

**CIVIL RECOVERY OF CRIMINAL ASSETS AND TERRORIST PROPERTY:
HARARE SCHEME ON MUTUAL ASSISTANCE AND DRAFT MODEL
LEGISLATIVE PROVISIONS**

Paper by the Commonwealth Secretariat

INTRODUCTION

1. At their Meeting in St. Vincent and the Grenadines in 2002, Law Ministers considered measures to enhance capacity regarding the seizure and forfeiture of criminal assets. They asked the Commonwealth Secretariat to provide model legislative provisions dealing with the seizure and forfeiture of terrorist assets and for civil forfeiture regimes.

2. This paper and its Annex have been prepared in response to that mandate.

DRAFT MODEL LAW ON CIVIL RECOVERY OF CRIMINAL ASSETS INCLUDING TERRORIST PROPERTY

3. Over the past several years, a number of international initiatives including penal law Conventions such as the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* and the *United Nations Convention against Transnational Organised Crime* and the work of the Financial Action Task Force (FATF), have led to the development and adoption by states of legislation to allow for the restraint and forfeiture of the proceeds and instrumentalities of crime. Recent initiatives relating to terrorism, in particular the *Convention for the Suppression of the Financing of Terrorism*, have led to an expansion of forfeiture laws to cover terrorist property.

4. To date, much of the legislation adopted has provided for “conviction based” forfeiture where proceedings to forfeit assets are based on an underlying criminal conviction. Recently however, several states have also adopted laws that will permit “non-conviction based” or “civil recovery” of criminal assets as an additional tool to combat serious crime and the financing of terrorism. Under these regimes, the proceedings are generally *in rem*, brought against property as opposed to a person. Civil rules of procedure apply and forfeiture can be ordered on the basis of evidence to a standard of balance of probabilities.

5. Several examples of such legislation can be found in Commonwealth jurisdictions such as Australia, Canada, South Africa and the United Kingdom, as well as in Ireland and the United States.

6. Pursuant to the request of Law Ministers, the Secretariat has undertaken a project to develop a model law which countries considering the adoption of such legislation could use as a resource tool. To avoid duplication of effort and the waste of resources, it was decided to develop a draft model law in collaboration with the United Nations Office on Drugs and Crime (UNODC) in Vienna.

7. In late September of 2003 an expert group meeting was held in Vienna to develop drafting instructions for a model law on civil forfeiture. Experts from Australia, Canada, Ireland, South Africa, the United Kingdom and the United States participated in the meeting along with officials from UNODC and the Commonwealth Secretariat. The Government of Canada agreed to provide the services of a legislative drafter to prepare the model law.

8. In January of 2004, the legislative drafter, in consultation with the Commonwealth Secretariat and UNODC prepared a draft of a chapter on civil asset forfeiture for inclusion in the existing UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill of 2003. This draft was adapted by the Commonwealth Secretariat into a stand alone *Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property* (Annex 1).

CONSIDERATION BY SENIOR OFFICIALS

9. Senior Officials welcomed the work undertaken by the Commonwealth Secretariat in the preparation of a Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property. It was noted that the Model Bill was drafted so as to give a broad scope to the legislative provisions, which could be reduced to meet the particular needs and constitutional obligations of each enacting country. The meeting gave a general welcome to the drafts, but as a number of delegations had indicated that they had technical amendments to propose it was agreed that the Commonwealth Secretariat would engage in discussions with those delegations with a view to preparing a revised draft for submission to Law Ministers. Those discussions were carried out in the margins of SOLM.

ACTION BY LAW MINISTERS

10. The *Draft Commonwealth Model Law on the Civil Recovery of Criminal Assets including Terrorist Property* (Annex 1), incorporating amendments following the comments from SOLM, is now presented for consideration by Law Ministers.

**DRAFT COMMONWEALTH MODEL LEGISLATIVE PROVISIONS ON THE CIVIL
RECOVERY OF CRIMINAL ASSETS INCLUDING TERRORIST PROPERTY¹**

[NOTE: Provisions in italics represent options that a State may wish to include in legislation]

Division 1 - Interpretation

1. Definitions

- (a) "currency" means the coin and paper money of [name of State] or of a foreign country that is designated as legal tender and which is customarily used and accepted as a medium of exchange in the country of issue, monetary instruments that may be exchanged for money (such as cheques, travellers' cheques, money orders, negotiable instruments in a form in which title thereto passes on delivery), jewellery, precious metals and precious stones. Where the context permits, currency includes currency in electronic form;
- (b) "document" means a record of information kept in any form;
- (c) "instrumentality of unlawful activity" means property
- (i) used in or in connection with unlawful activity;
 - (ii) that facilitates or is otherwise concerned in unlawful activity;
- (d) "interest" in relation to property means:
- (i) a legal or equitable estate or interest in the property;
 - (ii) a right, power or privilege in connection with the property.
- (e) "lawful owner" means a person who
- (i) has an interest in the property which is the subject of the application,
 - (ii) has exercised reasonable care to ensure that the property is not terrorist property;
 - (iii) is not a member of a terrorist group.
- (f) "legitimate owner" means, with respect to property that is proceeds of unlawful activity, a person who did not, directly or indirectly, acquire the property as a result of unlawful activity carried out by the person and who
- (i) was the rightful owner of the property before the unlawful activity occurred and was deprived of the possession or control of the property by means of the unlawful activity; or
 - (ii) acquired the property for fair value after the unlawful activity occurred and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity;
- (g) "place" means any physical location and includes land, water, vessels, buildings and premises

¹ This draft has been prepared through co-operative work with the United Nations Office of Drugs and Crimes (UNODC) and generally parallels a draft Part IV.1 that has been prepared for inclusion in the UNODC Model Money-Laundering, Proceeds of Crime and Terrorist Financing Bill 2003.

- (h) "proceeds of unlawful activity" means any property or economic advantage derived or realised, directly or indirectly, as a result of or in connection with a unlawful activity, irrespective of the identity of the offender and irrespective of whether committed before or after the commencement of this Act and includes, on a proportional basis, property into which any property derived or realised directly or indirectly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the unlawful activity;
- (i) "property" means any asset of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and includes legal documents or instruments in any form including electronic or digital evidencing title to, or interest in such assets, including but not limited to bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit;
- (j) "responsible owner" means, with respect to property that is an instrumentality of unlawful activity, a person with an interest in the property who has done all that can reasonably be done to prevent the property from being used to carry out unlawful activity, including
- (i) promptly notifying appropriate law enforcement agencies whenever the person knows or ought to know that the property has been or is likely to be used to carry out unlawful activity, and
 - (ii) refusing or withdrawing any permission that the person has authority to give and that the person knows or ought to know has facilitated or is likely to facilitate the property being used to carry out unlawful activity;
- (k) "terrorist act" has the same meaning as in the [Commonwealth Model Legislative Provisions on Measures to Combat Terrorism]
- (l) "terrorist group" has the same meaning as in the [Commonwealth Model Legislative Provisions on Measures to Combat Terrorism]
- (m) "terrorist property" means –
- (i) proceeds from the commission of a terrorist act;
 - (ii) property which has been, is being, or is likely to be used to commit a terrorist act;
 - (iii) property which has been, is being, or is likely to be used by a terrorist group;
 - (iv) property owned or controlled by or on behalf of a terrorist group; or
 - (v) property which has been collected for the purpose of providing support to a terrorist group or funding a terrorist act.
- (n) "unlawful activity" means an act or omission that, whether it occurred before or after this Act comes into force,
- (i) would constitute an offence under a law of [name of State]; or
 - (ii) would constitute an offence under a law of a foreign State which, had it occurred in [name of State] would also have been an offence under a law of [name of State]

2. General Provisions

- (1) An application under this Act for a restraining order or for a forfeiture order under this Act may be brought whether or not a person has been charged or convicted of an offence, and whether or not an application has been brought for a {confiscation order/pecuniary penalty order/forfeiture order} after a criminal conviction.
- (2) [The Court] may, on application of the [Attorney General] [Director of Public Prosecutions] order that proceedings under this Act be postponed pending the outcome of proceedings under another Act if [the Court] is satisfied that to do so would clearly be in the interests of justice.
- (3) The result of an application under this Act does not finally decide an issue between the parties for the purposes of any proceedings other than those for which the issue was decided.

Division 2 - Restraining Orders

3. Restraining Order

- (1) The [Attorney-General] [Director of Public Prosecutions] may apply to [the Court] for a restraining order against property located inside or outside [name of State] that is:
 - (a) proceeds of unlawful activity;
 - (b) an instrumentality of unlawful activity; or
 - (c) terrorist property
- (2) An application for a restraining order under subsection (1) may be made *ex parte* and shall be in writing and be accompanied by an affidavit in support of the application.
- (3) [The Court] shall make a restraining order against the property if [the Court] is satisfied that there are reasonable grounds to [suspect][believe] that the property is proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property.
- (4) The hearing of an application for a restraining order may be held *in camera*.

4. Ancillary orders - Receivers

- (1) [The Court] may make ancillary orders, either concurrently with or after the making of the restraining order, that [the Court] considers necessary or expedient, including
 - (a) directing the [public trustee] or another person that [the Court] may appoint, to take care of, administer, manage or otherwise deal with the property, or a part of the property in accordance with any directions of [the Court] and where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;
 - (b) requiring any person having possession of the property to give possession of it to the [public trustee] or to the person appointed under subsection (a); and
 - (c) permitting the person appointed under subsection (a) to liquidate any perishable property, or any other property that the person considers, on reasonable grounds, may rapidly decline in value or cost more to preserve than its realisable value.
- (2) An application for an order under subsection (1) may be made *ex parte*.

5. Ancillary orders – Persons Affected by Restraining Orders

- (1) Subject to subsections (2) and (3), [the Court], if satisfied that to do so clearly would be in the interests of justice, may make ancillary orders, either concurrently with or after making the restraining order, to make provision for meeting out of the property or part of it,
 - (a) the reasonable living expenses of any person affected by the order (including the reasonable living expenses of the person's dependants, if any); and
 - (b) a person's reasonable legal expenses in any proceedings under this Act.
- (2) The Court shall not make an order under subsection (1) unless satisfied that
 - (i) the applicant could not otherwise meet the expenses; and
 - (ii) the applicant has disclosed [under oath] all interests in the property and submitted to [the Court] a [sworn] statement of all assets and liabilities.
- (3) An order under subsection (1)(b) is subject to the following conditions:
 - (a) [the Court] must be satisfied that all other means, including the [legal aid system], have been used by the person in order to limit the legal expenses;
 - (b) the amount ordered must not exceed the amount that would be paid for the legal work according to the [tariff of legal aid];
 - (c) the amount ordered must not, in any event, exceed [---]; and
 - (d) if so ordered by [the Court], the amounts must first be taxed by the [taxing authority] of [the Court].
- (4) An order under subsection (1) may be made subject to any conditions that [the Court] considers necessary or expedient.

6. Notice to be given

- (1) When [the Court] makes a restraining order, it shall, as soon as possible, order that the [Attorney General] [Director of Public Prosecutions]:
 - (a) give notice of the order to all persons known to the [Attorney General] [Director of Public Prosecutions] to have an interest in property that is affected by the order, and any other person [the Court] directs; and
 - (b) publish in [the Gazette or] a newspaper published and circulating in [name of State] a notice of the order.
- (2) [The Court] may also order service of the supporting affidavit if [the Court] is satisfied that to do so would clearly be in the interests of justice and that there is no over-riding public interest in it not being served at that time.
- (3) [The Court] may order that notice not be given, or that notice be given at a later time, if [the Court] is satisfied that there is an over-riding public interest against notice being given at that time, such as
 - (a) endangering the life or physical safety of any person;
 - (b) flight from prosecution;
 - (c) destruction, dissipation or removal from the jurisdiction of property affected by the order;
 - (d) destruction of or tampering with evidence;

- (e) intimidation of potential witnesses; or
- (f) otherwise seriously jeopardising an investigation or unduly delaying a proceeding under this Act.

7. Duration of Restraining Order

A restraining order expires [21] [90] days after the date on which notice of the order is given under section 6 or if no notice is given from the date of the order unless

- (a) an application for a forfeiture order has been made in respect of the property that is affected by the restraining order; or
- (b) the restraining order is revoked before the expiry of the [21] [90] days.

8. Registration of Restraining Order, etc.

- (1) A copy of a restraining order - and of any relevant ancillary order - that affects lands in [name of State] shall be registered with the [Registrar of Lands].
- (2) An order is of no effect with respect to registered land unless it is registered as a charge under the [Registration of Land Act].
- (3) Where particulars of an order are registered under the [Registration of Land Act], a person who subsequently deals with the property is deemed to have notice of the order at the time of the dealing.

9. Contravention of Restraining Order, etc.

- (1) A person who knowingly contravenes a restraining order or ancillary order commits an offence punishable upon conviction by:
 - (a) a fine of [.....] or imprisonment for a period of [.... years] or both, in the case of a natural person; or
 - (b) a fine of [5 times above figure] in the case of a body corporate.
- (2) The [Attorney-General] [Director of Public Prosecutions] may apply to [the Court] that made the restraining order for an order that a dealing with property be set aside if
 - (a) the property is dealt with in contravention of the restraining order; and
 - (b) the dealing was not for sufficient consideration or not in favour of a person who acted in good faith and without notice of the order.

Division 3 - Forfeiture Orders

10. Application for forfeiture order

- (1) The [Attorney-General] [Director of Public Prosecutions] may apply to [the Court] for a forfeiture order against property located inside or outside [name of State] that is:
 - (a) proceeds of unlawful activity;
 - (b) an instrumentality of unlawful activity; or
 - (c) terrorist property.

- (2) For greater certainty, an application for a forfeiture order may be made whether or not a restraining order has been made under section 3.
- (3) The [Attorney-General] [Director of Public Prosecutions] shall
 - (a) give [14] days notice of an application under subsection (1) to all persons known to the [Attorney General] [Director of Public Prosecutions] to have an interest in property affected by the application; and
 - (b) publish in [the Gazette or] a newspaper published and circulating in [name of State] a notice of the application at least [14] days before the application is scheduled to be decided .
- (4) A person who wishes to oppose the making of a forfeiture order with respect to property in which the person has an interest - or who wishes to exclude the person's interest from a forfeiture order - shall file an appearance within the [14] days mentioned in subsection (2), although [the Court] may agree to accept an appearance at a later time.
- (5) An application for a forfeiture order shall be in writing and be accompanied by an affidavit supporting it.
- (6) [The Court] must set the matter down for hearing as soon as possible after expiry of the [14] days' notice of the date of the application.
- (7) [The Court] must postpone the hearing of an application until the earlier of
 - (a) the completion of any investigative examination under section ... ; and
 - (b) [30 days]
 unless [the Court] orders otherwise.

11. Forfeiture Order

- (1) [The Court] shall make an order declaring that the property is forfeited to [name of State] if [the Court] is satisfied on a balance of probabilities that the property is proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property.
- (2) For greater certainty, the validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings in respect of an offence with which the property concerned was in some way associated.
- (3) For greater certainty, [the Court] need not be satisfied that the property was used or acquired in connection to any particular unlawful activity.
- (4) If [the Court] does not grant an application to make a forfeiture order, it may revoke any restraining order that affects the same property.
- (5) An order under subsection (1) takes effect on the later of
 - (a) the expiry of the period during which an appeal of the order may be taken [under the general law of civil procedure]; and
 - (b) the final disposition of the appeal.

12. Ancillary orders - receivers

- (1) [The Court] may make ancillary orders, either concurrently with or after the making of the forfeiture order, that [the Court] considers necessary or expedient, including
- (a) directing the [public trustee] or another person that [the Court] may appoint, to take care of, administer, manage or otherwise deal with the property, or a part of the property in accordance with any directions of [the Court] and where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking;
 - (b) requiring any person having possession of the property to give possession of it to the [public trustee] or to the person appointed under subsection (a) to take custody of the property; and
 - (c) permitting the person appointed under subsection (a) to liquidate any perishable property or any other property that the person considers, on reasonable grounds, may rapidly decline in value or cost more to preserve than its realisable value.
- (2) An application for an order under subsection (1) may be made *ex parte*.

13. Orders - Responsible Owner, Legitimate Owner and Lawful Owner

- (1) Except where it would clearly not be in the interests of justice, if [the Court] is satisfied on a balance of probabilities that the property is the proceeds of unlawful activity and that a person is a legitimate owner, [the Court] shall make any order it considers necessary to protect the person's interest in the property.
- (2) Except where it would clearly not be in the interests of justice, if [the Court] is satisfied on a balance of probabilities that the property is an instrumentality of unlawful activity and that a person is a responsible owner, [the Court] shall make any order it considers necessary to protect the person's interest in the property.
- (3) Except where it would clearly not be in the interests of justice, if [the Court] is satisfied on a balance of probabilities that the property is terrorist property and that a person is a lawful owner, [the Court] shall make any order that it considers necessary to protect the person's interest in the property.
- (4) No order may be made under subsection (1), (2) or (3) if
- (a) the person is a fugitive from justice in [name of State] at the time the forfeiture order is made;
 - (b) the property is property that it is unlawful for the person to possess in [name of State]; or
 - (c) the interest that the person has in the property is in the nature of an unsecured interest or claim against someone else's property, or is the interest of a bailee or nominee.
- (5) For greater certainty, the burden of satisfying [the Court] on a balance of probabilities that a person is a legitimate owner, a responsible owner or a lawful owner lies on the person claiming it.

14. Effect – Other Court Orders, etc.

- (1) The restraint or forfeiture of property pursuant to an order made under this Act is effective despite any law of [name of State] relating to bankruptcy of a person or to the winding up of a company in relation to the property - as long as the order is made before the date the person was adjudged bankrupt or the company ordered wound up, or a restraining order was made in relation to the property before that date and remains in force.
- (2) The forfeiture of property pursuant to an order made under this Act is effective despite any other court order affecting the property.

15. Application to Set Aside Dealings With Property

- (1) The [Attorney General] [Director of Public Prosecutions] may apply to [the Court] to set aside a dealing with property that contravenes an order made under section 11.
- (2) [The Court] shall set aside the dealing with the property from the day it occurred except if [the Court] is satisfied that to do so would clearly not be in the interests of justice, in which case it shall set aside the dealing as of the day on which the order is made and declare the rights of any persons who acquired interests in the property pursuant to the dealing.

16. Forfeiture Order – Effective Ownership

An order made under section 11 may also contain provisions respecting who is the effective owner of property held by a body corporate or in trust.

17. Application to Set Aside Forfeiture Order

- (1) A person who wishes to apply for an order to protect the person's interest in property and who meets the conditions of section 13 may, not later than [two] years after the forfeiture order is made under section 11, apply to set aside the order even if the person did not appear in accordance with subsection 10(4).
- (2) [The Court] shall grant the application under subsection (1) only if [the Court] is satisfied that to do so would clearly be in the interests of justice, that the person did not receive notice under subsection 10(3), and that after first learning that the order had been applied for or made the person did not unreasonably delay applying to set it aside.
- (3) For greater certainty, the order for the protection of a person's property under subsection (2) has no effect on the other parts of the forfeiture order made under section 11.

18. Limit on Purchase of Forfeited Property

No person who had possession of property or was entitled to possession of property that is affected by a forfeiture order under section 11 immediately prior to the making of the order - and no person acting on behalf of such a person - shall purchase the property.

19. Contravention of Forfeiture Order

A person who knowingly contravenes a forfeiture order or ancillary order commits an offence punishable upon conviction by:

- (a) a fine of [.....] or imprisonment for a period of [... years] or both, in the case of a natural person; or
- (b) a fine of [5 times above figure] in the case of a body corporate.

Division 4 - Compensation

20. Compensation Order

- (1) [The Court] may, if satisfied that to do so would clearly be in the interests of justice, make a compensation order, on application to it by a person if
 - (a) a restraining order was made under this Act;
 - (b) an application for a forfeiture order under this Act was not granted and the restraining order was revoked; and
 - (c) the person suffered loss as a result of the operation of the restraining order.
- (2) [The Court] may, if satisfied that to do so would clearly be in the interests of justice, make a compensation order, on application to it by a person if
 - (a) a forfeiture order relating to an instrumentality of unlawful activity was made under this Act that affects property in which the person had an interest immediately prior to the making of the order;
 - (b) in the opinion of [the Court], the value of the person's forfeited interest in the property far outweighs its value to the unlawful activity in question; and
 - (c) the person suffered loss because of the operation of the forfeiture order.
- (3) An application under subsection (1) or (2) must be made no later than six months after the date of the restraining or forfeiture order and notice of the application must be given to the [Attorney General] [Director of Public Prosecutions].

Division 5 - Information Gathering

21. Examination Order

- (1) The [Attorney-General] [Director of Public Prosecutions] may apply to [the Court] for an order for the examination of any person - and the production by the person of any document about:
 - (a) the nature, location and value of property that there are reasonable grounds to suspect is proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property;
 - (b) the affairs of that person or any other person, to the extent relevant to determining the manner and circumstances in which any person acquired, used, or disposed of the property.
- (2) [The Court] shall make the order unless [the Court] is satisfied that to do so would clearly not be in the interests of justice and shall appoint an examiner to carry out the examination.

22. Examination Notice

- (1) The examiner shall, as soon as possible after appointment, give to the person to be examined under section 21 an examination notice requiring the person to attend at the appointed time and place to be examined by the examiner and to produce any document specified.

- (2) The notice must be given no less than [7 days] before the time of the examination.

23. Examination

- (1) The examination shall take place in private, with the only persons in attendance being the person being examined, his or her counsel, the [Attorney General] [Director of Public Prosecutions], the examiner and any other person that [the Court] orders to be present.
- (2) The person being examined shall answer all questions put to him or her [after having taken an oath to tell the truth].
- (3) For greater certainty, a person may not refuse to answer a question or produce a document on the grounds that it might incriminate him or her or make the person liable to a penalty.

24. Admissibility of Answers

An answer given or a document produced in an examination is not admissible in evidence in civil or criminal proceedings against the person examined except

- (a) in criminal proceedings for false or misleading information;
- (b) in proceedings on an application under this Act;
- (c) in proceedings ancillary to an application under this Act;
- (d) in proceedings for enforcement of a restraining order or forfeiture order; or
- (e) in the case of a document, in civil proceedings in respect of a right or liability conferred or imposed by the document.

25. Offences

- (1) A person who fails to attend an examination at the time and place specified in an examination notice that he or she has received commits an offence punishable upon conviction by a fine of [.....] or imprisonment for a period of [..... years] or both.
- (2) A person attending an examination who does any of the following things commits an offence punishable upon conviction by a fine of [.....] or imprisonment for a period of [..... years] or both:
- (a) refusing or failing to [be sworn];
 - (b) refusing or failing to answer a question that the examiner requires the person to answer;
 - (c) refusing or failing to produce at the examination a document specified in the examination notice or otherwise required by the examiner; or
 - (d) leaving the examination before being excused by the examiner.
- (3) No offence is committed under subsection (2)(b) or (c) if the person could not, in proceedings before a court in [name of State] be compelled to answer the question or produce the document, *except if the person could not be compelled for one or more of the following reasons:*
- [(a) the person is a [member of a legal profession] and the answer would therefore be privileged from being disclosed, or the document would be privileged from being produced, in legal proceedings on the ground of legal professional privilege; or
 - [(b) the answer or document would, under a law of [name of State] relating to the law of evidence, be inadmissible in legal proceedings for a reason other than because:

- (i) the answer would be privileged from being disclosed; or
- (ii) the document would be privileged from being produced.]²

26. Production Orders

- (1) A [police officer/investigating authority] may apply *ex parte* and in writing to a [judge in chambers], for an order for the production of a document, where there are reasonable grounds to believe that the document exists at a place that is relevant to
 - (a) identifying, locating or quantifying property that there are reasonable grounds to suspect is the proceeds of unlawful activity, an instrumentality of unlawful activity or terrorist property; or
 - (b) identifying or locating a document necessary for the transfer of such property.
- (2) An application under this section shall be supported by an affidavit.
- (3) [The judge] may, if he or she considers there are reasonable grounds for so doing, make an order that the document be produced to a [police officer/investigating authority], at a time and place specified in the order.
- (4) A [police officer/investigating authority] to whom documents are produced may:
 - (a) inspect the documents;
 - (b) make copies of the documents; or
 - (c) retain the documents for so long as is reasonably necessary for the purposes of this Act.
- (5) Where a [police officer/investigating authority] retains documents produced to him or her, he or she shall make a copy of the documents available to the person who produced them.
- (6) A person is not entitled to refuse to produce documents ordered to be produced under this section on the ground that:
 - (a) the document might tend to incriminate the person or make the person liable to a penalty; or
 - (b) the production of the document would be in breach of an obligation (whether imposed by a law of [name of State] or otherwise) of the person not to disclose either the existence or contents, or both, of the document.

27. Evidential value of information

- (1) The production of a document pursuant to an order under section 26 - or any information, document or thing obtained as a direct or indirect consequence of the production of the document - is not admissible against the person producing it in any criminal proceedings except proceedings under section 28.
- (2) For the purposes of subsection (1), proceedings on an application for a restraining order, a confiscation order, a forfeiture order or a pecuniary penalty order are not criminal proceedings.

² Please note the section in italics is optional and can be removed on agreement.

28. **Failure to comply with a production order**

Where a person is required by a production order to produce a document to a [police officer], the person is guilty of an offence against this section if he or she:

- (a) contravenes the order without reasonable cause; or
- (b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular and does not so indicate to the police officer and provide to the police officer any correct information of which the person is in possession.

Penalty: in the case of a natural person, imprisonment for a maximum of [... years] or a maximum fine of [.....], or both, and in the case of a body corporate [five times] the fine.

29. **Search Warrant**

(1) In respect of an investigation or proceeding under this Act, a [police officer/investigating authority] may make an application supported by information [on oath] to a [magistrate/judge] for a search warrant for a place.

(2) Where an application is made under subsection (1) for a search warrant, the [magistrate/judge] may, *subject to subsection (4)*, issue the search warrant if satisfied that there are reasonable grounds to believe that there may be found on or in such place any document or thing:

- (a) relevant to identifying, locating or quantifying any property;
- (b) relevant to identifying or locating a document necessary for the transfer of property;
- (c) which may afford evidence of unlawful activity or the connection between unlawful activity and property

relevant to an investigation or proceeding under this Act.

(3) A search warrant issued under subsection (2) authorises a [police officer/investigating authority] (whether or not named in the warrant), with such assistance and by such force as is necessary and reasonable:

- (a) to enter in or on the place and to search for any document or thing described in subsection (2); and
- (b) to seize any document or thing found in the course of the search that the [police officer/investigating authority] believes on reasonable grounds to be a document or thing described in subsection (2).

(4) Where a search warrant is sought for documents described in subsection 26(1), a [magistrate/judge] shall not issue a warrant under subsection (2) unless he or she is satisfied that

- (a) a production order has been given and has not been complied with;
 - (b) a production order would be unlikely to be effective;
 - (c) the investigation or proceeding for the purposes of which the search warrant is being sought might be seriously prejudiced if the [police officer/investigating authority] does not gain immediate access to the document without any notice to any person;
- or

(d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.

(5) A warrant issued under this section shall state:

- (a) the purpose for which it is issued;
- (b) a description of the kind of documents or things authorised to be searched for or seized;
- (c) a time at which the warrant ceases to be in force; and
- (d) whether entry is authorised to be made at any time of the day or night or during specified hours.

30. Notice to Financial Institutions

(1) [A police officer] who believes on reasonable grounds that a financial institution may have information or documents of a type listed below that would be relevant to deciding whether proceedings ought to be taken under this Act may give written notice to a financial institution directing it to give such information or documents to him or her, namely documents that would be relevant to determining

- (a) whether an account is held by a specified person with the financial institution;
- (b) whether a particular person is a signatory to an account; and
- (c) if a person holds an account with the institution, the current balance of the account.

(2) Despite any other law, a financial institution that has been given a notice under this section shall comply with the notice and shall produce the information and documents not later than [14 days] after receiving the notice.

31. Offences

(1) Where a financial institution that has been given a notice under section 31, knowingly:

- (a) fails to comply with the notice; or
- (b) provides false or misleading information in purported compliance with the notice,

the institution commits an offence against this subsection.

Penalty: in the case of a natural person, imprisonment for a maximum of [... years] or a maximum fine of [.....], or both, and in the case of a body corporate [five times] the fine.

(2) A financial institution that has been given a notice under section 31 shall not disclose the existence or operation of the notice to any person except:

- (a) an officer or agent of the institution for the purpose of complying with the notice;
- (b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the notice; or
- (c) a police officer authorised in writing to receive the information.

Penalty: in the case of a natural person, imprisonment for a maximum of [... years] or a maximum fine of [.....], or both, and in the case of a body corporate [five times] the fine.

- (3) A person described in subsection (2)(a), (b) or (c) shall not disclose the existence or operation of the notice except to another such person, and may do so only for the purposes of the performance of the person's duties or functions.

Penalty: imprisonment for a maximum of [... years] or a maximum fine of [.....], or both.

Division 6 - Evidentiary Provision

32. Conviction Evidence of Unlawful Activity

For greater certainty, the fact that a person has been convicted of an offence is proof, in the absence of evidence to the contrary, that there was unlawful activity.

33. Effect of a person's death

- (1) Any notice authorised or required to be given to a person under this Act is, if the person has died, sufficiently given if given to the person's legal personal representative.
- (2) A reference in this Act to a person's interest in property is, if the person has died, a reference to an interest in the property that the person had immediately before his or her death.
- (3) An order can be applied for and made under this Act:
- (a) in respect of a person's interest in property even if the person has died, and
 - (b) on the basis of the activities of a person who has died.

Division 7 - Confiscated and Forfeited Assets Fund

34. Establishment of the Fund

- (1) There is hereby established in the accounts of [name of State] an account to be known as the [name of State Confiscated and Forfeited Assets Fund.]

35. Receipts and Disbursements

- (1) There shall be credited to the Fund :
- (a) all moneys derived from the fulfilment of confiscation orders under this Act;
 - (b) any sums of money allocated to the Fund from time to time by parliamentary appropriation;
 - (c) any voluntary payment, grant or gift made by any person for the purposes of the Fund; and
 - (d) any income derived from the investment of any amount standing to the credit of the Fund.
- (2) [The Minister of Justice] [Cabinet] may authorise payments out of the Fund to
- (a) compensate victims who suffered losses as a result of [criminal offences], [terrorism][unlawful activity];
 - (b) satisfy a compensation order under section 59.20 or 69;
 - (c) enable the appropriate law enforcement agencies to continue their fight against serious offences, terrorism and unlawful activities;
 - (d) share confiscated property with foreign States pursuant to any relevant treaties or arrangements.

36. Annual Report to Parliament

The [Minister of Justice] shall table a report in Parliament, not later than the first sitting day after the expiry of 90 days from the [end of the fiscal year] detailing

- (a) the amounts credited to the Fund;
- (b) the investments made with the amounts credited to the Fund; and
- (c) the payments made from the Fund, including the specific purpose for which each payment was made and to whom it was made.