

**FROM: CLAIRE TAYLOR
DOF DALO**

DATE: 15 November 2024

**TO: PETER HALL
COMMITTEE CLERK**

REFERENCE NUMBER GM-1845-2024

PROPERTY (DIGITAL ASSETS ETC) BILL

Summary

Business Area: DSO-Civil Law Reform

Issue: Briefing paper on Property (Digital Assets etc) Bill

Restrictions: None

Action Required: Committee to note ahead of scheduled attendance by DSO officials on 20 November 2024

Officials Attending: Michael Foster – Head of Civil Law Reform
Fidelma O'Hagan – PLO, Civil Law Reform

BACKGROUND

The Finance Minister, Dr Caoimhe Archibald MLA is seeking Executive agreement to the extension of the Property (Digital Assets etc) Bill to this jurisdiction via Legislative Consent Motion. It is hoped that it will be considered and approved by the Executive Committee on 21 November 2024.

In England and Wales, as is the case in this jurisdiction, private law principles which relate to personal property divide into two broad categories. The first category are rights relating to 'things in possession', this includes those things which are tangible

and are capable of being physically possessed. The second category are rights relating to 'things in action'. The Law Commission of England and Wales ("The Law Commission") was tasked with reviewing the extent to which personal property law applies to digital assets such as bitcoin crypto tokens to determine whether reform was required to accommodate them. In its report it noted movement within the courts in England and Wales towards recognition of a distinct 'third' category of personal property things which is capable of consisting of objects of personal property rights, and that the courts have accommodated and protected features unique to certain digital assets. However, there is, as yet, no definitive judicial position on this specific matter and it may be some time before binding precedent is handed down by the courts.

Following stakeholder engagement, the short, technical Law Commission Bill was introduced in the House of Lords on 11 September 2024. The Bill seeks to remove any doubt that there are only two categories of personal property by providing explicit recognition of a further third category of personal property that reflects the unique characteristics of certain things relevant to the modern age. However, it does not restrict the third category to digital things, nor does it mean any kind of digital thing will necessarily fall within that category, and it is clear that there may be other reasons why a thing cannot be personal property. Importantly, the Bill does not provide for the legal consequences of falling into this category, and will allow the common law to be able to develop in a flexible way to respond to such matters.

KEY ISSUES

The Bill does not impose widespread change affecting those holding cryptocurrencies or other digital assets but if extended to this jurisdiction, it would provide statutory clarity in the recognition of a distinct further category which could accommodate the unique nature of digital assets, but does not define them. This would allow the courts to develop common law with a focus on the attributes or characteristics of the thing in question within that third category, and of the legal treatment which should be afforded to it.

Our view is that statutory confirmation regarding a third category of personal property will reduce ambiguity in transactions involving digital assets and provide legal certainty for businesses in terms of risk assessments and investments. A reduction in such ambiguity may reduce disputes over ownership and rights related to digital assets. This could lead to fewer legal proceedings, saving time and money for individuals and businesses.

As well as the above key issues, the Committee has raised with the Department the following:

Stakeholder engagement: The Law Commission did not engage with stakeholders here. The Law Commission's remit extends to England and Wales only. While some of those with an interest in this issue are set up on a UK-wide basis and therefore have a presence in this jurisdiction, the Department has been keen to ensure that others, who may not have had the chance to comment on the proposals, are asked for their views. The Department therefore wrote to the stakeholders listed in Annex A to seek their views on the extension of this provision to this jurisdiction and sought

responses by 30 November 2024. No responses have been received to date. Copies of responses received will be made available to the Committee.

Impact: The provisions of the Westminster Bill are considered compatible with the Human Rights Act 1998 and there are no associated equality implications. The Bill does not create any new rights, nor dilute or remove any existing ones. It is not envisaged that it will have any implications relating to Article 2 of the Protocol on Ireland/Northern Ireland or The Windsor Framework.

The UK Government has stated that there are no financial implications of the Bill, the Bill does not mandate for the use of any certain type of asset (digital or otherwise) but instead provides clarity and greater legal certainty in how certain assets will be treated. No significant costs to the public purse in this jurisdiction are expected.

The Law Commission reported that the Bill complements, rather than duplicates or undermines, other provisions touching on digital assets and the crypto ecosystem. It is not anticipated that there will be any data protection or regulatory implications arising from the Bill. Nor is it anticipated that the Bill will have a rural impact.

Crypto currency trading in this jurisdiction: it has not been possible to identify how many people here are involved in crypto-currency trading, or the quantum for current or expected trading. However, the Financial Conduct Authority's 2023 online crypto assets consumer research reported that when looking at the profile of adults that own crypto assets, ownership is highest in London and in this jurisdiction. In terms of how much value people hold in their crypto assets, the research found that across the UK 39% held a value under £100, with 52% holding under £250.

NEXT STEPS

Following its Second Reading in the House of Lords on 6 November, during which the Bill received broad support, it will now move to Committee Stage. Officials have been liaising with counterparts in England and Wales and it is anticipated that a suitable amendment could be made, subject to the agreement of the Executive, to provide for the territorial extent of the Bill at a future stage of the Bill's passage. Due to the Bill being based on Law Commission proposals, it undertakes a slightly different legislative passage than a usual Government Bill, and the precise timelines are currently unclear. However, it is likely that agreement to include this jurisdiction, will need to be in place soon.

The Minister intends to seek the agreement of the Executive Committee at the meeting currently scheduled for 21 November 2024 to the extension of the provisions of the Bill to this jurisdiction, and to the tabling of an appropriate Legislative Consent Motion to obtain the Assembly's endorsement following Finance Committee scrutiny of the attached Legislative Consent Memorandum.

Responses from local stakeholders have been requested by COP 30 November. In the event of significantly differing local views, The Minister will take those into account before tabling the LCM at the Assembly.

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Annex A – List of local stakeholders.