**Digital Assets as Personal Property – Law Commission of England and Wales Short Consultation on Draft Clauses**

**Response by the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen**

This response is provided by a joint working group of the Centre for Commercial Law and the Centre for Scots Law at the University of Aberdeen. The members of the working group are Dr Euan West, Dr Jonathan Ainslie, Dr Chike Emedosi, Dr Alisdair MacPherson, Professor Donna McKenzie Skene and Dr Burcu Yüksel Ripley.

(1) Do you agree with the general approach of the draft bill, and agree that it will achieve the desired effect?

If English law is to maintain its traditional distinction between 'choses in possession' and 'choses in action', there is some value in the draft bill. It offers certainty on a particular point of classification and the recognition that the possession/action dichotomy is not exhaustive would give the law a degree of flexibility. Nor, as the wording of the bill makes clear, would the impact of such flexibility necessarily be confined to *digital* assets. The bill also arguably offers the courts some latitude as to the remedies that they could grant in respect of digital assets. All in all, statutory recognition of a third category of personal property would mean that the courts would not feel compelled to classify all property objects not fitting into the 'choses in possession' category as 'choses in action'.

While producing a code on digital assets would be onerous, and would no doubt bring its own problems, the fact that the draft bill has only one substantive provision is unfortunate. It savours of a missed opportunity. Much of the law's development will simply be left to the courts. If there is to be legislation on a third category of personal property, a number of points would benefit from clarification. For example, it would be helpful for the legislature to define the boundaries of this third category, lest it become nothing more than a vague miscellany. Is the third category defined *negatively*: that is, simply as any type of personal property that does not fit into the more established categories of choses in possession and choses in action? It would also be useful to clarify what this new category would exclude. If there are limits on what can constitute a property object, what are those limits? Whether or not the third category is defined positively or negatively, what is it about the three types of personal property which makes them distinctively categories of *property*, such as to distinguish them from other private law categories? What characteristic(s) do they have in common which others do not share? Clarification of what is *excluded* from being a property object (e.g. pure information) would be helpful, not least given the assertion, at paragraph 3.14, that 'any potential third-category thing will need to be capable of attracting property rights in the first place – *and some digital assets are not*' (emphasis added).

Another area on which clarification would be welcome is the availability of bespoke remedies for digital assets, including debt enforcement (execution) provision, and bespoke rules regarding such matters as transfer and good faith acquisition. Again, the bill seems to leave the task of developing the law on such matters to future litigation. The brevity of the draft bill belies the thoughtful discussions in the consultation documentation. Perhaps that documentation would one day offer interpretative guidance, but such guidance should perhaps be provided in the draft bill itself. It might be argued that much of what the consultation documentation identifies is principles rather than rules and that

statutes lend themselves more readily to the latter than to the former. However, it is possible for legislation to give expression to principles as well as to rules, and placing those principles in the legislation would be conducive to legal clarity.

It may be questioned whether this bill was necessary. The one substantive provision that it contains simply confirms what is already generally understood to be the law. Further, arguably, there was always going to be a bespoke regime for digital assets, much as for intellectual property, and that would have been so whether digital assets had been regarded simply as a form of choses of action and/or as (sometimes) belonging to some third category. Perhaps the bill would serve a symbolic function, signalling to the courts that the law in this area should be developed further wherever possible. It is only unfortunate that there is a lack of guidance as to *how* the law should be developed.

One point to consider is whether some types of property hitherto classified as 'choses in action' – perhaps simply because they are not choses in possession, coupled with the traditional perception that property objects must constitute either choses in possession or choses in action – would 'migrate' to the new category of personal property recognised in the draft bill. Conversely, even on the recognition of this new third category of property, it is worth considering whether *all* digital assets that constitute property objects would necessarily belong to that third category. Conceivably, some digital assets would fall under the 'choses in action' category and others under the new category. In other words, digital assets might cut across two categories. That being so, and assuming that the purpose of the draft bill is to foster a bespoke regime for digital assets, is there any real need for, or benefit in, the legislative recognition of a third category of personal property? A key advantage of legislation – which can consist of rigid, fact-specific rules – over common law principles – apt to be expanded by analogy in future cases – is that it is possible to provide targeted legislation in certain areas and for certain purposes without upsetting, say, the traditional dichotomy between choses in action and choses in possession. Arguably, such targeted legislation on digital assets would be more useful than what is currently proposed.

We are also uncertain as to the precise relationship between the categories specified in this draft bill and electronic trade documents. We note the comments at paragraph 3.21 of the consultation paper, as well as s 3(4) of the Electronic Trade Documents Act 2023 which specifies that such a document "is to be treated as corporeal moveable property" (i.e. broadly the equivalent of choses in possession) for the purposes of Scottish legislation relating to the creation of pledges over moveables (the broad equivalent of personal property). However, it is not wholly clear to us whether the intention now is for an electronic trade document to be a thing in possession due to the Electronic Trade Documents Act or a third category thing in English law, in terms of the draft bill. The consequences of such categorisation will also need to be considered.

Whatever the merits of the draft bill for the purposes of English law, it should not extend to Scotland. Any third category of personal property recognised in English law should not have any effect on Scots law, given the substantial differences between the two systems of property and the non-alignment of their taxonomical approaches to property categories. Given that there may be a greater need for legislative intervention as regards digital assets in Scotland than in England and Wales, due to the absence of case law in the former, it is important that Scotland does not adopt a parallel approach to England by default.

(2) What do you consider the positive impact of the Bill to be? Could you quantify them (for example, by how much in £ or days/hours might be reduced)?

Such limited clarification as the bill would provide may produce a saving in the long term. It would probably obviate the need for *some* litigation. Again, however, the minimalistic approach adopted in the draft bill, which deliberately leaves many important areas to be developed by the courts, would make the law more reliant on the courts, and thus on costly litigation, than would be the case with an alternative approach with further clarificatory provisions in the bill. This approach also means that the law will only develop if and when there is relevant litigation.

(3) What do you consider the costs and/or risks of the Bill to be?

As stated above, the minimalistic approach in the bill will most likely lead to more litigation than there would have been under a more detailed bill. In addition, there is a substantial time and resources cost in passing and implementing any piece of primary legislation. Consequently, a bill with a single provision may seem like a wasted opportunity, particularly if further legislation may be desirable in future. There is also a risk that one of the higher courts decides a case on digital assets and property categories in the relatively near future and prior to the bill passing or coming into force. Such a case might confirm that the law is already as stated in the legislation, thus somewhat undermining the justification for it.