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Law Commission Consultation: Digital Assets

The Law Commission (LC) has published a consultation paper which contains provisional law reform proposals to ensure that the law recognises and protects digital assets (including crypto-tokens and cryptoassets) in a digitised world.

The LC considers that digital assets are increasingly important in modern society. They are used 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 — and in growing volumes. Electronic signatures, cryptography, smart contracts, distributed ledgers and associated technology have broadened the ways in which digital assets can be created, accessed, used and transferred. Such technological development is set only to continue.

At a glance, the LC's key proposals and provisional conclusions and points for consultation are as follows. Each is discussed in more detail in both a summary paper and the full consultation paper.

(1) The LC provisionally proposes the explicit recognition of a “third” category of personal property distinct from things in possession and things in action, which would allow for a more nuanced consideration of new, emergent, and idiosyncratic objects of property rights. The LC labels this category “data objects”. It describes two options for the development and implementation of this provisional law reform proposal — iterative, common law reform or (limited) statutory intervention. The paper outlines the potential benefits and drawbacks for each but does not conclude with a preferred option. Instead, the LC asks consultees for their views.

(2) The LC provisionally proposes certain criteria that a thing must exhibit if it is to fall within its proposed third category of personal property.

(3) It provisionally concludes that the factual concept of control (as opposed to the concept of possession) best describes the relationship between data objects and persons.

(4) The LC provisionally concludes that crypto-tokens satisfy its proposed criteria of data objects and are appropriate objects of property rights. It analyses factual transfers of crypto-tokens (as a subset of data objects) and provisionally proposes that the rules of derivative transfer of title can be applied to such transfers, including in the context of the unauthorised disposition of a cryptotoken.

5) It provisionally proposes an explicit clarification that the special defence of good faith purchaser for value without notice should apply to crypto-token transactions.

(6) The LC provisionally proposes statutory law reform clarifying the scope and application of S53(1)(c) of the Law of Property Act 1925 in connection with certain dealings in specified forms of equitable crypto-token entitlements.

(7) It provisionally concludes that law reform clarifying and simplifying the apportionment of shortfall losses arising out of commingled crypto-token holdings held on trust by an insolvent custodian would be beneficial.

(8) The LC begins to consider whether it would be desirable to develop bespoke statutory provisions designed specifically for collateral arrangements in respect of crypto-tokens, but it does not make law reform proposals at this stage.

(9) It provisionally concludes that, in relation to the tort of conversion, there are arguments in favour of extending conversion (or a conversion-type cause of action) to data objects. However, it is acknowledged that this would be a step change for the law, and one which would need further consideration, so the LC does not make law reform proposals at this stage.

(10) It provisionally concludes that there is an arguable case for law reform to provide courts with the discretion to award a remedy (where traditionally denominated in money) denominated in certain crypto-tokens in appropriate cases. However, the LC does not make law reform proposals at this stage.

(11) It asks consultees for their views on the reasoning for the provisional proposals, on the proposals themselves and, in certain cases, on the most appropriate method for implementing such proposals

The consultation closes on Friday **4th November**. FOIL will be responding, following discussions in a number of SFTs to which these proposals are relevant.

The full consultation paper is available at: <https://www.lawcom.gov.uk/project/digital-assets/>

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