

Part V

Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders

Drafting note: This part implements FATF Recommendation 4 and the associated interpretive notes. The model comprises three sets of provisions on this issue: (1) provisions that are mandatory to comply with basic international standards (reference will be made to the relevant FATF standard in the drafting notes), which will be noted below; (2) additional provisions that are recommended for an effective and comprehensive asset recovery regime but that are not required under the FATF standard; and (3) provisions that are optional and reflect best practice.

Drafting authorities should review use of the terms ‘part’ and ‘act’ for appropriate usage as versions of these model provisions are adopted either alone or in conjunction with other segments of the model provisions.

Part V deals with conviction-based confiscation. It addresses both the preliminary orders to secure property for eventual confiscation and final orders to confiscate property. To obtain a confiscation order, there must be a criminal conviction of a natural or legal person. To restrain or seize property, there must at least be a criminal investigation in which an order to confiscate or recover benefits is anticipated. Part V also addresses investigative orders to assist in confiscation proceedings.

Application to terrorist acts and terrorism financing. Conviction-based confiscation provisions apply where there is a conviction for any criminal offence. The scope of these provisions should be broad enough to capture funds raised or provided in a terrorism financing setting, as objects, proceeds or instrumentalities of a terrorism financing offence. Likewise, if membership in a terrorist organisation is a criminal offence, it should cover the assets of such an organisation.

Definitions. Definitions applicable in this part appear in Section 38(4).

Terms: Part V provides for orders to ‘confiscate’ proceeds, objects and instrumentalities and to recover benefits. The terms ‘confiscate’ and ‘forfeit’ can be confusing as the way in which they are used varies from state to state. In some jurisdictions, confiscation refers to a value order while forfeiture refers to recovering the actual proceeds and/or instrumentalities. Care will have to be taken in individual jurisdictions to ensure that the correct terminology is used. In particular, there is often

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confusion between the terms ‘freeze’, ‘restrain’ and ‘seize’. Their use is defined in these model provisions but definitions may differ from state to state.

Modes of confiscation: Part V provides for two kinds of orders after a criminal conviction: first, *in rem* forfeiture orders directed against the proceeds or instruments of crime (described as ‘confiscation orders’) (Sections 53-56) and, secondly, *in personam* value orders designed to neutralise the benefit from the crime and directed against persons who have benefited from crime (described as ‘benefit recovery orders’ and ‘extended benefit recovery orders’) (Sections 57-60).

Section 38 Application of Part and Definitions

Drafting note: Kinds of criminal offences

The kinds of criminal offences for which confiscation orders under this part are available depend upon the definition drafting authorities choose for ‘offence’ for the purposes of this part. The widest application occurs if ‘offence’ is defined as ‘any offence against the laws of [State]’ (all-crimes approach).

Applications can be defined by using the ‘threshold approach’, which might specify an offence as ‘any offence against the laws of [State] carrying a maximum penalty of more than [12] months’ imprisonment’ or a minimum threshold approach such as ‘all offences that are punished by a minimum penalty of more than [six] months’ imprisonment.’

A third way is to define the offences by reference to a scheduled list of the offences a conviction for which will trigger the operation of the provisions (list approach). Adoption of any of those approaches or a combination thereof would comply with FATF Recommendation 3. Best practice might suggest adoption of an all-crimes approach. Please also see the drafting note under Part IV, Section 36, on this issue.

Restraint and seizure orders. For property to be available for confiscation, it is essential that it be secured as early as possible. Sections 39-48 address the restraint and seizure of property as provisional measures to preserve property in support of eventual confiscation.

Confiscation and benefit recovery order. There are two features of criminal confiscation provisions that states may use to address the significant challenges in recovering criminal proceeds. First, there are provisions that provide for recovery in respect of general criminal activity. Secondly, there are provisions

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that reduce the standard of proof with respect to what constitutes proceeds or benefit. Both of these features have been found important, for without them recovery of the proceeds of crime will often not be possible.

The evidentiary burden regarding fast-moving and often hidden proceeds constitutes a high and often impossible barrier for prosecutors. The two approaches above are reflected in provisions adopted by many common law jurisdictions. Care must be taken in drafting and applying such provisions in order to ensure consistency with a state's fundamental principles, and procedural fairness for defendants and third parties whose property rights will be affected.

In these model legislative provisions, provisions or options incorporate each of these features. Section 58 provides an option to extend the conduct for which recovery may occur to criminal activity beyond the offence of conviction, that is, to 'related activity.' Sections 53(6) and (7) provide for inferences that the court may use in the case of a confiscation order. In addition, Section 58(1)(d) provides an inference for use with a benefit recovery order. Optional Sections 59(7) and (8) relate to assumptions in an extended benefit recovery setting.

Section 38(1), in combination with the definition of offence below, makes clear that this part applies to both domestic and foreign offences. Subsection 38(4), the definitions subsection, contains a definition of 'offence.'

Under international standards, it is essential that the state be able to provide mutual legal assistance, whether through this kind of provision or some other method. See, for example, FATF Recommendation 38.

The effect of having the restraint and confiscation provisions available for domestic authorities to use in the case of foreign proceedings is that a foreign state can make a request based upon an investigation or conviction in that state. Even in the absence of a restraint or confiscation order in the foreign state, it could ask the authorities in the requested state to seek a restraint or confiscation order. All of this presupposes that there is relevant property located in the requested state.

- (1) This Part shall apply to any offence.
- (2) This Part shall apply even if the conduct that forms the basis for the offence occurred before this Part came into effect, and shall apply to any benefit whether it was obtained before or after this Part came into force.
- (3) Any question of fact to be decided by a court on an application under this Part is to be decided on a balance of probabilities.

Drafting note: Retrospective application. Section 38(2) makes clear that the remedies provided in this part – restraint, confiscation and benefit recovery orders – should be available even though the conduct that is the basis for the restraint or confiscation predates the adoption of the act. It will be important to make clear that the new provisions will apply even if the offence concerned, or the benefit obtained, took place before the act came into force. This act will not apply if the conviction for the offence took place before it came into force.

If domestic law and jurisprudence treats confiscation as a penalty, rather than as restorative or reparative, this provision on retroactivity is not appropriate. As the UN *International Covenant on Civil and Political Rights* notes at Article 15: ‘Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.’

In this Part, the following definitions shall apply:

Benefit means any advantage, gain, profit or payment of any kind, and the benefit that a person derives or obtains or that accrue to him or her includes any advantage that another person derives or obtains, or that otherwise accrues to such other person, if the other person is under the control of, or is directed or requested by, the first person.

Court means [insert reference to judicial authority that will be given authority to act with respect to the applications set forth in the Part].

Drafting note: Court. The definition permits individual states to determine which courts should be given jurisdiction to deal with applications relating to conviction-based confiscation. In states where asset confiscation legislation is new, it is not uncommon for jurisdiction to be restricted to senior or mid-level courts for the first few years of operation.

Once issues generated by the legislation have been resolved by the higher courts, a decision might be made to expand jurisdiction to include all courts, including magistrates’ courts.

A section on the limits of jurisdiction could be added if needed. One approach is to match the jurisdiction of courts under these provisions to their jurisdiction in civil matters. For example, if a magistrates’ court may not make orders in relation to land or other property over a certain value, the same approach might be thought sensible to apply in confiscation cases.

Dealing with property includes any of the following:

- (a) a transfer or disposition of property;
- (b) making or receiving a gift of the property;
- (c) removing the property from [insert name of State];

- (d) where the property is a debt owed to that person, making a payment to any person in reduction or full settlement of the amount of the debt;
- (e) using the property to obtain or extend credit, or using credit that is secured by the property; or
- (f) where the property is an interest in a partnership, doing anything to diminish the value of the partnership.

Effective control in relation to property means the exercise of practical control over the property whether or not that control is supported by any property interest or other legally enforceable power. In determining whether property is subject to the effective control of a person:

- (a) it is not necessary to be satisfied that the person has an interest in the property;
- (b) regard may be had to:
 - (i) shareholdings in, debentures over or directorships of a company that has an interest (whether direct or indirect) in the property;
 - (ii) a trust that has a relationship to the property;
 - (iii) family, domestic, business or other relationships between persons having an interest in the property, or in companies referred to in paragraph (a), or trusts referred to in paragraph (b), and other persons and;
 - (iv) the ability of the person to decide whether and to what extent the property may be dealt with.
- (c) A court may refuse to treat property as being subject to the effective control of a person if it is satisfied that a person's ownership or control of the property is subject to a lawful, bona fide trust held for the benefit of a third party.

Drafting note: Section 38 in its definition of effective control at paragraph (c) above ensures that the court can protect third-party property that has been placed under the control of the defendant for a lawful purpose. For instance, it might arise in relation to property held by a relevant person (whose property interests might otherwise be subject to restraint) to carry out a lawful obligation imposed by a trust, for instance where the relevant person has been appointed the executor of an estate to carry out the terms of a bequest in a will.

Another example might be the case of an attorney who is the subject of an investigation and who has an account that holds client funds in trust.

Enforcement authority means [insert name of authority the State shall use for this Part on criminal confiscation and related orders].

Drafting note: Enforcement authority. The term 'enforcement authority' is used as multiple prosecuting units may be involved. If this flexibility is not required, 'the Director of Public Prosecutions' or some other appropriate term

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can be substituted. The enforcement authority should be a legal office. Since the authority will be seeking orders in connection with a criminal case and presenting evidence to the court, it would not be appropriate in most cases for this to be a police agency.

The term is also used in Part VI on Civil Forfeiture. If another authority is responsible for civil cases, it may be helpful for 'enforcement authority' to be defined in different ways in the two parts.

Gift means property given by one person to another person and includes any transfer of property directly or indirectly made after the commission of an offence by the first person, to the extent of the difference between the market value of the property at the time of its transfer and

- (i) the consideration provided by the transferee, or
- (ii) the consideration paid by the transferor, whichever is greater.

Gift caught by the Act is a gift made by the subject of an investigation or defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings relate.

Instrumentality and instrumentalities includes any property used or intended to be used, in any manner, wholly or in part [*variant 1*: to commit] [*variant 2*: in or in connection with the commission of] a criminal offence or criminal offences and shall include property that is used in or intended or allocated for use in the financing of terrorism or terrorist acts or by terrorist organisations.

Drafting note: The definition of instrumentality reflected in *variant 1* is the same as it appears in the 1990 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (CETS 141), commonly known as the Strasbourg Convention, and the 2005 Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime (CETS 198) and in the civil law model law.

Variant 2 reflects language used in provisions in some common law jurisdictions. This variant broadens the property that might be considered an instrumentality to include objects of crime. Case law that may be helpful in deciding on an approach and that discusses the concepts underlying 'instrumentalities' includes (from Australia): *DPP (NSW) v. King* [2000], NSWSC 394 (New South Wales Supreme Court) per O'Keefe (available on AustLII); *Taylor v. A-G (SA)* (1991), 55 SASR 462 [53 A Crim R 166] (Court of Criminal Appeal South Australia); (from South Africa): *NDPP v. RO Cook Properties* (2004(2)) SACR 208 (Supreme Court of Appeal of South Africa); *Mohunram and Anor v. NDPP* [2007] ZACC 4; *NDPP v. Geysers* [2008] ZASCA 15 (RSA) (available on SafLII), *NDPP v. Mohamed No* [2003] ZACC4.

Interest in relation to property includes:

- (a) any legal or equitable estate or interest in the property; or
- (b) any right, power or privilege in connection with the property.

Offence, except when the term refers to a specific offence, means:

Variant 1

- (a) any offence under the law of [insert name of State]; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 2

- (a) any offence against a provision of any law in [insert name of State] for which the maximum penalty is more than 12 months' imprisonment; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Variant 3

- (a) offences defined in Schedule 1 to this Act; and
- (b) [*option: any offence under a law of a foreign State, in relation to*] acts or omissions that, had they occurred in [insert name of State], would have constituted an offence under subsection (a).

Drafting note: As noted in the introduction to Part V, the kinds of criminal offences for which confiscation and benefit recovery orders are available depend upon the definition drafting authorities choose for 'offence' for purposes of this part.

The definition of 'offence' should reflect one of the approaches in the interpretive note to FATF Recommendation 3. Drafting authorities should consider which approach to adopt: all offences, all serious offences, a comprehensive list that reflects all serious offences or some combination of these. The use of variant 1 will permit confiscation and restraint provisions to be used for all offences including minor offences, and drafting authorities should consider whether this is a manageable and proportionate aim. If variant 2 is chosen, the provisions on restraint and confiscation will be available in the case of all serious offences, namely those that carry a maximum penalty of more than one year. In the case of a country that has a minimum rather than maximum threshold in its legal system, variant 4 will be appropriate. Use of variant 3 alone, the list approach, has the disadvantage of requiring frequent changes in legislation as new offences are enacted.

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It is essential, whichever approach is chosen, that similar offences under the laws of other states are also covered. This is addressed by including subsection (b) in each variant.

Person means any natural or legal person.

Proceeds and ‘**proceeds of crime**’ carry the meanings as defined in Part II, Section 3.

Property carries the meaning as defined in Part II, Section 3.

Property in which the defendant has an interest includes:

- (a) any property that is, on the day when the first application is made under this Part, subject to the effective control of the defendant; and
- (b) any property or its value gifted by the defendant to another person within the period of [six] years ending at the date of the first application made under this Part.

Property in which the relevant person has an interest includes:

- (a) any property that is, on the day when the first application is made under this Part, subject to the effective control of the relevant person; and
- (b) any property or its value that was gifted by the relevant person to another person within the period of [six] years ending at the date of the first application made under this Part.

Drafting note: The definitions of ‘property in which the defendant has an interest’ and ‘property in which the relevant person has an interest’ are critical to the effective operation of benefit recovery orders as these extend the classes of property over which a restraint order and final orders can be obtained to property held by third parties in certain cases. It is important that this power be built into Part V. Without it, persons who commit a crime will be easily able to evade an application of this part by distancing themselves from their property using others as nominees.

The definition of ‘relevant person’ applies with respect to applications for and the granting of restraint orders under Sections 39, 40 and 43. In the case of the defendant (a person who is also included in the concept of ‘relevant person’), the definition becomes important. For instance, in Sections 58(1)(d) and 63 which relate to valuing the defendant’s benefit and realisation of defendant’s property to satisfy an order.

Absent these definitions, a person would be taken to have an interest only in property that he or she legally owns. In common law jurisdictions, a person might also be taken to have an interest or beneficial interest in property that is owned by a third party, but which is held on their behalf pursuant to a trust. However, trusts can often be structured in ways that make the ultimate beneficial ownership of the trust property very difficult or impossible to determine.

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This definition extends the classes of property over which a person will be considered to hold an interest to property that the person has gifted in certain circumstances (see definition) and property that the person ‘effectively controls’ (also defined).

These powers enable a court to look behind legal arrangements that may be used to obscure true ownership. They also permit the court to unravel transactions that have the effect of conferring legal ownership of property upon a third party by means of gift or other transaction, while the person making the gift or engaged in the transaction retains covert control of the asset in question.

Relevant person is a person who is the subject of an investigation for an offence, has been charged with an offence or has been convicted of an offence.

Serious crime shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.

Terrorist property has the same meaning as the definition of terrorist property in Part VI, Section 66.

Restraint Orders

Drafting note: Restraint orders. Sections 39–48 deal with restraint orders. The period between the time that a person first comes to the attention of law enforcement authorities and the making of a confiscation or benefit recovery order may be lengthy. It is therefore essential to have a mechanism to preserve property that might ultimately be subject to confiscation. This is usually achieved by means of a restraint order. Such orders can be imposed against all types of property – both tangible (cars, boats, jewellery) and intangible (bank accounts, a debt obligation).

The restraint order provisions may be used either to restrain property for a confiscation order (proceeds and instruments of crime; see Section 53) or to restrain property that might be used to satisfy a benefit recovery order (and extended benefit recovery order if that option is chosen) (Sections 57 and 59). The restraint order provisions therefore run in two parallel streams depending upon the purpose for which the order is required. Section 39(1) requires that there be an indication whether the restraint order is sought because it is proceeds or an instrumentality, or because a relevant person has an interest in the property. This will avoid confusion.

Restraint orders when property is outside the jurisdiction. While a court might be able to issue an order for the restraint of property that is outside its territory, such an order is made *in personam*. Typically the foreign state where property is located either will ask the requesting state to provide information and evidence so that the foreign state can seek its own order (the more usual

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approach) or will ask that the requesting state forward an appropriate order issued by its courts, which it will then recognise and register.

The term ‘restraint order’ has been used in this draft law, but individual states may use alternative terminology that is more appropriate to their system.

Although Section 39 is meant to restrain a specific person’s interest in property for the purpose of securing a confiscation order or a benefit recovery order, it may indirectly affect another person’s interest. The court will need to consider how best to protect third-party rights.

Section 39 Application for Restraint Order

- (1) Where a person is the subject of an investigation for an offence, or has been charged with an offence or has been convicted of an offence (referred to hereafter in this Part as ‘the relevant person’) and there are reasonable grounds to believe that he or she has benefited from an offence or is in possession of property that is an instrumentality of an offence, or terrorist property, the enforcement authority may apply for an order under subsection 2 in respect of any of the following:
- (a) property that is the proceeds of such offence;
 - (b) instrumentalities of such offence;
 - (c) any property in which the relevant person has an interest;
 - (d) terrorist property.

Drafting note: Application for restraint order

Timing of application: It is important to be able to apply for a restraint order before a person has been charged with an offence otherwise the person under investigation will have an opportunity to conceal or dissipate property. Some existing approaches permit restraint only at the time charges are or are about to be laid. Best practice suggests that restraint orders be obtained as early as possible following the commencement of a criminal investigation.

Subject of investigation: A person is a subject of an investigation for an offence when his conduct is being investigated by a law enforcement officer, acting in accordance with his duty, with a view to ascertaining whether or not the person should be charged with an offence.

Charging: The state may have particular procedures associated with charging which drafting authorities will consider if there is doubt as to when this stage in proceedings has commenced.

Court: Drafting authorities may wish to consider which court will hear applications for restraint orders and make sure this is aligned with the definition of a court in Section 38(4). It need not necessarily be the court that will determine an application for a confiscation, benefit recovery or extended benefit recovery order.

- (2) An application for an order under this Section to restrain property, ‘a restraint order’, may be made to secure the property for the purposes of an application for an order under Section 49, or for an application for a benefit recovery order [*option: or an extended benefit recovery order*] pursuant to Section 57 [*option: Sections 57 and 59*].
- (3) Upon application by the enforcement authority, an application for an order under this Section shall be heard *ex parte* and *in camera*, unless to do so would clearly not be in the interests of justice.

Drafting note: Most restraint orders will need to be obtained urgently and in a way that does not alert the relevant person that their property is about to be restrained. Thus, it should be made clear that, when the enforcement authority considers that secrecy is required, the court may deal with these applications without giving notice to, and in the absence of, the defendant or others with an interest in property that is the subject of the application (*ex parte*) and in a non-public proceeding (*in camera*) to avoid any tipping off of a defendant. This is accomplished by Section 39(3).

This does not prevent an application from being heard *inter partes*, that is, on notice to the defendant and other interested third parties. This would be appropriate where there is no risk of concealment or dissipation, for instance when the property involved has already been secured by a bona fide third party.

Section 39(3) is meant to govern the court’s exercise of its inherent discretion. See discussion on this issue in *Chatterjee v. Ontario* 2009 [SCC] 19.

- (4) An application for a restraint order under subsection (2) shall be in writing and shall be supported by [*variants: an affidavit; evidence; a verified statement*] of [specify the person to be authorised] indicating that the authorised person believes, and the grounds for his belief, that:
- (a) the person has benefited from an offence and that the property that is the subject of the application is proceeds of crime; or
 - (b) the property is an instrumentality or derived or intended for use in an act of terrorism; or
 - (c) that the property is terrorist property.

Drafting note: Section 39(4) requires the use of an affidavit, verified statement or other form of supporting evidence. The form of the material that the court will consider will depend upon local procedure. However, it is important that there be legal responsibility for, and a written record of, the representations made.

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Officers making application. Drafting authorities will need to decide which officials of the enforcement authority or other law enforcement officers will be entitled to substantiate applications under this section. Use of officers of sufficiently senior rank will guard against the misuse of these provisions. It is best that the court hear directly from the persons who are intimately involved in the investigation. Drafting authorities should identify the officers who will be involved (from what agency) either here or in the definitions section.

- (5) Where an application under subsection (1)(a) is made prior to the conviction of a person for an offence, the [*variants: affidavit; evidence; verified statement*] shall state the officer's grounds for belief, and the grounds for believing that the relevant person committed the offence(s), and is the subject of an investigation for the offence(s).
- (6) An application for a restraint order in respect of property for the purposes of a benefit recovery order [*option: or extended benefit recovery order*] under subsection (1)(b) shall be in writing and shall be supported by [*variants: an affidavit; evidence; a verified statement*] of [specify officials to be authorised] indicating the grounds upon which the officer reasonably believes that the relevant person derived a benefit directly or indirectly from the commission of the offence(s).
- (7) Where an application under subsection (1)(b) is made prior to the conviction of the person with an offence, the [*variants: affidavit; evidence; verified statement*] shall state the officer's grounds for believing that the relevant person committed the offence(s) and is the subject of an investigation for the offence(s).
- (8) If property that is the subject of an application for an order under this Section is the property of a third party, the [*variants: affidavit; evidence; verified statement*] shall indicate that the officer believes, and the grounds for his or her belief, that the property that is the subject of the application is property in which the relevant person has an interest.

Drafting note: Third-party interests. Section 39(8) sets out the evidentiary requirements that should be addressed in order to obtain a restraint order for the purpose of a benefit recovery order over property that, on the face of it, is owned by a third party. In essence, in order to restrain such property, it is necessary to show that the defendant has an 'interest' in it. 'Interest' is a defined term and includes, in addition to its ordinary meaning, property over which a person under investigation (or charged) has effective control or property which he or she has gifted.

The evidence in support of an application for the restraint of third-party property should indicate the basis upon which it is alleged that the property is property in which the relevant person has an 'interest,' and the extent of that interest. The court could be provided with real and personal property search results.

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This will enable the court to determine whether an order over the third party property should be made, and if so, whether the order should be made over the whole property or over some lesser interest in the property.

For example, if the property is wholly owned by a third party but the evidence is that the property is effectively controlled by the relevant person, it would be appropriate to restrain the whole property. However, it may be that the property is wholly owned by the third party, subject to a trust in relation to a share of the property. This would be the case, for instance, where the relevant person contributed 25 per cent of the purchase price of a house that the third party then purchased in his or her name, the third party supplying the remaining 75 per cent of the purchase price from his or her own funds.

Here the third party is the legal owner of the whole property, subject to a trust in favour of the relevant person in respect of his or her 25 per cent share. In such a case it would not be appropriate to restrain the whole property as this would inappropriately capture the interest legitimately owned by the third party. An order in this case should be over the ‘relevant person’s 25 per cent interest in the property’. The practical effect of such an order will probably be to prevent dealings in the entire property until the matter is finally resolved, or until the relevant person’s 25 per cent share is paid out.

It will be clear, however, that, whatever happens, the third-party interest in the property can never be applied to the payment of a benefit recovery order made against the relevant person.

Section 40 The Restraint Order

Drafting note: Grant of restraint order. Section 40 provides the court with discretion to grant a restraint order where it considers there are reasonable grounds to believe:

- that a person committed the offence and there is an investigation or charge relating to that conduct; and
- that the property to be restrained is proceeds or an instrumentality or terrorist property (if a confiscation order is contemplated) or that the person derived a benefit (if a benefit recovery or extended benefit recovery order is contemplated).

Standard for granting a restraint order. Standards that states use to grant restraint orders vary. Among them would be that a confiscation or benefit recovery order is likely to be made or that there are reasonable grounds to believe that such an order may be made. Section 39(1) does not rely on the likelihood

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that an order will be granted as such a standard may be difficult to apply. Rather it looks to the reasons underlying whether an order will ultimately be made.

Some states require, in addition, evidence of a risk of dissipation or concealment. This can be very difficult to obtain, particularly at an early stage of an investigation. Using this requirement may mean that there will be no assets to satisfy an eventual order.

Drafting authorities must evaluate the appropriate balance to be struck for restraint with the understanding that, if the evidentiary threshold is too high, state authorities may only rarely be able to restrain fast-moving criminal proceeds and assets may never be reachable, but, if too low, this could amount to unfair interference with a person's right to peaceful enjoyment of possessions.

- (1) Where the enforcement authority applies to the court for a restraint order in accordance with this Section, and the court is satisfied, having regard to the facts and beliefs set out in the [*variants*: affidavit; evidence; verified statement] in support of the application and any other relevant matter, that there are reasonable grounds to believe that subsection (1)(a) and any one of subsections (1)(b), (1)(c) [*option: and 1(d)*] are satisfied, it may order any of the matters set out in subsection (2):
- (a) where the relevant person has not been convicted of an offence, that he or she committed an offence and that the person is either the subject of a criminal investigation or has been charged with an offence; and
 - (b) where the application for a restraint order is made for the purpose of securing property for a confiscation order, that the property could properly be the subject of an application for a confiscation order; or
 - (c) where the application for a restraint order is made for the purpose of securing property for a benefit recovery order, that the relevant person derived a benefit from the commission of the offence, and has an interest in that property; [or]
 - (d) where the application for a restraint order relates to terrorist property, that the property so relates.
 - (e) [*option: where the application for a restraint order is made for the purpose of securing property for an extended benefit recovery order, that offence is a serious offence for the purposes of Section 59 and that the relevant person has an interest in that property.*]

Drafting note: Throughout these model legislative provisions, when referring to the level of evidence required for an order, the standard of 'belief' has been adopted. However, when orders are being sought at the early stage of an investigation, drafters may consider that the appropriate evidential standard is

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‘suspect’. In determining which standard to apply, consideration will need to be given both to other provisions in domestic law and to the impact that ‘suspicion’ as a standard may have on applications for mutual legal assistance.

- (2) The court may order any one or more of the following:
- (a) that the property, or such part of the property as specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances (if any) as are specified in the order;
 - (b) that the property, or such part of the property as is specified in the order, shall be seized, taken into possession, delivered up for safekeeping or otherwise secured by a named authorised officer, the enforcement authority or such other person appointed for this purpose by the court; or
 - (c) if the court is satisfied that the circumstances so require, direct a named receiver to take custody and control of the property, or such part of the property as is specified in the order and to manage or otherwise deal with the whole or any part of the property in accordance with any direction from the court.
- (3) Where a person has been appointed under subsection (2)(c) in relation to property, he or she may do anything that is reasonably necessary to preserve the property and its value including, without limiting the generality of this:
- (a) becoming a party to any civil proceedings that affect the property;
 - (b) ensuring that the property is insured and that all obligations in respect of the property are satisfied;
 - (c) realising or otherwise dealing with the property if it is perishable, subject to wasting or other forms of loss, its value volatile, or the cost of its storage or maintenance is likely to exceed its value, provided this power may be exercised without the prior approval of the court only where:
 - (i) all persons known by the appointed person to have an interest in the property consent to the realisation or other dealing with the property; or
 - (ii) the delay involved in obtaining such approval is likely to result in a significant diminution in the value of the property; or
 - (iii) the cost of obtaining such approval would, in the opinion of the person appointed, be disproportionate to the value of the property concerned;

Drafting note: The importance of managing seized assets cannot be overstated. Asset management is a developed skill, and states will have to establish and maintain mechanisms dedicated to ensuring the maintenance of the value of seized assets. Part XI of this draft contains sample asset management provisions

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that drafters can employ. FATF Recommendation 4 includes a requirement to identify, trace and evaluate property, and those responsible for asset management will have to be able to undertake these functions as well.

Section 40(2) deals with the nature of the order required to restrain property. A simple order, as provided for in subsection 2(a), will suffice for many types of property, for instance a bank account. Other kinds of property may need to be taken into possession or held by an authorised officer under subsection 2(b). Other property may require on-going management, for instance on-going concerns, businesses or share portfolios and certain kinds of real estate. Subsection 2(c) thus provides for the appointment of a named receiver (or trustee as local law requires) to deal with such matters. The term used for the person appointed by the court under Section 40(2)(c) will be a matter for the state concerned. It may be that terms other than those suggested may be used, for example 'asset manager'.

To avoid confusion with a person appointed to a similar role under the civil forfeiture part of these laws, it may be that a different term should be used for each part. Clarification of the terms used, perhaps by a definition, will be essential to avoid confusion with other use of the same terms. In some jurisdictions, existing government agencies may have appropriately qualified persons who can undertake this role. Thus, allowance should be made for states to appoint appropriate persons who may not be formal 'trustees'. In others, the court will need to turn to appropriately qualified private persons, such as members of accounting firms. This will have significant cost implications, and considerable care must be taken in remuneration arrangements.

Preferably this should not be left to the court, but set out in regulations and in any order made. It is a prerequisite of the appointment of a property 'manager' that there is property that requires management to guard against its value being diminished, thereby ensuring that in the event of conviction the proper value of the property will be available to the state and, in the event of an acquittal, the original asset will be available for return to its owner with its value maintained.

Under the model provisions, a person appointed by the court can have two roles in relation to restrained property: preserving/managing the property pending confiscation and realising the property post confiscation.

A preservation/management order may be made pursuant to Section 40 at an early stage in the proceedings, either when a restraint order is made or at some subsequent time if it becomes apparent that restrained property needs to be managed or maintained in order to preserve its value.

(d) if the property consists, wholly or partly, of a business:

- (i) employing, or terminating the employment of, persons in the business;
- (ii) doing anything that is necessary or convenient for carrying on the business on a sound and lawful commercial basis; and

- (iii) selling, liquidating or winding up the business if it is not a viable, going concern, subject to obtaining the prior approval of the court; and
- (e) if the property includes shares in a company, exercising rights attaching to the shares as if he or she were the registered holder of the shares.

Drafting note: Section 40(3) provides for an order that regulates the actions of the appointed person with respect to the property. It provides in Section 40(3)(c) for such person to realise or deal with the property, for instance to sell it in some circumstances.

Under the model provisions, a person appointed by the court can have two roles in relation to restrained property: preserving/managing the property pending confiscation and realising the property post confiscation.

A preservation/management order may be made pursuant to Section 40 at an early stage in the proceedings, either when a restraint order is made or at some subsequent time if it becomes apparent that restrained property needs to be managed or maintained in order to preserve its value.

- (4) A restraint order in respect of property may be made whether or not there is any evidence of risk of the property being disposed of, or otherwise dealt with, in such a manner as would defeat the operation of this Act.

Drafting note: Section 40(4) makes clear that risk of dissipation is not a pre-requisite for the making of an order. It is important to clarify this point, as a restraint order in connection with a criminal case should be viewed as conceptually different from the common law remedy of *Mareva* injunctions, which apply to private civil litigation and are limited by the requirement to demonstrate risk of dissipation and balance of convenience. (See, for example, *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509.) Restraint orders in criminal cases should be easier to obtain since the person affected has been charged, or is likely to be charged, with an offence that he or she is reasonably believed to have committed, or he or she has been convicted of the offence.

Section 41 Restraint Orders and International Requests

- (1) This Section applies:

- (a) if a restraint order under Section 40 has been made; or
- (b) in respect of an offence under the law of a foreign State in relation to acts and or omissions that, had they occurred in [insert name of State], would have constituted an offence in [insert name of State] and a request for assistance has been made by the foreign State for the restraint or confiscation of property

relating to such acts and or omissions, or for information or evidence that may be relevant to the proceeds, benefits or instrumentalities of the offence.

- (2) Where the enforcement authority believes that property in which the relevant person has an interest is situated in a State or territory outside [insert name of the State], it may request assistance from such State or territory to enforce the restraint order in that State or territory.

Drafting note: Property abroad. Section 41 may be used in cases where there is property in a foreign state that has been identified as property in which the relevant person has an interest. Without such a provision, it is easy for a person under investigation or who has been charged to remove property beyond the reach of investigators in the state conducting the investigation with authorities having limited access to it for purposes of restraint.

It will be important to ensure that this provision be considered in relation to provisions of domestic law permitting mutual legal assistance so that requests can be made in an effective manner.

In some states, mutual legal assistance provisions may be comprehensive enough to permit outgoing requests of this kind, and this provision would not be necessary. It is important, however, that it be quite clear that such provisions do apply.

Section 41(3) enables the provisions of this act to be used in support of foreign applications for assistance.

- (3) Where the enforcement authority is asked to assist a foreign State pursuant to subsection (2) above, it may make an application to the relevant court for such orders as are appropriate having regard to all the circumstances of the request for assistance.

Section 42 Notice of Restraint Order

Where a restraint order is made, the enforcement authority shall, within [21] days of the making of the order, or such other period as the court may direct, give notice of the order to persons affected by the order.

Drafting note: Notice. It will be important to ensure that notice of the order is given to the person whose conduct has given rise to the investigation, prosecution or conviction even if he or she is no longer the holder of property to be restrained. Section 42 provides for this.

The person should be served with sufficient information to enable him or her to understand the basis of the restraint order or, alternatively, there should be

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a procedure in place to afford him or her access to appropriate information. Where third parties hold the property, the court should determine the extent to which such background information should be provided. The number of days is a matter of choice for the state. It should be noted that the service of these orders as soon as is reasonably practicable is best practice. States are encouraged to consider reducing the statutory number of days to the barest minimum consistent with the practicalities of service within the jurisdiction.

Section 43 Further Orders

- (1) Where a court makes a restraint order, it may, at the time when it makes the order or at any later time, make any further orders that it considers appropriate. Without limiting the generality of this, the court may on the application of any person affected make:
 - (a) an order revoking the restraint order or varying the property to which it relates;
 - (b) an order varying any condition to which the restraint order is subject;
 - (c) an order directing the owner or the relevant person or a director or officer specified by the court of a body corporate that is an owner or the relevant person to give to the enforcement authority and to any person appointed pursuant to Section 40(2)(c) a sworn statement setting out particulars of all property wherever situated or dealings with such property, of the owner or the relevant person, as the court thinks proper;
- (2) Where the restraint order appoints a person to take custody and control of property pursuant to Section 40(2)(c) the court may make:
 - (a) an order regulating the manner in which the person may exercise his or her powers or perform his or her duties under the restraint order;
 - (b) an order determining any question relating to the property to which the restraint order relates, including any question with respect to the property to which the restraint order relates, relating to the liabilities of the owner or to the exercise of the powers, or performance of the duties, of the person appointed and/or;
 - (c) an order directing the owner or another person to do any act or thing necessary or convenient to be done to enable the person appointed to take custody and control of the property in accordance with the restraint order;
 - (d) an order to provide for meeting, out of the property or a specified part of the property, all or any of the following:
 - (i) the relevant person's reasonable living expenses (including the reasonable living expenses of his or her dependants (if any)) and reasonable business expenses; and/or

- (ii) the relevant person's reasonable expenses in defending a criminal charge or any proceeding under this Act.
- (3) A court may make provision under subsection (1)(e) for reasonable legal, living and business expenses only if the relevant person satisfies the court that he or she cannot meet such expenses out of assets that are not subject to a restraint order, that he or she has disclosed the extent of all his or her interests in all assets in which he or she has any interest and the court determines it is in the interest of justice to make such a provision.

Drafting note: Section 43 makes it clear that the court can make any further orders in relation to the restraint order that it deems appropriate. Thus, it may revoke or vary the order (Section 43(1)(a)) and may provide for legal and living expenses out of the restrained property (Section 43(2)(d)), among other orders.

Legal and living expenses. The issue of making restrained assets available for legal and living expenses is a difficult one, and one that is approached by different jurisdictions in a number of ways. If there is unlimited access, restrained assets can be completely consumed by such expenses within a short time. The model provision at Section 43(3) permits access if the court determines it to be in the interest of justice to do so, and in the absence of any other funding. Some jurisdictions prohibit the use of restrained assets for legal expenses and require a defendant who is unable to pay for representation, because there are no non-restrained assets available, to turn to legal aid services at legal aid rates.

This solution presupposes that a legal aid service is available to be used in this way. Some jurisdictions cap the rate, or require the court to have regard to the legal aid rates in making such an order. The UK Proceeds of Crime Act 2002 specifically prohibits the use of restrained funds to pay for private legal fees unless it is to make refunds to the legal aid fund administered by the state. This approach leads to a much more proportionate use of restrained funds in relation to legal fees.

Section 43(2)(d), while it does not prohibit access to restrained assets to pay for legal or living expenses, requires that such expenses be 'reasonable'. This may require a level of supervision from the court. Also, as noted, the request must meet the twofold test: (1) there must not be unrestrained assets that could be used to pay such expenses and (2) the court must decide it is in the interest of justice to provide access to the assets.

Drafting authorities should consider how reasonableness would be determined in the domestic context, for instance with reference to existing or specially created fee schedules or 'capped' fees for specified tasks, or by review or supervision of the fees by a person appointed by the court.

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To establish that unrestrained assets are not available, the court will need to look at evidence of the totality of the person's financial resources and should require a sworn statement that no other assets exist.

The nature of the restrained property is also a factor that the court could consider or could be included by drafting authorities in a provision. If property is restrained because it is shown on a reasonable basis to be the proceeds of crime, there is a good argument that a defendant should never be permitted access to such property to pay for expenses. Drafting authorities must ensure there is some kind of access to legal representation, so that fundamental rights in a criminal proceeding are not denied.

- (4) Where a person is required to give a statement pursuant to subsection (1)(c), the person is not excused from making the statement on the ground that the statement might tend to incriminate the person, or make the person liable to a confiscation order, benefit recovery order [*option: extended benefit recovery order*] or penalty.
- (5) Where a person makes a statement pursuant to an order under subsection(1)(c), anything disclosed in any statement and any information, document or thing obtained as a direct or indirect consequence of the statement is not admissible against the person in any criminal proceeding except a proceeding in respect of the falsity of the statement.
- (6) For the purposes of subsection (5), applications for a restraint order, a confiscation order or a benefit recovery order [*option: or an extended benefit recovery order*] are not criminal proceedings.

Drafting note: Section 43(6) makes clear that the use immunity conferred by Section 43(5) does not apply to proceedings for orders under this act.

Section 44 Exclusion of Property from Restraint

- (1) Where a person who is not the relevant person has an interest in property that is subject to a restraint order applies to the court to exclude his or her interest from the order, the court shall grant the application if it is satisfied:
 - (a) in the case of a restraint order to secure property for a confiscation order:
 - (i) that the property is not or does not represent proceeds or an instrumentality and
 - (ii) that the applicant was not, in any way, involved in the commission of the offence in relation to which the restraint order was made;
 - or:
 - (iii) where the applicant acquired the interest before the commission of the offence, the applicant did not know that the relevant person would use,

or intended to use, the property in or in connection with the commission of the offence;

or:

- (iv) where the applicant acquired the interest at the time of or after the commission or alleged commission of the offence, the interest was acquired in circumstances that would not arouse a reasonable suspicion that the property was proceeds or an instrumentality of crime.
 - (b) in the case of a restraint order to secure property for a benefit recovery order, [*option: or extended benefit recovery order*] that the property interest that is the subject of the application is not property in which the relevant person has an interest.
- (2) For the purposes of subsection (1)(a)(iii) and (iv), the value of the applicant's interest shall be in proportion to the proper consideration the applicant provided to the relevant person.
- (3) Where a person having an interest in property that is subject to a restraint order and who is a defendant applies to the court to exclude his or her interest from the order, the court shall grant the application if satisfied:
- (a) in the case of an order that secures property for a confiscation order, that the property is not the proceeds or an instrumentality of crime or terrorist property; and
 - (b) in the case of an order that secures property for a benefit recovery order [*option: or extended benefit recovery order*], that a benefit recovery order [*option: or extended benefit recovery order*] cannot be made against the defendant.
- (4) Where property is restrained to secure it for the purposes of both confiscation and benefit recovery [*option: or extended benefit recovery*] orders, a court may decline to exclude property from restraint under this Section unless satisfied that each of the relevant provisions for exclusion apply.

Drafting note: Exclusion of property. Section 44 provides for the exclusion of property from a restraint order. Sections 44(1) and 44(2) deal with requests from third parties, and subsection (3) deals with requests by the subject of an investigation or a defendant who has been charged ('the relevant person').

Sections 44(1) and 44(2) are provisions designed to protect the interests of bona fide purchasers. They should ensure that the amount of the consideration paid by a bona fide purchaser may be excluded from the operation of the restraint order. Section 44(1)(a)(iv) is aimed at ensuring that wilfully blind third parties are not in a position to recover instrumentalities.

Section 44(1)(b) provides that, in the case of a benefit recovery order, the property should not be excluded if it is property in which the relevant person has

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an interest. Property in which such a person has an interest includes property that he or she owns or effectively controls as well as property that he or she has gifted. Thus, for property to be excluded, it is not enough for third parties to show that the property is legally theirs. They also must demonstrate that it is not subject to the effective control of the defendant.

If a relevant person has only a partial interest in property, the restraint order should reflect this by restraining only that interest (leaving other interests held by third parties and that are not subject to the effective control of the relevant person unrestrained).

In the event that, for whatever reason, a restraint order does ‘capture’ property or an interest in property in which a defendant has no interest (as that term is defined), the exclusion order procedure provides the owner of such property with a mechanism to exclude the property from restraint.

Section 45 Contravention of Restraint Order

- (1) A person who knowingly contravenes a restraint order by disposing of or otherwise dealing with property that is subject to the restraint order is guilty of an offence punishable upon conviction by imprisonment for a period not exceeding [insert number] years or a fine of up to [insert amount], or both, if the person is a natural person, or by a fine of [insert amount] if the person is a corporation.

Drafting note: Contravention of restraint order. Section 45 prescribes criminal consequences for a breach of a restraint order. This approach emphasises the serious nature of such breaches and provides for appropriate criminal consequences. An alternative approach would be to treat such breaches as a contempt of court. The state’s domestic court procedure will provide appropriate remedies.

- (2) Where a restraint order is made against a property and the property is disposed of or otherwise dealt with in contravention of the restraint order, and the disposition was for insufficient consideration or the purchaser did not act in good faith, the enforcement authority may apply to the court for an order that the disposition or dealing be set aside.

Section 46 Seizure Order

- (1) On application by the enforcement authority, the court may make an order for the enforcement authority to search for and seize property that is the subject of a restraint order, or property that the court reasonably believes is an instrumentality of crime, or terrorist property, provided it is satisfied that the restraint order may not be effective to preserve the subject of the restraint order or:

- (a) [insert each condition and ground from domestic law considered necessary to safeguard issuance of a coercive warrant for the property identified in (1) above and note they must be satisfied].
- (2) An order under this Section may also grant power to a person named in the order to enter any premises to which the order applies, and to use all necessary force to effect such entry.
- (3) If during the course of searching under an order granted under this Section, the person named in the order finds any thing that he or she believes on reasonable grounds:
 - (a) will afford evidence as to the commission of an offence; or
 - (b) is of a kind that could have been included in the order had its existence been known of at the time of application for the order; he or she may seize that property or thing and the seizure order shall be deemed to authorise such seizure.
- (4) Unless the court orders otherwise, property seized under this Section shall be retained by the enforcement authority until further order of the court unless required as evidence in any criminal proceedings.

Drafting note: Seizure order. A restraint order is the usual means of securing property for eventual post-conviction recovery. However, in some circumstances a restraint order will be ineffective because the property the prosecutor seeks to immobilise is in the hands of the defendant or some other person who will not voluntarily produce or preserve it. In these circumstances, the seizure order provided for by Section 46 provides a compulsory mechanism to secure property for eventual recovery post conviction.

Provision should also be made either in this law or in the state's general criminal procedure code for situations in which evidence of other criminal offences is discovered in the course of execution of a Section 46(1) search warrant. For instance, the executing authority might discover prohibited drugs while searching for a specified article of jewellery.

The seizure order provided for by Section 46 contains only the essential components of the power necessary for its operation. Section 46(3) is an essential requirement and drafting authorities will need to look closely at standards and procedures within the state and include them in some way. States should ensure that the usual warrant standards in the jurisdiction (for instance, in some jurisdictions probable cause to believe that an offence was committed and that the specified property is at the place to be searched), as well as the powers, procedures and controls, are inserted to facilitate the proper operation of the order.

Section 47 Protection of the Appointed Person

- (1) Where a court has appointed a person in relation to property pursuant to Section 40(2)(c) or 63, he or she shall not be liable for any loss or claim arising out of the

exercise of powers conferred upon him or her by the order or this Part unless the court is satisfied that:

- (a) the applicant has an interest in the property in respect of which the loss or claim is made; and
- (b) the loss or claim arose by reason of the negligence or reckless or intentional misconduct of the person appointed.

Drafting note: Any person appointed under this act should be subject to the same requirements as to integrity, competence and insurance as any other person appointed with the responsibility to have control and/or management of the assets of a third party under any other legislation. Examples might include a public trustee, a litigation guardian, a court-appointed receiver or a bankruptcy trustee.

Section 48 Duration of Restraint Order

Unless the court otherwise orders in the interest of justice, a court that makes a restraint order pursuant to this Part upon the basis that a person is the subject of an investigation shall discharge the order upon application if the person is not charged within a reasonable time of the date of the original order.

Drafting note: Section 40 provides for restraint orders that are issued at the investigative stage and seeks to ensure that they are proportionate. Such orders are proportionate only if the prosecutor acts within a reasonable time to bring the case.

Once charges are laid, a restraint order will usually be in force until further order of the court. Applications to discharge would then be made under Section 48.

Section 49 Application for Confiscation Order or Benefit Recovery [*option: or Extended Benefit Recovery*] Order

- (1) Where a person is convicted, the enforcement authority may apply to the court for one or both of the following orders:
 - (a) a confiscation order against property that is proceeds or an instrumentality of that offence or terrorist property;
 - (b) a benefit recovery [*option: or extended benefit recovery*] order against the person.

Drafting note: Section 49 addresses applications for orders post conviction.

Kinds of orders. The enforcement authority may apply for several kinds of orders.

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A confiscation order or a benefit recovery order should be used when the proceeds of the offending (including converted/substituted assets) can be identified. Similarly, a confiscation order should be used when the property is identified as an instrumentality or terrorist property. A benefit recovery order will be appropriate when it is not possible to identify a specific asset as the proceeds (including converted/substituted assets) or instrumentality of an offence.

An optional addition is an extended benefit recovery order in circumstances in which states decide to adopt assumptions as to the extent of the criminal conduct of the defendant following conviction.

Section 49(1) addresses the kinds of orders that may be sought. Section 49(2)–(4) sets forth when the orders may be sought. Section 49(5) and (6) deals with finality issues.

Normally, the application for a confiscation order will be made at the time the conviction is obtained. Section 49(2) provides that the application should be made within a prescribed time limit of the conviction. Section 49(3) provides for the situation in which property that could have been subject to an application for confiscation is identified, or evidence to identify property is only obtained, only some time after the conviction.

- (2) Except with the leave of the court, the enforcement authority must make an application under subsection (1) within [six] months of the date upon which a person was convicted of the offence.
- (3) A court shall grant leave under subsection (2) only if it is satisfied that it is in the interests of justice to do so.
- (4) The enforcement authority may amend an application for a confiscation order or benefit recovery order [*option: or extended benefit recovery order*] at any time prior to the final determination of the application by the court, providing that reasonable notice of the amendment is given to affected persons.
- (5) Where an application under this Section has been finally determined, the enforcement authority may not make a further application for a confiscation order or a benefit recovery order [*option: or extended benefit recovery order*] in respect of the same offence without the leave of the court. The court must not give such leave unless it is satisfied that:
 - (a) the property or benefit to which the new application relates was identified after determination of the previous application;
 - (b) necessary evidence became available after the previous application was determined; or
 - (c) it is in the interests of justice to do so.

- (6) A further application under Section 49 may not be made later than [six] years after the date of the final determination of the application under this Section.
- (7) For the purposes of this Section, a person shall also be treated as convicted of an offence if:
 - (a) found not guilty by reason of insanity following a determination that the criminal acts were committed; or
 - (b) the court takes the offence into consideration with the consent of the convicted person when passing sentence.

Section 50 Application for Confiscation Order or Benefit Recovery Order in the Case of Absconding or Death

- (1) On application by the enforcement authority the court may treat a person as convicted for the purposes of Section 49(1) where:
 - (a) he or she was charged with an offence, a warrant for his or her arrest was issued in relation to the charge and reasonable attempts to arrest him or her pursuant to a warrant have been unsuccessful during the period of [six] months commencing on the day the warrant was issued; or
 - (b) he or she was charged with the offence but died without the charge having been determined; and
 - (c) having regard to all the evidence before the court that such evidence is of sufficient weight to support a conviction for the offence.
- (2) For the purposes of subsection (1)(a), a person shall be deemed to have been convicted on the last day of the period referred to in that subsection.
- (3) The enforcement authority may not make application under Section 59 for an extended benefit order in the case of a person deemed to be convicted under this Section.
- (4) Where a person has died, any notice authorised or required to be given to a person under this Part may be given to the person's legal personal representative.
- (5) A reference in this Part 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 death.

Drafting note: Absconding and death. Section 50 addresses applications for confiscation and benefit recovery orders in the case of persons who abscond or die after being charged but before a conviction. Jurisdictions may decide that such provisions are not appropriate, especially if they have provisions for civil forfeiture. The existence of civil forfeiture provisions to cover such cases

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is a very strong argument in favour of their inclusion in a comprehensive asset recovery regime.

Sections 50(1) and (2) provide a procedure for the enforcement authority to secure a determination by the court that a specific person will be taken to be convicted, and thus that the provisions of the part regarding confiscation and benefit recovery orders will apply. Under Section 50(3), for a person to be taken to be convicted, the court, in addition to concluding that the person was charged and either absconded or died, must also be satisfied that there is evidence of sufficient weight to support a conviction.

In cases where a restraint order was made at the investigative stage, authorities should rely on civil forfeiture provisions to seek to forfeit restrained property. In addition, in the case of a person who has absconded after learning of an investigation but before charging, authorities might seek to proceed with a trial *in absentia* (depending on the provisions of local law) and upon conviction to confiscate the property in accordance with the provisions of this part.

For jurisdictions that do not have civil forfeiture provisions, if a person who is under investigation with property restrained dies, it will not be easy to deal with the restrained property. Authorities could consider including a special provision that would provide, in essence, for a criminal trial against the restrained assets. In this, a court would have to be satisfied that the evidence against the person is of sufficient weight to support a conviction beyond a reasonable doubt for a specific offence, that the offence generated proceeds (or instrumentalities used to commit the offence) and that the property restrained was such proceeds/instrumentalities. Such difficulties, however, constitute a strong argument in favour of the introduction of civil forfeiture provisions.

Section 51 Service of Application and Appearances

- (1) Where the enforcement authority makes an application for an order under Section 49(1):
 - (a) it shall serve a copy of the application on the person convicted and on any other person whom the enforcement authority has reason to believe may have an interest in the property;
 - (b) the person convicted and any other person claiming an interest in the property may appear and adduce evidence at the hearing of the application; and
 - (c) at any time before its final determination of the application, the court may direct the enforcement authority to provide such notice as the court deems appropriate to any person who, in the court's opinion, appears to have an interest in the property.

- (2) The absence by absconding or death of the person, or of any person to whom notice has been given, does not prevent the court from making an order in their absence.
- (3) The court may waive the requirements under subsection (1) to give notice if:
 - (a) the person convicted is before the court; and
 - (b) the court is satisfied either that any other person who has an interest in the property is present before the court or that it is fair to waive the requirement despite any such person not being present.

Section 52 Procedure on Application

- (1) Where an application is made for an order under Section 49, the court may, in determining the application, have regard to any evidence received in the course of the proceedings against the person convicted.
- (2) Where an application for an order under Section 49 is before the court before which the defendant was convicted, the court, if satisfied it is reasonable to do so, may defer imposing sentence until it has determined the application.
- (3) Where the court determines not to defer imposing sentence, it shall leave out of account in deciding the appropriate sentence any financial orders that it may otherwise consider appropriate. Where the court does defer imposing sentence, it shall determine the extent of any order under Section 49 before considering any other financial order.

Drafting note: Deferral of sentencing. Section 52(2) permits a sentencing court to defer imposing sentence until any pending application for a benefit recovery, extended benefit recovery or confiscation order is dealt with. The sentencing court is thus able to consider, if it deems it appropriate, the effect of the confiscation order/(extended) benefit recovery order in determining the sentence. In some states, these orders will be considered part of the sentence and penal in effect. In others, they will be viewed only as a consequence of the criminal conviction and not formally part of the sentence.

With the relationship between confiscation and sentence varying from state to state, there is likely to be a range of practice. In some states, it might not be appropriate to consider the orders at all at sentencing. Consideration, if permitted, in some situations may affect the sentence. For instance, several defendants could have been involved in a criminal venture with some dissipating all assets and others having assets available for recovery. Valuable lawfully acquired property, in excess of the benefit from the conduct, may have been used as an instrumentality.

There is no requirement that the court defer sentencing. Public policy may require that a convicted person be sentenced as soon as possible after conviction. In other situations, this section will not apply because the application for the order will be made after sentencing.

Section 53 Confiscation Order on Conviction

- (1) A confiscation order is an order *in rem*, following conviction for an offence, to forfeit to the State property that is the proceeds or instrumentalities of that offence or terrorist property.
- (2) The court may make an order under this Section if the enforcement authority has applied to the court for an order under Section 49, or if the court believes that it is appropriate to make such an order.
- (3) Where the court is satisfied that property is the proceeds of crime or terrorist property, the court shall order that it be confiscated.
- (4) Where the court is satisfied that property is an instrumentality of crime, the court shall order that it be confiscated.
- (5) In considering whether to make a confiscation order relating to an instrumentality, the court may have regard to the rights and interests of third parties taking into account the interests of justice [and in particular having regard to the public interest in the confiscation of the instrumentalities of crime].
- (6) In determining whether property is an instrumentality, the court may infer that the property is an instrumentality if it was in the defendant's possession at the time of or immediately after the commission of the offence unless the defendant satisfies the court that such inference is inappropriate.
- (7) In determining whether property is proceeds, the court may infer that the property was derived, obtained or realised as a result of or in connection with the commission of the offence, if it was acquired or possessed by the defendant during or after the commission of the offence, unless the defendant satisfies the court that such inference is inappropriate.
- (8) In determining whether property is terrorist property, the court may infer that the property was derived, obtained or realised as a result of or in connection with terrorist acts if it was acquired or possessed by the defendant, unless the defendant satisfies the court that such inference is inappropriate.
- (9) Where the court makes an order under this Section in respect of property other than money, the court shall specify the monetary amount that it considers to be the value of the property at the time of its order.
- (10) Where a court is minded to make a confiscation order under this Section but the property is no longer available, the court may make an order in a monetary value equivalent to the original property.
- (11) Where the court makes an order under this Section, it may give such directions as are necessary or convenient for giving effect to the order.

Section 54 Enforcement of Confiscation Order Abroad

- (1) This Section applies if a confiscation order under Section 53 has been made.

- (2) Where a confiscation order has been made in respect of property that is situated in a State or territory outside [insert name of the State], the enforcement authority may request assistance from the appropriate authorities in the other State or territory to enforce the said order.
- (3) If a request under subsection (2) has resulted in the realisation of property in the foreign State or territory, the property realised shall be applied in accordance with the terms of any agreement between the States and any such realisation shall be treated as compliance by the defendant with the terms of the order.

Drafting note: This section will apply where a restraint order is already in place in the foreign jurisdiction, but this is not a prerequisite. Where the final forfeiture or confiscation order has been obtained, this provision may be used to seek enforcement of that order abroad. As with restraint orders, this provision will need to be linked to the mutual assistance provisions in the state adopting the provision so that the request for foreign enforcement can be made in an effective manner.

FATF Recommendation 38 requires states to be able to take expeditious action in response to foreign requests for, *inter alia*, confiscation. It also requires that states should have effective arrangements for ‘... the sharing of confiscated assets’.

A state may be a party to a multilateral or bilateral agreement about the sharing of assets that are recovered through the enforcement of a confiscation order in a foreign state. The interpretative note to FATF Recommendation 38 also requires that countries should take such measures as may be necessary to enable them to share among or between other countries confiscated property.

Section 55 Effect of Confiscation Order

- (1) Subject to subsection (2), where a court makes a confiscation order, the property shall vest in [insert name of State] upon the making of the order.
- (2) Where title to property is conveyed or transferred by registration, the property shall vest in [insert name of State] by virtue of the order.

Drafting note: In any particular state, the authority in whose name confiscated property vests will depend on domestic arrangements. Consideration will have to be given to consequential amendments to land registration and similar systems. See the sample provisions for a recovered assets fund in Part XI below.

- (3) Upon vesting, the enforcement authority is authorised to do anything necessary or convenient to secure registration, including executing instruments for transferring an interest in the property.

- (4) Where the court makes a confiscation order, the property shall not, except with the leave of the court and in accordance with any directions of the court, be disposed of, or otherwise dealt with, before the expiration of the appeal period applicable to the confiscation order, or, if an appeal is made, before the appeal is finally determined.

Section 56 Exclusion of Property from a Confiscation Order

- (1) A person who is not the defendant and who has an interest in property that is subject to a confiscation order may apply to the court to exclude his or her interest from the order. The court shall grant the application if satisfied:
- (a) that the property is not proceeds or an instrumentality; or
 - (b) that the applicant was not in any way involved in the commission of the offence(s) in relation to which the order was made; and
 - (c) where the applicant acquired the interest before the commission of the offence, he or she did not know that the defendant would use, or intended to use, the property in or in connection with the commission of the offence; or
 - (d) where the applicant acquired the interest at the time of or after the commission of the offence, the interest was acquired in circumstances that did not arouse a reasonable suspicion that the property was proceeds or an instrumentality.
- (2) For purposes of subsections (1)(c) and (d), the value of the applicant's interest shall be in proportion to the consideration the applicant provided to the defendant.

Drafting note: Section 56 protects owners. It also protects the interests of bona fide purchasers and ensures that the amount of the consideration paid by a purchaser may be excluded from the operation of the confiscation order. Section 56(1)(d) is a provision to ensure that 'wilfully blind' third parties are not able to recover proceeds or instruments of crime.

- (3) An application under this Section may be made whether or not the interest in property that is the subject of the application is or was the subject of a restraint order.
- (4) An application under this Section shall not be made more than [six] months after the day on which the confiscation order is made.
- (5) A person who was served with the application for a confiscation order under Section 51 or made an appearance at the hearing on the application for a confiscation order may not, without leave of the court, make an application under this Section after either the confiscation order was made or an application to exclude the property from restraint under Section 44 was considered and dismissed.

Section 57 Benefit Recovery Order on Conviction

Drafting note: Benefit recovery orders. Section 57 provides for the court to order the recovery of benefit. The enforcement authority will, in the usual case, have made an application for the order under Section 49, but the court may also issue such an order upon its own initiative.

The model provisions provide several options:

- (1) recovery only of the benefit from the conduct resulting in conviction;
- (2) in addition to the benefit from the offence, recovery of the benefit arising out of criminal activity through one or both of two methods:
 - (a) use of the optional language set out in Section 57; or
 - (b) use of optional provision in Section 59 on extended benefit recovery orders.

- (1) A benefit recovery order is an order *in personam* requiring the defendant to pay an amount equal to the benefit that he or she derived as a result of or in connection with his or her conviction [*option: and related criminal activities*].
- (2) The court may make an order under this Section if the enforcement authority has applied to the court for a benefit recovery order or if the court considers it appropriate to do so.
- (3) Where the court is satisfied that the defendant has benefited from his or her conduct [*option: or has benefited from any criminal activity*], it shall order him or her to pay an amount equal to the value of his or her benefit.

Drafting note: Recovery of extended benefit. Section 57(3) contains optional language that permits the court to order recovery of benefit beyond the specific conduct resulting in a conviction. As already noted, this is one method common law states use to deal with the challenges they face in attempting to recover the actual benefits a criminal may have gained from his or her general unlawful conduct. Given the prevalence of tax evasion, this type of provision might be considered a useful tool when recovering the proceeds of such evasion.

It also addresses the problem that the benefit calculation based upon offences for which a defendant was convicted will often not reflect the total benefit of his conduct, as prosecutors are unable to take action with respect to all of a person's criminal activity. Thus, the benefits of the conduct that are proven beyond a reasonable doubt might only be a small proportion of the proceeds accruing from a criminal course of conduct, rather than the total amount.

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One consequence of the use of the extended benefit provisions is that the defendant will have to justify the existence of assets disproportionate to his or her legitimate income. This may place a burden of proof on the defendant or, alternatively, may be used by the defence to counter the prosecution's assertions of benefit gained. States will need to consider carefully how they want to approach this

Use of the extended benefit provisions will need to be considered in the context of the state's legal system and constitutional or other arrangements.

If the optional language set forth in Section 57 is used, authorities will also need to consider whether criminal activity 'related to such offence' should be defined or left to the court to decide in the context of each case. If optional language is adopted, corresponding changes must be also be made in Section 58.

- (4) The court shall assess the value of the benefit that a person has derived from an offence [*option: and other criminal activity*] in accordance with Sections 58–60.
- (5) Where the court makes a benefit recovery order against a person:
 - (a) the order shall not, except with the leave of the court and in accordance with any directions of the court, be enforced before the relevant appeal date; and
 - (b) if, after the relevant appeal date, the order has not been varied or quashed, the order may be enforced and any proceeds applied in accordance with this Part and any directions given by the court.
- (6) Where the enforcement authority has applied to the court for a benefit recovery order, it may provide to the court, and if so shall serve upon the defendant, a statement setting out an assessment of the value of the benefit obtained by the defendant.
- (7) The court may, for the purposes of determining whether benefit is established and the value of the benefit, treat any acceptance by the defendant of the allegations set out in the statement as conclusive of the matters to which it relates.
- (8) The court may require any defendant served with a copy of a statement under subsection (6) to respond to each allegation in it and, in so far as he or she does not accept any allegation, to indicate on oath any facts upon which he or she proposes to rely. The court may treat a defendant's failure to respond or to indicate the facts upon which he or she will rely as his or her acceptance of every allegation in the statement other than:
 - (a) an allegation regarding whether he or she complied with the requirement; and
 - (b) an allegation that he or she has benefited from the offence or that he or she obtained any property or advantage as a result of or in connection with the commission of the offence.

- (9) In this Section ‘relevant appeal date’ used in relation to a benefit recovery order made in consequence of a person’s conviction means:
- (a) the date on which the period allowed by rules of court for the lodging of an appeal against a person’s conviction, or for the lodging of an appeal against the making of a benefit recovery order, expires without an appeal having been lodged, whichever is the later; or
 - (b) where an appeal against a person’s conviction or against the making of a benefit recovery order is lodged, the date on which the appeal lapses in accordance with the rules of court or is finally determined, whichever is the later.

Section 58 Rules for Determining the Value of Benefit

- (1) For the purposes of this Part, the value of the benefit derived by a defendant from an offence [*option: and other criminal activities*] may include:
- (a) any money or other property received by the defendant, or by another person at the request or by the direction of the defendant, as a result of or in connection with the commission of the offence; and
 - (b) the value of any property that was derived or realised, directly or indirectly, by the defendant or by another person at the request or by the direction of the defendant, as a result of or in connection with the commission of the offence; and
 - (c) the value of any service or financial advantage provided for the defendant or another person, at the request or by the direction of the defendant, as a result of or in connection with the commission of the offence; or
 - (d) unless the court is satisfied that the increase was unrelated to the commission of the offence, any increase in the value of property in which the defendant has an interest in the period beginning immediately before the commission of the offence and ending at the date the court makes its order;

but does not include any property confiscated under this Part.

Drafting note: Section 58 provides the rules for calculating the defendant’s benefit. It shall be either Section 58(1)(a)–(c) or Section 58(1)(d). Section 58(1)(d) provides that benefit can be established by a net worth analysis. At its core this includes an inference that any increase in net worth in an appropriate period relating to the offence is a benefit. There may be evidence that suggests that an inference that the increase in net worth emanated from the commission of the offence should not be made.

The exclusion of property confiscated under the part ensures that there is no double recovery, i.e. recovery of both the property and the value of the property, if both a confiscation and a benefit recovery order are used.

- (2) In calculating, for the purposes of a benefit recovery order, the value of benefit derived by the defendant from the commission of an offence:
- (a) any expenditure in connection with the commission of the offence shall not be excluded; and
 - (b) the court shall make such adjustment as is necessary to prevent a benefit from being counted more than once.

Drafting note: The effect of Section 58(2)(a) is that the defendant's expenses in committing the crime are not deducted. Thus, if illegal substances are purchased and then sold at a profit, the purchase price paid by the defendant, even if from legal sources, is considered part of the benefit. Section 58(2)(b) ensures that, where more than one method is used to determine benefits, there is no double counting of benefits.

- (3) Where the benefit derived by a defendant was in the form of illegal property, the court may, in determining the value of that property, have regard to evidence given by a law enforcement officer or other person whom the court considers has expert knowledge of the value of that type of property.

Section 59 Option: Extended Benefit Recovery Orders

Drafting note: Overview. Section 59 provides for another kind of benefit recovery order that drafting authorities may want to use to deal with serious crime. It will be particularly helpful for those states that are not able to adopt the optional extended benefit language in Section 58. Section 59 provides, in essence, that one consequence of a certain kind of criminal conviction may be an order requiring the payment of an amount that appears to represent the general benefit the convicted person has reaped from his or her life of crime rather than the benefit merely from the specific crime of conviction. This is an approach that the United Kingdom took in the Proceeds of Crime Act 2002.

Section 59 operates by applying certain assumptions, which the defendant is free to rebut pursuant to Section 59(8). The court must find that all of a defendant's interests, including any gifts, are criminal benefit if all the conditions set out in Section 59 are satisfied. In cases where an extended benefit order applies, the state has the benefit of an assumption that such assets are the product of criminal activity; the task of rebutting that assumption becomes a matter for the defendant. In doing so, he or she may adduce evidence or rely on material disclosed in the state's case.

Depending on the particular rules applicable in the state, the prosecution will have to disclose to the defendant evidence known to it that arguably tends to

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rebut the assumption that his or her assets are of unlawful origin, or even to demonstrate in its case that it has made good faith efforts to identify and give the defendant credit for all lawful sources of income. Absent rebuttal evidence or an overriding consideration of the interests of justice, the state will prevail with respect to the assumptions.

When to use. An extended benefit recovery order should be made available in clearly defined circumstances, in order to undermine serious, on-going, or organised criminal activity. Thus, according to Section 59(4) and (5), the section is to be used by the only court to assess benefit in cases where the defendant has engaged in criminal activity that suggests that he or she is a ‘career criminal’ and/or is engaged in a continuing series of criminal activities.

The specific determination of when the extended benefit order provisions should be engaged, and whether they should refer to monetary amounts or numbers of convictions, can be a matter for local drafting. Their use may be limited to situations in which the conviction follows at least two other convictions, or is a conviction for a certain kind of serious crime (for instance drug trafficking, trafficking in human or corruption) that suggests that the individual has engaged in continuing criminal conduct beyond the course of conduct that resulted in the conviction. There might also be a value threshold if the trigger is the number of convictions, to avoid a petty criminal being caught by the provisions.

It should be noted that an extended benefit recovery assessment is not concerned with what the defendant made from the offence for which he or she was convicted. The defendant need not even necessarily have been successful in acquiring a benefit from that offence. As noted in Section 59(1), the court is not looking at the specific benefit from the offence.

Consequence of assumptions. The use of an assumption is a common technique that may mitigate the burden of proof. It is premised on common experience of a connection between a known fact and the one to be assumed, particularly when one party has superior access to knowledge. Once an assumption is in place, based upon evidence, the defendant runs the risk of the assumption being accepted as fact if he or she adduces no evidence to rebut it.

The term ‘assumption’ has been used in these model provisions, although it is acknowledged that in many jurisdictions the appropriate word will be ‘presumption’. States will have to use appropriate terminology for their jurisdiction.

Provisions that permit courts to use assumptions concerning property or benefits derived from criminal activity are widespread in common law jurisdictions.

These assumptions are useful to prosecutors as, if they apply, they relieve the prosecution from proving actual use or derivation of the property, which might be difficult in many cases. A defendant is in a better position to explain the

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source of his or her wealth than an external investigator. Evidence from the state or the defendant may satisfy the court that an assumption has been rebutted.

Assumptions can be left out of the scheme if it is not appropriate to extend the operation of the act in this way in a state, or if there are legal or constitutional problems associated with the use of such provisions. However, obtaining extended benefit orders without the use of assumptions would be challenging.

Because this structure looks at general benefit to a defendant from his or her criminal lifestyle, and not at the specific benefit that the defendant obtained from the unlawful conduct that resulted in the conviction, it must be carefully structured so as not to be viewed as general confiscation. It is essential that the defendant has a full opportunity to present evidence and substantiate the legitimacy of his or her wealth.

A decision will have to be made as to what the triggering mechanisms will be, in essence in what circumstances it is appropriate and proportional for a convicted defendant to be subject to an assumption that all of his or her wealth has been unlawfully acquired, and to permit in connection with a conviction a recovery of benefits in excess of the benefits that are derived directly from the offence that resulted in that conviction.

- (1) *An extended benefit recovery order is an order in personam for the defendant to pay an amount not restricted to the benefit obtained from the offence for which he or she has been convicted.*
- (2) *Where the defendant has been convicted of a serious crime, the enforcement authority may apply to the court for an extended benefit recovery order under this Section.*
- (3) *Where an application is made under subsection (2), any order made must take into account any amount realised by virtue of any order made against the defendant under Section 57 (in a case arising out of the same criminal conduct) or any previous order made under this Part.*
- (4) *Where an application under subsection (2) is made, the court may assess the benefit derived by the defendant in accordance with subsection (7) if it is satisfied that:*
 - (a) *the defendant has been convicted of a serious crime; and*
 - (b) *the serious crime upon which the application is based is the third serious crime of which the defendant has been convicted (either in relation to the current proceeding or at any other time within [ten] years preceding the defendant's conviction for the serious crime that is the subject of the application before the court).*
- (5) *For the purpose of this Section, a serious crime is not an offence in respect of which an extended benefit recovery order can be made if the value of the benefit is less than [insert monetary amount].*

Drafting note: The definition of a serious crime for purposes of Section 59 is a matter that requires careful consideration and appears in Section 38. It is likely to vary from jurisdiction to jurisdiction.

As noted in the introduction, the idea is to capture those criminal activities that tend to attract ‘career criminals’. The definition should not extend to low-level offences. Not only would this be unfair to the offenders, it would also waste resources necessary to make these provisions work.

The definition of serious crime is a reference back to the definition in Section 38, which is in turn taken from Article 2 of the Palermo Convention.

Subsection (5) is based upon a threshold benefit test and therefore would not trigger the powers of court without proof of a set threshold being reached.

It would then be possible to add other offences that will trigger such orders, for instance drug-related offences involving a trafficable quantity (however defined), and other offences that, for whatever reason, would not be caught by the benefit threshold.

- (6) *For the purpose of making an extended benefit recovery order under this Section, the court may have regard to evidence received in the course of the proceedings against the defendant.*
- (7) *In assessing the value of the benefit derived by a defendant for the purposes of an extended benefit recovery order, the court shall, subject to subsection (8), include—*
- (a) *all property in which the defendant had an interest at the date the application for an extended benefit recovery order is finally determined; and*
 - (b) *all expenditure and gifts made by the defendant within the period of [six] years immediately before the date in (a) above to the extent not included in (a).*
- (8) *The court shall not treat as benefit specified property or expenditure if it is satisfied that:*
- (a) *in the case of property, the property was not used in, or in connection with, any criminal conduct and was not derived or realised, directly or indirectly, by the defendant from any criminal conduct; or*
 - (b) *in the case of an expenditure or gift, the property expended or gifted was lawfully acquired and was not derived or realised, directly or indirectly, by any person from any criminal conduct; or*
 - (c) *to include any item of property, expenditure or gift would pose a serious risk of injustice.*

Drafting note: Calculating the extended benefit. The drafting note at the beginning of this section makes clear the philosophy behind the extended benefit recovery order. The scheme is based on the principle that, if there are reasonable grounds to believe that an offender is living on the proceeds of crime, then he or she should be required to account for his or her assets, and should have them confiscated to the extent that he or she is unable to account for their lawful origin. In a case where the court has decided to impose such an order, Sections 59(7) and (8) provide the court with powers that allow it to calculate the extended benefits in a particular case.

Rather than look at particular benefit from the offence to assess the extended benefit, the court must look at the whole financial circumstances using two methods.

The first will be a calculation of the value of all property received or transferred by the defendant. The second aspect of the assessment will be a calculation of everything that the defendant has spent, or has gifted, in the specified period before the date of the court's determination. This period could reasonably be set at six years, but periods between four and ten years would also be reasonable here. It is to be noted in this context that six years is the usual period during which people are required to keep books and records of their business, and so it is suggested that this period or such other period as is applied in that context is the right limit.

The result of this calculation is that, if a defendant is found to be liable to an extended benefit recovery order, effectively the court is saying that everything that he has owned over the specified period is potentially subject to the order (unless a Section 59(8) exclusion applies).

So, if a repeat criminal has acquired wealth over a period of years, and, in anticipation of a court order, gifts significant assets, or gambles them away, the court can take such gifts or gambling losses into its assessment, and can make an extended benefit recovery order of an appropriate amount. Since the order is an order *in personam*, the defendant has to pay this amount or face the consequences as defined in Section 60, which might well result in substantial additional periods of imprisonment.

Section 59(8) gives a mechanism for the defendant to seek the exclusion from assessment of particular property. This will be possible, first, if the defendant can demonstrate that the property both was legitimately acquired and was not an instrumentality and second, in the case of expenditures or gifts that can be shown to be legitimate. A third justification for exclusion is that inclusion would cause a serious risk of injustice. Such circumstances should be rare and will be for the court to determine, but it is important to retain this safeguard.

- (9) *Where the enforcement authority has applied to the court for an extended benefit recovery order, it may provide to the court, and if so shall serve upon the defendant, a statement setting out an assessment of the value of the extended benefit obtained by the defendant.*
- (10) *The court may, for the purposes of determining whether extended benefit is established and its value, treat any acceptance by the defendant of the allegations set out in the statement under subsection (9) as conclusive of the matters to which it relates.*
- (11) *The court may require any defendant served with a copy of a statement under subsection (9) to respond to each allegation in it and, in so far as he or she does not accept any allegation, to indicate on oath any facts upon which he or she proposes to rely.*
- (12) *The court may treat a defendant's failure to respond or to indicate the facts upon which he or she will rely as his acceptance of every allegation in the statement other than an allegation regarding whether he complied with the requirement.*

Drafting note: Section 59(9)–(12) provides a mechanism for the enforcement authority to validate its information on benefit so that the court can make an appropriate determination in the absence of any cooperation from the defendant.

Section 60 Amount Recovered under Benefit Recovery [*option: and Extended Benefit Recovery*] Orders

- (1) The amount to be recovered under a benefit recovery [*option: or extended benefit recovery*] order shall be the amount specified in the order under Section[s] 57 [*and 59*] or, if a certificate is issued pursuant to subsection (6), for the lesser amount specified in the certificate.
- (2) The order shall be paid by no later than [four] months following the date of the recovery order.
- (3) In the event that the order is not paid by the date identified in subsection (2) above, the defendant shall serve a sentence of imprisonment in default of payment consecutive to any sentence imposed for the criminal conduct, if any. Such sentence will be determined by reference to [such term as is considered appropriate by local practice].
- (4) Where a court imposes a term of imprisonment under subsection (3), it shall direct that:
 - (a) notwithstanding any term of imprisonment imposed, the unpaid amount will remain due and owing; [*optional*], and
 - (b) [*optional*] that any law regarding the remission of sentences of prisoners serving a term of imprisonment shall not apply to the term of imprisonment imposed under subsection (3).

Drafting note: It is advisable that the legislation provide for the imposition of a sentence in default of payment to be imposed at the time of the making of the order, thereby saving court time and expense on a further hearing, and also putting the defendant on notice at a very early stage as to the consequences of non-payment. The length of such default sentence will be a matter for the drafting authorities to determine, it being plainly a matter of national preference.

Prison term for non-payment. Section 60(3) provides for the imposition of a term of imprisonment. Drafting authorities may wish to include a scale of imprisonment periods to reflect varying sums of unpaid amounts. Under Section 60(3), imposition of the imprisonment term is mandatory. This is because the certificate procedure results in the imposition of a final amount that does not exceed the ability of the defendant to pay. States may wish to consider the imposition of lighter sentences in exceptional circumstances. In some states, it may not be possible to use a mandatory sentence, and the provision should reflect that the court *may* impose the term. Some states calibrate the sentence in default to the default terms imposed for non-payment of fines.

- (5) The court shall grant a certificate on the application by the defendant pursuant to this Section if, having regard to the facts and beliefs set out in the [*variants: affidavit; evidence; verified statement*] in support of the application and any other relevant matter, there are reasonable grounds to believe that:
 - (a) the value of the financial resources held by the defendant has declined to the extent that it is less than the benefit recovery order [*option: or extended benefit recovery order*]; and
 - (b) it is considered by the court appropriate in the interests of justice to reduce the order.
- (6) An application pursuant to subsection (5):
 - (a) may not be made more than [30] days after the date upon which a benefit recovery [*option: or extended benefit recovery order*] was made;
 - (b) must be supported by a sworn [*variants: affidavit; evidence; verified statement*] of the defendant and of any other person upon whose evidence the defendant proposes to rely;
 - (c) must be served upon the enforcement authority together with any supporting [*variants: affidavits; evidence; verified statements*]; and
- (7) The court may suspend the running of time under subsection 2(b) until the application is finally determined, dismissed or withdrawn if it appears to the court to be in the interests of justice to do so.
- (8) Where a certificate is granted pursuant to subsection (5), it must specify a monetary amount equal to the total value of the financial resources held by the defendant or subject to his or her effective control.

- (9) The court may, on the application of the enforcement authority within [insert number] years after the grant of the certificate, vary or revoke it or issue a benefit recovery [*option: or extended benefit recovery*] order in a new amount, when:
- (a) it is made aware of facts that would have led it to a different conclusion regarding the granting of a certificate or the amount of a certificate; or
 - (b) the value of the assets held by the defendant not yet realised increase in value or the defendant acquires possession or control of new and additional assets that, had they been available at the date of the certificate, would have resulted in the certificate not being granted or granted for a higher amount.

Drafting note: The certificate process has the effect of reducing the amount that the defendant is obligated to pay based upon his or her ability to pay at a point in time, namely the time of the granting of the certificate. If a certificate has been granted reducing the original amounts the defendant had to pay, absent Section 60(9) he or she would benefit from later acquired wealth.

It is debatable if it is equitable to permit a defendant to be relieved of an on-going obligation to pay the full amount of his or her benefit. When, at a later point, the defendant has assets available to repay his or her benefit, the issue is whether he or she should, just like the civil litigant, have an obligation to make payment. Drafting authorities will need to consider this issue, weighing the state's policy regarding finality of judgments, the need to ensure that crime does not pay and the need to provide a practical opportunity for offenders to commence a new life. By providing the enforcement authority with a lengthy period under Section 60(9) during which it can go after later-acquired assets if it deems it appropriate to do so, drafters could provide an avenue for the state to recover the full benefit for the same time period provided under the state's rules for recovery of civil judgment amounts.

It is one thing for a court to make a benefit recovery order and another for it to be paid. The restraint order provisions, by permitting property of a defendant to be restrained, may effectively secure assets that, when realised, enable the order to be paid in full. However, the value of restrained assets may be insufficient, or their value may have been reduced by court-ordered payments for living or legal expenses. Thus, the operation of Sections 57–60 may well result in a court determining that there is a benefit the value of which greatly exceeds restrained assets.

Courts in both criminal and civil matters issue orders that reflect benefits to a person or an assessment of actual damage and are in excess of a defendant's assets, all of which may not be known to the court. A benefit recovery order falling into this category (as to which a defendant has not used the certificate process to limit the amount) would simply remain on the record of the court,

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and would be capable of enforcement at a later time in the event that the financial situation of the defendant improves.

The certificate process is aimed at ensuring that the court is advised of a defendant's actual financial situation, and that the defendant is not able to engage in fraud in this regard. In addition, Section 60(9) provides an avenue for the authorities to reach any assets that may have been hidden by a defendant, as well as later-acquired assets where there is a later ability to pay the actual full amount of the benefit.

Section 60 provides a powerful mechanism designed to ensure that a defendant against whom a benefit recovery order has been made complies with the order to the greatest extent possible. This is done by creating a procedure for a term of imprisonment in the case of non-payment. This would operate harshly if applied against a defendant who did not have the means to pay, but the procedures here assure that any non-payment is not due to a lack of available assets. If a defendant is able to satisfy the court that his or her available assets are less than the amount of the benefit recovery order, then his or her obligation to pay will be reduced to the value of the available assets.

This type of provision has been used successfully in the United Kingdom, although it is clear that there may be constitutional or policy reasons why it is not appropriate in some states. Obviously, great care should be used in policy decisions relating to this.

Section 61 Satisfaction and Discharge of Orders

- (1) An order made under this Part is satisfied by payment of the amount due or transfer of the property due under the order.
- (2) An order made under this Part is discharged if the conviction on the basis of which the order was made is quashed and no conviction for the offence or offences is substituted, or if the order itself is quashed.
- (3) A person's conviction for an offence shall be taken to be quashed in any case:
 - (a) where a person is convicted of the offence, if the conviction is quashed or set aside;
 - (b) where the person is granted a pardon in respect of the person's conviction for the offence.

Section 62 Appeals

Any application to appeal against the granting of, or the refusal to grant, an order under this Part shall be made in accordance with the rules applicable to appeals against sentence.

Section 63 Realisation of Property

- (1) Where an order is made under this Part, and the order is neither subject to appeal nor discharged, the court may, on application by the enforcement authority, exercise the powers conferred upon the court by this Section.
- (2) The court may appoint a receiver to take possession and control of, and then to realise:
 - (a) where a confiscation order has been made, the property subject to confiscation pursuant to that order; and
 - (b) where a benefit recovery order [*option: or extended benefit recovery order*] has been made, any property in which the defendant has an interest.
- (3) Where a receiver has already been appointed pursuant to Section 40(2)(c), any order made pursuant to subsection (2) may be made in respect of that receiver.
- (4) The court may make any further orders to assist the receiver in the discharge of his or her duties that the court considers are reasonably necessary.

Drafting Note: The term ‘receiver’ has been used in the context of an appointment under this section. In some jurisdictions alternative terminology may be more appropriate.

In addition, drafters should be aware that there are asset management provisions in Part X that might be applied.

Reference is made in subsection (3) to the appointment of a person under Section 40(2)(c), but the appointment under this section need not necessarily relate to the same person. Further, the appointment can be made under this section in the absence of an earlier appointment under Section 40(2)(c).

- (5) The court shall, in respect of any property, exercise the powers conferred by this Section only after it affords persons asserting any interest in the property a reasonable opportunity to make representations to the court.

Section 64 Application of Monetary Sums

- (1) Monetary sums in the hands of the receiver shall, after any such payments as the court may direct are made out of those sums, be paid to the [insert payment authority, e.g. Registrar of the Court] and applied on the defendant’s behalf towards the satisfaction of the order made under this Part in the manner provided by subsection (3).
- (2) If, after payment of the amount payable under the order made under this Part, any sums under subsection (1) remain in the hands of the receiver, such sums shall be distributed amongst persons who held property that has been realised under

this Part and in such proportions as the court directs, after giving a reasonable opportunity for those persons to make representations to the court.

- (3) Property received by the [e.g. Registrar of the Court] in payment of amounts due under an order made under this Part shall be applied as follows:
- (a) if received from a receiver under subsection (1), it shall first be applied in payment of the remuneration of the receiver and expenses of the management of the property; and
 - (b) the balance shall be paid or transferred to [a Recovered Assets Fund] [the Treasury].

Section 65 Compensation Order

- (1) The court may make a compensation order on application to it by a person if:
- (a) a restraint order was made under this Act;
 - (b) an application for a confiscation order or a benefit recovery order [*optional: or extended benefit recovery order*] under this Part was not granted or was withdrawn and the restraint order was discharged; or an application for a confiscation order or a benefit recovery order [*optional: or extended benefit recovery order*] was never made because the defendant was acquitted;
 - (c) the person suffered a loss as a result of the operation of the restraint order; and
 - (d) there was serious default consisting of gross negligence or intentional misconduct on the part of a person or persons involved in the investigation or prosecution and the investigation would not have continued or the proceedings would not have started or continued had the default not occurred.
- (2) The amount of compensation to be paid under this Section is the amount that the court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
- (3) An application under subsection (1) must be made no later than [six] months after the date on which the event relied on in subsection(1)(b) occurred. The person making an application must provide notice of the application to the enforcement authority.

Drafting note: Compensation. Section 65 addresses the situations in which compensation or damages should be provided if no final order issues and a restraint order is revoked. Such compensation would be in favour of persons whose property had been restrained and who suffered a consequential loss. Many states (for instance the United Kingdom, Singapore and Canada) limit this to situations in which there was a serious default on the part of a person involved in the investigation or prosecution. The theory is that such restraints

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are a usual part of a criminal investigation or proceeding, and in the normal case there is no obligation on the part of the authorities to provide compensation for losses except in case of bad faith, intentional misconduct, etc.

Section 65(1)(d) sets out a serious default standard that is reflected in the United Kingdom's legislation (Section 72, *Proceeds of Crime Act*), with the explanation that such default must consist of gross negligence or intentional misconduct.

Section 65(3) provides a time limit for any application for compensation. Three months is suggested as appropriate time limit, but drafting authorities may wish to use a longer or shorter time.

Costs. No provision is made here regarding costs. Drafters should review the state's provisions regarding the awarding of costs in connection with criminal proceedings to determine if any provision is necessary. Normally a court would not award costs in a criminal matter unless there were extraordinary circumstances such as a demonstration of serious misconduct by the prosecutor or law enforcement officials.