

Additional written submission from the Rt. Hon. Lord Hodge, 19 December 2025

The Rt. Hon. Lord Hodge
Deputy President of the Supreme Court of the United Kingdom

Daniel Johnson MSP
The Convenor of the Economy and Fair Work Committee
The Scottish Parliament

19 December 2025

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Dear Mr Johnson,

Digital Assets (Scotland) Bill

Professor Fox and I have considered the consultation responses to the draft Bill and have had meetings with Scottish Government officials and the parliamentary drafting team. I write on behalf of Professor Fox and myself to explain our views on the legal matters to which we have given further consideration.

We think that there is not a problem in relation to insolvency with categorising digital assets as incorporeal moveable property in section 2 of the Bill. In corporate insolvency the assets of a company will remain vested in the company. In personal insolvency, which also covers the insolvency of a partnership, the insolvent's estate vests in the trustee on sequestration and the trustee can take steps to obtain control over the digital assets.

We have also considered the suggestion that one might extend the protection of the acquirer in good faith and for value in section 4(2) to enable the acquirer to obtain the digital asset clear of all prior real rights that affect it. This would have the effect of destroying an otherwise valid right in security over the digital asset. While there are arguments in favour of doing so in order to enhance the negotiability of a digital asset, we think that there is no need for such a provision at this time. Were the Scottish Parliament to decide to extend the statutory pledge under the Moveable Transactions (Scotland) Act 2023 to provide security over digital assets, it would be appropriate to consider extending the section 4(2) protection, but it is not required at this time.

We have however one suggestion which your Committee may wish to consider. Section 2 of the Bill states that digital assets are incorporeal moveables and (so far as consistent with their nature *and subject to any enactment*) the law applies in relation to them on that basis. (Emphasis added)

The purpose of the words in italics is to make sure that that rule in the Bill does not override an inconsistent statutory provision in another enactment.

There is a case for making all the provisions of the Bill subject to any enactment. There are statutory provisions which make specific rules for particular forms of digital asset, such as the Electronic Trade Documents Act 2023 and the Uncertificated Securities Regulations 2001. While it may be argued that the Bill, which provides general rules in relation to digital assets, should not be interpreted as impliedly repealing such specific rules in earlier legislation, there remains a degree of uncertainty because of the doctrine of implied repeal of a provision in an earlier enactment by a contradictory provision in a later enactment.

This could be addressed by deleting from section 2 the words in italics above and by adding a new section which provides that the Act is subject to any enactment (including an enactment passed prior to this Act).

Professor Fox and I are happy to give further assistance if that is wished.

Yours sincerely,

Patrick S. Hodge