

[1] Stage 1 Report on the Digital Assets (Scotland) Bill
[2] Stage 1 Report, para 158
[3] Stage 1 Report, para 6

Specific Comments on Sections of the Bill

Section 1 – Meaning of Digital Asset

Section 1 describes the digital things with which the Bill is concerned, labelling them as "digital assets" and confirming they are objects of property which are capable of being owned.

We note from the recent Call for Views[4] that there is widespread support for the statutory definition of digital assets to be technologically neutral and avoid being too prescriptive. We also note that there are calls for digital assets to be defined with reference to two proposed characteristics: *"capable of independent existence"*[5] and *"rivalrous"*[6].

We consider that the definition at section 1 of the Bill is largely technologically neutral and attempts to strike a balance between providing a workable definition of digital assets in Scots law whilst ensuring that the definition can be applied to types of digital assets which are not yet developed or commonly known. We note that the meaning of "rivalrous" is defined in section 1(2) and further explained at paragraphs 16-19 of the Explanatory Notes[7] to the Bill.

However, we question whether the requirement for an *"immutable record of transactions"* at subsection 2(a) is technologically neutral, as it seems to be devised with primarily standard 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).

We believe that 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, recently passed by the Westminster Parliament[8], 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

[4] Published responses for Digital Assets (Scotland) Bill - Scottish Parliament - Citizen Space
[5] section 1(b) Digital Assets (Scotland) Bill
[6] section 1(a) Digital Assets (Scotland) Bill
[7] Explanatory Notes
[8] Property (Digital Assets etc) Act 2025

legislation, due to the absence of authority in Scotland and the need for rules in the Bill to apply to such property.

We note that the Lead Committee supports the definition of digital assets in the Bill.[9] However, the Committee does acknowledge different views on the manner in which the term "immutable" may be interpreted by the courts and asks the Scottish Government to monitor developments in this area. We consider that, if Section 1 is passed as drafted, such monitoring is sensible.

A further point on the definition of "digital assets" at section 1 is our belief that 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 note that the Lead Committee recommends that the Scottish Government works with industry, academia and relevant public sector stakeholders regarding the development of guidance on the interpretation and application of definitions of digital assets,[10] and requests that the Scottish Government provide further information setting out which current digital technologies are expected to meet or not meet the Bill's definition of a digital asset.[11] Subject to our comments above, we welcome these recommendations.

However, we would not 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.

As indicated in oral evidence to the Lead Committee, we are also of the view that it should be clarified in section 1 that certain "things" should not be treated as digital assets for the purposes of the Bill as they are already subject to other transfer regimes. In particular, "electronic trade documents" as defined in the Electronic Trade Documents Act 2023 (**ETDA 2023**) were mentioned in this context and "claims" and "financial collateral" as defined for the purposes of the Moveable Transactions (Scotland) Act 2023 and the Moveable Transactions (Scotland) Act 2023 (Financial Collateral Arrangements and Financial Instruments) (Consequential Provisions and Modifications) Order 2025. In addition, "uncertificated units of a security" as defined in the Uncertificated Securities Regulations 2001 and "rights, benefits and privileges attaching to or arising from such a unit, or relating to the details of a holder of such a unit" should not be treated as digital assets for the purposes of the Bill[12]. As with a power to designate

[9] Stage 1 Report, para 51
[10] Stage 1 Report, para 54
[11] Stage 1 report, para 55
[12] This currently relates principally to the CREST system and reliance on dematerialised instructions under regulation 35 of the 2001 Regulations. The 2001 Regulations are not, however, restricted to CREST.

a given digital phenomenon as a digital asset, it would be sensible to include a power by statutory instrument to confirm that a given digital phenomenon is not to be treated as a digital asset under the Bill. We do not believe that section 4(3) is sufficient for these purposes, if otherwise retained, as it disapplies enactments relating to corporeal property rather than incorporeal property and is not sufficiently specific to preserve market certainty.

We welcome the Lead Committee's request that the Scottish Government reflect on whether there are certain things that should be excluded from the Bill's provisions, with a view to bringing forward any necessary amendments at Stage 2.[13]

Section 2 – Nature of Digital Assets in Scots Law

Section 2 provides that digital assets are incorporeal moveables for the purposes of Scots law.

It is helpful to have this express confirmation that digital assets are to be recognised as incorporeal moveables, as this will remove any doubts on the application of the existing private law rules for these types of assets to digital assets.

However, please see our further comments below regarding acquisition of ownership and the difficulty that we anticipate will arise from labelling digital assets as corporeal moveables for this purpose.

Section 3 to 5 – Presumption of Ownership, Acquisition and Exclusive Control

Section 3 creates a rebuttable presumption that the person who has exclusive control of a digital asset owns it. We note from the Bill's accompanying explanatory note that *"the presumption created by section 3 is analogous to the one that applies in relation to corporeal things, whereby the person in possession of a thing is presumed to be its owner."*[14]

We agree with the inclusion of a provision in the Bill specifying how ownership of a digital asset is transferred, as the general rules for transferring incorporeal property are difficult to apply to digital assets. However, we believe that describing digital assets as being corporeal moveables for the purposes of acquisition of ownership will create uncertainty and unforeseen issues and is likely to lead to incompatibility with the (correct) general application otherwise of the law of incorporeal property. This is reflected in section 4(3), which as noted above disapplies enactments relating to corporeal property but takes no account of enactments relating to incorporeal property which might interact with the corporeal property rules for the acquisition of ownership applied by section 4(1). There may also be issues regarding whether and to what extent digital assets are

[13] Stage 1 Report, para 66
[14] Pg 9, Explanatory Note to Bill

to be treated as corporeal or incorporeal moveables in the context of acquisition of ownership in insolvency law.

In addition, if corporeal property rules were to be applied to the acquisition of ownership of digital assets, some clarification would also be required that certain common law rules regarding the acquisition of ownership were also inapplicable or applicable in a different way, such as rules regarding accession of one digital asset to a digital asset owned by another person or the application of the *specificatio* doctrine on the changing of the nature of a digital asset by a non-owner. There is therefore uncertainty and scope for unforeseen issues arising within the acquisition of ownership through applying corporeal property rules, let alone in their interaction with the incorporeal property rules otherwise applying.

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.

In view of the foregoing, we believe that section 4(1) of the Bill could be amended to 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.

We believe that the use of physical possession as an analogy for the (exclusive) control of some types of 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 ETDA 2023 as equivalent to their paper counterparts, for which there is a clear body of law meaning that 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. As indicated above, this could be avoided if electronic trade documents are expressly excluded from the Bill's scope.

We note the Lead Committee's recommendation that issues of how the concepts of control and exclusive control as they apply to digital assets in practice could be included in guidance.[15] Subject to our comments above, we consider this sensible.

In relation to section 4(2) of the Bill, we agree with the provision 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, particularly in situations of error.

However, we believe that it is likely that the law will have to subsequently address the practical realities of control and it may not be 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 normally 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 should normally be rebuttable by evidence to the contrary through contractual, agency and trust arrangements with the exchange. 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, we believe that clarity on related points will need to be developed by wider case-law.

We note that the Lead Committee has asked that the Scottish Government keeps the issue of good faith acquisition under review, [16] and has asked the Government to reflect on how the good faith provision in the Bill is drafted.[17]

Section 6 to 8 – Ancillary Provision, Regulation Making Powers and Commencement

Section 6 empowers the Scottish Ministers to make, by regulations, various types of ancillary provision for the purposes of, in connection with, or to give full effect to the Act that the Bill will, if enacted, become or any provision made under the Act. We note from the explanatory note that this power is stated to include *"the power to modify any enactment (including the Act that the Bill, if enacted, will become). The word "enactment" is defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010 and includes primary legislation (e.g. Acts of the Scottish and the UK Parliament)."*[18]

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[15] Stage 1 Report, para 84
[16] Stage 1 Report, para 99
[17] Stage 1 Report, para 100
[18] Explanatory Notes accessible, page 15

Section 7 makes further provision about the regulation-making powers conferred on the Scottish Ministers by sections 6 (ancillary provision) and 8 (commencement).

We have mixed views about these powers. 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 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 seeking wider Parliamentary scrutiny or review of the Bill's impact should it become law.

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.

Wider Commentary

We believe that there are a number of wider issues that have not been addressed in the Bill, but which will require further consideration.

First, we note that no provisions have been included in terms of debt enforcement (diligence) and insolvency (albeit that property classification and acquisition of ownership provisions may have some relevance in such contexts too). Whilst we believe that creating a more effective system in these areas 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 these areas are not currently addressed, we would welcome assurances that reforms will be considered as soon as possible. A solution to the issues regarding debt enforcement would be the introduction of amended versions of information disclosure orders and residual attachment, which are provided for in the Bankruptcy and Diligence etc (Scotland) Act 2007 (sections 129-145 and 220) but have never been brought into force.

Furthermore, in terms of civil procedure and dispute resolution (and given the cross-border dimensions of digital assets), we also 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 consultation by the Law Commission of England and Wales in 2025 on Digital Assets and (Electronic) Trade Documents in Private International Law[19]. 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

[19] Digital assets and electronic trade documents in private international law – Law Commission Consultation

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, strengthening a need for provision in that regard. We therefore welcome the Lead Committee's recommendation that the Scottish Government maintains a watching brief on initiatives in other countries to ensure any decisions taken here do not create unnecessary barriers to businesses operating internationally.[20]

In addition, it would be desirable to 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 a particular focus on the location of digital assets for tax purposes.

We welcome the Lead Committee's recommendation that the Scottish Government view the law in areas including private international law, debt enforcement, taking security for loans, and court procedure with a view to bringing forward reform proposals.[21]

We note the Lead Committee's calls for the Scottish Government to work with stakeholders to ensure Scottish interests are represented on the UK Jurisdiction Taskforce, as well as any other relevant expert group which may be established.[22] We also note the Lead Committee's call for the Scottish Government to establish a Scottish panel of experts to advise the courts, businesses and the legal sector on emerging digital technology issues in Scotland.[23] We consider liaison with other jurisdictions appropriate, and would welcome confirmation of the Scottish Government's intentions in these areas.

Conclusion

Whilst we welcome the development of this Bill and its attempts to clarify the law surrounding digital assets, we believe that this needs to be taken forward in the context of the issues highlighted above, alongside a consideration of the potential risks and drawbacks of widespread usage of such assets. Investments in cryptocurrencies remains 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, although we note that UK-wide regulatory changes are being introduced and further developed.

Consequently, whilst enhanced legal recognition is a step in the right direction, this should not to be taken as an endorsement of digital assets as a type of investment, creative vehicle, or otherwise. We believe that caution needs to be

[20] Stage 1 Report, para 134
[21] Stage 1 Report, para 144
[22] Stage 1 Report, para 104
[23] Stage 1 Report, para 105

exercised and that further legislation will likely be required before the full range of digital assets benefits will be realised.

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