



FACULTY OF ADVOCATES

Response to Scottish Government's Consultation on Digital Assets (Scotland) Bill

- 1. Does the definition of digital asset in the Bill meet the criteria of being technologically neutral and not too prescriptive? Do you have any suggested improvements?**

We agree that the definition of digital asset in the Bill is appropriate, with reference to the specified criteria.

However, we consider section 1(2)(b) is vague, in particular the words: "in a certain way (for example by transferring or spending it)". We suggest that this provision could be improved by reference to the definitions of "divestiture transaction" and "transfer transaction" within section 5(5) of the Bill. For example:

"(b) that record is used to ensure that the intended results of divestiture transactions and transfer transactions, within the meaning of section 5(5), are achieved."

- 2. What types of digital asset might be captured by the definition, both now and in the future? And are there wider implications for society to giving these legal recognition?**

This is a technical and political question, therefore we offer no views.

- 3. The transfer provisions in the Bill favour an acquirer in good faith (someone who is not aware of any problems with the asset they are acquiring) over the actual owner**

of a digital asset. Is this justified? Are there alternative approaches which could better balance the interests of acquirers and owners?

The question of whether this is justified is a policy matter on which we offer no view.

However, we note that the provisions of the Bill do not actually result in an acquirer in good faith becoming the owner of the asset. Section 4(2) is expressed in the negative: a good faith acquirer is not prevented from becoming the owner. That is not the same as saying that a good faith acquirer becomes the owner. Applying the *nemo plus* principle that this provision bears to be an exception to, a good faith acquirer can only become the owner if the actual owner transfers the asset to them. The provision, therefore, appears to have no effect.

At best, a good faith acquirer would benefit from the presumption of ownership provided for in section 3. Notwithstanding the provisions of section 4(2), a good faith acquirer's ownership of the asset would remain open to challenge by the actual owner.

If the policy intent is to protect good faith acquirers, we suggest section 4(2) be reworded to have a positive effect.

4. Do the provisions in the Bill create a framework for identifying and dealing with digital assets which is workable for businesses involved in this sector?

This is a question for the business community to answer, therefore we offer no views.

5. Is there a need for wider reform to Scots law to enable disputes involving digital assets to be dealt with fairly?

We do not consider there to be any issues, unique to digital assets, which would require to be addressed to enable disputes in relation to them to be dealt with fairly. We offer no views, in this context, on the need for any wider reform to Scots law.

6. What other work is needed to enable the benefits of digital assets to be more widely realised across Scottish society?

This is a political question, therefore we offer no views.

7. Should the Bill contain any mechanisms to monitor its impact and allow for changes to be made in the future?

No. The normal legislative process would allow for changes to be made in the future, if it were considered necessary. A built-in monitoring and review mechanism does not seem consistent with the stated intention to confirm the status of digital assets as objects of property which are capable of being owned.