

PROCEEDS OF CRIME ACT 1997



**BERMUDA
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PROCEEDS OF CRIME ACT 1997

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WHEREAS it is expedient to extend the powers of the police and the courts in relation to the tracing and confiscation of the proceeds of drug trafficking; to make new provision in relation to the tracing and confiscation of the proceeds of certain other indictable offences; to make new and amended provision in relation to money laundering; to extend the powers of seizure and forfeiture on import or export of cash suspected of being the proceeds of criminal conduct; and to make connected and consequential provision;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:—

PART I

PRELIMINARY

Introductory

Short title

1 This Act may be cited as the Proceeds of Crime Act 1997.

Commencement and application

2 (1) This Act shall come into operation on such day as the Minister responsible for the Police may appoint by notice published in the Gazette.

(2) This Act shall apply to any property, whether or not situated in Bermuda.

Interpretation

Meaning of "drug trafficking", "relevant offence", "criminal conduct"

3 In this Act—

"criminal conduct" means—

- (a) drug trafficking, or
- (b) any relevant offence;

"drug trafficking offence" means an offence—

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- (a) under section 4, 5, 6(3), 7 or 11 of the Misuse of Drugs Act 1972 (importation, production, possession with intent to supply or handling of controlled drugs and cultivation of cannabis);
- (b) under section 12 or 17 of the Criminal Justice (International Co-operation) (Bermuda) Act 1994 (manufacture and supply of scheduled substances and using ship for illicit traffic); or
- (c) under section 43, 44 or 45 of this Act (money laundering) which relates to the proceeds of drug trafficking;

or an offence under section 32, 33, 230 or 231 of the Criminal Code Act 1907 (attempt, incitement, conspiracy etc) deriving from such an offence;

"drug trafficking" means doing or being concerned in, whether in Bermuda or elsewhere, any act constituting—

- (a) a drug trafficking offence, or
- (b) an offence punishable under a corresponding law,

and includes entering into or being otherwise concerned in, whether in Bermuda or elsewhere, a drug trafficking arrangement;

"drug trafficking arrangement" means an arrangement whereby—

- (a) the retention or control by or on behalf of another person of that other person's proceeds of drug trafficking is facilitated; or
- (b) the proceeds of drug trafficking by another person are used to secure that funds are placed at that other person's disposal or are used for that other person's benefit to acquire property by way of investment;

"relevant offence" means—

- (a) any indictable offence in Bermuda other than a drug trafficking offence; or
- (b) any act or omission which, had it occurred in Bermuda, would have constituted an indictable offence other than a drug trafficking offence.

["relevant offence" substituted by 2000:35 s.2(1) effective 1 June 2001]

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Meaning of "property", "realisable property" etc

4 (1) In this Act—C

"property" means money and all other property, movable or immovable, including things in action and other intangible or incorporeal property; and

"interest", in relation to property, includes right.

(2) For the purposes of this Act—

(a) property is held by any person if he holds any interest in it;

(b) references to property held by a person include a reference to property vested in his trustee in bankruptcy or liquidator;

(c) references to an interest held in property by a person beneficially include a reference to an interest which would be held by him beneficially if the property were not so vested in his trustee in bankruptcy or liquidator; and

(d) property is transferred by one person to another if the first person transfers or grants to the other any interest in the property.

(3) In this Act, "realisable property" means—

(a) any property held by the defendant (other than property in respect of which there is in force a forfeiture order under section 37 of the Misuse of Drugs Act 1972); and

(b) any property held by a person to whom the defendant has, directly or indirectly, made a gift caught by this Act.

(4) For the purposes of this Act, the amount that might be realised at the time a confiscation order is made against the defendant shall be—

(a) the total of the values at that time of all the realisable property held by the defendant; less

(b) where there are obligations having priority at that time, the total amounts payable in pursuance of such obligations,

together with the total of the values at that time of all gifts caught by this Act.

(5) For the purposes of subsection (4), an obligation has priority at any time if it is an obligation of the defendant—

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- (a) to pay an amount due in respect of a fine, or other order imposed or made on conviction of an offence, where the fine was imposed or order made before the confiscation order; or
 - (b) to pay any sum which would be included among the preferential debts in the defendant's bankruptcy commencing on the date of the confiscation order or winding up under an order of the court made on that date.
- (6) For the purposes of subsection (5)(b), "preferential debts"—
- (a) in relation to bankruptcy, means the debts to be paid in priority under section 39 of the Bankruptcy Act 1989 (assuming the date of the confiscation order to be the date of the receiving order); and
 - (b) in relation to winding up, means the debts to be paid in priority in accordance with section 236 of the Companies Act 1981 (assuming the date of the confiscation order to be the date of the winding up).

Value of property

5 (1) Subject to the following subsections and section 6, for the purposes of this Act, the value of property (other than cash) in relation to any person holding the property shall be its market value, except that where any other person holds an interest in the property, the value shall be—

- (a) the market value of the first-mentioned person's beneficial interest in the property, less
- (b) the amount required to discharge any incumbrance (other than a charging order) on that interest.

(2) Subject to section 6(3), references in this Act to the value at any time (referred to in subsection (3) as the "material time") of a gift caught by this Act are references to—

- (a) the value of the gift to the recipient when he received it adjusted to take account of subsequent changes in the value of money; or
- (b) where subsection (3) applies, the value mentioned therein,

whichever is the greater.

(3) Subject to section 6(3), if at the material time the recipient holds—

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- (a) the property which he received (not being cash); or
- (b) property which, in whole or in part, directly or indirectly represents in his hands the property which he received,

the value referred to in subsection (2)(b) shall be the value to him at the material time of the property mentioned in paragraph (a) or as the case may be, of the property mentioned in paragraph (b) so far as it so represents the property which he received, but disregarding in either case any charging order.

Gifts caught by this Act

6 (1) In relation to a drug trafficking offence, a gift (including a gift made before the commencement of this Act) is caught by this Act if—

- (a) it was made by the defendant at any time since the beginning of the period of six years ending—
 - (i) when the proceedings for the drug trafficking offence were instituted against him, or
 - (ii) where no such proceedings have been instituted, when an application for a charging or restraint order is made under section 28 or 29; or
- (b) it was made by the defendant at any time and was a gift of property—
 - (i) received by the defendant in connection with drug trafficking carried on by him or another person, or
 - (ii) which in whole or in part directly or indirectly represented in the defendant's hands property received by him in that connection.

(2) In relation to a relevant offence, a gift (including a gift made before the commencement of this Act) is caught by this Act if—

- (a) it was made by the defendant at any time since the commission of the relevant offence, or, if more than one, the earliest of the offences to which the proceedings relate (including any offence which the court takes into consideration in determining his sentence); and
- (b) the court considers it appropriate in all the circumstances to take the gift into account.

(3) For the purposes of this Act—

- (a) the circumstances in which the defendant is to be treated as making a gift include those where he transfers

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property to another person, directly or indirectly, for a consideration the value of which is significantly less than the value of the consideration provided by the defendant; and

- (b) in those circumstances, this section and section 5 shall apply as if the defendant had made a gift of such share in the property as bears to the whole property the same proportion as the difference between the values referred to in paragraph (a) bears to the value of the consideration provided by the defendant.

Other definitions

7 (1) In this Act—

"banking institution" means an institution licensed under the Banks and Deposit Companies Act 1999;

"Bermuda Monetary Authority" means the Authority established under section 2 of the Bermuda Monetary Authority Act 1969;

"Confiscated Assets Fund" means the Fund established under section 55A;

"confiscation investigation" means an investigation into—

- (a) whether a person has benefited from his criminal conduct; or
- (b) the extent or whereabouts of his benefit from his criminal conduct;

"confiscation order" means an order made under section 9 or 10 (including such an order made by virtue of section 17 or 22);

"the court" means the Supreme Court;

"defendant" means a person against whom proceedings have been instituted for an offence (whether or not he has been convicted);

"FIA" means the Financial Intelligence Agency established under section 3 of the Financial Intelligence Agency Act 2007;

"items subject to legal privilege" means—

- (a) communications between a professional legal adviser, and his client made in connection with the giving of legal advice to the client; and
- (b) communications between a professional legal adviser and his client or between such an adviser and any other

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person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings,

when they are in the possession of a person who is entitled to possession of them; but items held with the intention of furthering a criminal purpose are not items subject to legal privilege;

"material" includes any book, document or other record in any form whatsoever, and any container or article relating thereto;

"Minister" means the Minister responsible for justice;

"money laundering" means an act which —

- (a) constitutes an offence under section 43, 44 or 45;
- (b) constitutes an attempt, conspiracy or incitement to commit an offence specified in paragraph (a);
- (c) constitutes aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a); or
- (d) would constitute an offence specified in paragraph (a), (b) or (c) if done in Bermuda;

for these purposes, having possession of any property shall be taken to be doing an act in relation to it; and "money laundering offence" and "money laundering investigation" have a corresponding meaning;

"premises" includes any place and, in particular, includes—

- (a) any vehicle, vessel, aircraft, or offshore structure, and
- (b) any tent or moveable structure;

"prescribe" means prescribe by regulations made under this Act;

"relevant institution" has the meaning given in subsection (2);

(2) In this Act "relevant institution" means —

- (a) a banking institution; or
- (b) an institution falling within a class of institutions designated as relevant institutions by order of the Minister.

(3) The Minister may by order subject to negative resolution procedure designate institutions for the purposes of subsection (2).

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["Confiscated Assets Fund" inserted by 2000:35 s.6(1) effective 1 June 2001; "money laundering" deleted and substituted by 2007:25 s.3 effective 15 November 2008; "banking institution", "confiscation investigation", "FIA", "Minister" "relevant institution", subsection 2 and 3 inserted by 2007:25 s.3 effective 15 November 2008; "prescribe" amended by 2009:50 s.5 effective 15 January 2010.]

Institution and conclusion of proceedings

- 8 (1) For the purposes of this Act—
- (a) proceedings for an offence are instituted in Bermuda when an information is laid charging a person with an offence;
 - (b) proceedings in Bermuda for an offence are concluded on the occurrence of one of the following events—
 - (i) the discontinuance of the proceedings;
 - (ii) the acquittal of the defendant;
 - (iii) the quashing of the defendant's conviction for the offence;
 - (iv) the satisfaction of a confiscation order made in the proceedings;
 - (c) an application under section 17, 18, 20 or 22 is concluded—
 - (i) if the court decides not to make or vary (as the case may be) a confiscation order against the defendant, when it makes that decision; or
 - (ii) if a confiscation order is made or varied as a result of that application, when the order is satisfied;
 - (d) a confiscation order is satisfied when no amount is due under it.
- (2) For the purposes of this Act, an order is subject to appeal until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the order could be varied or set aside.

PART II

CONFISCATION ORDERS

Confiscation orders

Confiscation orders: drug trafficking

9 (1) Where a defendant appears before the Supreme Court to be sentenced for one or more drug trafficking offences, the court shall proceed under this section—

- (a) on the application of the Director of Public Prosecutions, or
- (b) of its own motion where it considers it appropriate to do so.

(2) The court shall first determine whether the defendant has benefited from drug trafficking.

(3) For the purposes of this Act, a person has benefited from drug trafficking if he has at any time (whether before or after the commencement of this Act) received any payment or other reward in connection with drug trafficking carried on by him or another person.

(4) If the court determines that he has so benefited, it shall, before sentencing or otherwise dealing with him in respect of the offence or (as the case may be) any of the offences concerned, make a confiscation order and determine in accordance with section 15 the amount to be recovered in his case under the order.

(5) The court shall then, in respect of the offence or offences concerned—

- (a) order the defendant to pay the amount of the confiscation order within such period as it may specify; and
- (b) take into account the confiscation order before—
 - (i) imposing any fine on him;
 - (ii) making any other order involving any payment by him; and
 - (iii) making any order under section 37 of the Misuse of Drugs Act 1972 (forfeiture); but
- (c) subject to paragraph (b), leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant.

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[section 9 amended by 2007:25 s.20 effective 15 November 2008]

Confiscation orders: relevant offences

10 (1) Where a defendant appears before the Supreme Court to be sentenced for one or more relevant offences, the court shall proceed under this section—

- (a) on the application of the Director of Public Prosecutions, or
- (b) of its own motion where it considers it appropriate to do so.

(2) The court shall first determine whether the defendant has benefited from—

- (a) the offence or offences for which he is to be sentenced ("the principal offence"),
- (b) any other relevant offence of which he was convicted in the same proceedings as the principal offence, and
- (c) any relevant offences which the court will be taking into consideration in determining his sentence for the principal offence.

(3) For the purposes of this Act—

- (a) a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of any property so obtained; and
- (b) if he derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated as if he had obtained instead a sum of money equal to the value of the pecuniary advantage.

(4) If the court determines that the defendant has benefited from the offences mentioned in subsection (2), it shall, before sentencing or otherwise dealing with him in respect of the principal offence, make a confiscation order and determine in accordance with section 15 the amount to be recovered in his case under the order.

(5) The court shall then in respect of the principal offence—

- (a) order the defendant to pay the amount of the confiscation order within such period as it may specify; and
- (b) take into account the confiscation order before—
 - (i) imposing any fine on him, or

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- (ii) making any other order involving any payment by him; but
- (c) subject to paragraph (b), leave the confiscation order out of account in determining the appropriate sentence or other manner of dealing with the defendant.

[section 10 amended by 2007:25 s.20 effective 15 November 2008]

Postponed determinations

11 (1) Where the court is proceeding under section 9 or 10 (as the case may be), but considers that it needs more information before—

- (a) determining whether the defendant has benefited as mentioned in the section in question, or
- (b) determining the amount to be recovered from him under a confiscation order,

it may, for the purpose of enabling that information to be obtained, postpone making the determination for such period as it may specify.

(2) More than one postponement may be made under subsection (1).

(3) Unless satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) which, by itself or taken together with any other postponement under this section, exceeds six months from the date of conviction.

(4) Where the defendant appeals against his conviction, the court may on that account—

- (a) postpone making either or both of the determinations mentioned in subsection (1) for such period as it may specify; or
- (b) where it has exercised its powers to postpone, extend the specified period.

(5) A postponement or extension under subsection (1) or (4) may be made on the application of the Director of Public Prosecutions or the defence or by the court of its own motion.

(6) Unless the court is satisfied there are exceptional circumstances, any postponement or extension under subsection (4) shall not extend beyond three months after the appeal is determined or otherwise disposed of.

(7) Where the court exercises its power under this section it may nevertheless proceed to sentence the defendant in respect of the offence in question or any such offences; and on making a postponed

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confiscation order by virtue of this section it may vary any fine or other order involving payment imposed on the defendant in accordance with subsection (5)(b) of section 9 or 10 (as the case may be).

[section 11 amended by 2007:25 s.20 effective 15 November 2008]

Assessing proceeds of drug trafficking

- 12 (1) For the purposes of this Act—
- (a) any payments or other rewards received by a person at any time (whether before or after the commencement of this Act) in connection with drug trafficking carried on by him or another person are his proceeds of drug trafficking; and
 - (b) the value of his proceeds of drug trafficking is the aggregate of the values of the payments or other rewards.
- (2) Subject to subsections (4) and (5), the court shall make the required assumptions for the purpose—
- (a) of determining whether the defendant has benefited from drug trafficking, and
 - (b) if he has, of determining the value of his proceeds of drug trafficking.
- (3) The required assumptions are—
- (a) that any property appearing to the court—
 - (i) to have been held by the defendant at any time since his conviction, or
 - (ii) to have been transferred to him at any time since the beginning of the period of six years ending when the proceedings were instituted against him,was received by him as a payment or reward in connection with drug trafficking carried on by him;
 - (b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him;
 - (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of other interests in it.

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(4) The court shall not make any of the required assumptions in relation to any particular property or expenditure if—

- (a) that assumption is shown to be incorrect in the defendant's case; or
- (b) the court is satisfied that there would be a serious risk of injustice in the defendant's case if that assumption were to be made;

and where the court, by virtue of this subsection, does not make one of the required assumptions it shall state its reasons.

(5) Subsection (2) does not apply if the only drug trafficking offence in respect of which the defendant appears before the court for sentencing is an offence under section 43, 44 or 45 relating to the proceeds of drug trafficking.

(6) For the purpose of assessing the value of the proceeds derived by the defendant from drug trafficking in a case where a confiscation order has previously been made against him (under this Act or the Drug Trafficking Suppression Act 1988) the court shall leave out of account any such proceeds that are shown to the court to have been taken into account in determining the amount to be recovered under the previous order.

Statements

13 (1) Where the Director of Public Prosecutions asks the court to proceed under section 9 or 10 he shall give the court, within such period as it may direct, a statement (a "prosecutor's statement") of matters which he considers relevant in connection with—

- (a) determining whether the defendant has benefited as mentioned in the section in question; or
- (b) assessing the value of his proceeds of drug trafficking or benefit from any relevant offences.

(2) Where the court proceeds under section 9 or 10 without the Director of Public Prosecutions having asked it to do so, it may require him to give it a prosecutor's statement, within such period as it may direct.

(3) Where a prosecutor's statement has been given—

- (a) the Director of Public Prosecutions may at any time give the court a further such statement; and
- (b) the court may at any time require him to give it a further such statement, within such period as it may direct.

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(4) Where any prosecutor's statement has been given and the court is satisfied that it has been served on the defendant, it may require the defendant, within such period as it may direct—

- (a) to indicate the extent to which he accepts the allegations in the statement; and
- (b) so far as he does not accept any such allegation, to give particulars of any matters on which he proposes to rely;

and the court may for the purposes of the determination and assessment mentioned in subsection (1) treat any acceptance by the defendant as conclusive of the matters to which it relates.

(5) To the extent that the defendant fails in any respect to comply with a requirement under subsection (4), he may be treated for the purposes of this section as accepting every allegation in the statement.

(6) Where—

- (a) there is tendered to the court by the defendant a statement as to any matters relevant to determining the amount that might be realised at the time the confiscation order is made; and
- (b) the Director of Public Prosecutions accepts to any extent any allegation in the statement,

the court may, for the purposes of that determination, treat that acceptance as conclusive of the matters to which it relates.

(7) An allegation may be accepted or a matter indicated for the purposes of this section either orally before the court or in writing.

(8) No acceptance by the defendant under this section that proceeds have been derived by him from drug trafficking or from any relevant offence shall be admissible in evidence in any proceedings for an offence.

[section 13 amended by 2007:25 s.20 effective 15 November 2008]

Provision of information by defendant

14 (1) For the purpose of obtaining information to assist it in carrying out its functions in relation to making a confiscation order, the court may order the defendant to give it such information in such manner and before such date as may be specified in the order.

(2) If the defendant fails without reasonable excuse to comply with any order under this section, the court may draw such inference from that failure as it considers appropriate.

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(3) Where the Director of Public Prosecutions accepts to any extent any allegation made by the defendant in giving to the court information required under this section, the court may treat that acceptance as conclusive of the matters to which it relates.

[section 14 amended by 2007:25 s.20 effective 15 November 2008]

Amount to be recovered

15 (1) Subject to subsection (3), the amount to be recovered under a confiscation order shall be the amount the court assesses to be the value of the defendant's proceeds of drug trafficking or benefit from relevant offences (as the case may be).

(2) If the court is satisfied as to any matter relevant for determining the amount that might be realised at the time the confiscation order is made (whether by reason of the acceptance of an allegation made in a statement given under section 13 or made in the giving of information under section 14 or otherwise), the court may issue a certificate giving its opinion as to the matters concerned and shall do so if satisfied as mentioned in subsection (3).

(3) If the court is satisfied that the amount that might be realised at the time the confiscation order is made is less than the amount the court assesses to be the value of the defendant's proceeds of drug trafficking or benefit from relevant offences (as the case may be), the amount to be recovered under the confiscation order shall be the amount appearing to the court to be the amount that might be so realised.

Protection of third party rights

16 (1) Where an application is made for a confiscation order, a person who asserts an interest in realisable property may apply to the court, before the confiscation order is made, for an order under subsection (2).

(2) If a person applies to the court for an order under this subsection in respect of his interest in realisable property and the court is satisfied—

- (a) that he was not in any way involved in the defendant's criminal conduct; and
- (b) that he acquired the interest—
 - (i) for sufficient consideration; and
 - (ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time he acquired it,

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property that was involved in or was the proceeds of criminal conduct,

the court shall make an order declaring the nature, extent and value (as at the time the order is made) of his interest.

(3) Subject to subsection (4), where a confiscation order has already been made, a person who asserts an interest in the property may apply under this subsection to the court for an order under subsection (2).

(4) Except with the leave of the court, an application shall not be made under subsection (3)—

(a) by a person—

- (i) who had knowledge of the application for a confiscation order before the order was made, or
- (ii) who appeared at the hearing of that application; or

(b) later than 28 days beginning with the day on which the confiscation order was made.

(5) A person who makes an application under subsection (1) or (3) shall give not less than seven days' written notice of the making of the application to the Director of Public Prosecutions who shall be a party to any proceedings on the application.

[section 16 amended by 2007:25 s.20 effective 15 November 2008]

Subsequent proceedings

Reconsideration of case

17 (1) This section applies where a defendant has appeared before the Supreme Court to be sentenced in respect of one or more drug trafficking or relevant offences but the court has not made a confiscation order because either—

(a) it did not proceed under section 9 or 10, or

(b) the court has made a determination under subsection (2) of section 9 or 10 ("a subsection (2) determination") that the defendant has not benefited from drug trafficking or from any relevant offence.

(2) If the Director of Public Prosecutions has evidence which was not previously available but which he believes would have led the court to determine that the defendant had benefited from drug trafficking or from any relevant offence he may make an application to the court.

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(3) On such an application the court shall consider the evidence and if satisfied that the defendant had so benefited, the court shall make a confiscation order and order the payment of such amount as it thinks just in all the circumstances of the case, including in particular the amount of any fine or other orders for payment imposed on the defendant in respect of the offence or offences in question.

[section 17 amended by 2007:25 s.20 effective 15 November 2008]

Revised assessment of proceeds of criminal conduct

18 (1) This section applies where the court has made a determination of the amount to be recovered under a confiscation order ("the current determination").

(2) Where the Director of Public Prosecutions is of the opinion that the real value of the defendant's proceeds of drug trafficking or benefit from any relevant offences was greater than their assessed value, he may apply to the court for the evidence on which he has formed his opinion to be considered by the court.

(3) If, having considered the evidence, the court is satisfied that the real value of the defendant's proceeds of drug trafficking or benefit from any relevant offences is greater than their assessed value (whether because the real value at the time of the current determination was higher than was thought or because the value of the proceeds or benefit in question has subsequently increased), the court shall make a fresh determination of the amount to be recovered under a confiscation order.

(4) In subsections (2) and (3)—

"assessed value" means the value of the defendant's proceeds of drug trafficking or benefit from any relevant offences as assessed by the court in accordance with section 15(1) of this Act; and

"real value" means—

- (a) the value of the defendant's proceeds of drug trafficking which took place in the period by reference to which the current determination was made or in any earlier period; or
- (b) the value of his benefit from any of the relevant offences mentioned in section 10(2).

(5) Any determination by virtue of this section shall be by reference to the amount that might be realised at the time when the determination is made.

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(6) For the avoidance of doubt, section 12(6) shall not apply in relation to any of the defendant's proceeds of drug trafficking taken into account in respect of the current determination.

(7) If, as a result of making the fresh determination required by subsection (3), the amount to be recovered exceeds the amount set by the current determination, the court may substitute for the amount to be recovered under the confiscation order such greater amount as it thinks just in all the circumstances of the case.

(8) Where the court varies a confiscation order by virtue of this section it shall substitute for the term of imprisonment in default fixed under section 25(1) in respect of the amount to be recovered under the order such longer term as may be determined in accordance with that section in respect of the greater amount to be recovered under the order as varied.

[section 18 amended by 2007:25 s.20 effective 15 November 2008]

Reconsideration etc: supplementary

19 (1) On an application under section 17 or 18, the court may take into account any payment or other reward received by the defendant on or after the date—

- (a) of the conviction (in the case of an application under section 17 by virtue of subsection (1)(a));
- (b) of the subsection (2) determination (in the case of an application under section 17 by virtue of subsection (1)(b)); or
- (c) of the current determination (in the case of an application under section 18);

but only if the Director of Public Prosecutions shows that it was received by the defendant in connection with drug trafficking carried on, or with any relevant offence committed, on or before that date.

(2) In considering any evidence which relates to any payment or reward in relation to drug trafficking to which subsection (1) applies, the court shall not make the assumptions which would otherwise be required by section 12.

(3) No application shall be entertained by the court under section 17 or 18 if it is made after the end of the period of six years beginning with the date on which the defendant was convicted, or where the application relates to more than one conviction, the date of the latest conviction.

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(4) Sections 13 and 14 apply, with such modifications as may be necessary, in relation to applications under sections 17 and 18 as they apply in relation to proceedings under sections 9 and 10.

[section 19 amended by 2007:25 s.20 effective 15 November 2008]

Increase in realisable property

20 (1) This section applies where, by virtue of section 15(3), the amount which a person is ordered to pay under a confiscation order is less than the amount assessed to be his proceeds of drug trafficking or benefit from relevant offences (as the case may be).

(2) If, on an application made—

(a) by the Director of Public Prosecutions, or

(b) by a receiver appointed under section 28 or 31 in relation to the realisable property of the person in question,

the court is satisfied that the amount that might be realised in the case of the person in question is greater than the amount taken into account in making the confiscation order (whether it was greater than was thought when the order was made or has subsequently increased), the court shall issue a certificate to that effect, giving its reasons.

(3) Where a certificate has been issued the Director of Public Prosecutions may apply to the court for an increase in the amount to be recovered under the confiscation order; and on that application the court may—

(a) substitute for that amount such amount not exceeding the amount assessed as the value referred to in subsection (1) as appears to the court to be appropriate having regard to the amount now shown to be realisable; and

(b) increase the term of imprisonment fixed in respect of the confiscation order under section 25(1) if the effect of the substitution is to increase the maximum period applicable in relation to the order under that section.

[section 20 amended by 2007:25 s.20 effective 15 November 2008]

Inadequacy of realisable property

21 (1) If, on an application made in respect of a confiscation order,

(a) by the defendant; or

(b) by a receiver appointed under section 28 or 31,

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the court is satisfied that the realisable property is inadequate for the payment of any amount remaining to be recovered under the order, the court shall issue a certificate to that effect, giving its reasons.

(2) For the purposes of subsection (1)—

(a) in the case of realisable property held by a person who has been adjudged bankrupt, the court shall take into account the extent to which any property held by him may be distributed among creditors; and

(b) the court may disregard any inadequacy in the realisable property which appears to the court to be attributable, wholly or partly, to anything done by the defendant for the purpose of preserving any property held by a person to whom the defendant had, directly or indirectly, made a gift caught by this Act from any risk of realisation under this Act.

(3) Where a certificate has been issued under subsection (1), the person who applied for it may apply to the court which made the confiscation order for the amount to be recovered under the order to be reduced.

(4) The court shall, on an application under subsection (3)—

(a) substitute for the amount to be recovered under the order such lesser amount as the court thinks just in all the circumstances of the case; and

(b) substitute for the term of imprisonment in default fixed under section 25(1) in respect of the amount to be recovered under the order a shorter term if such is determined in accordance with that section in respect of the lesser amount to be recovered under the order as varied.

(5) Any person appearing to the court to be likely to be affected by any exercise of its powers under this section shall be entitled to appear before the court and make representations.

Absconded persons etc

Confiscation order where defendant has absconded or died

22 (1) Where a person has been convicted of one or more drug trafficking or relevant offences, on the application of the Director of Public Prosecutions the court may make a confiscation order against him if satisfied that he has absconded or died.

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(2) Where proceedings for one or more drug trafficking or relevant offences have been instituted but not concluded, on the application of the Director of Public Prosecutions the court may make a confiscation order against the defendant if satisfied that he has absconded, but shall not do so until after the period of two years beginning with the date which is, in the opinion of the court, the date on which the defendant absconded.

(3) In any proceedings under this section—

- (a) section 12(2) shall not apply;
- (b) section 13 shall apply with the omission of subsections (4) to (6);
- (c) the court shall not make a confiscation order against a defendant unless it is satisfied that the Director of Public Prosecutions has taken reasonable steps to contact him; and
- (d) any person appearing to the court to be likely to be affected by the making of a confiscation order shall be entitled to appear before the court and make representations.

(4) Where an application has been made to the court under this section in relation to a defendant who has absconded and the court has decided not to make a confiscation order against him, section 17 shall not apply at any time while he remains an absconder.

[section 22 amended by 2007:25 s.20 effective 15 November 2008]

Variation of order made against absconder

23 (1) Where a confiscation order is made by virtue of section 22(2) and the defendant ceases to be an absconder, he may apply to the court for a variation of the amount to be recovered under the order.

(2) If on such an application the court is satisfied that the value of the defendant's proceeds of drug trafficking in the period by reference to which the determination in question was made, or the value of his benefit from relevant offences, or the amount that might have been realised at the time the order was made, was less than the amount ordered to be paid under the confiscation order, the court—

- (a) may if it considers it just in all the circumstances reduce the amount to be recovered under the confiscation order, and
- (b) if it does so, shall reduce the term of imprisonment in default in accordance with section 25(1).

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(3) Where the court reduces the amount to be recovered under a confiscation order it may, on the application of a person who held property which was realisable property, order compensation to be paid to him if satisfied that he has suffered loss as a result of the making of the confiscation order and if, having regard to all the circumstances of the case, it considers it appropriate to do so.

(4) No application shall be entertained by the court if it is made after the end of six years beginning on the day on which the confiscation order was made.

Discharge of order where absconder acquitted etc

24 (1) Where a confiscation order is made by virtue of section 22(2) and the defendant is subsequently tried for the offence or offences in question and acquitted on all counts, the court shall cancel the confiscation order.

(2) Where a confiscation order is made by virtue of section 22(2) against a person who ceases to be an absconder and subsection (1) of this section does not apply, the court may on the application of the defendant cancel the confiscation order if satisfied that—

- (a) there has been undue delay in continuing the proceedings in respect of which the power under section 22(2) of this Act was exercised; or
- (b) the Director of Public Prosecutions does not intend to proceed with the prosecution.

(3) Where the court cancels a confiscation order under this section it may, on the application of a person who held property which was realisable property, order compensation to be paid to him if satisfied that he has suffered loss as a result of the making of the confiscation order and if, having regard to all the circumstances of the case it considers it appropriate to do so.

(4) Where the court cancels a confiscation order under this section it may make such consequential or incidental order as it thinks fit.

[section 24 amended by 2007:25 s.20 effective 15 November 2008]

PART III

ENFORCEMENT OF CONFISCATION ORDERS

Default powers

Imprisonment in default

25 (1) Notwithstanding section 61 of the Criminal Code Act 1907 (limits on periods of imprisonment in default of fines etc), where the court orders the defendant to pay an amount under a confiscation order it shall in addition direct him to be imprisoned in default of payment of any amount under the confiscation order as follows—

- (a) if the amount does not exceed \$20,000, for a term not exceeding 2 years;
- (b) if the amount exceeds \$20,000 but does not exceed \$50,000, for a term not exceeding 5 years;
- (c) if the amount exceeds \$50,000 but does not exceed \$100,000, for a term not exceeding 7 years; and
- (d) if the amount exceeds \$100,000, for a term not exceeding 10 years.

(2) Where—

- (a) a warrant to commit the defendant to prison is issued for a default in payment of an amount ordered to be paid under a confiscation order in respect of an offence or offences; and
- (b) at the time the warrant is issued, the defendant is liable to serve any term of imprisonment in respect of the offence or offences,

the term of imprisonment to be served in default of payment of the amount shall not begin to run until after the term mentioned in paragraph (b).

(3) Where a defendant serves a term of imprisonment in default of paying any amount due under a confiscation order, his serving that term does not prevent the confiscation order from continuing to have effect, so far as any other method of enforcement is concerned.

Interest on unpaid sums

26 (1) If any sum required to be paid by a person under a confiscation order is not paid when it is required to be paid, that person shall be liable to pay interest on that sum for the period for which it remains unpaid; and the amount of interest shall for the purposes of

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enforcement, be treated as part of the amount to be recovered from him under the confiscation order.

(2) The court may, on the application of the Director of Public Prosecutions, increase the term of imprisonment fixed in respect of the confiscation order if the effect of subsection (1) is to increase the maximum period applicable in relation to the order under section 25(1).

(3) The rate of interest under subsection (1) shall be that for the time being applying to a judgment debt.

[section 26 amended by 2007:25 s.20 effective 15 November 2008]

Restraint and charging orders

Cases in which restraint and charging orders may be made

27 (1) The powers conferred on the Supreme Court by section 28 to make a restraint order and by section 29 to make a charging order are exercisable where—

- (a) proceedings have been instituted against the defendant for a drug trafficking or relevant offence or an application has been made in respect of the defendant under section 17, 18, 20 or 22;
- (b) the proceedings have not, or the application has not been concluded;
- (c) the court is satisfied that there is reasonable cause to believe—
 - (i) in the case of an application under section 18 or 20 of this Act, that the court will be satisfied as mentioned in section 18(3) or 20(2); or
 - (ii) in any other case, that the defendant has benefited from drug trafficking or from any relevant offence (as the case may be).

(2) The court shall not exercise those powers if it is satisfied that there has been undue delay in continuing the proceedings or application in question, or that it is not intended to proceed with the prosecution.

(3) Those powers are also exercisable where the court is satisfied—

- (a) that a person is to be charged with a drug trafficking or relevant offence or an application as mentioned in subsection (1)(a) is to be made; and

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- (b) the court is satisfied as mentioned in subsection (1)(c).
- (4) For the purposes of sections 28 and 29, at any time when those powers are exercisable before proceedings have been instituted—
 - (a) references in this Act to the defendant shall be construed as references to the person referred to in subsection (3)(a); and
 - (b) references in this Act to realisable property shall be construed as if, immediately before that time, proceedings had been instituted against the person referred to in subsection (2) for a drug trafficking or relevant offence.
- (5) Where the court has made a restraint or charging order by virtue of subsection (3), the court shall discharge the order if proceedings in respect of the offence are not instituted, or if the application is not made, within such time as the court considers reasonable.

Restraint orders

- 28 (1) The court may make a restraint order to prohibit any person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.
- (2) A restraint order may apply—
 - (a) to all realisable property held by a specified person, whether the property is described in the order or not; and
 - (b) to realisable property held by a specified person, being property transferred to him after the making of the order.
 - (3) This section shall not have effect in relation to any property for the time being subject to a charge under section 29 of this Act or under section 19 of the Drug Trafficking Suppression Act 1988.
 - (4) A restraint order—
 - (a) may be made only on an application by the Director of Public Prosecutions;
 - (b) may be made on an ex parte application to a Judge in chambers; and
 - (c) shall provide for notice to be given to persons affected by the order.
 - (5) A restraint order—

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- (a) may, on the application of any person affected by the order, be discharged or varied in relation to any property; and
 - (b) shall be discharged when proceedings for the offence are concluded.
- (6) Where the court has made a restraint order, the court—
- (a) may at any time appoint a receiver—
 - (i) to take possession of any realisable property; and
 - (ii) in accordance with the directions of the court, to manage or otherwise deal with any property in respect of which he is appointed,subject to such exceptions and conditions as may be specified by the court; and
 - (b) may require any person having possession of property in respect of which the receiver is appointed under this section to give possession of it to the receiver.
- (7) For the purposes of this section, dealing with property held by any person includes (without prejudice to the generality of the expression)—
- (a) where a debt is owed to that person, making a payment to any person in reduction of the amount of the debt; and
 - (b) removing the property from Bermuda.
- (8) Where the court has made a restraint order, a police officer may seize any realisable property for the purpose of preventing its removal from Bermuda; and property so seized shall be dealt with in accordance with the directions of the court.

[section 28 amended by 2007:25 s.20 effective 15 November 2008]

Charging orders

29 (1) For the purposes of this Act, a charging order is an order made under this section imposing on any such realisable property as may be specified in the order a charge for securing the payment of money to the Crown.

(2) The court may make a charging order on realisable property for securing the payment to the Crown—

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- (a) where a confiscation order has been made, of an amount not exceeding the amount payable under the confiscation order; and
 - (b) where a confiscation order has not been made, of an amount equal to the value from time to time of the property charged.
- (3) A charging order—
 - (a) may be made only on an application by the Director of Public Prosecutions; and
 - (b) may be made on an ex parte application to a Judge in chambers.
- (4) Subject to subsection (6), a charge may be imposed by a charging order only on—
 - (a) any interest in realisable property, which is an interest held beneficially by the defendant or by a person to whom the defendant has directly or indirectly made a gift caught by this Act—
 - (i) in any chargeable asset; or
 - (ii) under any trust; or
 - (b) any interest in realisable property held by a person as trustee of a trust if the interest is in a chargeable asset or is an interest under another trust and a charge may, by virtue of paragraph (a), be imposed by a charging order on the whole beneficial interest under the first-mentioned trust.
- (5) In this section—
 - (a) "chargeable asset" means any of the following—
 - (i) any land in Bermuda;
 - (ii) any relevant securities;
 - (iii) any motor vehicle;
 - (iv) any vessel;
 - (v) any aircraft;
 - (vi) any other type of asset which the Minister may prescribe for the purposes of this section; and
 - (b) "relevant securities" means any of the following—

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- (i) securities of the government or of any public authority;
- (ii) stock of any body incorporated in Bermuda;
- (iii) stock of any body incorporated outside Bermuda or of any country or territory outside Bermuda, being stock registered in a register kept at any place within Bermuda;
- (iv) options in relation to stock described in subparagraphs (ii) or (iii);
- (v) units of any unit trust in respect of which a register of the unit holders is kept at any place in Bermuda.

(6) In any case where a charge is imposed by a charging order on any interest in any relevant securities, the court may provide for the charge to extend to any interest or dividend payable in respect of them.

(7) Where the court has made a charging order, the court may give such directions to such person as the court thinks fit to safeguard the assets under the charging order.

(8) The court—

- (a) may, on the application of any person affected by the charging order, make an order discharging or varying it; and
- (b) shall make an order discharging the charging order if the proceedings for the offence are concluded or on payment into court of the amount which is secured by the charge.

[section 29 amended by 2007:25 s.20 effective 15 November 2008]

Charging orders: supplementary

30 (1) A charging order may be made either absolutely or subject to conditions including in particular conditions—

- (a) as to notifying any person holding any interest in the property to which the order relates; or
- (b) as to the time when the charge is to become enforceable.

(2) Notice of any charging order shall be deposited in the office of the Registrar-General for recording and registration in accordance with section 3 of the Registrar-General (Recording of Documents) Act 1955.

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(3) Subject to any provision made under section 31, a charge imposed by a charging order shall have the like effect and shall be enforceable in the same manner as an equitable charge created by the person holding the beneficial interest or, as the case may be, the trustees by writing under their hand.

Realisation of property

Realisation of property

31 (1) The court may, on an application by the Director of Public Prosecutions, exercise the powers conferred by this section, where a confiscation order has been made and it is neither satisfied nor subject to appeal.

(2) The court may appoint a receiver in respect of realisable property.

(3) The court may empower the receiver appointed under this section or section 28 or in pursuance of a charging order—

(a) to enforce any charge imposed under section 29 on realisable property or on interest or dividends payable in respect of such property; and

(b) in relation to any realisable property other than property for the time being subject to a charge under section 29, to take possession of the property subject to such conditions or exceptions as may be specified by the court.

(4) The court may order any person having possession of realisable property to give possession of it to the receiver.

(5) The court may empower the receiver to realise any realisable property in such manner as the court may direct.

(6) The court—

(a) may order any person holding an interest in realisable property to make such payment to the receiver in respect of any beneficial interest held by the defendant or, as the case may be, the recipient of a gift caught by this Act as the court may direct; and

(b) may, on the payment being made, by order transfer, grant or extinguish any interest in the property.

(7) Subsections (4) to (6) shall not apply to property for the time being subject to a charge under section 29 of this Act (or section 19 of the Drug Trafficking Suppression Act 1988).

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(8) The court shall not in respect of any property exercise the powers conferred by subsection (3)(a), (5) or (6) unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court.

[section 31 amended by 2007:25 s.20 effective 15 November 2008]

Application of proceeds of realisation etc

32 (1) The following sums in the hands of the receiver pursuant to section 28 or 31 or in pursuance of a charging order—

- (a) the proceeds of the enforcement of any charge imposed under section 29;
- (b) the proceeds of the realisation, other than by the enforcement of such a charge, of any property under section 28 or 31; and
- (c) any other sums, being property held by the defendant,

shall, after such payments (if any) as the court may direct have been made out of those sums, be applied on the defendant's behalf towards the satisfaction of the confiscation order.

(2) If, after the amount payable under the confiscation order has been fully paid, any such sums remain in the hands of the receiver, he shall distribute those sums—

- (a) among such of those who held property which has been realised under this Act; and
- (b) in such proportions,

as the court may direct after giving a reasonable opportunity for such persons to make representations to the court.

Exercise of powers for the realisation of property

33 (1) This section shall apply to the powers conferred on the court by sections 28 to 32 or on the receiver pursuant to section 28 or 31 or in pursuance of a charging order.

(2) Subject to subsections (3) to (6), the powers shall be exercised with a view to making available for satisfying the confiscation order or (as the case may be) any confiscation order that may be made in the defendant's case, the value for the time being of realisable property held by any person by the realisation of such property.

(3) In the case of realisable property held by a person to whom the defendant has, directly or indirectly, made a gift caught by this Act, the powers shall be exercised with a view to realising no more than the value for the time being of the gift.

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(4) The powers shall be exercised with a view to allowing any person other than the defendant or the recipient of any such gift to retain or recover the value of any property held by him.

(5) In exercising those powers, no account shall be taken of any obligations of the defendant or of the recipient of any such gift which conflict with the obligation to satisfy the confiscation order.

(6) An order may be made or other action taken in respect of a debt owed by the Crown.

Receivers: supplementary

34 (1) Where a receiver appointed under section 28 or 31 or in pursuance of a charging order—

(a) takes any action in relation to property which is not realisable property, being action which he would be entitled to take if it were such property, and

(b) believes and has reasonable grounds for believing, that he is entitled to take that action in relation to that property,

he shall not be liable to any person in respect of any loss or damage resulting from his action, except in so far as the loss or damage is caused by his negligence.

(2) Any amount due in respect of the remuneration and expenses of a receiver so appointed shall be paid out of the Consolidated Fund or the Confiscated Assets Fund.

[Section 34 amended by 2000:35 s.6(2) effective 1 June 2001]

Insolvency

Bankruptcy of defendant

35 (1) Where a person who holds realisable property is adjudged bankrupt—

(a) property for the time being subject to a restraint order made before the order adjudging him bankrupt; and

(b) any proceeds of property realised by virtue of section 28(6) or 31(5) or (6) for the time being in the hands of a receiver appointed under section 28 or 31,

shall be excluded from the bankrupt's estate for the purposes of the Bankruptcy Act 1989 ("the 1989 Act").

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(2) Where a person has been adjudged bankrupt, the powers conferred on the court by sections 28 to 32 or on a receiver shall not be exercised in relation to property for the time being comprised in the property of the bankrupt for the purposes of the 1989 Act.

(3) Nothing in the 1989 Act shall be taken as restricting, or enabling the restriction of, the exercise of those powers referred to in subsection (2).

(4) Subsection (2) shall not affect the enforcement of a charging order—

(a) made before the order adjudging the person bankrupt;
or

(b) on property which was subject to a restraint order when the order adjudging him bankrupt was made.

(5) Where, in the case of a debtor, the receiver constituted by virtue of section 9 of the 1989 Act or an interim receiver stands appointed under section 10 of the 1989 Act, and any property of the debtor is subject to a restraint order—

(a) the powers conferred on the receiver by virtue of that Act shall not apply to property for the time being subject to the restraint order; and

(b) any such property in the hands of the receiver shall, subject to a lien for any expenses (including his remuneration) properly incurred in respect of the property, be dealt with in such manner as the court may direct.

(6) Where a person is adjudged bankrupt and has directly or indirectly made a gift caught by this Act—

(a) no order shall be made by virtue of section 33 or 45 of the 1989 Act (avoidance of certain settlements etc) in respect of the making of the gift at any time when—

(i) proceedings for the drug trafficking or relevant offence have been instituted against him and have not been concluded;

(ii) an application has been made in respect of the defendant under section 17, 18, 20 or 22 of this Act and has not been concluded; or

(iii) property of the person to whom the gift was made is subject to a restraint order or a charging order; and

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- (b) any order made by virtue of section 33 or 45 of the 1989 Act after the conclusion of the proceedings shall take into account any realisation under this Act of property held by the person to whom the gift was made.

Winding up of company holding realisable property

36 (1) Where realisable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for the voluntary winding up, the functions of the liquidator shall not be exercisable in relation to—

- (a) property for the time being subject to a restraint order made before the relevant time; and
- (b) any proceeds of property realised by virtue of section 28(6) or 31(5) or (6) for the time being in the hands of a receiver appointed under section 28 or 31,

but there shall be payable out of such property any expenses (including the remuneration of the liquidator) properly incurred in the winding up in respect of the property.

(2) Where, in the case of a company, such an order has been made or such a resolution has been passed, the powers conferred on the court by sections 28 to 32 or on a receiver so appointed shall not be exercised in relation to any realisable property held by the company in relation to which the functions of the liquidator are exercisable—

- (a) so as to inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
- (b) so as to prevent the payment out of any property of expenses (including the remuneration of the liquidator) properly incurred in the winding up in respect of the property.

(3) Nothing in the Companies Act 1981 shall be taken as restricting, or enabling the restriction of, the exercise of those powers referred to in subsection (2).

(4) Subsection (2) shall not affect the enforcement of a charging order made before the relevant time or on property which was subject to a restraint order at the relevant time.

(5) In this section—

"company" means any company which may be wound up under the Companies Act 1981;

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"liquidator" includes any person appointed to the office of liquidator (whether provisionally or otherwise) under the Companies Act 1981;

"the relevant time" means—

- (a) where no order for the winding up of the company has been made, the time of the passing of the resolution for voluntary winding up;
- (b) where—
 - (i) such an order has been made; but
 - (ii) before the presentation of the petition for the winding up of the company by court order, such a resolution had been passed by the company, the time of the passing of the resolution; and
- (c) in any other case where such an order has been made, the time of the making of the order.

PART IV

INFORMATION GATHERING POWERS

Production orders

37 (1) For the purpose of an investigation into—

- (a) drug trafficking,
- (aa) money laundering,
- (b) whether any person has benefited from criminal conduct, or
- (c) the whereabouts of any proceeds of criminal conduct,

a police officer may apply to the Supreme Court for an order under subsection (2) (a "production order") in relation to particular material or material of a particular description.

(2) The court may, if on such an application it is satisfied that the conditions in subsection (4) are fulfilled, make a production order requiring the person who appears to the court to be in possession of the material to which the application relates—

- (a) to produce it to a police officer for him to take away; or
- (b) to give a police officer access to it,

within such period as the order may specify.

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This subsection has effect subject to section 40(10).

(3) The period to be specified in a production order shall be seven days unless it appears to the court that a longer or shorter period would be appropriate in the particular circumstances of the application.

(4) The conditions referred to in subsection (2) are—

(a) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking, or money laundering or has benefited from criminal conduct;

(b) that there are reasonable grounds for suspecting that the material to which the application relates—

(i) is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made; and

(ii) does not consist of or include items subject to legal privilege; and

(c) that there are reasonable grounds for believing that it is in the public interest, having regard—

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person in possession of the material holds it,

that the material should be produced or that access to it should be given.

(5) Where the court makes a production order under subsection (2)(b) in relation to material on any premises, it may, on the same or a subsequent application of a police officer, order any person who appears to him to be entitled to grant entry to the premises to allow a police officer to enter the premises to obtain access to the material.

(6) An application under subsection (1) or (5) may be made ex parte to a judge in Chambers.

(7) Where the material, to which an application under this section relates, consists of information contained in or accessible by means of a computer—

(a) a production order under subsection (2)(a) shall have effect as an order to produce the material in a form in which it can be taken away and in which it is visible and legible; and

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(b) a production order under subsection (2)(b) shall have effect as an order to give access to the material in a form in which it is visible and legible.

(8) A production order—

(a) shall not confer any right to production of, or access to, items subject to legal privilege;

(b) shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise; and

(c) may be made in relation to material in the possession of a Government Department.

(9) A police officer may photograph or make copies of any material produced or to which access is given under this section.

(10) Rules of court may make provision as to—

(a) the discharge and variation of production orders; and

(b) proceedings in relation to such orders.

(11) Where the investigation into whether a person has benefited from criminal conduct or the whereabouts of the proceeds of criminal conduct relates to a relevant offence which was not committed in Bermuda, an application under subsection (1) shall not be made unless the provisions of section 6 of the Criminal Justice (International Co-operation) (Bermuda) Act 1994 (Bermudian evidence for use overseas) as modified by subsection (12) have been complied with.

(12) Section 6 of the Criminal Justice (International Co-operation) (Bermuda) Act 1994 shall apply for the purposes of this section and section 39 with the following modifications—

(a) in subsection (1), for the words "criminal proceedings" to the end there shall be substituted "an investigation into whether a person has benefited from a relevant offence or the whereabouts of the proceeds of a relevant offence.";

(b) in subsection (2)(a), for the words "an offence" there shall be substituted "a relevant offence";

(c) for the words "by a notice" to the end of subsection (2) there shall be substituted "authorise a police officer to make an application for a production order under section 37 of the Proceeds of Crime Act 1997 or for a search warrant under section 39 of that Act.";

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- (d) at the end of subsection (5) there shall be added ", and "relevant offence" has the meaning given in the Proceeds of Crime Act 1997.";
- (e) subsection (6) shall be omitted.

[section 37 amended by 2007:25 s.4 effective 15 November 2008]

Failure to comply with production order

38 (1) Where a person is required by a production order to produce any material to a police officer or give a police officer access to any material, the person shall be guilty of an offence under this section if he—

- (a) contravenes the order without reasonable excuse; or
- (b) in purported compliance with the order produces or makes available any material known to the person to be false or misleading in a material particular without—
 - (i) indicating to the police officer to whom the material is produced or made available that the material is false or misleading and the respect in which the material is false or misleading; and
 - (ii) providing correct information to the police officer if the person is in possession of, or can reasonably acquire, the correct information.

(2) A person guilty of an offence under this section shall be liable on summary conviction to imprisonment for two years or a fine of \$10,000 or both.

Search warrants

39 (1) For the purpose of an investigation into—

- (a) drug trafficking,
- (aa) money laundering,
- (b) whether any person has benefited from criminal conduct, or
- (c) the whereabouts of any proceeds of criminal conduct,

a police officer may apply to the Supreme Court for a warrant under this section in relation to specified premises.

(2) On such an application, the court may issue a warrant authorising a police officer to enter and search the premises if the court is satisfied—

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- (a) that a production order made in relation to material on the premises has not been complied with;
 - (b) that the conditions in subsection (3) are fulfilled; or
 - (c) that the conditions in subsection (4) are fulfilled.
- (3) The conditions referred to in subsection (2)(b) are—
- (a) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking, or money laundering or has benefited from criminal conduct;
 - (b) that the conditions in section 37(4)(b) and (c) are fulfilled in relation to any material on the premises; and
 - (c) that it would not be appropriate to make an order under that section in relation to the material because—
 - (i) it is not practicable to communicate with any person entitled to produce the material;
 - (ii) it is not practicable to communicate with any person entitled to grant access to the material or entitled to grant entry to the premises on which the material is situated; or
 - (iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a police officer could secure immediate access to the material.
- (4) The conditions referred to in subsection (2)(c) are—
- (a) that there are reasonable grounds for suspecting that a specified person has carried on drug trafficking, money laundering or has benefited from criminal conduct;
 - (b) that there are reasonable grounds for suspecting that there is on the premises any such material relating—
 - (i) to the specified person;
 - (ii) to drug trafficking;
 - (iia) to money laundering;
 - (iii) to the question whether that person has benefited from criminal conduct; or
 - (iv) to any question as to the extent or whereabouts of any proceeds of criminal conduct,

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as is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made, but that the material cannot at the time of the application be particularised; and

(c) that—

- (i) it is not practicable to communicate with any person entitled to grant entry to the premises;
- (ii) entry to the premises will not be granted unless a warrant is produced; or
- (iii) the investigation for the purposes of which the application is made might be seriously prejudiced unless a police officer arriving at the premises could secure immediate entry to them.

(5) Where a police officer has entered premises in the execution of a warrant issued under this section, he may seize and retain any material, other than items subject to legal privilege, which is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the warrant was issued.

(6) A police officer may photograph or make copies of any material seized under this section.

(7) A person who hinders or obstructs a police officer in the execution of a warrant issued under this section is guilty of an offence and liable on summary conviction to imprisonment for two years or a fine of \$10,000 or both.

(8) Where the investigation into whether a person has benefited from criminal conduct or the whereabouts of the proceeds of criminal conduct relates to a relevant offence which was not committed in Bermuda, an application under subsection (1) shall not be made unless the provisions of section 6 of the Criminal Justice (International Co-operation) (Bermuda) Act 1994 (Bermudian evidence for use overseas) as modified by section 37(12) have been complied with.

[section 39 amended by 2007:25 s.5 effective 15 November 2008]

Disclosure of information by Government Departments

40 (1) Subject to subsection (4), the Supreme Court may, on an application by the Director of Public Prosecutions, order any material mentioned in subsection (3) which is in the possession of a Government Department to be produced to the court within such period as the court may specify.

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(2) The power to make an order under subsection (1) is exercisable if—

- (a) the powers conferred on the court to make a restraint order or a charging order are exercisable by virtue of section 27(1); or
- (b) those powers are exercisable by virtue of section 27(3) and the court has made a restraint or charging order which has not been discharged,

but where the power to make an order under subsection (1) is exercisable by virtue only of paragraph (b), section 27(4) shall apply for the purposes of this section as it applies for the purposes of sections 28 and 29.

(3) The material referred to in subsection (1) is any material which—

- (a) has been submitted to an officer of a Government Department by the defendant or by a person who has at any time held property which was realisable property;
- (b) has been made by an officer of a Government Department in relation to the defendant or such a person; or
- (c) is correspondence which passed between an officer of a Government Department and the defendant or such a person,

and an order under that subsection may require the production of all such material, or of a particular description of such material, in the possession of the body concerned.

(4) An order under subsection (1) shall not require the production of any material unless it appears to the court that the material is likely to contain information that would facilitate the exercise of the powers conferred on the court by section 28, 29 or 31 or on a receiver appointed under section 28 or 31 or in pursuance of a charging order.

(5) The court may by order authorise the disclosure to such a receiver of any material produced under subsection (1) or any part of such material; but the court shall not make an order under this subsection unless a reasonable opportunity has been given for an officer of the Government Department to make representations to the court.

(6) Material disclosed in pursuance of an order under subsection (5) may, subject to any conditions contained in the order, be further disclosed for the purposes of the functions under this Act of the receiver or the court.

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(7) The court may by order authorise the disclosure to a police officer of any material produced under subsection (1) or any part of such material; but the court shall not make an order under this subsection unless—

- (a) a reasonable opportunity has been given for an officer of the Government Department to make representations to the court; and
- (b) it appears to the court that the material is likely to be of substantial value in exercising functions relating to criminal conduct.

(8) Material disclosed in pursuance of an order under subsection (7) may, subject to any conditions contained in the order, be further disclosed for the purposes of functions relating to criminal conduct.

(9) Material may be produced or disclosed in pursuance of this section notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise.

(10) An order under subsection (1) and, in the case of material in the possession of a Government Department, a production order, may require any officer of the Government Department (whether named in the order or not) who may for the time being be in possession of the material concerned to comply with it, and such an order shall be served as if the proceedings were civil proceedings against the department.

(11) For the purposes of this section, "Government Department" includes—

- (a) the Bermuda Monetary Authority;
- (b) such other bodies as the Minister may prescribe for the purposes of this section.

[section 40 amended by 2007:25 s.20 effective 15 November 2008]

Monitoring orders

41 (1) A police officer may apply to the Supreme Court for an order ("a monitoring order") directing a banking institution to give to a police officer information obtained by the institution about transactions conducted through an account held by a particular person with the institution.

(2) An application for a monitoring order shall be made ex parte to a judge in Chambers and shall be supported by affidavit.

(3) A monitoring order shall apply in relation to transactions conducted during the period specified in the order, commencing not

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earlier than the day on which notice of the order is given to the banking institution and ending not later than three months after the day on which the order is made.

(4) A monitoring order shall not be made unless the court is satisfied that there are reasonable grounds for suspecting that the person in respect of whom the information is sought—

- (a) has committed or is about to commit a drug trafficking offence or a relevant offence;
- (b) was involved in the commission, or is about to be involved in the commission, of such an offence; or
- (c) has benefited directly or indirectly or is about to benefit directly or indirectly from the commission of such an offence.

(5) A monitoring order shall specify—

- (a) the name or names in which the account is believed to be held;
- (b) the nature of the information which the institution is required to give; and
- (c) the manner in which the information is to be given.

(6) A person who knowingly—

- (a) contravenes a monitoring order; or
- (b) provides false or misleading information in purported compliance with the order,

shall be guilty of an offence and liable on summary conviction to imprisonment for two years or a fine of \$10,000 or both.

(7) A reference in this section to a transaction conducted through an account includes a reference—

- (a) to the making of a fixed term deposit;
- (b) to the transfer of an amount so deposited or any part of it at the end of the term; and
- (c) to the existence or use of a deposit box held by the institution.

(8) The provision of information to a police officer by virtue of a monitoring order shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or otherwise and shall not give rise to any civil liability.

(9) In this section "banking institution" includes—

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- (a) *[repealed]*
- (b) *[repealed]*
- (c) such other institutions as the Minister may prescribe for the purposes of this section.

[Section 41 subsection (9)(a) amended, (b) repealed, by BR81/1999 effective 1 January 2000; subsection (9)(a) repealed by 2007:25 s.6 effective 15 November 2008; subsection (9)(c) amended by 2007:25 s.20 effective 15 November 2008]

Customer information orders

41A (1) A magistrate may, on an application made to him by a police officer make a customer information order if he is satisfied that each of the requirements for the making of the order is fulfilled.

(2) The application for a customer information order must state that a person specified in the application is subject to a confiscation investigation or a money laundering investigation.

(3) The application must also state that—

- (a) the order is sought for the purposes of the investigation;
- (b) the order is sought against the relevant institution or institutions specified in the application.

(4) An application for a customer information order may specify—

- (a) all relevant institutions, or
- (b) a particular relevant institution.

(5) A customer information order is an order that a relevant institution covered by the application for the order must, on being required to do so by notice in writing given by a police officer, provide any such customer information as it has relating to the person specified in the application as soon as practicable.

(6) A relevant institution which is required to provide information under a customer information order must provide the information to a police officer in such manner as the officer requires.

(7) If a relevant institution on which a requirement is imposed by a notice given under a customer information order requires the production of evidence of authority to give the notice, it is not bound to comply with the requirement unless evidence of the authority has been produced to it.

[section 41A inserted by 2007:25 s.7 effective 15 November 2008]

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Meaning of customer information

41B (1) "Customer information", in relation to a person and a relevant institution, is information whether the person holds, or has held, an account or accounts at the relevant institution (whether solely or jointly with another) and (if so) information as to —

- (a) the matters specified in subsection (2) if the person is an individual;
 - (b) the matters specified in subsection (3) if the person is a company or limited liability partnership or a similar body incorporated or otherwise established outside Bermuda, or a partnership.
- (2) The matters referred to in subsection (1) (a) are—
- (a) the account number or numbers;
 - (b) the person's full name;
 - (c) his date of birth;
 - (d) his most recent address and any previous addresses;
 - (e) the date or dates on which he began to hold the account or accounts and, if he has ceased to hold the account or any of the accounts, the date or dates on which he did so;
 - (f) such evidence of his identity as was obtained by the institution under or for the purposes of this Act or any regulations thereunder;
 - (g) the full name, date of birth and most recent address, and any previous addresses over the most recent 10 years, of any person who holds, or has held, an account at the institution jointly with him;
 - (h) the account number or numbers of any other account or accounts held at the institution to which he is a signatory and details of the person holding the other account or accounts;
 - (i) the source of the funds in the account.
- (3) The matters referred to in subsection (1) (b) are—
- (a) the account number or numbers;
 - (b) the person's full name;
 - (c) a description of any business which the person carries on;

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- (d) the country or territory in which it is incorporated or otherwise established;
 - (e) its registered office, and any previous registered offices, under the Companies Act 1981 or anything similar under corresponding legislation of any country or territory outside Bermuda;
 - (f) its registered office, and any previous registered offices, under the Limited Partnerships Act 1883 or anything similar under corresponding legislation of any country or territory outside Bermuda;
 - (g) the date or dates on which it began to hold the account or accounts and, if it has ceased to hold the account or any of the accounts, the date or dates on which it did so;
 - (h) such evidence of its identity as was obtained by the institution under or for the purposes of this Act or any regulations thereunder;
 - (i) the full name, date of birth and most recent address, and any previous addresses over the most recent 10 years, of any person who is a signatory to the account or any of the accounts;
 - (j) the source of the funds in the account.
- (4) The Minister may by order subject to affirmative resolution procedure provide for information of a description specified in the order —
- (a) to be customer information; or
 - (b) no longer to be customer information.

[section 41B inserted by 2007:25 s.7 effective 15 November 2008]

Requirements for making of customer information order

41C (1) These are the requirements for the making of a customer information order.

(2) In the case of a confiscation investigation, there must be reasonable grounds for suspecting that the person specified in the application for the order has benefited from his criminal conduct.

(3) In the case of a money laundering investigation, there must be reasonable grounds for suspecting that the person specified in the application for the order has committed a money laundering offence.

(4) In the case of any investigation, there must be reasonable grounds for believing that —

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- (a) customer information which may be provided in compliance with the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought; and
- (b) there must be reasonable grounds for believing that it is in the public interest for the customer information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.

[section 41C inserted by 2007:25 s.7 effective 15 November 2008]

Offences

41D (1) A relevant institution commits an offence if without reasonable excuse it fails to comply with a requirement imposed on it under a customer information order.

(2) A relevant institution guilty of an offence under subsection (1) is liable on summary conviction to a fine of \$50,000.

(3) A relevant institution commits an offence if, in purported compliance with a customer information order, it—

- (a) makes a statement which it knows to be false in a material particular; or
- (b) recklessly makes a statement which is false or misleading in a material particular.

(4) A relevant institution guilty of an offence under subsection (3) is liable —

- (a) on summary conviction, to a fine of \$50,000, or
- (b) on conviction on indictment, to a fine of \$100,000.

[section 41D inserted by 2007:25 s.7 effective 15 November 2008]

Statements

41E (1) A statement made by a relevant institution in response to a customer information order may not be used in evidence against it in criminal proceedings.

(2) But subsection (1) does not apply on a prosecution for —

- (a) an offence under section 41D(1) or (3); or
- (b) some other offence where, in giving evidence, the relevant institution makes a statement inconsistent with the statement mentioned in subsection (1).

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(3) A statement may not be used by virtue of subsection (2)(b) against a relevant institution unless —

- (a) evidence relating to it is adduced; or
- (b) a question relating to it is asked;

by or on behalf of the relevant institution in the proceedings arising out of the prosecution.

[section 41E inserted by 2007:25 s.7 effective 15 November 2008]

Disclosure of information

41F A customer information order has effect notwithstanding any restriction on the disclosure of information (however imposed).

[section 41F inserted by 2007:25 s.7 effective 15 November 2008]

Supplementary

41G (1) An application to discharge or vary a customer information order may be made to the magistrate by —

- (a) a police officer;
- (b) any person affected by the order.

(2) The magistrate may —

- (a) discharge the order;
- (b) vary the order.

(3) Magistrates' Court Rules may make provision as to the practice and procedure to be followed in connection with proceedings relating to customer information orders.

[section 41G inserted by 2007:25 s.7 effective 15 November 2008]

Offence of prejudicing investigation

42 (1) Where in relation to an investigation into criminal conduct —

- (a) a production order has been made, or has been applied for and has not been refused;
- (b) a warrant under section 39 has been issued; or
- (c) a monitoring order has been made,

a person is guilty of an offence if, knowing or suspecting that the investigation is taking place, he makes any disclosure which is likely to

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prejudice the investigation or reveal the existence of the monitoring order.

(2) In proceedings against a person for an offence under this section, it is a defence to prove—

- (a) that he did not know or suspect that the disclosure was likely to prejudice the investigation or reveal the existence of the monitoring order; or
- (b) that he had lawful authority or reasonable excuse for making the disclosure.

(3) Nothing in subsection (1) makes it an offence for a professional legal adviser to disclose any information or other matter—

- (a) to, or to a representative of, a client of his in connection with the giving by the legal adviser of legal advice to the client; or
- (b) to any person—
 - (i) in contemplation of, or in connection with, legal proceedings; and
 - (ii) for the purpose of those proceedings;

but this subsection does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(4) A person who commits an offence under this section shall be liable—

- (a) on summary conviction to imprisonment for two years or a fine of \$5,000 or both; and
- (b) on conviction on indictment to imprisonment for five years or a fine of \$10,000 or both.

PART V

MONEY LAUNDERING

Offences

Interpretation

42A In this Part —

“AML/ATF regulated financial institution” means a person who—

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- (a) carries on deposit-taking business within the meaning of section 4 of the Banks and Deposit Companies Act 1999;
- (b) carries on investment business within the meaning of section 3 of the Investment Business Act 2003;
- (c) is an insurer (and not a reinsurer) registered under section 4 of the Insurance Act 1978 who carries on long term business falling within paragraph (a) or (c) of the definition of “long-term business” in section 1(1) of the Insurance Act 1978;
- (d) is an insurance manager or broker registered under section 10 of the Insurance Act 1978 in so far as he acts as a manager or broker in connection with long term business (other than reinsurance business) falling within paragraph (a) or (c) of the definition of “long-term business” in section 1(1) of the Insurance Act 1978;
- (e) carries on the business of a fund administrator within the meaning of section 2(2) of the Investment Funds Act 2006;
- (f) carries on money service business within the meaning of section 20AA of the Bermuda Monetary Authority Act 1969;
- (g) carries on trust business within the meaning of section 9(3) of the Trusts (Regulation of Trust Business) Act 2001 and is not otherwise exempted by or under paragraph 3 of the Trusts (Regulation of Trust Business) Exemption Order 2002; or
- (h) is the operator of an investment fund within the meaning of section 2 of the Investment Funds Act 2006;

“business relationship” means a business, professional or commercial relationship between an AML/ATF regulated financial institution and a customer, which is expected by the institution when contact is first made between them to have an element of duration;

"country" includes territory;

"designated person", in relation to a direction, means any of the persons in relation to whom the direction is given;

“direction” means a direction issued by the Minister by order under section 49A;

"notice" means a notice in writing;

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“professional accountant” means a person who is a member of the Institute of Chartered Accountants of Bermuda;

“professional legal adviser” means a barrister and attorney who is a member of the Bermuda Bar Association;

“supervisory authority” means —

(a) the Bermuda Monetary Authority in relation to relevant persons falling within paragraph (a)(i) of section 49(4) being persons who are licensed, registered or otherwise exempted under any enactment regulating the financial services industry; or

(b) a professional body designated by the Minister under any enactment in relation to relevant persons regulated by it;

“regulations” means regulations made under section 49(3);

“relevant persons” means a person to whom, in accordance with section 49(3) and (4), regulations apply.

[section 42A added by 2008:31 s.3 effective 15 November 2008; amended by 2009:50 s.6 effective 15 January 2010.]

Concealing or transferring proceeds of criminal conduct

43 (1) A person is guilty of an offence if he—

(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct, or

(b) converts or transfers that property or removes it from Bermuda;

for the purpose of avoiding prosecution for a drug trafficking or relevant offence or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—

(a) conceals or disguises that property, or

(b) converts or transfers that property or removes it from Bermuda;

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for the purpose of assisting any person to avoid prosecution for a drug trafficking or relevant offence or the making or enforcement of a confiscation order.

(3) In this section the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it.

Assisting another to retain proceeds of criminal conduct

44 (1) Subject to subsection (3), a person is guilty of an offence if he enters into or is otherwise concerned in an arrangement whereby—

- (a) the retention or control by or on behalf of another person ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or
- (b) A's proceeds of criminal conduct—
 - (i) are used to secure that funds are placed at A's disposal; or
 - (ii) are used for A's benefit to acquire property by way of investment,

and he knows or suspects that A is a person who is or has been engaged in or has benefited from criminal conduct.

(2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct.

(3) Where a person discloses in good faith to the FIA a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct, or any matter on which such a suspicion or belief is based—

- (a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information however imposed; and
- (b) if he does any act in contravention of subsection (1) and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if—
 - (i) the disclosure is made before he does the act concerned and the act is done with the consent of the FIA; or

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- (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(4) In proceedings against a person for an offence under this section, it is a defence to prove—

- (a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct;
- (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used as mentioned in subsection (1)(b); or
- (c) that—
 - (i) he intended to disclose to the FIA such a suspicion, belief or matter as is mentioned in subsection (3) in relation to the arrangement, but
 - (ii) there is reasonable excuse for his failure to make any such disclosure in the manner mentioned in subsection (3)(b).

(5) In the case of a person who was in employment at the time in question, subsections (3) and (4) shall have effect in relation to disclosures and intended disclosures to the appropriate person in accordance with any procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to the FIA.

[section 44 amended by 2007:25 s.8 effective 15 November 2008; by 2008:31 s.4 effective 15 November 2008]

Acquisition, possession or use of proceeds of criminal conduct

45 (1) A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, the proceeds of criminal conduct, he acquires or uses that property or has possession of it.

(2) It is a defence to a charge of committing an offence under this section that the person charged acquired or used the property or had possession of it for adequate consideration.

(3) For the purposes of subsection (2)—

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- (a) a person does not acquire property for adequate consideration if the value of the consideration is significantly less than the value of the property; and
 - (b) a person does not use or have possession of property for adequate consideration if the value of the consideration is significantly less than the value of his use or possession of the property.
- (4) The provision for any person of services or goods which are of assistance to him in criminal conduct shall not be treated as consideration for the purposes of subsection (2).
- (5) Where a person discloses in good faith to the FIA a belief that any property is, or in whole or in part directly or indirectly represents, the proceeds of criminal conduct, or any matter on which such a belief is based—
- (a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information however imposed; and
 - (b) if he does any act in relation to the property in contravention of subsection (1), he does not commit an offence under this section if—
 - (i) the disclosure is made before he does the act in question and the act is done with the consent of the FIA; or
 - (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.
- (6) For the purposes of this section, having possession of any property shall be taken to be doing an act in relation to it.
- (7) In proceedings against a person for an offence under this section, it is a defence to prove that—
- (a) he intended to disclose to the FIA such a belief or matter as is mentioned in subsection (5), but
 - (b) there is reasonable excuse for his failure to make any such disclosure in the manner mentioned in subsection (5)(b).
- (8) In the case of a person who was in employment at the time in question, subsections (5) and (7) shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with any procedure established by his employer as they have effect in relation to disclosures, and intended disclosures, to the FIA.

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(9) Neither the FIA nor any other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in connection with the enforcement, or intended enforcement, of any provision of this Act or of any other statutory provision relating to drug trafficking or relevant offences or the proceeds of criminal conduct.

[section 45 amended by 2007:25 s.9 effective 15 November 2008; by 2008:31 s.5 effective 15 November 2008]

Agreement in furtherance of money laundering void

45A Any agreement entered into for the purposes of facilitating the commission of money laundering is void.

[section 45A inserted by 2007:25 s.10 effective 15 November 2008]

Money laundering: defence when overseas conduct is legal

45B (1) A person does not commit an offence under section 43, 44 or 45 if —

- (a) he knows or believes on reasonable grounds that the relevant criminal conduct occurred in a particular country or territory outside Bermuda; and
- (b) the relevant criminal conduct —
 - (i) was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and
 - (ii) is not of a description prescribed by an order made by the Minister.

(2) The Minister may by order subject to negative resolution procedure prescribe conduct for the purpose of subsection (1)(b)(ii).

[section 45B inserted by 2007:25 s.10 effective 15 November 2008]

Disclosure of knowledge or suspicion of money laundering

46 (1) Where a person in good faith discloses to the FIA—

- (a) his suspicion or belief that another person is engaged in money laundering, or
- (b) any information or other matter on which that suspicion or belief is based,

the disclosure shall not be treated as a breach of any restriction upon the disclosure of information however imposed.

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(2) A person is guilty of an offence if—

- (a) he knows or suspects that another person is engaged in money laundering which relates to any proceeds of criminal conduct;
- (b) the information, or other matter, on which that knowledge or suspicion is based came to his attention in the course of his trade, profession, business or employment; and
- (c) he does not disclose the information or other matter to the FIA as soon as is reasonably practicable after it comes to his attention.

(3) Subsection (2) does not make it an offence for a professional legal adviser to fail to disclose any information or other matter which has come to him in privileged circumstances.

(4) It is a defence to a charge of committing an offence under this section that the person charged had a reasonable excuse for not disclosing the information or other matter in question.

(5) Any disclosure made by a person who was in employment at the time in question to the appropriate person in accordance with any procedure established by his employer shall be treated, for the purposes of this section, as a disclosure to the FIA.

(6) For the purposes of this section, any information or other matter comes to a professional legal adviser in privileged circumstances if it is communicated or given to him—

- (a) by, or by a representative of, a client of his in connection with the giving by the adviser of legal advice to the client;
- (b) by, or by a representative of, a person seeking legal advice from the adviser; or
- (c) by any person—
 - (i) in contemplation of, or in connection with, legal proceedings; and
 - (ii) for the purpose of those proceedings;

but no information or other matter shall be treated as coming to a professional legal adviser in privileged circumstances if it is communicated or given with a view to furthering any criminal purpose.

[section 46 amended by 2007:25 s.11 effective 15 November 2008; by 2008:31 s.6 effective 15 November 2008]

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Tipping-off

- 47 (1) A person is guilty of an offence if—
- (a) he knows or suspects that a police officer is acting, or is proposing to act, in connection with an investigation which is being, or is about to be, conducted into money laundering; and
 - (b) he discloses to any other person information or any other matter which is likely to prejudice that investigation or proposed investigation.
- (2) A person is guilty of an offence if—
- (a) he knows or suspects that a disclosure has been made to the FIA or to an appropriate person under section 44, 45 or 46; and
 - (b) he discloses to any other person information or any other matter which is likely to prejudice any investigation which might be conducted following such a disclosure.
- (3) Nothing in subsection (1) or (2) makes it an offence for a professional legal adviser to disclose any information or other matter—
- (a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client; or
 - (b) to any person—
 - (i) in contemplation of, or in connection with, legal proceedings; and
 - (ii) for the purpose of those proceedings;

but this subsection does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(4) In proceedings against a person for an offence under subsection (1) or (2), it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way there mentioned.

(5) No police officer or other person shall be guilty of an offence under this section in respect of anything done by him in the course of acting in accordance with the enforcement, or intended enforcement, of any provision of this Act or of any other statutory provision relating to criminal conduct or the proceeds of criminal conduct.

[section 47 amended by 2007:25 s.12 effective 15 November 2008]

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Penalties

Penalties for money laundering etc

48 (1) A person guilty of an offence under section 43, 44 or 45 (money laundering) shall be liable—

- (a) on summary conviction, to imprisonment for five years or a fine of \$50,000 or both; and
- (b) on conviction on indictment, to imprisonment for twenty years or an unlimited fine or both.

(2) A person guilty of an offence under section 46 or 47 (failure to disclose knowledge or suspicion; tipping off) shall be liable—

- (a) on summary conviction, to imprisonment for three years or a fine of \$15,000 or both; or
- (b) on conviction on indictment, to imprisonment for ten years or an unlimited fine or both.

Forfeitures

48A (1) The court by or before which a person is convicted of a money laundering offence may make a forfeiture order in accordance with the provisions of this section.

(2) Where a person is convicted of a money laundering offence, the court may order the forfeiture of any property which, at the time of the offence, he had in his possession or under his control and which he used or intended to use for the purposes of the offence.

(3) Where a person is convicted of a money laundering offence, the court may order the forfeiture of any property which wholly or partly, and directly or indirectly, is received by any person as a payment or other reward in connection with the commission of the offence.

(4) Where a person other than the convicted person claims to be the owner of or otherwise interested in anything which can be forfeited by an order under this section, the court shall give him an opportunity to be heard before making an order.

[section 48A inserted by 2008:31 s.7 effective 15 November 2008]

Prevention of money laundering

Establishment of Committee; regulations etc

49 (1) There shall be established a committee, to be known as the National Anti-Money Laundering Committee, for the purpose of—

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- (a) advising the Minister in relation to the detection and prevention of money laundering, and on the development of a national plan of action to include recommendations on effective mechanisms to enable the competent authorities in Bermuda to coordinate with each other concerning the development and implementation of policies and activities to combat money laundering;
- (b) *[repealed]*;
- (c) advising the Minister as to the participation of Bermuda in the international effort against money laundering;

and the Committee shall meet as often as may be necessary to carry out its duties.

(2) The members of the National Anti-Money Laundering Committee shall be—

- (a) the Chairman,
- (aa) the Solicitor General,
- (b) the Financial Secretary,
- (c) the Permanent Secretary of the Ministry responsible for the Police,
- (d) the Commissioner of Police,
- (da) the Director of the FIA,
- (e) the Chief Executive Officer of the Bermuda Monetary Authority,
- (ea) the Director of Public Prosecutions;
- (eb) the Permanent Secretary Ministry of Justice;
- (ec) the Collector of Customs;
- (f) such other persons as the Minister may from time to time appoint.

(2A) The Minister shall appoint a person with relevant experience to be the Chairman of the Committee for a term not exceeding three years, which may be renewed.

(2B) A person is disqualified for appointment as Chairman if he is a member of either House of the Legislature.

(2C) A person holding office as Chairman may at any time resign by giving notice in writing to the Minister.

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(2D) The Chairman shall forthwith vacate his office if he becomes disqualified for appointment.

(2E) The Minister may by notice in writing remove the Chairman from office if satisfied that —

- (a) he has without reasonable excuse been absent from three consecutive meetings of the Committee;
- (b) he has been convicted (whether before or after his appointment) of a criminal offence;
- (c) he is an undischarged bankrupt or his estate has been sequestrated and he has not been discharged;
- (d) he has made a composition or arrangement with, or granted a trust deed for, his creditors; or
- (e) he is otherwise unable or unfit to carry out his functions as Chairman.

(3) The Minister may, after consulting the National Anti-Money Laundering Committee, make such regulations as he thinks fit for the purposes of detecting and preventing money laundering.

(3a) Regulations made under subsection (3) are subject to affirmative resolution procedure.

(4) Without prejudice to the generality of subsection (3), such regulations may in particular—

- (a) require —
 - (i) such persons or classes of persons conducting businesses in the financial services industry, falling within any one or more activities or operations for or on behalf of a customer as may be prescribed by the Minister; and
 - (ii) professional legal advisers and accountants in independent practice, who by way of business provide legal or accountancy services to other persons when participating in financial or real property transactions concerning a class of activity specified in subsection (5); and for this purpose, a person participates in a transaction by assisting in the planning or execution of the transaction or otherwise acting for or on behalf of a client in the transaction;

to establish and maintain procedures relating to the identification of clients, the keeping of records, the making of reports, the vetting of

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employees, the verification of the effective design and operation of anti-money laundering systems and the training of employees;

(b) create criminal offences of failing to comply with the regulations.

(c) *[repealed]*

(5) For the purposes of paragraph (a) of subsection (4) the following are specified activities —

(a) buying and selling real property;

(b) managing of client monies, securities and other assets;

(c) management of bank, savings or securities accounts;

(d) organisation of contributions for the creation, operation or management of companies;

(e) creation, operation or management of legal persons or arrangements, and buying and selling business entities.

(6) *[repealed]*

[section 49 amended by 2007:25 s.13 & 20 effective 15 November 2008; amended by 2008:31 s.8 effective 15 November 2008]

Directions

49A (1) The Minister may, by order, issue a direction to an AML/ATF regulated financial institution carrying on business in or from Bermuda if—

(a) the intergovernmental body, known as the Financial Action Task Force, has advised that measures should be taken in relation to a country because of the risk of money laundering activities being carried on—

(i) in the country;

(ii) by the government of the country, or

(iii) by persons resident or incorporated in the country; or

(b) the Minister reasonably believes that there is a risk that money laundering activities are being carried on—

(i) in the country,

(ii) by the government of the country, or

(iii) by persons resident or incorporated in the country,

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and that this poses a significant risk to the national interests of Bermuda.

- (2) A direction under this section may be given to—
- (a) a particular AML/ATF regulated financial institution;
 - (b) any description of AML/ATF regulated financial institutions; or
 - (c) all AML/ATF regulated financial institutions.

(3) The requirements imposed by a direction must be proportionate to the seriousness of the risk, having regard to the advice mentioned in subsection (1)(a) or to the risks mentioned in subsection (1)(b), as the case may be.

[Section 49A inserted by 2009:50 s.7 effective 15 January 2010]

Transactions and persons affected by directions

49B (1) A direction may impose requirements in relation to transactions or business relationships with—

- (a) a person carrying on business in the country;
- (b) the government of the country;
- (c) a person resident or incorporated in the country.

- (2) The direction may impose requirements in relation to—
- (a) a particular person within subsection (1),
 - (b) any description of persons within that subsection, or
 - (c) all persons within that subsection.

(3) For the purposes of this section, a transaction or business relationship with a person or government includes a transaction or business relationship with any third party that ultimately benefits, or is intended to benefit, that person or government.

- (4) A direction may make different provisions—
- (a) in relation to different descriptions of persons to whom the direction is given; and
 - (b) in relation to different descriptions of transaction or business relationship.

[Section 49B inserted by 2009:50 s.7 effective 15 January 2010]

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Requirements that may be imposed by directions

49C A direction may impose any of the following requirements—

- (a) customer due diligence;
- (b) ongoing monitoring;
- (c) systematic reporting
- (d) limiting or ceasing business.

[Section 49C inserted by 2009:50 s.7 effective 15 January 2010]

Customer due diligence

49D (1) A direction may require an AML/ATF regulated financial institution to undertake enhanced customer due diligence measures—

- (a) before entering into a transaction or business relationship with a designated person; and
- (b) during a business relationship with such a person.

(2) The direction may do either or both of the following—

- (a) impose a general obligation to undertake enhanced customer due diligence measures;
- (b) require an AML/ATF regulated financial institution to undertake specific measures identified or described in the direction.

(3) In this section, "customer due diligence measures" means measures to—

- (a) establish the identity of the designated person;
- (b) obtain information about the designated person; their business, and the source of their funds, and
- (c) assess the risk of the designated person being involved in money laundering activities.

[Section 49D inserted by 2009:50 s.7 effective 15 January 2010]

Ongoing monitoring

49E (1) A direction may require an AML/ATF regulated financial institution to undertake enhanced ongoing monitoring of any business relationship with a designated person.

(2) The direction may do either or both of the following—

- (a) impose a general obligation to undertake enhanced ongoing monitoring;

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(b) require an AML/ATF regulated financial institution to undertake specific measures identified or described in the direction.

(3) In this section, “ongoing monitoring” of a business relationship means—

(a) scrutiny of transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person’s knowledge of the customer, his business and risk profile; and

(b) so far as practicable keeping the documents, data or information obtained for the purpose of applying customer due diligence measures up to date.

[Section 49E inserted by 2009:50 s.7 effective 15 January 2010]

Systematic reporting

49F (1) A direction may require an AML/ATF regulated financial institution to provide such information and documents as may be specified in the direction relating to transactions or business relationships with designated persons.

(2) A direction imposing such a requirement must specify how the direction is to be complied with, including—

(a) the person to whom the information and documents are to be provided; and

(b) the period within which, or intervals at which, information and documents are to be provided.

(3) The power conferred by this section may not be exercised in relation to information or documents in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

(4) The exercise of the power conferred by this section and the provision of information under it is not otherwise subject to any restriction on the disclosure of information, whether imposed by statute or otherwise.

[Section 49F inserted by 2009:50 s.7 effective 15 January 2010]

Limiting or ceasing business

49G A direction may require an AML/ATF regulated financial institution not to enter into or continue to participate in—

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- (a) a specified transaction or business relationship with a designated person,
- (b) a specified description of transactions or business relationships with a designated person, or
- (c) any transaction or business relationship with a designated person.

[Section 49G inserted by 2009:50 s.7 effective 15 January 2010]

Making and giving effect to directions

- 49H (1) The Minister may vary or revoke a direction at any time.
- (2) A direction ceases to have effect one year after the day on which it was made, without prejudice to the making of further directions.
- (3) A direction given to a description of AML/ATF regulated financial institutions or to all such institutions is a statutory instrument and is subject to the negative resolution procedure.
- (4) A direction given to a particular person is not a statutory instrument. The Minister must give notice of the direction to that person as soon as possible after issuing it.

[Section 49H inserted by 2009:50 s.7 effective 15 January 2010]

Directions limiting or ceasing business: exemption by license

- 49I (1) An AML/ATF regulated financial institution that is subject to a direction referred to in section 49G may apply to the Minister in such form as the Minister may specify, to exempt a specific transaction or business relationship or a description of transactions or business relationships from the requirements of the direction.
- (2) The applicant shall provide such information and documents as the Minister may require in determining the application.
- (3) The Minister may grant a license to the applicant exempting it from the requirements of the direction in relation to the transactions or business relationships specified in the license with the persons designated in it, if the Minister is satisfied that the applicant's participation in the transactions or business relationships with those persons does not pose a risk to the national interests of Bermuda.
- (4) The Minister, on his own initiative, may—
- (a) grant a license to a particular AML/ATF regulated financial institution or to a group of such institutions exempting them from the requirements of a direction in

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relation to transactions or business relationships specified in the license with persons designated in it; or

- (b) grant a general license exempting all AML/ATF regulated financial institutions from the requirements of the direction in relation to transactions or business relationships specified in the license with persons designated in it,

if the Minister is satisfied that the participation of those institutions in the specified transactions or business relationships with the designated persons does not pose a risk to the national interests of Bermuda.

(5) A license may be subject to such conditions as the Minister sees fit to impose and may be of the same duration as the direction or subject to an earlier expiry date.

(6) The Minister may vary or revoke a license at any time.

(7) On the grant, variation or revocation of a license, the Minister must—

- (a) in the case of a license granted to a particular person, give notice of the grant, variation or revocation to that person; or
- (b) in the case of a general license or a license granted to a description of persons, take such steps as he considers appropriate to publicize the grant, variation or revocation of the license.

[Section 49I inserted by 2009:50 s.7 effective 15 January 2010]

Offences: failure to comply with a direction

49J (1) A person who fails to comply with a requirement imposed by direction commits an offence.

(2) Notwithstanding subsection (1), no offence is committed if the person took all reasonable steps and exercised all due diligence to ensure that the requirement would be complied with.

(3) A person guilty of an offence under this section is liable—

- (a) on summary conviction, to a fine of \$50,000; or
- (b) on conviction on indictment to a fine of \$750,000 or to imprisonment for a term of two years or to both.

(4) Where a person is convicted of an offence under this section, he is not liable to a civil penalty under any statutory provision in relation to the same matter.

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[Section 49J inserted by 2009:50 s.7 effective 15 January 2010]

Offences in connection with licenses

49K (1) A person commits an offence who for the purpose of obtaining a license under section 49I—

- (a) provides information that is false in a material respect or a document that is not what it purports to be; and
- (b) knows that, or is reckless as to whether, the information is false or the document is not what it purports to be.

(2) A person guilty of an offence under this section is liable—

- (a) on summary conviction, to a fine of \$50,000; or
- (b) on conviction on indictment to a fine of \$750,000 or to imprisonment for a term of two years or to both.

[Section 49K inserted by 2009:50 s.7 effective 15 January 2010]

Report to Legislature

49L (1) As soon as reasonably practicable after the end of each calendar year, the Minister must—

- (a) prepare a report about the exercise during that year of the Minister's powers and functions in relation to directions and licenses under this Part; and
- (b) lay a copy of the report before both Houses of the Legislature.

(2) Subsection (1) does not apply in relation to a year if the Minister has not issued a direction pursuant to those powers and functions at any time in that year.

[Section 49L inserted by 2009:50 s.7 effective 15 January 2010]

Use of guidance

49M (1) In determining whether a person has committed an offence under sections 43, 44, 45, 46, 47 and 49J, a court shall consider whether a defendant has followed any relevant guidance which was at the time —

- (a) issued by a supervisory authority;
- (b) approved by the Minister; and
- (c) published in a manner approved by the Minister as appropriate in his opinion to bring the

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guidance to the attention of persons likely to be affected by it.

(2) Guidance issued under this section is not a statutory instrument and the Statutory Instruments Act 1977 shall not apply to it.

[section 49A inserted by 2000:35 s.3 effective 1 June 2001; repealed and replaced by 2008:31 s.9 effective 15 November 2008; renumbered by 2009:50 s.7 and amended by 2009:50 s. 8 effective 15 January 2010]

PART VI

SEIZURE OF CASH

Seizure and detention of cash imported or exported

50 (1) A police officer may seize and detain, in accordance with this Part, any cash which is being imported into or exported from Bermuda if the officer has reasonable grounds for suspecting that it directly or indirectly represents any person's proceeds of criminal conduct or is intended by any person for use in any criminal conduct.

(2) Cash seized by virtue of this section shall not be detained for more than forty-eight hours unless its continued detention is authorised by an order made by a magistrate; and no such order shall be made unless the magistrate is satisfied—

- (a) that there are reasonable grounds for the suspicion mentioned in subsection (1); and
- (b) that continued detention of the cash is justified while its origin or derivation is further investigated or consideration is given to the institution (whether in Bermuda or elsewhere) of criminal proceedings against any person for an offence with which the cash is connected.

(2A) The period of forty-eight hours mentioned in subsection (2) shall be calculated in accordance with subsection (2B).

(2B) In calculating the period of forty-eight hours in accordance with this subsection no account shall be taken of —

- (a) a Saturday; or
- (b) a public holiday within the meaning of the Public Holidays Act 1947.

(3) Any order under subsection (2) shall authorise the continued detention of the cash to which it relates for such period, not exceeding three months beginning with the date of the order, as may be

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specified in the order; and a court of summary jurisdiction, if satisfied as to the matters mentioned in that subsection, may thereafter from time to time by order authorise the further detention of the cash but so that—

- (a) no period of detention specified in such an order shall exceed three months beginning with the date of the order; and
 - (b) the total period of detention shall not exceed two years from the date of the order under subsection (2).
- (4) Any application for an order under subsection (2) or (3) shall be made by a police officer.
- (5) At any time while cash is detained by virtue of this section—
- (a) a court of summary jurisdiction may direct its release if satisfied—
 - (i) on an application made by the person from whom it was seized or a person by or on whose behalf it was being imported or exported, that there are no, or are no longer, any such grounds for its detention as are mentioned in subsection (2); or
 - (ii) on an application made by any other person, that detention of the cash is not for that or any other reason justified; and
 - (b) a police officer may release the cash if satisfied that its detention is no longer justified but shall first notify the magistrate or court of summary jurisdiction under whose order it is being detained.
- (6) If at a time when any cash is being detained by virtue of this section—
- (a) an application for its forfeiture is made under section 51 or
 - (b) proceedings are instituted (whether in Bermuda or elsewhere) against any person for an offence with which the cash is connected,

the cash shall not be released until any proceedings pursuant to the application or, as the case may be, the proceedings for that offence have been concluded.

[section 50 subsections (2A) and (2B) inserted by 2007:25 s.14 effective 15 November 2008]

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Forfeiture orders and appeals

51 (1) A court of summary jurisdiction may make an order (a "forfeiture order") ordering the forfeiture of any cash which has been seized under section 50 if satisfied, on an application made by a police officer while the cash is detained under that section, that the cash directly or indirectly represents any person's proceeds of, or benefit from, or is intended by any person for use in, criminal conduct.

(2) An order may be made under subsection (1) whether or not proceedings are brought against any person for an offence with which the cash in question is connected.

(3) Any party to the proceedings in which a forfeiture order is made (other than the applicant) may, before the end of the period of thirty days beginning with the date on which it is made, appeal to the Supreme Court.

(4) On an application made by an appellant to a court of summary jurisdiction at any time, that court may order the release of so much of the cash to which the forfeiture order relates as it considers appropriate to enable him to meet his legal expenses in connection with the appeal.

(5) An appeal under this section shall be by way of rehearing, and the Supreme Court may make such order as it considers appropriate and, in particular, may order the release of the cash (or any remaining cash) together with any accrued interest.

Seizure: supplementary

52 (1) Cash consisting of coins and bank-notes seized under this Part and detained for more than forty-eight hours shall where practicable, unless required as evidence of an offence, be held in an interest-bearing account, and the interest accruing on any such cash shall be added to that cash on its forfeiture or release.

(2) An order under section 50(2) shall provide for notice to be given to persons affected by the order.

(3) Without prejudice to the generality of any existing power to make rules, provision may be made by rules of court—

- (a) with respect to applications to any court under this Part;
- (b) for the giving of notice of such applications to persons affected;
- (c) for the joinder of persons as parties; and
- (d) generally with respect to the procedure under this Part before any court.

(4) In this Part—

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"cash" means—

- (a) coins and bank-notes in any currency; and
- (b) negotiable instruments;

"exported", in relation to any cash, includes its being brought to any place in Bermuda for the purpose of being exported.

Freezing of funds

52A (1) An application for the freezing of funds may be made to a magistrate by a police officer in the course of a confiscation investigation or an investigation into money laundering.

(2) Where the magistrate is satisfied that a person by, for or on behalf of whom any funds are held is suspected of having benefited from criminal conduct or having committed a money laundering offence, the magistrate may make an order requiring the relevant institution that holds those funds not to make them available to any person.

(3) An order made under subsection (2) shall specify a period, not exceeding seven days, for which the order is to have effect.

(4) The period of seven days mentioned in subsection (3) shall be calculated in accordance with subsection (5).

(5) In calculating the period of seven days in accordance with this subsection no account shall be taken of —

- (a) a Saturday; or
- (b) a public holiday within the meaning of the Public Holidays Act 1947.

(6) In this section "funds" means monies deposited with designated institution.

(7) Magistrates' Court Rules may make provision as to the practice and procedure to be followed in connection with proceedings relating to orders under this section.

[section 52A inserted by 2007:25 s.15 effective 15 November 2008]

PART VII

MISCELLANEOUS & SUPPLEMENTAL

Foreign orders etc

Enforcement of external confiscation orders

53 (1) The Minister may, by order—

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- (a) direct in relation to a country or territory outside Bermuda designated by the order (a "designated country") that, subject to such modifications as may be specified, this Act shall apply to external confiscation orders and to proceedings which have been or are to be instituted in the designated country and may result in an external confiscation order being made there;
- (b) make—
 - (i) such provision in connection with the taking of action in the designated country with a view to satisfying a confiscation order;
 - (ii) such provision as to evidence or proof of any matter for the purposes of this section and 54; and
 - (iii) such incidental, consequential and transitional provision,
as appears to him to be expedient; and
- (c) without prejudice to the generality of this subsection, direct that, in such circumstances as may be specified, proceeds arising out of action taken in the designated country with a view to satisfying a confiscation order and which are retained there shall nevertheless be treated as reducing the amount payable under the order to such extent as may be specified.

(2) An order under this section may make different provision for different cases or classes of cases.

(3) The power to make an order under this section includes power to modify this Act in such a way as to confer power on a person to exercise a discretion.

(4) In this section and section 54—

"external confiscation order" means an order made by a court in a designated country for the purpose—

- (a) of recovering property, or the value of such property, obtained as a result of or in connection with—
 - (i) drug trafficking; or
 - (ii) any offence which would, if committed in Bermuda, be triable on indictment; or
- (b) of depriving a person of a pecuniary advantage so obtained;

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"modifications" includes additions, alterations and omissions.

(5) An order under this section is subject to the negative resolution procedure.

[section 53 amended by 2007:25 s.20 effective 15 November 2008]

Registration of external confiscation orders

54 (1) On an application made by or on behalf of the government of a designated country, the Supreme Court may register an external confiscation order made there if—

- (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
- (b) it is satisfied, where the person affected by the order did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
- (c) it is of the opinion that enforcing the order in Bermuda would not be contrary to the interests of justice.

(2) In subsection (1)(a), "appeal" includes—

- (a) any proceedings by way of discharging or setting aside a judgment; and
- (b) an application for a new trial or a stay of execution.

(3) The court shall cancel the registration of an external confiscation order if it appears to the court that the order has been satisfied by payment of the amount due under it.

Evidence of corresponding law

55 (1) A document purporting to be issued by or on behalf of the Government of a country or territory and purporting to state the terms of a corresponding law in force in that country or territory shall be admitted in evidence, in proceedings under this Act, on its production by the prosecution without further proof, and such document shall be conclusive evidence that—

- (a) it is issued by or on behalf of the Government of that country or territory;
- (b) the terms of such law are as stated in the document;
- (c) any facts stated in the document to constitute an offence under such law do constitute such offence.

(2) "Corresponding law"—

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- (a) in relation to proceedings relating to drug trafficking has the meaning given in section 40 of the Misuse of Drugs Act 1972; and
- (b) in any other case, means a law which corresponds with a provision of Bermuda law which creates a relevant offence.

Confiscated Assets Fund

55A (1) There shall be established a fund to be known as the Confiscated Assets Fund ("the Fund").

(2) There shall be paid into the Fund—

- (a) proceeds of criminal conduct recovered under a confiscation order;
- (aa) property forfeited under section 48A;
- (b) cash forfeited under Part VI;
- (ba) cash or property forfeited or confiscated under the Anti-Terrorism (Financial and Other Measures) Act 2004;
- (c) money forfeited under section 37 of the Misuse of Drugs Act 1972;
- (d) money paid to the Government of Bermuda by a foreign jurisdiction in respect of confiscated assets, whether under a treaty or arrangement providing for mutual assistance in criminal matters or otherwise.

(3) The Minister and the Minister of Finance may authorise payments to be made out of the Fund—

(a) for purposes related to—

- (i) law enforcement, including in particular the investigation of suspected cases of drug trafficking, terrorist financing and money laundering;
- (ii) cover costs associated with the treatment and rehabilitation of drug addicts;
- (iii) cover costs associated with the prevention and public education concerning drug abuse;
- (iiia) meet the expenses of the Department of National Drug Control; and
- (iv) training of officials in the effective implementation of the provisions of this Act in

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relation to money laundering and in relation to terrorist financing within the meaning of sections 5 to 8 of the Anti-Terrorism (Financial and Other Measures) Act 2004.

- (b) to satisfy an obligation of the Government of Bermuda to a foreign jurisdiction in respect of confiscated assets, whether under a treaty or arrangement providing for mutual assistance in criminal matters or otherwise;
- (c) to meet the expenses of the National Anti-Money Laundering Committee;
- (ca) towards the expenses of the FIA;
- (d) to meet the remuneration and expenses of a receiver appointed under this Act or the Anti-Terrorism (Financial and Other Measures) Act 2004;
- (e) to pay compensation or costs awarded under this Act or the Anti-Terrorism (Financial and Other Measures) Act 2004;
- (f) to cover costs associated with the administration of the Fund.

[Section 55A inserted by 2000:35 s.5 effective 1 June 2001; subsection (2)(ba) inserted, section (3) paragraphs (a)(i), (d) and (e) amended by 2004:31 s.26 effective 7 March 2005; subsection 3(a)(iv) inserted by 2007:25 s.16 effective 15 November 2008; amended by 2007:25 s.20 effective 15 November 2008; amended by 2008:31 s.10 effective 15 November 2008; amended by 2009:18 s.2 effective 1 April 2009; amended by 2009:50 s. 9 effective 15 January 2010]

Administration of the Fund

55B (1) The moneys paid into the Fund shall be invested in accordance with the Public Funds Act 1954, and the income earned from such investments shall be paid into the Fund.

(2) The financial year of the Fund shall end on 31st March in each year.

(3) The Minister of Finance shall cause proper accounts, and proper records in relation to the accounts, of the Fund to be kept, and shall cause to be prepared in respect of each financial year a statement of the accounts of the Fund in such form as the Minister of Finance may direct.

(4) Within six months after the end of each financial year, the Minister shall send to the Auditor a copy of the statement of accounts for that financial year.

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(5) The Auditor shall examine every statement of accounts received by him under this section and shall make a report in writing on the statement to the Minister.

(6) The Minister shall lay before each House of the Legislature a copy of the Auditor's report.

[Section 55B inserted by 2000:35 s.5 effective 1 June 2001; amended by 2007:25 s.20 effective 15 November 2008; amended by 2008:31 s.11 effective 15 November 2008]

Offences and police powers etc

Offences by bodies corporate etc.

56 (1) If an offence under this Act committed by a body corporate is shown—

(a) to have been committed with the consent or the connivance of an officer of the body corporate; or

(b) to be attributable to any neglect on his part,

the officer as well as the body corporate is guilty of an offence and liable to be proceeded against and punished accordingly.

(2) If an offence under this Act committed by a partnership is shown—

(a) to have been committed with the consent or the connivance of a partner; or

(b) to be attributable to any neglect on his part ;

the partner as well as the partnership is guilty of an offence and liable to be proceeded against and punished accordingly.

(3) If an offence under this Act committed by an unincorporated association (other than a partnership) is shown—

(a) to have been committed with the consent or the connivance of an officer of the association; or

(b) to be attributable to any neglect on his part,

that officer as well as the association is guilty of an offence and liable to be proceeded against and punished accordingly.

(4) If the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body.

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(5) Proceedings for an offence alleged to have been committed by a partnership or an unincorporated association shall be brought in the name of the partnership or association (and not in that of its members).

(6) A fine imposed on the partnership or association on its conviction of an offence is to be paid out of the funds of the partnership or association.

(7) In this section—

“officer”—

(a) in relation to a body corporate, means a director, manager, secretary, chief executive, member of the committee of management, or a person purporting to act in such a capacity; and

(b) in relation to an unincorporated association, means any officer of the association or any member of its governing body, or a person purporting to act in such capacity; and

“partner” includes a person purporting to act as a partner.

[section 56 repealed and replaced by 2008:31 s.12 effective 15 November 2008]

Police powers etc

57 (1) For the purposes of this Act, "police officer" includes any officer of the Customs Department.

(2) A police officer may arrest without warrant any person whom he reasonably believes has committed an offence under this Act.

(3) An officer of the Customs Department may, in any case relating to the commission of an offence under this Act, exercise all or any of the powers in relation to investigations into an offence which is arrestable without warrant conferred on a police officer by the Criminal Code Act 1907.

Duty of confidentiality

58 (1) Except as provided in this section, no person who under or for the purposes of this Act receives information from any person shall disclose it without the consent of the person to whom it relates (and if different) the person from whom it was received as aforesaid..

(2) This section does not apply to information which at the time of the disclosure is or has already been made available to the public from other sources, or to information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it.

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(3) A person who contravenes subsection (1) shall be guilty of an offence and liable on summary conviction to a fine of \$50,000 or to imprisonment for two years or to both.

(4) Subsection (1) does not preclude the disclosure of information in any case in which disclosure is for the purpose of enabling or assisting the Bermuda police service or the FIA to discharge their functions under any statutory provision.

(5) Subsection (1) does not preclude the disclosure of information to the Minister of Finance or to the Bermuda Monetary Authority in any case in which the disclosure is for the purpose of enabling or assisting the Minister of Finance or the Authority to discharge their functions under any statutory provisions.

[section 58 repealed and replaced by 2007:25 s.17 effective 15 November 2008]

Procedure

Jurisdiction

59 Where a defendant is charged with a drug trafficking or relevant offence which may be tried summarily or on indictment—

- (a) the power of the Director of Public Prosecutions to issue a certificate under section 450 of the Criminal Code Act 1907 requiring an offence to be tried on indictment may be exercised where the Director of Public Prosecutions intends to make an application for a confiscation order if the defendant is convicted; and
- (b) the power of a court of summary jurisdiction to commit the defendant to the Supreme Court for sentencing under section 25(1) of the Summary Jurisdiction Act 1930 may be exercised where the court of summary jurisdiction is of the opinion that the defendant is one against whom the Supreme Court may consider making a confiscation order.

[section 59 amended by 2007:25 s.20 effective 15 November 2008]

Compensation

60 (1) If an investigation is begun against a person for a drug trafficking or relevant offence or offences and any of the following circumstances occur—

- (a) no proceedings are instituted against that person;

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- (b) proceedings are instituted against that person but do not result in his conviction for any drug trafficking or relevant offence; or
- (c) proceedings are instituted against that person and he is convicted of one or more drug trafficking or relevant offences, but
 - (i) the conviction or convictions concerned are quashed; or
 - (ii) he is granted a pardon in respect of the conviction or convictions concerned,

the Supreme Court may, on application by a person who held property which was realisable property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order.

(2) The court shall not order compensation to be paid unless it is satisfied—

- (a) that there has been some serious default on the part of any person concerned in the investigation or prosecution of the offence or offences concerned; and
- (b) that the applicant has suffered loss in consequence of anything done in relation to the property by, or in pursuance of a restraint order or a charging order.

(3) The court shall not order compensation to be paid in any case where it appears to the court that the investigation would have been continued, or the proceedings would have been instituted or continued, as the case may be, if the serious default had not occurred.

(4) Without prejudice to subsection (1), where—

- (a) a disclosure is made by any person in accordance with section 44(3) or 44(5) in relation to any property;
- (b) in consequence of the disclosure and for the purposes of an investigation or prosecution in respect of a drug trafficking offence or offences any act is done or omitted to be done in relation to that property; and
- (c) no proceedings are instituted against any person in respect of that offence or offences or no restraint order or charging order is made in relation to that property,

the court may, on application by a person who held the property, order compensation to be paid to the applicant if, having regard to all the circumstances, it considers it appropriate to make such an order.

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(5) The court shall not order compensation to be paid under subsection (4) unless it is satisfied—

(a) that there has been some serious default on the part of any person concerned in the investigation or prosecution of the offence or offences concerned and that, but for that default, the act or omission referred to in subsection (4)(b) would not have occurred; and

(b) the applicant has, in consequence of the act or omission referred to in subsection (4)(b), suffered loss in relation to the property.

(6) The amount of compensation to be paid under this section shall be such as the court thinks just in all the circumstances of the case.

(7) Compensation ordered to be paid under this section and sections 23 and 24 shall be paid out of the Consolidated Fund or the Confiscated Assets Fund.

[section 60 amended by 2000:35 s.6(3) effective 1 June 2001]

Costs

61 (1) Where—

(a) a person brings, or appears at, court proceedings under this Act and endeavours—

(i) to prevent a confiscation order or a restraint order or a charging order from being made against property of his; or

(ii) to have property of his excluded from such an order; and

(b) that person is successful in that endeavour; and

(c) the court is satisfied that he was not in any way involved in criminal conduct,

then the court may by order declare that he is entitled to be paid all reasonable costs incurred by him in connection with those proceedings, or such part of those costs as the court determines.

(2) The costs referred to in subsection (1) are not limited to costs of a kind that are normally recoverable by a successful party in civil proceedings.

(3) Costs payable by virtue of a declaration made by the court under subsection (1) shall be paid out of the Consolidated Fund or the Confiscated Assets Fund.

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[section 61 amended by 2000:35 s.6(4) effective 1 June 2001]

Civil standard of proof

62 Any question of fact to be decided by a court in proceedings under this Act, except any question of fact that is for the prosecution to prove in any proceedings for an offence under this Act, shall be decided on the balance of probabilities.

Appeals

63 Any decision of a court in proceedings under this Act, except proceedings in relation to any offence committed under this Act, is a judgment of a court in a civil cause or matter within section 12(1) and (2) of the Court of Appeal Act 1964 or, as the case may be, section 2 of the Civil Appeals Act 1971.

Supplemental

Index of defined expressions

64 In this Act the expressions listed below are defined by, or otherwise fall to be construed in accordance with, the provisions of this Act listed below—

amount that might be realised	section 4(4)
amount to be recovered	section 15
benefited from—	
drug trafficking	section 9(3)
relevant offence	section 10(3)
chargeable asset	section 29(5)
charging order	section 29
conclusion of application	section 8(1)
conclusion of proceedings	section 8(1)
confiscation order	section 7
corresponding law	section 55
criminal conduct	section 3
customer information orders	section 41A
defendant	section 7
the court	section 7
drug trafficking	section 3

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drug trafficking arrangement	section 3
drug trafficking offence	section 3
external confiscation order	section 53
freezing of funds	section 52A
gift caught by this Act	section 6
held (in relation to property)	section 4(2)
institution of proceedings	section 8(1)
interest (in relation to property)	section 4(1)
items subject to legal privilege	section 7
material	section 7
money laundering	section 7
monitoring order	section 41
police officer	section 57
premises	section 7
prescribed	section 7
proceeds of drug trafficking	section 12(1)(a)
production order	section 37
property	section 4(1), (2)
prosecutor's statement	section 13(4)
realisable property	section 4(3)
relevant offence	section 3 and Schedule
restraint order	section 28
subject to appeal	section 8(2)
transferred (in relation to property)	section 4(2)
value of gift	section 5(2)
value of proceeds of drug trafficking	section 12(1)(b)
value of property	section 5(1)

[section 64 amended by 2007:25 s.18 effective 15 November 2008]

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Regulations

65 (1) The Minister may make regulations prescribing anything which may be prescribed under this Act and generally for carrying out the purposes and provisions of this Act.

(2) Regulations made under this section shall be subject to the negative resolution procedure.

[section 65 subsection (1) repealed and substituted by 2007:25 s.19 effective 15 November 2008]

Crown application

66 This Act binds the Crown, but not so as to make the Crown capable of any criminal offence.

Repeals

67 The following enactments (which are superseded by this Act) are repealed—

The Drug Trafficking Suppression Act 1988	The whole Act
The Trust Companies Act 1991	Section 17(2)(a) and (3)
The Criminal Justice (International Co-operation) (Bermuda) Act 1994	Sections 14 and 15 Section 21(2) Sections 22 to 26 Section 28(2) In Schedule 4, the entry relating to the Drug Trafficking Suppression Act 1988.

Transitional provision

68 The repeal by this Act of the enactments mentioned in section 67 shall not affect their continuing operation in relation to orders made thereunder.

Consequential amendments

69 In the Criminal Justice (International Co-operation) (Bermuda) Act 1994—

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- (a) in section 9(6), for the words "or would be a drug offence as defined by section 6 of the Drug Trafficking Suppression Act 1988" there shall be substituted "or would be a drug trafficking offence as defined by section 3 of the Proceeds of Crime Act 1997";
- (b) in section 13(6), for the words "the Drug Trafficking Suppression Act 1988" there shall be substituted "the Proceeds of Crime Act 1997"; and
- (c) in section 16, for the words "drug offence" there shall be substituted "drug trafficking offence within the meaning of the Proceeds of Crime Act 1997".

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SCHEDULE

[Schedule repealed by 2000:35 s.2(2) effective 1 June 2001]

[Amended by:

1999 : 39 (Repealed)

BR 81/1999

2000 : 35

2004 : 31

2007 : 25

2008 : 31

2009 : 18

2009 : 50]