The Scottish Parliament
Pàrlamaid na h-Alba

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SPICe Briefing
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Digital Assets (Scotland) Bill

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The Digital Assets (Scotland) Bill would clarify the status of digital assets - as defined in the Bill - as things which can be owned in Scots law. Legal clarity is expected to support economic development in Scotland.

18 November 2025
SB 25-58

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Purpose of the Bill

The Digital Assets (Scotland) Bill aims to clarify that certain digital assets are recognised as things which can be owned in Scots law. The Scottish Government hopes that increased legal certainty will benefit both businesses and individuals in Scotland who use digital assets.

The Bill sets out:

- a definition for the digital assets to which the Bill will apply
- that such digital assets are to be treated as incorporeal moveable property for the purposes of Scots law
- how ownership in relation to these digital assets can be established and transferred.

This briefing looks at the context in which the proposals have been developed, including relevant terminology and concepts, the work of the Law Commission of England and Wales and the Expert Reference Group on digital assets in Scots law in Scotland.

It also looks at what the Bill would do.

The SPICe briefing Digital assets in Scots law (2025) [1] looks in more detail at how digital assets are currently treated in Scots law,. It also looks at various international approaches to legislating for digital assets and the proposals in the Scottish Government's consultation on digital assets in Scots law.

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The Bill: important dates and documents

The Digital Assets (Scotland) Bill was introduced in the Scottish Parliament on 30 September 2025 by Kate Forbes MSP, Deputy First Minister and Cabinet Secretary for the Economy and Gaelic. It is a Government Bill.

The Economy and Fair Work Committee (Economy Committee) is the lead committee for Stage 1 scrutiny of the Bill. Stage 1 scrutiny looks at the general principles of the Bill. The Economy Committee issued a call for views on the Bill [2] , which closed on 12 November 2025.

Documents relating to the Bill are available on the Digital Assets (Scotland) Bill page of the Scottish Parliament website. They include:

- the Digital Assets (Scotland) Bill [as introduced] [3]
- the Explanatory Notes, which explain the purpose of the Bill [4]
- the Policy Memorandum, which explains the policy context and objectives of the Bill [5] .

What are digital assets?

There is no single, recognised definition of digital assets within Scotland, the UK or internationally

At its broadest, the term could be considered to cover a very wide range of digital items, such as documents or spreadsheets in electronic or digital form, images, social media accounts and in-game purchases (for example, weapons or outfits). At its narrowest, it could be considered to only cover digital items which are already traded as things, such as certain cryptocurrencies and non-fungible tokens.

The Digital assets in Scots law [1] briefing looks at how digital assets have been defined in some other countries and by international bodies which have a role in harmonising the law. Emerging concepts include that a digital asset is something that is capable of being controlled and the idea of rivalrousness.

The term cryptoasset is already defined in UK legislation

The Financial Services and Markets Act 2000 has been amended to contain the following definition for cryptoasset (section 417):

> "cryptoasset" means any cryptographically secured digital representation of value or contractual rights that—
>
> (a) can be transferred, stored or traded electronically, and
>
> (b) that uses technology supporting the recording or storage of data (which may include distributed ledger technology).

The Financial Conduct Authority already regulates the promotion of cryptoassets. Plans are in place for further regulation of cryptoasset-related financial activity, including offering trading and custody (safe storage) services

Some businesses dealing in cryptoassets are also covered by money laundering regulations. The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, define cryptoassets as (Regulation 14A(3)(a)):

> "cryptoasset" means a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically

Cryptoasset exchanges and custodians are covered by these Regulations. HMRC is also in the process of extending reporting requirements to cryptoasset service providers to reduce the opportunities for tax evasion.

The Bill would apply to a certain sub-category of digital assets

The Bill defines the digital assets it would apply to. The requirements which need to be

met for something to qualify as a digital asset are discussed in more detail in the How digital assets are defined in the Bill section. The definition is expected to cover cryptocurrencies like bitcoin and Ether, and other cryptoassets, such as non-fungible tokens. It could also cover other items supported by blockchain or similar technologies. This could, in the future, potentially include things like emissions quotas and securities. It would not cover electronic documents or images generated by most systems, nor items like social media accounts.

Note too that the Bill would not necessarily stop other digital items - outwith the definition - being recognised as things which could be owned, through the process of the courts applying the general principles of the common law.

The technology underpinning digital assets

The emergence of cryptoassets as a new type of digital item

While the term digital assets can cover a wide range of digital items, it is a particular category of digital things which is causing issues for legal systems around the world. While rights such as contractual rights or intellectual property rights may be engaged by the output of electronic communication and computer systems, these systems have not previously been considered to give rise to items that attract stand-alone property rights.

Broadly, this comes down to the fact that data can be replicated endlessly. This means that the traditional issue that property rights regulate - who owns a thing and controls its use - does not arise. This attribute of things which can be owned - that use or consumption by one person limits use or consumption by another - is termed rivalrousness.

However, a new category of digital items - generally called cryptoassets - has been specifically designed to be rivalrous. This is what makes cryptocurrencies, such as bitcoin, suitable for use as a means of exchange. It is what makes non-fungible tokens, such as Bored Ape Yacht Club images, traceable and tradeable.

The Explanatory Notes [4] which accompany the Bill describe this as the "double spend problem": Paragraph 16 states:

> "[...] person A's spending the coin by giving it to person B would mean person A no longer had it and so could not spend it again. A physical coin can therefore be said to be rivalrous. In order for the Bill to recognise a notional digital coin as a "digital asset", the electronic system giving rise to it must ensure that the digital coin, like its physical counterpart, cannot be spent and spent again infinitely by the same person."

Blockchain is the key underlying technology which makes a digital thing rivalrous

Blockchain is the innovation which has solved the "double spend" issue for digital items. It involves storing data in blocks connected by chains in chronological order. The information is kept secure using **cryptography** - mathematical processes which encrypt the data.

Blockchain is a type of **distributed ledger technology**. This involves sharing information across different computer systems which then need to agree to changes being made. This makes it almost impossible to manipulate the record unless you control over 50% of the computing network.

The particular process a system uses for agreeing changes is called a **consensus mechanism**. This creates one "true" record of what has happened, allowing use of a digital item to be tracked and validated. There are different consensus mechanisms, with "proof of work" and "proof of stake" being discussed in more detail in the section dealing with the Environmental impact of digital assets.

Blockchain networks can be permissionless or permissioned. **Permissionless networks** are open to anyone to participate in by providing computer power. The Bitcoin network is

an example of a permissionless network. **Permissioned networks** involve only designated participants (although decision-making is still distributed among them). Permissioned systems may be used by businesses or other bodies to replicate some of the advantages of blockchain for their specific purposes - for example, tracking assets.

Note though that, while blockchain is the dominant technology at the moment, there are alternatives. It is also possible for blockchain to be used in private systems in a way which would not necessarily create digital assets which would be recognised by the Bill.

Other important terms and concepts

This briefing uses the following technical terminology.

Blockchain - the primary current technology for creating an immutable record of digital transactions, which then makes them rivalrous. Blockchain is a type of distributed ledger technology which records and stores transaction data in encrypted blocks which are joined together chronologically.

Common law - the traditional law as developed by the decisions of judges in individual court cases.

Consensus mechanism - the way in which consensus is reached when distributed ledger technology is used to enable a number of different computer networks to participate in a system. There are different types of consensus mechanism, with proof of work and proof of stake being the main ones for blockchain.

Cryptoasset - a digital representation of an asset backed by cryptographic processes such as blockchain. Common examples of cryptoassets are digital tokens signifying ownership of digital art, such as Bored Ape Yacht Club images, and digital tokens which give you access to particular services or perks, such as a fan club.

Cryptocurrency - a digital representation of currency, issued privately rather than by a bank or government and backed by cryptographic processes such as blockchain. Bitcoin and Ether are examples of cryptocurrencies.

Cryptography - using mathematical processes to encrypt data to prevent unauthorised access. Various types of cryptography are used to generate blockchain and to secure blockchain-based transactions.

Distributed ledger technology - a computing concept that involves sharing data records across different computers in the system. This enables people to participate independently in the system and transact peer-to-peer without the need for central control (described as decentralisation). Distributed ledger technology can be used to create a synchronised record of digital transactions because the various computers on the network need to agree to make changes via a consensus mechanism.

Fintech - short for financial technology, to refer to businesses which work in this sector.

Good faith - in the context of the Bill, a broad concept which requires the acquirer of property to be unaware of any problems with previous ownership of the property. It will not exist if there is explicit knowledge of a problem, but may also be called into question where circumstances may imply an issue (for example, a very low sale price or an unusual sales process).

Hashing - a cryptography process used to make blockchain secure. Data is converted into a hash (a unique string of text with a fixed length). The process cannot be reversed, creating an immutable record. And any minor changes to the data will result in a different output, making it easy to detect unauthorised changes to the data.

Non-fungible token - a non-fungible item is unique, so that it cannot be easily replaced by a similar thing. Money and apples are usually fungible, whereas a painting by Picasso is non-fungible. A non-fungible token is a digital representation of ownership rights to a non-fungible item, stored in a computer system which makes them rivalrous. Famously, non-fungible tokens can represent digital art, like Board

Ape Yacht Club images, but they can also be used to represent other ownership rights digitally.

Security - used to describe the right a creditor has in an asset which secures payment of a loan (for example, a house in a "mortgage"). Where a loan is secured, the risk to the creditor is reduced. This is because they can sell the asset if the debtor cannot make payment. Being able to use different types of asset as security is important to businesses because it is likely to reduce the interest rate they pay to borrow money.

Securities - tradeable financial instruments such as shares in a company or bonds issued by a government or a company.

Smart contracts - contracts which use computer code to execute obligations when the agreed conditions are met, without the requirement for human intervention.

Trust law - the branch of the law that deals with assets held in trust. Assets are held in trust where a person or body (a trustee) holds them for the benefit of another (the beneficiary). Trusts are a common form of legal relationship - for example, when someone dies, the assets in their estate are held in trust for those who will inherit. There are lots of commercial uses for trusts - in particular, money held in trust by a third party body (such as a bank, or a solicitor) is not affected if that third party becomes insolvent.

The Law Commission of England and Wales's work on digital assets

The Law Commission was established to keep the law in England and Wales under review and to recommend reforms where needed. It has completed its project looking at the status of digital assets in personal property law in England and Wales.

The Law Commission recommended very targeted legislative reform for England and Wales

The final report of the digital assets project [6] made recommendations about how the law in England and Wales could be strengthened to support the use of digital assets. Its key recommendations were:

- that the common law (the traditional law as developed in decisions by judges in individual court cases) was sufficiently flexible to deal with digital assets. Where possible, allowing the common law to develop incrementally to address emerging issues with digital assets would be the best approach
- that, because some types of digital asset do not fall neatly into the current categories or property recognised by the law in England and Wales, there should be legislative reform to clarify a third category of personal property exists. This has resulted in the Property (Digital Assets) Bill currently making its way through the UK Parliament
- to aid the development of the law, there should be a panel of experts to provide additional, non-binding guidance to judges considering complex issues relating to digital assets.

The legal analysis undertaken by the Law Commission has underpinned some of the concepts in the Scottish Bill

The Law Commission concluded that the approach to developing the law in England and Wales should be **technologically neutral**. In its view, this was best achieved by the application of common law principles in a technologically neutral way, albeit to factual circumstances which would relate to the specific technologies underpinning the potential property items in question.

The Law Commission analysed which features could be used to identify things which fell into a new "third category" of types of property in the law of England and Wales. Key features were:

- **whether an item had an independent existence** - so it did not rely on a particular person or recognition from the legal system to exist
- **whether an item was rivalrous** - so that use or consumption of the item by one person limited its use or consumption by others.

The Law Commission originally also considered that a third category thing should be composed of data, but ultimately rejected this requirement as being unnecessarily focussed on current technology.

The Law Commission looked in detail at the concept of **control of a digital asset**. It concluded that this concept could be useful in understanding relationships to digital assets. However, it was complex and technical, and operated differently in relation to different categories of digital asset. It did not recommend further definition in legislation, but did recommend that the panel of experts could provide ongoing and non-legally binding guidance in this area.

The Law Commission has undertaken further work relevant to digital assets

This includes projects looking at:

- decentralised autonomous organisations (DAOs) - loose associations co-ordinated through rules set out in computer code and recorded in blockchain
- smart legal contracts - agreements which use computer code to perform obligations without human intervention
- digital assets and electronic trade documents in private international law - private international law is the branch of the law which deals with questions such as which country's laws apply to a dispute when there is a foreign dimension.

The Scottish Government's Expert Reference Group

There is a need for separate consideration of digital assets in Scots law

The recommendations of the Law Commission on digital assets only apply to England and Wales. They cannot be directly transferred to Scotland because the principles of property law are different between the two jurisdictions.

In addition, the Law Commission's recommendations give a prominent role to the common law as the most suitable vehicle for incremental development of the law in this area. Development of the common law relies on the decisions of judges in individual court cases. Because England and Wales is a much larger jurisdiction than Scotland, there are naturally more court cases. English law is also the law of choice for a wide range of international businesses, further boosting the number of cases likely to be considered by the English courts.

Scotland is a small jurisdiction, and Scots law is not widely used or understood beyond its borders. This means that there are significantly fewer opportunities for the law to be developed through judges' decisions in individual court cases. While there is already a body of case law in relation to digital assets which can be referred to in England and Wales, this is not the case in Scotland.

The Expert Reference Group recommended legislation to clarify the status of digital assets in Scots law

The Scottish Government established the Digital Assets in Scots Private Law: Expert Reference Group to look at issues in this area for the law of Scotland. In November 2023, the Group wrote to the Minster for Small Business, Innovation, Tourism and Trade, Richard Lochhead MSP, to set out its recommendations for reform [7] .

The Group concluded that digital assets did not clearly fit into any of the existing categories of property recognised by Scots law, meaning that the law may not develop in a coherent way. It therefore recommended that legislation was brought forward to clarify certain aspects of the law in this area.

It recommended that this legislation should:

- apply only to those digital assets which have an independent existence and are rivalrous
- clarify that such digital assets are recognised as moveable property in Scots law
- set out how such digital assets could be owned and transferred by establishing and transferring control of the asset
- establish that someone who acquires such a digital asset in good faith and for "onerous consideration" would get ownership of the asset, even if the person they got it from did not own it
- state that the general principles of Scots law, including in relation to trusts, apply to

these digital assets.

The Expert Reference Group also called for Scottish representation in relation to projects to develop the law in this area

The Expert Reference Group noted recommendations from the Law Commission for England and Wales in relation to:

- establishing a panel of experts to advise judges on the development of the law in this area
- amending the Financial Collateral Arrangement Regulations (No. 2) 2003 (which deal with enforcement rights when financial assets such as shares, claims for payment or cash are used as security for a loan)
- developing a legislative framework for using digital assets as security for loans.

It noted the importance of ensuring that the separate needs of Scots law were adequately considered in relation to this work.

The UK Jurisdiction Taskforce

The UK Jurisdiction Taskforce has taken forward some of the work on digital assets proposed by the Law Commission for England and Wales.

It is an industry-based initiative which aims to promote the use of English law for organisations involved in technical and digital innovation. It is hosted by LawtechUK and supported by the UK Government's Ministry of Justice.

The Taskforce brings together judges, lawyers and technology experts to issue what it calls "legal statements". These aim to provide the authoritative answers to questions about how the law of England and Wales applies to new technologies. It has recently issued legal statements on digital assets and insolvency and digital securities.

The environmental impact of digital assets

Some types of digital assets have a significant environmental impact

Bitcoin is a particular focus of concern, but environmental issues relate to all digital assets supported by blockchain which use a "proof of work" consensus mechanism.

Blockchain and related technologies create an immutable record of transactions. To do this, different computer networks work together to agree that an addition can be made to the current record. There are different mechanisms which can be used to come to consensus about these changes.

The **proof of work** consensus mechanism involves computer networks devoting computer power to solve mathematical puzzles. Doing so gives them a chance to validate new additions to the blockchain and earn cryptocurrency. However, as demand increases, the difficulty of the puzzles increase. It therefore takes more and more computer power to solve them. This involves consuming energy resources to power the computers. It often also involves consuming water resources to cool them.

There are alternatives to proof of work blockchain

Technologies which do the same job with more efficient use of networks to establish consensus are emerging. There are also alternative consensus mechanisms which can be used for blockchain.

The main alternative is "**proof of stake**". This enables participants in the network to earn the right to participate in validation by staking cryptocurrency. Those staking higher amounts get more chances to carry out validation, and thus earn more cryptocurrency.

The Ethereum network (which supports the Ether cryptocurrency) moved from proof of work to proof of stake as a consensus mechanism due to concerns about environmental impact. However, there is no agreement across users of blockchain that proof of stake is the preferred mechanism. Some see it as undermining the decentralised nature of the concept.

Scottish Parliament staff undertook a Sustainable Development Impact Assessment which looked at issues around the environmental impact of blockchain

The exercise took the form of an anonymised workshop discussion with staff and academics[i] with an interest in this area. It looked at a range of issues. In relation to the environmental impact of blockchain, points raised in the discussion included:

- that, while the environmental impact of cryptoassets such as bitcoin was significant, legal clarification of their status in Scots law would have only a marginal impact on this
- the cryptoasset sector was reacting to concerns about environmental impact by actively working on alternatives, such as proof of stake consensus mechanisms

i The academics who took part in the event were Alisdair MacPherson and Burcu Yüksel-Ripley from the University of Aberdeen, Morshed Mannan from the University of Edinburgh and Jill Robbie from the University of Glasgow. Not all of those present agreed with all the views expressed.

- the need to source significant amounts of power for the computer networks behind proof of work consensus mechanisms was itself driving innovation in renewable energy alternatives. However, one could question whether this focus represented the best use of energy resources (even renewable energy resources) from a sustainability perspective.

What the Bill would do

This part of the briefing looks at what the Bill would do. It deals with:

- the Scottish Government's consultation on proposals for clarifying the position of digital assets in Scots law
- how digital assets are defined in the Bill
- the categories of property recognised in Scots law, and how such digital assets would fit in
- how ownership of these digital assets could be established and transferred, including the concept of exclusive control
- protection for innocent acquirers - that someone who acts in good faith and pays "value" for digital assets (as defined in the Bill) would get ownership even if the person they bought them from did not own them
- options for further reform not dealt with in the Bill.

Scottish Government consultation on proposals for clarifying the position of digital assets in Scots law

The Scottish Government undertook a consultation [8] on high level proposals for reforming the law in this area, informed by the findings of the Digital Assets in Scots law: Expert Reference Group.

There were 21 responses to the consultation, from academics, the legal profession and the finance and fintech sectors. The Scottish Government has produced an analysis of the responses [9] .

There was general support for all the proposals in the consultation, with 85% supporting primary legislation to address the issues. However, some of the more detailed proposals were supported by only slightly more than half of respondents:

- 52% of respondents supported "independent existence" as a defining criterion for digital assets
- 57% of respondents supported rivalrousness as a defining criterion for digital assets
- 57% of respondents supported protection for good faith acquirers of digital assets.

The SPICe briefing Digital assets in Scots Law [1] looks in detail at the proposals in the consultation.

How digital assets are defined in the Bill

The Bill would only apply to a limited selection of items that could be described as digital

assets. Note though that the Bill would not prevent other types of digital asset - outwith this specific definition - being recognised as things which could be owned through the process of the courts applying the general principles of the common law.

Section 1 of the Bill defines a digital asset as a thing which:

- arises from an electronic system which makes it rivalrous and
- exists separately from the legal system.

The concept of rivalrousness

A thing is rivalrous if its use or consumption by one person limits its use or consumption by others. Money and apples are rivalrous: if you spend money you cannot spend it again and, if you eat an apple, no one else can eat it. A more complex example might be a printed book. The fact that you have read a book doesn't stop other people reading the same book. However, if you are reading it, this stops or limits other people from doing so.

In the context of the Bill, the concept of rivalrousness differentiates a digital asset from something which is only data. Data can be used again and again without consequences to other users. For example, sending a standard digital image to one person doesn't prevent you sending it to lots of other people.

Digital assets may be made up of data. However, they will not be recognised by the Bill as objects to which property rights attach unless there are limits to how they can be used or consumed. For example, Bored Ape Yacht Club images are also digital images. However, their use and transfer is controlled by blockchain technology. This means they can only be owned by one holder at a time (and there is a record of previous owners). They can sell for large amounts of money.

The requirement for "an immutable record"

Section 1 of the Bill further defines how an electronic system makes a thing rivalrous. It must maintain "an immutable record" of transactions in relation to the thing. That record must be used to stop a person transacting with the thing in a particular way more than once.

The main way in which electronic systems currently create an immutable record is using blockchain technology, although there are alternatives.

The requirement for an immutable record also has the effect of stopping most items which arise out of the electronic systems we use daily from meeting the definition of digital assets. These records can usually be changed. Even where organisations use variants of blockchain technology to track interactions, internal systems can usually be over-ridden.

The requirement to exist separately from the legal system

To be covered by the Bill, a digital asset must also exist separately from the legal system. A key function of this requirement is to differentiate digital assets to which the Bill would apply from other types of (potentially digital) asset which are better recognised as a standard type of incorporeal moveable property.

Incorporeal moveable property is usually conceptualised as types of legal rights. Examples include the right to be paid money as a creditor or rights someone may have under a smart

contract. However, these rights rely on recognition by the legal system to exist.

In contrast, money, apples, books, cryptocurrencies and certain non-fungible tokens are treated by people as existing without recognition by a legal system. In the words of the Policy Memorandum [5] (paragraph 38):

> " [...] should Scots private law cease to exist, the digital asset would continue to exist."

How such digital assets would fit into the categories of property recognised in Scots law

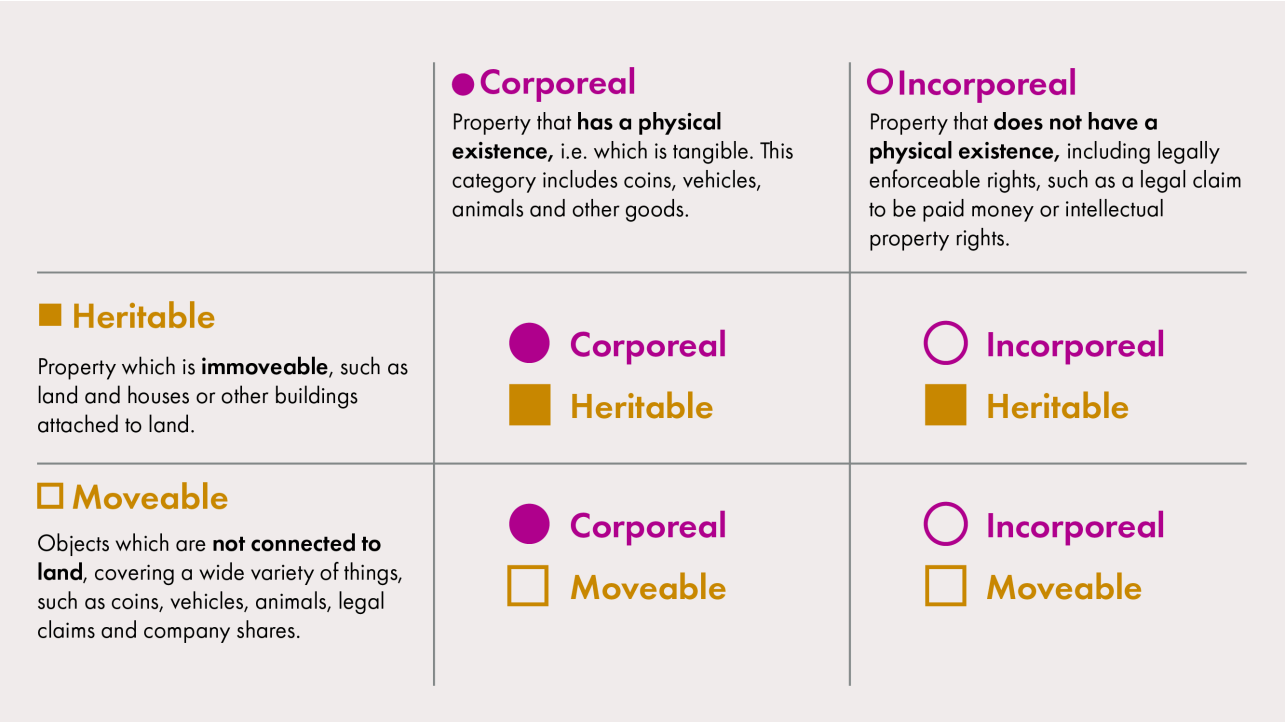
Scots law property categories

Scots law recognises two general types of property. **Heritable property** is land and buildings, as well as some related rights. **Moveable property** is everything else.

These two general categories are sub-divided into corporeal property and incorporeal property. **Corporeal property** is property with a physical existence, and **incorporeal property** is everything else.

The image below describes the overall division.

Figure 1: property categories in Scots Law



MacPherson and Yüksel-Ripley, 2025

Digital assets which meet the Bill's definition would generally be treated as incorporeal moveable property

Section 2 of the Bill would recognise digital assets which meet the Bill's definition as incorporeal moveable property. The law, in most respects, would be applied to them on this basis (where it was not inconsistent with their nature, and subject to any specific provision in legislation).

Incorporeal moveable property is usually conceived of as types of legal rights (such as rights flowing from owning shares in a company, the right to bring a court claim for compensation or intellectual property rights). Many items which could be considered to be digital assets but do not meet the Bill's definition - such as rights under smart contracts or relating to social media accounts - may fall into the incorporeal moveable category anyway.

Ownership of incorporeal moveable property is usually transferred by a process called "assignation". There are different rules, depending on the type of incorporeal moveable property involved. The most common type of assignation is the assignation of a legal claim (such as to be paid money). This would involve an assignor drawing up an assignation document in the favour of an assignee. Ownership of the claim would pass to the assignee at the point the transfer was publicised, either by intimation to the debtor in the obligation or by registration in the Register of Assignations.

But digital assets which meet the Bill's definition would be treated as corporeal moveable property for the purposes of acquiring ownership

Section 4 of the Bill would require digital assets which meet the Bill's definition to be treated as if they were corporeal moveable assets for the purposes of acquiring ownership, including by transfer from the previous owner. Transferring ownership of corporeal moveable property is, in principle, achieved by transferring possession of the object to someone else, with the intention that they should gain ownership.

Note that digital assets which meet the Bill's definition would not be treated as corporeal moveable property for the purposes of legislation. So, for example, the Sale of Goods Act 1979 would not apply to the acquisition of ownership of digital assets.

How ownership of such digital assets would be established and transferred

Sections 3, 4 and 5 of the Bill make provisions relevant to establishing and transferring ownership of digital assets which meet the Bill's definition.

Acquiring ownership of digital assets which meet the Bill's definition

Section 4 sets out that digital assets which meet the Bill's definition would be treated as corporeal moveable property for the purposes of acquiring ownership. Ownership of corporeal moveables is, in principle, acquired by the transfer of possession from the previous owner, with the intention that ownership should pass to the new holder.

Section 4 also sets out that, for the purposes of ownership, exclusive control of a digital asset is to be treated as physical possession of it. So ownership of digital assets within the Bill's definition would be acquired by obtaining exclusive control of the asset (where there is also an intention to transfer ownership, for voluntary transfers).

Section 3 of the Bill supports this by setting out that a person with exclusive control of a digital asset is presumed to own it, unless it can be shown otherwise.

The concepts of control and exclusive control

Section 5 of the Bill sets out what is required to establish exclusive control.

Someone has control of a digital asset which meets the Bill's definition if they have the ability to initiate either:

- a **transfer transaction** (which would result in someone gaining the ability to transfer the asset or some aspect of it and the person who initiated the transfer losing that ability)
- if a transfer transaction isn't possible within the system, a **divestiture transaction** (which would result in no-one being able to have any further dealings with the asset).

The requirement is being able to initiate a transaction. The Explanatory Notes [4] (paragraph 47) state that co-signing arrangements are possible in relation to digital assets. So, where someone can initiate a transaction, even if co-signatures are needed to complete it, they can meet the requirements for control.

Someone has "**exclusive control**" of a digital asset if only they can initiate a transfer transaction (or, if that is not supported by the system, a divestiture transaction). And someone with control of the digital asset is presumed to have exclusive control, unless it can be shown otherwise.

Control of digital assets in practice

Access to digital assets is usually managed through a system called **public key cryptography**. In this system, digital information is encrypted using a public key that is unique to the user but can be seen by anyone else. However, it can only be decrypted by a related private key. The private key code is designed to be virtually impossible to crack.

For example, holdings of cryptocurrency are usually protected by a private key. In order to facilitate a transfer of cryptocurrency, a public key is generated from the private key. People can send cryptocurrency to the address created by the public key, but only the holder of the private key can access the funds or transfer them on.

Someone with access to the private key for an address or account would usually meet the requirements for having control, for the purposes of the Bill, of the digital assets stored there.

Protection for innocent acquirers of these digital assets

Section 4(2) of the Bill would create protection for innocent acquirers of digital assets which meet the Bill's definition.

The effect would be that a person acquiring a digital asset within the Bill's definition would usually become its owner even if the person transferring it did not own it. However, the

acquirer has to acquire it in good faith (so they are not aware of any issues with ownership), and they have to acquire it for "value" (payment of some sort, but not necessarily money).

Protection for innocent acquirers is not the normal legal position

This is contrary to the standard position in Scots law. As a general rule, someone transferring ownership of property can only pass on the rights they have. If there is an issue with a seller's ownership, the defect passes onto the buyer. This is known as the "nemo dat" (or sometimes "nemo plus") rule. It comes from the Latin phrase "nemo dat quod non habet" or "no one can give what they do not have".

So if something has been stolen, it is not usually possible to pass on ownership, even if the seller is entirely unaware of the theft. Instead, the person from whom the thing has been stolen can usually recover it from anyone in possession of it.

However, there are existing exceptions from the general rules on acquirers' rights

There are other situations where the acquirer of property is protected, to various degrees, against the actions of a seller who did not own the property. There are examples from legislation relating to consumers buying vehicles subject to hire purchase agreements and goods (corporeal moveable property) more generally.

Another exception, of particular relevance to some forms of digital asset, relates to "negotiable instruments". These are legal documents which govern ownership of a debt and include bank notes and cheques.

The law around negotiable instruments has developed because of their importance to commerce. This includes a rule that a good faith acquirer for value is able to get ownership of the obligation to pay money even where the seller did not own it.

This exception to the nemo dat rule was developed in recognition of the importance for commercial practice of confidence in the use of negotiable instruments and of the fact that an acquirer had limited opportunity to confirm the details of the underlying obligation.

It is arguable that these factors are also relevant to the use of some digital assets, particularly cryptocurrency. However, it is less clear that they apply to digital assets like non-fungible tokens, where the thing can be clearly identified, and it is often possible to check ownership details.

Policy reasons for applying protection for innocent purchasers to digital assets within the Bill's definition

The Expert Reference Group recommended inclusion in legislation of a rule that an acquirer in good faith and for "onerous consideration" should get ownership of a digital asset, even if the seller did not own it. However, its letter [7] did not provide further explanation for this recommendation. The Policy Memorandum [5] which accompanies the Bill states (paragraph 59):

> "... the characteristics of digital assets, including pseudonymity and the potential ease of transfer (with the ability for transfers to occur on multiple occasions within very short periods of time) require to be taken into account. There would also be considerable practical challenges for someone claiming to be an owner in terms of enforcing their rights against a later good faith purchaser. These considerations, along with the policy intention of providing legal certainty to help to provide markets and transactions with greater confidence when dealing with digital assets, merit an exception to the general legal rule."

The Policy Memorandum does note that application of common law principles in relation to transferring ownership of corporeal moveable property requires that a transfer is both voluntary and made with the intention of transferring ownership. This would prevent a thief and, potentially, a fraudster, gaining ownership of digital assets within the Bill's definition. However, many of the same obstacles identified in the quote above would exist in relation to the owner taking action against the thief or fraudster to recover their assets or to be paid compensation.

Options for further reform relating to digital assets

The Scottish Government's consultation [8] on high level proposals for the Bill also asked if any other provisions (within devolved competence) should be included in future legislation. Fifty-two percent of respondents thought there were (with 28% disagreeing).

There are a range of concerns about how digital assets interact with the current law of Scotland which could benefit from being addressed in legislation

Areas of particular concern, identified by respondents to the Scottish Government's consultation and other commentators, include:

- **debt enforcement** (including of an award made as a result of successful court action) - Scots law doesn't really have the tools to support enforcement against digital assets. This may allow people to avoid their legal obligations by holding wealth in digital assets.
- **insolvency** - there may also be a lack of appropriate tools (for example, requiring holders to provide access to cryptoassets) in insolvency law. This may allow some people to avoid obligations to creditors. Clarity in the treatment of digital assets in insolvency situations is also important to ensure that digital assets are protected when a custodian (an organisation holding digital assets on behalf of others, such as cryptocurrency in digital wallets) enters insolvency. The specific split of reserved and devolved powers in relation to insolvency law can be unclear. However, both policy and court processes for bankruptcy (personal insolvency - covering individuals and partnerships) are devolved.
- **using digital assets as security for a loan** - which is likely to be particularly important for fintech businesses which hold or work with digital assets. The Law Commission for England and Wales recommended further work in this area. However, there are significant differences between the law of Scotland and England in this area, so specific Scottish work is likely to be needed.

- **private international law** -this is the branch of the law which deals with questions, such as which country's laws apply to a dispute when there is a foreign dimension. Any dispute about digital assets is likely to involve conflicting legal rules (for example, between the laws of the country where the owner is based and the country where the organisation holding the assets is based). Rules which at least set out how to decide the applicable law in relation to digital assets would provide some clarity before the courts in Scotland. Note though that this does not stop another legal system taking a different view on the matter.

The SPICe briefing Digital assets in Scots law [1] looks in more detail at the way digital assets interact with Scots law in a range of different contexts, as well as highlighting potential areas for reform.

The Bill does not make any further provision on the treatment of digital assets in Scots law

The Scottish Government's analysis of responses [9] gives reasons for not legislating in most of the areas identified. Paragraphs 27 and 28 of the Policy Memorandum [5] state:

> 27. Views were mixed on whether there should be additional substantive provisions, within the devolved legislative competence of the Scottish Parliament, beyond those outlined in the consultation. Some respondents identified ancillary changes for diligence as being an area where further clarification may be beneficial. It may be appropriate to specifically consult on the matter with bodies such as Scottish Courts and Tribunal Service and the Society of Messengers-at-Arms and Sheriff Officers. [...] If undertaken, such an holistic review would need to be progressed separately and would not be within the intended scope of the Bill.
>
> 28. Some respondents recommended ancillary changes to insolvency law, however, the scope of the insolvency reservation under the Scotland Act 1998 is such that the Bill will not make provision in relation to insolvency, to avoid encroaching upon this reservation.

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