Bar Council response to the Law Commission Digital Assets consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Law Commission consultation paper entitled Digital Assets.[1]

2. The Bar Council represents over 17,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

4. The consultation paper does not discuss the closely related question of consumer rights over "digital content" which are provided by Chapter 3 of the Consumer Rights Act 2015. Section 2 of the CRA defines digital content as "*data which are produced and supplied in digital form*". This is distinct from the CRA definition of "goods", i.e. "*any tangible moveable items*". The latter definition is considered and rejected as a workable definition in the context of crypto-tokens at para 13.136 of the consultation, but there is no further analysis as to whether the digital content definition is of any utility, nor as to how it might impact practically on the area.

5. We think that this misses a potentially important aspect of the way UK law currently addresses the area. Thus, for example, at para 15.24 the view of Dr Guadamuz is quoted - "*When someone is purchasing an NFT, they are purchasing the metadata file and, as an NFT, this is transferrable as well.*" At footnote 1343 is the explanation that "*metadata is data that describes other data*". It therefore appears at least potentially able to fall within the first limb of the CRA definition, as being "*data which are produced…in digital form*". Whether metadata is also

[1] https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/07/Digital-Assets-Consultation-Paper-Law-Commission-1.pdf

"*supplied in digital form*" may be a moot point, on which we lack the expertise to express a view one way or the other, but if the reality of a consumer's purchase of an NFT is that they are, at least in part, purchasing the metadata associated with it then it would seem a little odd for that not to fall within the concept of supply.

6. We therefore wonder whether it would be helpful to consider:

    a. whether the CRA already provides a method of solving certain of the issues raised by NFTs in particular, at least in the consumer context; and/or

    b. if it does not (perhaps because the CRA definition has now been rendered unworkable due to technological advancement), what if anything would need to be done to ensure that the proposal for a third category of property does not adversely impact on the existing regime of consumer protection for digital content.

7. In a similar vein, we suggest that it would be worth considering the way in which the criminal law of England and Wales has approached the question of defining (and valuing) digital assets, which not infrequently feature in cases concerning criminal confiscation and asset recovery.

8. For example, Schedule 9 of the Proceeds of Crime Act 2002 (POCA), which identifies businesses within the regulated sector for the purposes of the Act, defines the term *"cryptoasset"* as *"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"*: §1(13)(a). That definition is then further clarified as including *"a right to, or interest in, the cryptoasset"*: §1(13)(c).

9. The question of whether cryptocurrency falls within the definition of "property" for the purposes of Part V of POCA has also been considered by the courts, most recently in *DPP v. Briedis*[2021] EWHC 3155 (Admin) – which is referenced in the consultation paper at §19.114. In the context of an application for a property freezing order, Fordham J was satisfied *"that cryptocurrency, as cryptoassets, fall within the wide definition of "property" in section 316(4)(c) ("other intangible … property"), especially when viewed in the light of the purpose of these statutory powers. It would be a serious lacuna if cryptoassets fell outside the reach of this statutory scheme."*

10. It is also within the experience of members of LRC that certain cryptoassets (in particular cryptocurrency, and predominantly bitcoin) have featured in criminal confiscation proceedings, valued in line with the exchange rate applicable at the time of the making of any order, and as such treated in the same way as any other currency.

11. We therefore raise for consideration the apparent lack of difficulty which the criminal courts (and POCA) have found in identifying and valuing certain cryptoassets, with a view to informing the question of whether the creation of a new category of personal property is required.

Bar Council[2]
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[2] Prepared by the Law Reform Committee