

# PROPERTY (DIGITAL ASSETS ETC) BILL [HL]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Property (Digital Assets etc) Bill [HL] as introduced in the House of Lords on 11 September 2024 (HL Bill 31)

- These Explanatory Notes have been prepared by the Ministry of Justice in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The Bill is concerned with the law of personal property in England and Wales. It provides that something may be capable of attracting property rights even if does not fit into either of the two categories of personal property that have traditionally been recognised under the law of England and Wales. These categories are: things in possession (generally, tangible things) and things in action (personal property that can only be claimed or enforced through a court action).
- 2 The Bill gives effect to recommendations of the Law Commission for England and Wales. The Commission recommended statutory confirmation that a thing will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in possession nor a thing in action. This recommendation responds to the development of new types of assets such as crypto-tokens which challenge the traditional categories.

## Policy background

- 3 In 2020 the Ministry of Justice asked the Law Commission to review the law on crypto-tokens and other digital assets and to consider whether the law of England and Wales required reform to ensure that it can accommodate such assets and to make recommendations to ensure that the law of England and Wales can accommodate digital assets. In particular, the Law Commission was asked to consider whether crypto-assets or other digital assets could be characterised as personal property.
- 4 Personal property rights are important for many reasons. They are important in cases of bankruptcy or insolvency, in cases where objects of property rights are interfered with or unlawfully taken, and for the legal rules concerning succession on death. They are also important for the proper characterisation of numerous modern and complex legal relationships, including custody relationships, collateral arrangements and structures involving trusts.
- 5 Digital assets are increasingly important to modern society and the contemporary economy. They are used in growing volumes and for an expanding variety of purposes – including as valuable things in themselves, as a means of payment, or to represent or be linked to other things or rights.
- 6 The term digital asset is extremely broad. It captures a huge variety of things including digital files, digital records, email accounts, domain names, in-game digital assets, digital carbon credits, crypto-tokens and non-fungible tokens (NFTs). The technology used to create or manifest those digital assets is not the same. Nor are the characteristics or features of those digital assets. In particular, cryptography, distributed ledgers, smart contracts and associated technology have broadened the ways in which digital assets can be created, accessed, used and transferred.
- 7 The Law Commission reviewed the current law and concluded that certain types of digital assets are things to which property rights relate. However, the Commission said that such digital assets do not easily fit within the traditionally-recognised categories of personal property which were developed long before the concept of digital assets was contemplated. The Commission said that this should not prevent them being recognised as property, but that that they are better regarded as belonging to a separate category of personal property. The Commission noted that the courts have been moving towards recognition that a thing may

comprise personal property even though it is neither a thing in action nor a thing in possession.<sup>1</sup>

- 8 It is important that the law keeps pace with technological developments and can recognise and protect new types of assets. This ensures that people and businesses that own, use, and transact with digital assets can do so confidently, allowing the possibilities of these new technologies to flourish.
- 9 The Law Commission consulted on proposals in 2022,<sup>2</sup> and published its recommendations for reform in 2023.<sup>3</sup> Among other recommendations, the Law Commission formally recommended statutory confirmation that a thing will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession.<sup>4</sup>
- 10 The Ministry of Justice then asked the Law Commission to prepare a draft Bill to implement this recommendation. The Commission consulted on a draft in February 2024,<sup>5</sup> and published a supplemental report with draft Bill in July 2024.<sup>6</sup>

## Legal background

- 11 “Property” under the law of England and Wales can be divided into real property (interests in land) and personal property (interests in other things). The law traditionally recognises two categories of personal property.
- 12 Things in possession are, broadly, any object that the law considers capable of possession. This category includes assets which are tangible, moveable and visible, such as a bar of gold. Possession of a thing gives its possessor a property right which is enforceable against the world. Rights in things in possession can be asserted by use and enjoyment as well as by the exclusion of others from them. Things in possession exist regardless of whether anyone lays claim to them, and regardless of whether any legal system recognises or is available to enforce such claims. Things in possession have historically been aligned with things that can be physically possessed.<sup>7</sup>
- 13 Things in action include, traditionally, any personal property that can only be claimed or enforced through legal action or proceedings,<sup>8</sup> enforceable against a particular party. Common examples of things in action are debts, rights to sue for breach of contract, and shares in a company. Things in action have no independent form and exist only insofar as

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<sup>1</sup> eg *AA v Persons Unknown* [2019] EWHC 3556 at [55] per Bryan J and other cases referred to in the Law Commission’s reports. As well as digital assets, a further category has also been contemplated, expressly or impliedly, in relation to other emergent forms of intangible things such as milk quotas (*Swift v Dairywise (No 1)* [2000] 1 WLR 1177, [2000] BCC 642); European Union carbon emission allowances (EUAs) (*Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156); export quotas (*A-G of Hong Kong v Chan Nai-Keung* [1987] 1 WLR 1339, (1987) 3 BCC 403 at p 1342) and waste management licences (*Re Celtic Extraction Ltd* [2001] Ch 475, [2000] 2 WLR 991).

<sup>2</sup> Digital Assets (2022) Law Commission Consultation Paper No 256.

<sup>3</sup> Digital assets: Final report (2023) Law Com No 412.

<sup>4</sup> Digital assets: Final report (2023) Law Com No 412, recommendation 1, and see generally chapters 3 and 4.

<sup>5</sup> Digital assets as personal property: Short consultation on draft clauses (February 2024).

<sup>6</sup> Digital assets as personal property: Supplemental report and draft Bill (2024) Law Com No 416.

<sup>7</sup> Although the Electronic Trade Documents Act 2023 provides that electronic trade documents such as bills of lading and bills of exchange are susceptible to possession if certain criteria are satisfied.

<sup>8</sup> Because property rights are rights in relation to things, it is more accurate to refer to “rights in things in possession” and to “rights in things in action” to capture the divide between the property right and the object of the property right; see M Bridge, L Gullifer, K Low and G McMeel, *The Law of Personal Property* (3rd ed 2021) para 4.002.

they are recognised by a legal system. This means that the presence of a thing in action in the world is dependent on there being both a party against whom the thing in action (the right) can be enforced and a legal system willing to recognise and enforce that right. The category of things in action is sometimes given a much broader meaning as a residual class of personal property — that is, it is sometimes argued that the category can encompass any personal property that is not a thing in possession.

- 14 A 19th century case, *Colonial Bank v Whinney*,<sup>9</sup> is often used as authority for the proposition that these two categories of personal property are exhaustive, so that anything that is an object of personal property rights must fall within one or other of them. Lord Justice Fry said:

All personal things are either in possession or in action. The law knows no *tertium quid* [third thing] between the two.

- 15 However, there now exist certain assets that have characteristics associated with things that are regarded as being property,<sup>10</sup> but which do not sit easily within either of the two traditional categories.
- 16 It might be possible to leave the courts to expand the category of things in action such that it became a residual category for every thing capable of attracting property rights that is not a thing in possession. However, the view of the Law Commission, supported by the majority of consultees, was that it is better to recognise a further category of personal property to reflect the emergence of assets with unique features which were not within contemplation when the original categories were developed. It is also worth noting that the courts have shown a preference for recognising that a thing may be personal property even if does not fall within the existing categories, rather than expanding the meaning of “things in action”.
- 17 Although the Commission’s work focused on crypto-tokens in particular, the Bill does not mention crypto-tokens specifically or say how they should be categorised, nor is its scope restricted to them. There are different arguments about the appropriate analysis of, for example, private, permissioned blockchain systems, voluntary carbon credits (VCCs), in-game digital assets and digital files, including (in some cases) whether they are property at all and, if so, into which category of personal property they fall. The common law has well-established tests for determining what is properly property and how it is characterised, which can be deployed in this context and which will be capable of responding in a nuanced way to different types of new and emerging assets and developing features of existing assets.

## Territorial extent and application

- 18 Clause 2(1) provides that the Bill extends to England and Wales only.
- 19 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions.

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<sup>9</sup> (1885) 30 Ch D 261 at 285.

<sup>10</sup> The characteristics/indicia of property generally are discussed below.

## Commentary on provisions of Bill

20 The Bill comprises two clauses.

### Clause 1: Objects of personal property rights

- 21 Clause 1 provides that a thing (including a digital or electronic thing) will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession. Things that are neither things in action nor things in possession may therefore be recognised as attracting property rights. There may be other reasons, however, why a thing cannot be personal property – such as the thing in question not satisfying the indicia for personal property generally. The effect of this clause is not to say that any and all “things” are property.
- 22 The draft Bill is not intended to, and deliberately does not, confirm the status of any particular type of thing (including a crypto-tokens) as the object of personal property rights. In particular:
- a. it does not attempt to say what things are, in fact, objects of property rights despite not being things in possession or things in action; and
  - b. it does not attempt to detail what the implications of such proprietary recognition would be (such as tortious liability, applicable remedies etc).
- 23 These matters are left to development by the common law. Personal property rights are traditionally creatures of common law and have been developed by the courts over hundreds of years. The common law approach has allowed for a highly nuanced and flexible approach which is not possible to achieve in statute. The draft Bill is intended only as means of “unlocking” the development of the common law by removing the uncertainty stemming from *Colonial Bank v Whinney*,<sup>11</sup> without unduly restricting the way in which it can then respond to technological developments and new types of assets.
- 24 Although the draft Bill is deliberately agnostic about the characteristics of third category things, it does refer expressly to things that are “digital or electronic in nature” as things that could potentially be capable of attracting property rights despite not necessarily being things in possession or things in action. Although this reference is not necessary in legal terms, it is included for context because digital things such as crypto-tokens are likely to be the main type of thing that users of the law will be concerned with, at least in the short to medium term, and because they were the main impetus for the draft Bill. It is important to note, however, that there is nothing in the draft Bill to restrict its impact to digital things; nor does it mean that any particular kind of digital thing will necessarily be found to be property.

### Clause 2: Extent, commencement and short title

- 25 Clause 2(1) sets out the territorial extent of the Bill. The Bill extends to England and Wales.
- 26 Clause 2(2) makes provision about the coming into force of the Bill. The Bill comes into force at the end of the period of two months beginning with the day on which it is passed.

## Commencement

- 27 We are seeking consent from the Law Officers so that the bill to come into force after Royal Assent. Clause 2(2) of the Bill will be updated accordingly if consent is given.

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<sup>11</sup> (1885) 30 Ch D 261 at 285.

## Financial implications of the Bill

- 28 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.

## Parliamentary approval for financial costs or for charges imposed

- 29 The Bill will be introduced in the House of Lords. This section will be completed when the Bill transfers to the House of Commons.

## Compatibility with the European Convention on Human Rights

- 30 The Government considers that the Property (Digital Assets etc) Bill is compatible with the European Convention on Human Rights. Accordingly, Lord Ponsonby, Parliamentary Under Secretary of State, has made a statement under section 19(1)(a) of the Human Rights Act 1998 to this effect.

## Environment Act 2021 section 20 statement

- 31 Lord Ponsonby, Parliamentary Under Secretary of State, is of the view that the Bill as introduced into the House of Lords does not contain provision which, if enacted, would be environmental law for the purposes of section 20 of the Environment Act 2021. Accordingly, no statement under that section has been made.

## European Union (Withdrawal) Act 2018 section 13C statement

- 32 Lord Ponsonby, Parliamentary Under Secretary of State, is of the view that the Bill as published does not contain provisions which, if enacted, would have an effect on trade between Northern Ireland and the rest of the United Kingdom. Accordingly, no statement has been made under section 13C of the European Union Withdrawal Act 2018.

## Related documents

33 The following documents are relevant to the Bill and can be read at the stated locations:

- Law Commission for England and Wales: Digital assets as personal property: supplemental report and draft Bill (2024) Law Com No 416: <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/07/Digital-assets-as-personal-property-supplemental-report-and-draft-Bill-web-version.pdf>
- Law Commission for England and Wales: Digital assets: final report (2023) Law Com No 412: <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/06/Final-digital-assets-report-FOR-WEBSITE-2.pdf>
- Law Commission for England and Wales: Digital assets: consultation paper (2022): <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf>



## Annex A – Territorial extent and application in the United Kingdom

34 The substantive provision in the Bill extends and applies to England and Wales only, as expressed in Clause 2.<sup>12</sup>

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion process engaged?	Extends and applies to Scotland	Legislative Consent Motion process engaged?	Extends and applies to Northern Ireland?	Legislative Consent Motion process engaged?
Clause 1	Yes	Yes	No	No	No	No	No
Clause 2	Yes	Yes	No	No	No	No	No

## Subject matter and legislative competence of devolved legislatures

35 The Bill’s purpose is concerns of matters of private law – specifically the law of personal property and the categories that exist therein. Paragraph 3 of Schedule 7B to the Government of Wales Act 2006 provides that the Senedd Cymru is restricted from modifying private law (para 3(1)).

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<sup>12</sup> References in this Annex to a provision being within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly are to the provision being within the legislative competence of the relevant devolved legislature for the purposes of Standing Order No. 83J of the Standing Orders of the House of Commons relating to Public Business.

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## EXPLANATORY NOTES

These Explanatory Notes relate to the Property (Digital Assets etc) Bill [HL] as introduced in the House of Lords on 11 September 2024 (HL Bill 31).

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