

VIRGIN ISLANDS

PROCEEDS OF CRIMINAL CONDUCT ACT, 1997

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No. of 1997 Proceeds of Criminal Virgin Islands
Conduct Act, 1997

I Assent

Governor
, 1997

VIRGIN ISLANDS

NO. OF 1997

An Act to make provision for the recovery of the proceeds of certain criminal conduct and to provide for other matters connected therewith.

[Gazetted , 1997]

ENACTED by the Legislature of the Virgin

Islands as follows:

Preliminary

Short title and 1. This Act may be cited as the commencement.
Proceeds of Criminal Conduct Act, 1997 and
shall come into force on such date as the Governor
in Council may, by Notice published in the Gazette, appoint.

Interpretation. 2. (1) In this Act, unless the context
otherwise requires,

"charging order" means an order made under
section 18 imposing on such realisable
property as may be specified in the order a charge for
securing the payment of money to the revenue of the
Territory;

"confiscation order" means an order made by a
court under section 6;

"criminal conduct" means conduct which
constitutes an offence to which this Act applies or would
constitute such an offence if it had occurred in the
Territory;

"defendant" means a person against whom
proceedings have been instituted for an
offence to which this Act applies, whether or not he has
been convicted;

"drug trafficking offence" has the same
meaning assigned to it under section 2
of the Drug Trafficking Offences Act,

Act No. 5 of 1992
1992;

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

Cap. 104 "police officer" includes a person who
qualifies as a customs officer or officer within the meaning
of the
Customs Ordinance;

"proceeds of criminal conduct", in relation
to any person who has benefitted from
criminal conduct, means that benefit;

"property" includes money and all other
property, real or personal, including things in
action and other intangible or incorporeal property;

Court; "Registrar" means the Registrar of the High

High Court under section 17.

(2) The expressions listed in the left-hand column below fall to be construed in accordance with the provisions of this Act listed in the right-hand column in relation to those expressions:

Expressions	Relevant provision
Benefitted from an offence	Section 6(6)
Dealing with property	Section 17(11)
Gift caught by this Act	Section 4(1)
Making a gift	Section 4(3)
Value of gift	Section 3(8)
Value of property	Section 3(4).

(3) Nothing in this Act confers any power on any court in connection with offences committed before the coming into force of this Act or proceedings against a person for an offence instituted before the coming into force of this Act.

(4) References in this Act to property obtained, or to a pecuniary advantage derived, in connection with the commission of an offence include a reference to property obtained, or to a pecuniary advantage derived, both in that connection and in some other connection.

(5) For the purposes of this Act,

(a) property is held by a person

if he holds an 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 by a person beneficially in property include a reference to an interest which would be held by him beneficially if the property were not so vested;
- (d) references to an offence to which this Act applies are references to all indictable offences, other than drug trafficking offences;
- (e) property is transferred by one person to another if the first person transfers or grants to the other an interest in the property;
- (f) proceedings for an offence are instituted
 - (i) when a summons or warrant is issued in respect of the offence,
 - (ii) when a person is charged with the offence after being taken into custody without a warrant,
 - (iii) when an indictment is preferred,
 and where the application of this paragraph would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times;
- (g) proceedings for an offence are concluded
 - (i) when the defendant is acquitted on all counts or, as

the case may be, every charge against him is dismissed;

(ii) if he is convicted on one

or more counts but the court decides not to make a confiscation order against him, when the court makes that decision;

(iii) if he is sentenced

without the court having considered whether or not to proceed under section 6 in his case, when he is sentenced; or

(iv) if a confiscation order

is made against him in those proceedings, when the order is satisfied;

(h) an application under section 12, 13, or 14 is concluded,

(i) if the court decides not

to make or, as the case may be, not to vary an order against the defendant on that application, when it makes that decision;

(ii) if an order against the

defendant is made or varied on that application, when the order is satisfied; or

(iii) if the application is

withdrawn, when the prosecutor notifies the withdrawal of the application to the court to which it was made;

(i) a confiscation order is satisfied when no amount is due under it; and

(j) 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.

(6) For the purpose of section 23, a confiscation order shall be treated as satisfied when the

defendant in respect of whom it was made has served a term of imprisonment in default of payment of the amount due under the order.

Realisable 3. (1) Subject to subsection (2), property and
"realisable property", for the purposes of its value. this Act, means

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

(2) Property is not realisable property if an order under section 29 of the Drugs Cap. 178 (Prevention of Misuse) Act is in force in respect of the property.

(3) For the purposes of this Act, the amount that may be realised at the time a confiscation order is made is

- (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.

(4) For the purposes of subsection (3) an obligation has priority at any time if it is an obligation of the defendant to pay an amount due in respect of a fine, or other order of a court, imposed or made on conviction of an offence, where the fine was imposed or order made before the confiscation order.

(5) Subject to the provisions of this section, for the purposes of this Act the value of property (other than cash), in relation to any person holding the property is,

- (a) where any other person holds an interest in the property,
 - (i) the market value of the first-mentioned person's beneficial interest in the property, less
 - (ii) the amount required to

discharge any incumbrance
(other than a charging order) on
that interest; and

(b) in any other case, its market
value.

(6) References in this Act to the value
at any time (referred to in subsection (7) as "the material
time") of any property obtained by a person as a result of or in
connection with the commission of an offence are references

(a) to the value of the property
to him when
he obtained it adjusted to take account of
subsequent changes in the value of money,
or

(b) to, where subsection (7)
applies, the
value mentioned in that subsection,

whichever is the greater.

holds (7) If at the material time the person

(a) the property (not being cash)
which he obtained, or

(b) property which, in whole or in
part,
directly or indirectly represents in his hands
the property which he obtained,

the value referred to in subsection (6) (b)

is 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 represents the
property which he obtained, but disregarding any charging order.

(8) Subject to section 4(3), references
in this Act to the value at any time (referred to in
subsection (9) as "the material time") of a gift caught by this Act
are references

(a) to 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) to, where subsection (9)
applies, the
value mentioned in that subsection,

whichever is the greater.

(9) Subject to section 4(3), if at the material time the person holds

(a) the property (not being cash) which he received, 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 (8) is

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 represents the property which he received, but disregarding any charging order.

Gifts caught before the coming into force of this Act, 4. (1) A gift, including a gift made by this Act. caught by this Act if

(a) it was made by the defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings relate; and

(b) the court considers it appropriate in all the circumstances to take the gift into account.

(2) The reference in subsection (1) to an offence to which the proceedings relate include, where the proceedings have resulted in the conviction of the defendant, a reference to an offence which the court takes into consideration when determining his sentence.

(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 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 the circumstances mentioned in paragraph (a), the provisions of subsections (1) and (2) and section 3 shall apply as if the defendant has 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.

Application. 5. This Act applies to property wherever situated.

Making of Confiscation Orders

Confiscation 6. (1) Where an offender is convicted of an offence in any proceedings before a court, the court shall,

- (a) if the prosecutor has given written notice to the court that he considers that it would be appropriate for the court to proceed under this section, or
- (b) if the court considers, even in the absence of the notice referred to in paragraph (a), that it would be appropriate for the court to proceed under this section,

act in the manner provided by this section before sentencing or otherwise dealing with the person in respect of that offence or any other relevant criminal conduct.

(2) The court shall first determine whether the offender has benefitted from any relevant criminal conduct.

(3) Subject to subsection (4), if the court determines that the offender has benefitted from any relevant criminal conduct, it shall

- (a) determine, in accordance with subsection (8), the amount to be recovered in his case by virtue of this section; and
- (b) make an order under this section ordering the offender to pay the amount determined under paragraph (a).

(4) If, in a case falling within subsection (3), the court is satisfied that a victim of any relevant criminal conduct has instituted, or intends to institute, civil proceedings against the defendant in respect of loss, injury or damage sustained in connection with that conduct,

- (a) the court may make an order

under this section;

(b) subsection (8) shall not apply for determining the amount to be recovered in that case by virtue of this section; and

(c) where the court makes an order in exercise of the power conferred by paragraph (a), the sum required to be paid under the order shall be of such amount, not exceeding the amount which (but for paragraph (b)) would apply by virtue of subsection (8), as the court thinks fit.

(5) Subject to section 9(6), the reference in this Act to "relevant criminal conduct", in relation to a person convicted of an offence in any proceedings before a court, means that offence taken together with any other offences which are offences

(a) of which he is convicted in the same proceedings; or

(b) which the court will be taking into consideration in determining his sentence for the offence in question.

(6) For the purposes of this Act, 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 the property so obtained.

(7) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this Act as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

(8) Subject to subsection (4), the sum which an offender is required to pay by virtue of an order made by a court under this section shall be equal to

(a) the benefit in respect of which it is made, or

(b) the amount appearing to the court to be the amount that might be realised at the time the order is made,

whichever is the less.

(9) The standard of proof required to determine any question arising under this Act as to

- (a) whether a person has benefitted from any offence, or
- (b) the amount to be recovered in his case,

shall be that applicable in civil

proceedings.
Powers of court

7. (1) Where a court makes a confiscation in making a order under section 6 against a defendant in confiscation any proceedings, it shall, in respect of any order. offence of which the defendant is convicted in those proceedings, take account of the order before

(a) imposing any fine on him,

(b) making an order involving any

payment by him, other than an order under section 27 of

Act No.1 of 1997

the Criminal Code, 1997,

or

(c) making any order under section

29 of

Cap. 178

the Drugs (Prevention of Misuse) Act,

but subject to that shall leave the order out of account in determining the appropriate sentence or other manner of dealing with him.

(2) No enactment restricting the power of a court dealing with an offender in a particular way from dealing with him also in any other way shall by reason only of the making of a confiscation order restrict the court from dealing with an offender in any way it considers appropriate in respect of an offence to which this Act applies.

(3) Where

(a) a court makes both a confiscation order and an order for the payment of compensation under section 27 of the Criminal Code, 1997

Act No.1 of 1997

and

(b) it appears to the court that he will not have sufficient means to satisfy both the orders in full,

it shall direct that as much of the compensation as will not in its opinion be recoverable because of the insufficiency of his means shall be paid out of any sums recovered under the confiscation order.

Postponed

8. (1) Where a court is acting under determinations. section 6 but considers that it requires further information before determining
- (a) whether the defendant has benefitted from any relevant criminal conduct, or
- (b) the amount to be recovered in the defendant's case,
- it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify.
- (2) More than one postponement may be made under subsection (1) in relation to the same case.
- (3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) which by itself or, where there have been one or more previous postponements under subsection (1) or (4), when taken together with the earlier specified period or periods, exceeds six months beginning with the date of conviction.
- (4) Where the defendant appeals against his conviction, the court may, on that account,
- (a) postpone making any of the determinations mentioned in subsection (1) for such period as it may specify; or
- (b) where it has already exercised its powers under this section to postpone, extend the specified period.
- (5) A postponement or extension under subsection (1) or (4) may be made
- (a) on application by the defendant or the prosecutor; or
- (b) by the court of its own motion.
- (6) Unless the court is satisfied that there are exceptional circumstances, any postponement or extension under subsection (4) shall not exceed the period ending three months after the date on which the appeal is determined or otherwise disposed of.

(7) Where the court exercises its power under subsection (1) or (4), it may nevertheless proceed to sentence, or otherwise deal with, the defendant in respect of the offence or any of the offences concerned.

subsection (7), (8) Where the court proceeds under

(a) section 6(3) shall have effect; and

(b) section 7(1) shall have effect as if after the word "determining" there were inserted the words "relation to any offence in respect of which he has not been sentenced or otherwise dealt with".

(9) In sentencing, or otherwise dealing with, the defendant in respect of the offence, or any of the offences, concerned at any time during the specified period, the court shall not

(a) impose any fine on him; or

(b) make any such order as is mentioned in section 7(1)(b) or (c).

(10) Where the court has sentenced the defendant under subsection (7) during the specified period, it may, after the end of that period, vary the sentence by imposing a fine or making any such order as is mentioned in section 7(1)(b) or (c).

(11) In this section, a reference to

(a) an appeal includes a reference to an application under section 162 of the Magistrate's Code of

Cap. 44

Procedure Act;

(b) "the date of conviction" means the date on which the defendant was convicted of the offence concerned or, if convicted for two or more offences, the date of the latest of those offences.

Confiscation 9. (1) In this section, "qualifying relating to a offence", in relation to proceedings before a course of court, means any offence in relation to which criminal the following conditions are satisfied: conduct.

(a) it is an offence to which this Act applies;

(b) it is an offence which was committed after the coming into force of this Act; and

(c) that court is satisfied that it is an offence from which the defendant has

benefitted.

(2) This section applies in a case where an offender is convicted in any proceedings before a court of a qualifying offence if,

- (a) the prosecutor gives written notice for the purposes of section 6(1)(a);
- (b) the notice given by the prosecutor under section 6(1)(a) contains a declaration that it is the prosecutor's opinion that the case is one in which it is appropriate for the provisions of this section to be applied; and
- (c) the offender
 - (i) is convicted in those proceedings of at least two qualifying offences (including the offence in question); or
 - (ii) has been convicted of a qualifying offence on at least one previous occasion during the relevant period.

(3) When proceeding under section 6 in pursuance of the notice referred to in subsection (2) (a), the court may, subject to subsection (5), determine, if it thinks fit so to do, that the assumptions specified in subsection (4) are to be made for the purpose

- (a) of determining whether the defendant has benefitted from a relevant criminal conduct; and
- (b) if he has benefitted, of assessing the value of the defendant's benefit from such conduct.

subsection (3) are (4) The assumptions referred to in

- (a) that any property appearing to the court
 - (i) to be held by the defendant at the date of conviction or at any time in the period between that date and the determination in question, or

(ii) to have been transferred

to him at any time since the beginning of the relevant period,

was received by him, at the earliest time when he appears to the court to have held it, as a result of or in connection with the commission of offences to which this Act applies;

(b) that any expenditure of his since the beginning of the relevant period was met out of payments received by him as a result of or in connection with the commission of offences to which this Act applies;

(c) that, for the purpose of valuing any benefit which he had or which he is assumed to have had at any time, he received the benefit free of any other interests in it.

(5) Where the court has determined that the assumptions specified in subsection (4) are to be made in any case, it shall not in that case make any such assumption in relation to any particular property or expenditure if,

(a) that assumption, so far as it relates to that property or expenditure, is shown to be incorrect in the defendant's case;

(b) that assumption, so far as it so relates, is shown to be correct in relation to an offence the defendant's benefit from which has been the subject of a previous confiscation order; or

(c) the court is satisfied that there would (for any other reason) be a serious risk of injustice in the defendant's case if the assumption were to be made in relation to that property or expenditure.

(6) Where the assumptions specified in subsection (4) are made in any case, the offences from which, in accordance with those assumptions the defendant is assumed to have benefitted shall be treated as if they were comprised, for the purposes of this Act, in the conduct which is to be treated, in that case, as relevant criminal conduct in relation to the defendant.

(7) For the purposes of this section,

(a) "the date of conviction"

means,

- (i) in a case falling within paragraph (b), the date on which the defendant is convicted of the offence in question; or
- (ii) where he is convicted of that offence and one or more other offences in the proceedings in question and those convictions are not all on the same date, the date of the latest of those convictions; and

- (b) "the relevant period" means the period of six years ending when the proceedings in question were instituted against the defendant.

Statements,
where a person has been convicted of an
confiscation
orders.

10. (1) Subsection (2) applies in a case etc. relevant to making offence if,

- (a) the prosecutor has given written notice to the court for the purposes of section 6(1)(a); or
- (b) the court is proceeding in pursuance of section 6(1)(b) and requires a statement under this section from the prosecutor.

(2) Where this subsection applies, the prosecutor shall, within such period as the court may direct, tender to the court a statement as to any matters relevant

- (a) to determining whether the defendant has benefitted from any relevant criminal conduct, or
- (b) to an assessment of the value of the defendant's benefit from that conduct,

and, where such a statement is tendered in a case in which a declaration has been made for the purposes of section 9(2)(b), that statement shall also set out all such information available to the prosecutor as may be relevant for the purposes of section 9(4) and (5)(b) and (c).

(3) Where a statement is tendered to the court under this section,

- (a) the prosecutor may at any time

tender
to the court a further statement as to the
matters mentioned in subsection (2); and

- (b) the court may at any time
require the
prosecutor to tender any further statement
within such period as it may direct.

(4) Where

- (a) a statement has been tendered
to a
court by the prosecutor under this section,
and

- (b) the defendant accepts to any
extent
any allegation in the statement,

the court may, for the purpose of determining
whether the defendant has benefitted from any relevant
criminal conduct or of assessing the

value of the defendant's benefit from such conduct, treat his
acceptance as conclusive of the matters to which it relates.

(5) Where

- (a) a statement is tendered by the
prosecutor under this section, and

- (b) the court is satisfied that a
copy of that
statement has been served on the
defendant,

the court may require the defendant to
indicate to what extent he accepts each allegation in the
statement and, so far as he does not accept any such allegation,
to indicate any matters he proposes to rely on.

(6) If the defendant fails in any
respect to comply with a requirement under subsection
(5), he may be treated, for the purposes of this section, as
accepting every allegation in the statement apart from

- (a) any allegation in respect of
which he has
complied with the requirement; and

- (b) any allegation that he has
benefitted from
an offence or that any property was
obtained by him as a result of or in
connection with the commission of an

offence.

(7) Where

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

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

(8) An allegation may be accepted or a matter indicated for the purposes of this section

- (a) orally before the court; or
- (b) in writing in accordance with rules of court.

(9) 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 an acceptance under this section or otherwise), the court may issue a certificate giving the court's opinion as to the matters concerned and shall do so if 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 benefit from any relevant criminal conduct.

(10) Where the court has given a direction under this section, it may at any time vary the direction by giving a further direction.

Provision of 11. (1) This section applies in a case information by where a person has been convicted of an offence if,

- (a) the prosecutor has given a written notice to the court for the purposes of section 6(1)(a); or
- (b) the court is proceeding in pursuance of section 6(1)(b) or is considering whether so to proceed.

(2) For the purpose of obtaining

information to assist it in carrying out its functions under this Act, the court may at any time order the defendant to give it such information as may be specified in the order.

(3) An order made under subsection (2) may require all, or any specified part, of the required information to be given to the court in such manner, and within such period, as may be specified in the order.

(4) If the defendant fails, without reasonable excuse acceptable to the court, to comply with an order made under this section,

the court may draw such inference from that failure as it considers appropriate.

- (5) Where the prosecutor accepts to any extent an allegation made by the defendant
- (a) in giving to the court information required by an order made under this section, or
 - (b) in any other statement tendered to the court for the purposes of this Act,

the court may treat that acceptance as conclusive of the matters to which it relates.

- (6) For the purposes of this section, an allegation may be accepted
- (a) orally before the court; or
 - (b) in writing in accordance with rules of court.

Review and Revision of Certain Questions and Determinations

Review of
where
proceeds of
crime not

12. (1) This section applies in a case cases where
- (a) a person has been convicted of assessed.
an offence in any proceedings
 - (b) the prosecutor did not give written notice
for the purposes of section 6(1)(a); and
 - (c) a determination was made for the
purposes of section 6(1)(b) not to proceed
under that section, or no determination was
made for those purposes.
- (2) If the prosecutor has evidence

which, at the date of conviction or, if later, when any determination not to proceed under section 6 was made, was not available to him and therefore was not considered by the court, but which he believes would have led the court to determine (if the written notice under section 6(1)(a) had been given and the evidence had been considered by the court) that the defendant had benefitted from a relevant criminal conduct, the prosecutor may apply to the court for it to consider the evidence.

(3) If, having considered the evidence, the court is satisfied that it is appropriate to do so, it shall proceed under section 6 as if it were doing so before sentencing or otherwise dealing with the defendant in respect of a relevant criminal conduct, and section 8 shall apply accordingly.

(4) In considering whether it is appropriate to proceed under section 6 in accordance with subsection (3), the court shall have regard to all the circumstances of the case.

(5) Where, having decided in pursuance of subsection (3) to proceed under section 6, the court determines that the defendant did benefit from a relevant criminal conduct,

(a) section 6(3) shall not apply and subsection (8) thereof shall not apply for determining the amount to be recovered in that case;

(b) the court may make a confiscation order; and

(c) if the court makes an order in

exercise of the power conferred under paragraph (b), the sum required to be paid by the order shall be such amount, not exceeding the amount which (but for paragraph (a)) would apply by virtue of section 6(8), as the court thinks fit.

(6) In considering the circumstances of any case under subsection (5)(b) and (c), the court shall have regard, in particular, to

(a) any fine imposed on the defendant in respect of any relevant criminal conduct; and

(b) any order made in connection with any relevant criminal conduct under section 27 of the Criminal Code, 1997.

(7) In making any determination under or for the purposes of this section, the court may take into account, to the extent that they represent in what respects the defendant has benefitted from any relevant criminal conduct, any payments or other rewards which were not received by him until after the time when he was sentenced or otherwise dealt with in the case in question.

(8) Where an application under this section contains such declaration as is mentioned in section 9(2)(b), the section shall, subject to subsection (9) of this section, apply in the case of any determination on the application as if it were a determination in a case in which the requirements of section 9(2)(a) and (b) had been satisfied.

(9) For the purposes of any determination to which section 9 applies by virtue of subsection (8), none of the assumptions specified in subsection (4) of that section shall be made in relation to any property, unless it is property held by or transferred to the defendant before the time when he was sentenced or otherwise dealt with in the case in question.

(10) Sections 10 and 11 shall apply where the prosecutor makes an application under this section as they apply in a case where the prosecutor has given written notice to the court for the purposes of section 6(1)(a), but as if the reference in section 11(1)(a) to a declaration made for the purposes of section 9(2)(b) were a reference to a declaration for the purposes of subsection 8.

(11) No application shall be entertained by the court under this section if it is made after the end of the period of six years beginning with the date of conviction.

(12) For the purposes of this section, "the date of conviction" means,

- (a) in a case not falling within paragraph (b), the date on which the defendant was convicted of the offence in question; or
- (b) where the defendant was convicted of the offence in question and one or more other offences in the same proceedings and those convictions were not all on the same date, the date of the latest of those convictions.

Revision of 13. (1) This section applies where in any assessment of case there has been a determination under proceeds of section 6(2) (referred to in this section and crime. section 14(6) as "the original determination") that the defendant in that case had not benefitted from any relevant criminal conduct.

(2) If the prosecutor has evidence which was not considered by the court which made the

original determination, but which the prosecutor believes would have led the court, if the evidence had been considered, to determine that the defendant had benefitted from a relevant criminal conduct, the prosecutor may apply to the court for it to consider that evidence.

(3) If, having considered the evidence, the court is satisfied that if that evidence had been available to it would have determined that the defendant had benefitted from a relevant criminal conduct, that court

(a) shall proceed, as if it were proceeding under section 6, to make a fresh determination of whether the defendant has benefitted from any relevant criminal conduct and then make such determination as is mentioned in section 6(3)(a); and

(b) may, after making the determinations referred to in paragraph (a), make an order, subject to subsection (5), requiring the payment of such sums as it thinks fit.

(4) An order made under subsection (3)(b) shall be deemed for all purposes to be a confiscation order.

(5) The court shall not, in exercise of the power conferred by subsection (3)(b), make an order for the payment of a sum which is more than the amount determined in pursuance of paragraph (a) of that subsection.

(6) In making a determination under or for the purposes of subsection (3), the court may take into account, to the extent that they represent in what respects the defendant has benefitted from any relevant criminal conduct, any payments or other rewards which were not received by him until after the making of the original determination.

(7) Where, in a case in which section 9 does not otherwise apply, an application under this section contains such declaration as is mentioned in subsection (2) (b) of that section, that section shall, subject to subsection (8) of this section, apply in the case of any determination on the application as if it were a determination in a case in which the requirements of section 8(2)(a) and (b) had been satisfied.

(8) Where, for the purposes of a determination under subsection (3), section 9 applies, none of the assumptions specified in subsection (4) of that section shall be made in relation to any property, unless it is property held by or transferred to the defendant before the time when he was sentenced or otherwise dealt with in the case in question.

(9) No application shall be entertained by the court under this section if it is made after the end

of the period of six years beginning with the date of conviction.

(10) Section 8 shall apply where the court is acting under this section as it applies where the court is acting under section 6.

(11) Sections 10 and 11 shall apply where the prosecutor makes an application under this section as they apply in a case where the prosecutor has given written notice to the court for the purposes of section 6(1)(a), but as if

(a) the reference in section 10(2) to a declaration made for the purposes of section 9(2)(b) included a reference to a declaration for the purposes of subsection (7); and

(b) any reference in section 10(9) to the time the confiscation order is made were a reference to the time the order is made on that application.

(12) In this section, the term "the date of conviction" has the same meaning as in section 12(12).

Revision of

14. (1) This section applies where, in the assessment of case of a person convicted of an offence, amount to be there has been a determination under this Act recovered. (referred to in this section as "the current determination") of any sum required to be paid in his case under any confiscation order.

(2) Where the prosecutor is of the opinion that the value of any benefit to the defendant from any relevant criminal conduct was greater than the value at which that benefit was assessed by the court on the current determination, the prosecutor may apply to the court for the evidence on which the prosecutor has formed his opinion to be considered by the court.

(3) If, having considered the evidence, the court is satisfied that the value of the benefit from any relevant criminal conduct is greater than the value so assessed by the court (whether because its real value was higher at the time of the current determination than was thought or because the value of the benefit in question has subsequently increased), the court

(a) shall, subject to subsection (4), make a fresh determination, as if it were proceeding

under section 6, of

- (i) the amount by which the
 - defendant has benefitted from the relevant criminal conduct; and
- (ii) the amount appearing to
 - be the amount that might be realised at the time of the fresh determination; and

- (b) may, subject to subsection
 - (5), increase, to such extent as it thinks just in all the circumstances of the case, the amount to be recovered by virtue of section 6 and to vary accordingly any confiscation order made by reference to the current determination.

(4) Where the court is under a duty to make a fresh determination for the purposes of subsection (3)(a) in any case to which section 9 applies, it shall not, in determining any amounts for those purposes, make any of the assumptions specified in section 9(4) in relation to any property, unless it is property held by or transferred to the defendant before the time when he was sentenced or otherwise dealt with in the case in question.

(5) The court shall not, in exercise of the power conferred by subsection (3)(b), vary any order so as to require the payment of any sum which is more than the lesser of the two amounts determined in pursuance of paragraph (a) of that subsection.

(6) In making any determination under or for the purposes of subsection (3), the court may take into account, to the extent that they represent in what respect the defendant has benefitted from any relevant criminal conduct, any payments or other rewards which were not received by him until after the making of the original determination.

(7) No application shall be entertained by a court under this section if it is made after the end of the period of six years beginning with the date of conviction.

(8) Section 8 shall apply where the court is acting under this section as it applies where the court is acting under section 6.

(9) Sections 10 and 11 shall apply where the prosecutor makes an application under this section as they apply in a case where the prosecutor has given written notice to the court for the purposes of section 6(1)(a), but as if any reference in section 10(9) to the time the

confiscation order is made were a reference to the time of the determination to be made on that application.

(10) In this section, the term "the date of conviction" has the same meaning as in section 12(12).

Enforcement, etc. of Confiscation Orders

Interest on 15. (1) If any sum required to be paid by a sums unpaid person under a confiscation order, whether under a forthwith or within a specified period, is confiscation not paid, that person is liable to pay order. interest on the sum for the period for which it remains unpaid.

(2) The amount of the interest referred to in subsection (1) shall be treated as part of the amount to be recovered from the person liable to pay interest under the confiscation order.

(3) The rate of interest under this section shall be that applicable to a civil judgment debt under section 7 of the Cap. 35 Judgments Act.

Cases in which 16. (1) The powers conferred on the High restraint and Court by sections 17(1) and 18(1) are charging orders exercisable where may be made.

(a) proceedings have been instituted against any person for an offence to which this Act applies;

(b) the proceedings have not been concluded or, if they have, an application that has not been concluded has been made under section 12, 13 or 14 in respect of the defendant in those proceedings; and

(c) the court is satisfied that there is reasonable cause to believe,

(i) in a case where there is an application under section 14, that the court will be satisfied as mentioned in subsection (3) of that section; or

(ii) in any other case, that the proceedings may result or have resulted in, or that the application is made by reference to, a conviction of the

defendant for an offence which he may be, or has been, shown to have benefitted.

(2) The High Court shall not exercise the powers conferred by virtue of subsection(1) if it is satisfied that

- (a) there has been undue delay in continuing the proceedings or application in question; or
- (b) the person who appears to the court to be the person who has or will have the conduct of the prosecution or, as the case may be, who made that application does not intend to proceed with it.

(3) The powers conferred on the High Court by sections 17(1) and 18(1) are also exercisable where the Court is satisfied that

- (a) a person is to be charged with an offence to which this Act applies or an application of a kind mentioned in subsection (1)(b) is to be made; and
- (b) the making or variation of a confiscation order may result from proceedings for that offence or, as the case may be, from the application.

(4) For the purposes of sections 17 and 18, at any time when these powers are exercisable before proceedings have been instituted, references in this Act

- (a) to the defendant shall be construed as references to the person referred to in subsection (3)(a); and
 - (b) to realisable property shall be construed as if, immediately before that time, proceedings had been instituted against the person referred to in subsection (3)(a) for an offence to which this Act applies.
- (5) Where the High Court has made an order under section 17(1) or 18(1) by virtue of subsection (3), it shall discharge the order if
- (a) proceedings in respect of the offence

are not instituted or, as the case may be, no application is made, within such time as the court considers reasonable; or

- (b) the court is satisfied that the case has become a case in which, in pursuance of sub-section (2), it would be unable to exercise the powers conferred by virtue of subsection (1).

Restraint

17. (1) The High Court may make a restraint order prohibiting a person from dealing with any realisable property, subject to such conditions and exceptions as may be specified in the order.

(2) Without prejudice to the generality of subsection (1), the court may, in making a restraint order, include such provision as it thinks fit for living and legal expenses.

(3) 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.

(4) A restraint order

- (a) may be made only on an application by a prosecutor;
- (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

- (a) may be discharged or varied in relation to any property; and
- (b) shall be discharged on the conclusion of the proceedings or application in question.

(6) An application for the discharge or

variation of a restraint order may be made by any person affected by it.

(7) Where the High Court has made a restraint order, it may at any time appoint a receiver

(a) to take possession of any realisable
property, and

(b) in accordance with the court's

directions, to manage or otherwise deal with any property in respect of which he is appointed,

subject to such conditions and exceptions as

may be specified by the Court, and may require any person having possession of property in respect of which a receiver is appointed under this subsection to give possession of the property to the receiver.

(8) Where the High Court has made a restraint order, a police officer may, for the purpose of preventing any realisable property being removed from the Territory, seize the property.

(9) Property seized under subsection (8) shall be dealt with in accordance with the Court's directions.

(10) This section shall not have effect in relation to a property that is subject to a charge under section 18.

(11) For the purposes of this section, dealing with any property held by a person includes,

(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 the Territory.

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apply in relation to

(12) The Registered Land Ordinance shall

(a) restraint orders, as it applies in relation to orders affecting land made by the court for the purpose of enforcing judgments; and

(b) applications for restraint orders, as it
applies in relation to other pending land actions.

- Charging orders. 18. (1) The High Court may make a charging order on realisable property for securing the payment to the Crown,
- (a) where a confiscation order has not been made, of an amount equal to the value from time to time of the property charged; and
 - (b) in any other case, of an amount not exceeding the amount payable under the confiscation order.
- (2) A charging order
- (a) may be made only on an application by a prosecutor;
 - (b) may be made on an ex parte application to a judge in Chambers;
 - (c) shall provide for notice to be given to persons affected by the order; and
 - (d) may be made subject to such conditions as the court thinks fit, including the time when the charge is to become effective.
- (3) Subject to subsection (5), a charge may be imposed by a charging order only on an interest in realisable property,
- (a) being 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 asset of a kind mentioned in subsection (4); or
 - (ii) under any trust; or
 - (b) held by a person as trustee of a trust if the interest is in such an 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.

subsection (3) are (4) The assets referred to in

(a) land in the Territory; or
(b) securities of any of the following kinds:

(i) any description of security issued by or on behalf of the Government of the Territory;

(ii) the stock of any body

corporate incorporated within the Territory;

(iii) shares in any mutual fund registered under the Act No. 6 of 1996 Mutual Funds Act, 1996.

(5) In any case where a charge is imposed by a charging order on an interest in an asset of a kind mentioned in subsection (4) (b), the Court may provide for the charge to extend to any interest or dividend payable in respect of the asset.

the court (6) In relation to a charging order,

(a) may at any time make an order discharging or varying it; and

(b) shall make an order discharging it on

(i) the conclusion of the

proceedings or application in question, or

(ii) the payment into court of

the amount payment of which is secured by the charge,

whichever occurs first.

(7) An application for the discharge or variation of a charging order may be made by any person affected by it.

apply in relation to charging orders as it applies in relation to orders or writs issued or made for the purpose of enforcing judgments.

(9) Subject to any provision made under section 19 or by rules of court, a charge imposed by a charging order shall have the like effect and 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.

19. (1) Where

(a) a confiscation order is made
in proceedings
instituted for an offence to which this Act
applies or an order is made or varied on an
application under section 12, 13 or 14,

(b) the proceedings in question
have not, or
the application has not, been concluded,
and

(c) the order or variation is not
subject to appeal,

the High Court may, on an application by a
prosecutor, exercise the powers conferred by subsections
(2) to (6).

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

(3) The Court may empower a receiver
appointed under subsection (2), under section 17 or in
pursuance of a charging order,

(a) to enforce any charge imposed
under
section 18 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 subject to a charge under
section 18, to take possession of the
property subject to such conditions or
exceptions as may be specified by the Court.

(4) The Court may

(a) order any person having
possession of realisable property to give
possession of it to any such receiver;

(b) empower any such receiver to

realise
any realisable property in such manner as
the Court may direct; and

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

(5) Subsection (4) does not apply to property which is subject to a charge under section 18.

(6) The Court shall not, in respect of any property exercise the powers conferred by subsections (3)(a) and (4)(b) and (c), unless a reasonable opportunity has been given for persons holding an interest in the property to make representations to the Court.

Application of proceeds of realisation and 20. (1) Subject to subsection (2),
enforcement of any charge imposed under section 18,
(a) the proceeds of the other sums.

(b) the proceeds of the realisation, other than by the enforcement of a charge, of any property under section 17 or 19, and

(c) any other sums, being property held by the defendant,

which are in the hands of a receiver appointed under this Act or in pursuance of a charging order shall, after such payments (if any) as the High 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 sums remain in the hands of the receiver, he shall distribute the sums among those persons who held property which has been realised under this Act, and in such proportions as the High Court may direct after giving a reasonable opportunity for such persons to make representations to the Court.

(3) The receipt of any sum by the Registrar on account of an amount payable under a confiscation order shall reduce the amount so payable, but the Registrar shall apply the money received for the purposes specified

in this section and in the order so specified.

(4) If the money was paid to the Registrar by a receiver appointed under this Act or in pursuance of a charging order, the Registrar shall next pay the receiver's remuneration and expenses.

(5) After making

(a) any payment required by subsection (4), and

(b) in a case to which subsection (5) applies, any payment required by that subsection,

the Registrar shall reimburse any amount paid under section 26(2).

(6) The Registrar shall finally pay any compensation directed to be paid out of any sums recovered under the confiscation order under section 7(3).

(7) Any balance in the hands of the Registrar after he has made all payments required by this section shall be treated as if it were a fine imposed by the court.

(8) Where under subsection (3) a sum falls to be applied in payment both of compensation and of other outgoings,

(a) the person entitled to the compensation is liable to pay to the revenue of the Territory such an amount as bears to the remuneration or expenses the same proportion as the amount payable in accordance with the direction under section 7(3) bears to the total amount payable under the confiscation order;

(b) the Registrar shall deduct from the amount falling to be applied in payment of the compensation an amount equal to the amount of any liability arising by virtue of paragraph (a),

(c) notwithstanding the deduction under paragraph (b), the person entitled to the compensation shall be treated as having received the whole amount which falls to be applied in payment of it; and

(d) the amount deducted shall be treated as if it were a fine imposed by the court.

conferred on the High Court by sections 17 to High Court 20, or on a receiver appointed under this Act or receiver. or in pursuance of a charging order.

(2) Subject to the provisions of this section, the powers referred to in subsection (1) 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.

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

(6) 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.

Variation of 22.
of a confiscation order by
orders.

(1) If, on an application made in confiscation respect

(a) the defendant, or

(b) a receiver appointed under section 17 or 19, or in pursuance of a charging order,

the High 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 or whose estate has been sequestered, 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 has 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 High Court for the amount to be recovered under the order to be reduced.

(4) The High 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 fixed under section 96 of the Magistrate's Cap. 44 Code of Procedure Act and Act No.1 of 1997 section 25 of the Criminal Code, 1997 in respect of the amount to be recovered under the order a shorter term determined in accordance with those sections in respect of the lesser amount.

(5) A Magistrate's Court shall, on an application under subsection (3), 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.

(6) Rules of court may make provision

(a) for the giving of notice of any application under this section; and

(b) for any person appearing to the court to be likely to be affected by any exercise of its powers under this section to be given an opportunity to make representations to the court.

Bankruptcy of 23. (1) Where an order for bankruptcy is made against a person who holds realisable property, defendant, etc.

(a) any property for the time being subject to a restraint order made before the order for bankruptcy, and

- (b) any proceeds of property realised by virtue of section 17(7) or 19(4)(b) or (c) for the time being in the hands of a receiver appointed under section 17 or 19,

Cap. 8 is excluded from the property of the bankrupt for the purposes of the Bankruptcy Act.

(2) Where an order for bankruptcy is made against a person, the powers conferred on the High Court by sections 17 to 20 or on a receiver so appointed shall not be exercised in relation

Cap. 8 (a) to property comprised in the property of the bankrupt for the purposes of the Bankruptcy Act; and

Cap. 8 (b) to property which is to be applied for the benefit of creditors of the bankrupt under the Bankruptcy Act.

(3) Subject to subsection (2), nothing Cap. 8 in the Bankruptcy Act shall be taken as restricting, or enabling the restriction of, the exercise of the powers conferred on the High Court by sections 17 to 20 or on a receiver so appointed.

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

(a) made before the order for bankruptcy was made; or

(b) on property which was subject to a restraint order when the order for bankruptcy was made.

(5) Where, in the case of a debtor,

(a) the trustee in bankruptcy constituted under Part V of the Bankruptcy Act has been ordered to become the receiver or manager of the property or business of the debtor, and

(b) any property of the debtor is subject to a restraint order,

Cap. 8 the powers conferred on the trustee by virtue of the Bankruptcy Act do not apply to property subject to the restraint order.

(6) Where an order for bankruptcy is made against a person who has directly or indirectly made a gift caught by this Act, the provisions of the Bankruptcy Act shall not apply

- (a) in respect of the making of the gift at any time when proceedings for an offence to which this Act applies have been instituted against him and have not been concluded; or
- (b) when property of the person to whom the gift was made is subject to a restraint order or charging order.

Winding up of

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

- (a) to property subject to a restraint order made before the relevant time; and
- (b) to any proceeds of property realised by virtue of section 17(7) or 19(4)(b) or (c) for the time being in the hands of a receiver appointed under section 17 or 19.

(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 High Court by sections 17 to 19 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 so as to

- (a) inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors; or
- (b) prevent the payment out of any

property of expenses (including the remuneration of the liquidator or any provisional liquidator) properly incurred in the winding up in respect of the property.

(3) Subsection (2) does 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.

- "relevant time" means,
- (4) For the purposes of this section,
- (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 an order for the winding up of the company has been made and, before the presentation of the petition for the winding up of the company by the court, the resolution for voluntary winding up had been passed by the company, the time of the passing of the resolution; and
 - (c) in any other case where an order for the winding up of the company has been made, the time of the making of the order.

Supplementary 25. (1) Where a receiver appointed under provisions this Act or in pursuance of a charging order relating to receivers. takes any action

- (a) in relation to property which is not realisable property, being action which he would be entitled to take if it were such property,
- (b) believing, and having 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, if no sum is available to be applied in payment of it under section 20 (5), be paid out of the revenues of the Territory or, in a case where proceedings for an offence to which this Act applies are not instituted, by the person on whose application the receiver was appointed.

Compensation. 26. (1) If proceedings are instituted against a person for an offence to which this Act applies and

- (a) the proceedings do not result in his conviction for the offence, or

- (b) where he is convicted of one or more offences
- (i) the conviction or convictions concerned is or are quashed, or
 - (ii) he is pardoned by the

Governor in Her Majesty's name and on Her Majesty's behalf in respect of the conviction or convictions concerned,

the High 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 High Court shall not order compensation to be paid in any case unless it is satisfied that

- (a) there has been some serious default on the part of a person concerned in the investigation or prosecution of the offence concerned; and
- (b) the applicant has suffered substantial loss in consequence of anything done in relation to the property by or in pursuance of an order under this Act.

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

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

Money Laundering and Other Offences

Code of Practice 27. (1) The Governor in Council may issue a Code of Practice for the purpose of giving practical guidance with respect to any of the Authority. of Reporting requirements of this Act.

(2) The Governor may, by Order published in the *Gazette*,

- (a) appoint three persons, who shall include the Director of Financial Services, to act as the Reporting Authority for the purposes of this Act;

- (b) outline the powers and duties (in addition to but not derogating from those conferred or imposed by this Act) of the Reporting Authority to ensure the proper and effective implementation of the provisions of this Act; and
- (c) issue to the Reporting Authority such directions as he considers fit.

Assisting another 28. (1) Subject to subsection (3), a person to retain the
 commits an offence if he enters into or is benefit of otherwise concerned
 in an arrangement whereby
 criminal
 conduct.

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

knowing or suspecting that other person is a
 person who is or has been engaged in criminal conduct or has
 benefitted from criminal conduct.

(2) Where a person discloses to the Reporting Authority a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to the Reporting Authority 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 imposed by statute or otherwise and shall not give rise to any civil liability; 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; 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.

(3) 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 the other person mentioned in subsection (1) of any property was facilitated or, as the case may be, that by the arrangement any property was used, as mentioned in subsection (1); or

(c) that he intended to disclose to the Reporting Authority such a suspicion, belief or matter as is mentioned in subsection (2) in relation to the arrangement, but there is reasonable excuse for his failure to make disclosure in accordance with subsection (2)(b).

(4) In the case of a person who was in employment at the relevant time, subsections (2) and (3) shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to the Reporting Authority.

(5) Where information is disclosed to the Reporting Authority under subsection (2), the Authority shall not further disclose the information without the consent of the Attorney General who, when considering whether to give his consent, shall take into account

(a) the purpose for which the further disclosure is to be made, and

(b) the interests of third parties,

and the Attorney General may impose such conditions on the further disclosure as he may think fit.

(6) Subsection (5) does not apply to information received by the Reporting Authority which it discloses to any institution or person in the Territory.

(7) Subject to subsections (5) and (6), the Reporting Authority may disclose any information received under this section in relation to a criminal conduct,

- (a) to any law enforcement agency in the Territory, or
- (b) to any law enforcement agency in any other country,

in order

- (i) to report the possible commission of an offence;
- (ii) to initiate a criminal investigation respecting the matter disclosed;
- (iii) to assist with any investigation or criminal proceedings respecting the matter disclosed; or
- (iv) to generally give effect to the purposes of this Act.

(8) A person who commits an offence under this section is liable

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding three thousand dollars, or both; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars, or both.

(9) 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 represents in his hands his proceeds of criminal conduct.

Acquisition, 29. (1) A person commits an offence if, possession or use

knowing that any property is, or in whole or in part directly or indirectly represents, 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),

(a) a person acquires property for

inadequate consideration if the value of the consideration is significantly less than the value of the property; and

(b) a person uses or has possession of property for inadequate 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 to the Reporting Authority a suspicion or belief that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct or discloses to the Reporting Authority 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 imposed by statute or otherwise and shall not give rise to any civil liability; and

(b) if he does any act in relation to that 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 concerned;

(ii) the disclosure is made

after he does the act, but on his initiative and as soon as it is reasonable for him to make it.

(6) Where information is disclosed to the Reporting Authority under section 28 (2), the Authority shall not further disclose the information without the consent of the Attorney General who, when considering whether to give his consent, shall take into account

- (a) the purpose for which the further disclosure is to be made, and
- (b) the interests of third parties,

and the Attorney General may impose such conditions on the further disclosure as he may think fit.

(7) Subsection (6) does not apply to information received by the Reporting Authority respecting a matter which it requires to disclose to any institution or person in the Territory.

(8) Subject to subsections (6) and (7), the Reporting Authority may disclose any information received under this section in relation to a criminal conduct,

- (a) to any law enforcement agency in the Territory,
- (b) to any law enforcement agency in any other country

in order

- (i) to report the possible commission of an offence;
- (ii) to initiate a criminal investigation respecting the matter disclosed;
- (iii) to assist with any investigation respecting the matter disclosed; or
- (iv) to generally give effect to the purposes of this Act.

(9) In proceedings against a person for an offence under this section, it is a defence to prove that he intended to disclose to the Reporting Authority such a suspicion, belief or matter as is mentioned in subsection (5), but there is reasonable excuse for his failure to make the disclosure in accordance with paragraph (b) of that subsection.

(10) In the case of a person who was in employment at the relevant time, subsections (5) and (9) shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to the Reporting Authority .

(11) A person who commits an offence under this section is liable

- (a) on summary conviction, to

imprisonment for a term not exceeding six months or to a fine not exceeding three thousand dollars, or both; or

- (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars, or both.

(12) No member of the Reporting Authority or other person commits 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 enactment relating to criminal conduct or the proceeds of such conduct.

(13) For the purposes of this section, having possession of any property shall be taken to be doing an act in relation to it.

Concealing or transferring proceeds of

30. (1) A person commits an offence if he
- (a) conceals or disguises any criminal conduct.
 - or in part directly or indirectly represents, his proceeds of criminal conduct, or
 - (b) converts or transfers that property or removes it from the Territory,

for the purpose of avoiding prosecution for an offence to which this Act applies or the making or enforcement in his case of a confiscation order.

(2) A person commits 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 the Territory,

for the purpose of assisting any person to avoid prosecution for an offence to which this Act applies or the making or enforcement in his case of a confiscation order.

(3) In subsections (1) and (2), 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.

(4) A person who commits an offence under this section is liable

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding three thousand dollars, or both; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars, or both.

Tipping-off.

31. (1) A person commits an offence if

- (a) he knows or suspects that any member of the Reporting Authority or other person 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 commits an offence if

- (a) he knows or suspects that a disclosure ("the disclosure") has been made to the Reporting Authority under section 28 or 29; 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 the disclosure.

(3) A person commits an offence if

- (a) he knows or suspects that a disclosure ("the disclosure") of a kind mentioned in section 28 (2) or 29 (5) has been made;

and

- (b) he discloses to any person information or any other matter which is likely to prejudice any investigation which might be conducted following the disclosure.

(4) Nothing in subsections (1) to (3) 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.

(5) Subsection (4) does not apply in relation to any information or other matter which is disclosed with a view to furthering any criminal purpose.

(6) In proceedings against a person for an offence under subsection (1), (2) or (3), it is a defence to prove that he did not know or suspect that the disclosure was likely to be prejudicial in the way mentioned in that subsection.

(7) In this section "money laundering" means doing any act which constitutes an offence under section 28, 29 or 30 or, in the case of an act done otherwise than in the Territory, would constitute such an offence if done in the Territory.

(8) For the purposes of subsection (7), having possession of any property shall be taken to be doing an act in relation to it.

(9) A person who commits an offence under this section is liable

- (a) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding three thousand dollars, or both; or

- (b) on conviction on indictment,

to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand dollars, or both.

(10) No member of the Reporting Authority or other person shall be convicted 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 enactment relating to an offence to which this Act applies.

Enforcement of External Orders

Enforcement
Order,
confiscation
orders and

32. (1) The Governor in Council may, by of external

(a) direct in relation to a proceedings.
country or territory outside

the Territory designated by the Order (referred to in this section and section 33 as 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 section 33,

(iii) such incidental, consequential and transitional provision,

as appears to the Governor in

Council

to be expedient; and

(c) without prejudice to the

generality of this subsection, direct that in such circumstances as may be specified, proceeds which arise out of action taken in the designated country with a view to satisfying a confiscation order shall 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 provisions for different cases or classes of case.

(3) The power to make an order under this section includes the power to modify (whether by additions, alterations, omissions or otherwise) this Act in such a way as to confer power on a person to exercise a discretion.

(4) An Order made under this section shall not come into force, unless it is passed by a negative resolution of the Legislative Council.

(5) In this section and section 33, "external confiscation order" means an order made by a court in a designated country for the purpose of

(a) recovering property obtained as a result of or in connection with conduct corresponding to an offence to which this Act applies;

(b) recovering the value of property so obtained; or

(c) depriving a person of a pecuniary advantage so obtained.

- Registration of 33. (1) On an application made by the external Attorney General on behalf of the Government of a designated country, the High 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 against whom the order so made 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 the Territory would not be contrary to the interests of justice.

(2) The High Court shall not register an external confiscation order made in a designated country where the Attorney General has issued a certificate to the effect that the

application to register the order is contrary to the public interest of the Territory.

(3) The High 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 or by the person against whom it was made serving imprisonment in default of payment or by any other means.

"appeal" includes

(4) For the purposes of subsection (1),

(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.

Miscellaneous Provisions

Enforcement

34. (1) Where a court orders the defendant to pay any sum under this Act, section 25 of the Criminal Code, 1997 or section 84(1)(c) of the Criminal Procedure Act, shall have effect as if that sum were a fine imposed on him by the court.

Cap. 18

(2) Where

(a) the court has directed that in default of payment of a sum ordered to be paid under this Act in respect of an offence the defendant shall serve a term of imprisonment, and

(b) at the time the direction is made, the defendant is liable to serve a term of imprisonment in respect of the offence,

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

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

(a) consecutive terms of imprisonment and terms of imprisonment which are wholly or partly concurrent shall be treated as a single term; and

(b) there shall be disregarded any sentence, suspended under any enactment, which has not taken effect at the time the defendant has defaulted as

specified in the direction.

(4) Subject to section 2(6), where the defendant serves a term of imprisonment in default of paying any sum 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.

Powers of 35. A police officer may arrest without arrest. a warrant any person who has committed, or whom the police officer reasonably suspects to have committed, an offence to which this Act applies.

Order to make 36. (1) A police officer may, for the material purposes of an investigation into whether any available. person has benefitted from any criminal

conduct or into the extent or whereabouts of the proceeds of any criminal conduct, apply to the High Court for an order under subsection (2) in relation to a particular material or material of a particular description.

(2) If, on an application under subsection (1), the Court is satisfied that the conditions in subsection (4) are fulfilled, it may make an order that the person who appears to the Court to be in possession of the material to which the application relates shall

(a) produce it to a police officer for him to take away, or

(b) give a police officer access to it,

within such period as the order may specify.

(3) The period to be specified in an order under subsection (2) 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 that

(a) there are reasonable grounds for suspecting that a specified person has benefitted from any criminal conduct;

(b) 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 purposes of which the application is made; and

(ii) does not consist of or

include items subject to legal privilege; and

(c) 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 an order under subsection (2)(b) in relation to material on any premises, it may, on the application of a police officer, order any person who appears to the Court 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) Provision may be made by rules of

court as to

(a) the discharge and variation of orders under this section; and

(b) proceedings relating to such orders.

(8) Where the material to which an application under this section relates consists of information contained in a computer,

(a) an 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

(b) an 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.

- (9) An order under subsection (2)
- (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.

(10) Where, in relation to an investigation into an offence to which this Act applies, an order under subsection (2) has been made or has been applied for and has not been refused or a warrant under section 37 has been issued, a person who, knowing or suspecting that the investigation is taking place, makes any disclosure which is likely to prejudice the investigation commits an offence.

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

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

(12) A person who commits an offence under subsection (10) is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding three thousand dollars.

- Authority for 37. (1) A police officer may, for the search purposes of an investigation into whether any person has benefitted from any criminal conduct or into the extent or whereabouts of the proceeds of any criminal conduct, apply to the High Court for a warrant under this section in relation to specified premises.
- (2) On an application made under subsection (1), the Court may issue a warrant authorising a police officer to enter and search the premises if the Court is satisfied that

- (a) an order made under section 36 in relation to material on the premises has not been complied with;
- (b) the conditions in subsection (3) are fulfilled; or
- (c) the conditions in subsection (4) are fulfilled.

(3) The conditions referred to in subsection (2)(b) are that

- (a) there are reasonable grounds for suspecting that a specified person has benefitted from criminal conduct;
- (b) the conditions in section 36 (4)(b) and (c) are fulfilled in relation to any material on the premises; and

(c) 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 benefitted from any criminal conduct;

- (b) that there are reasonable grounds for suspecting that there is on the premises any such material relating
- or
- (i) to the specified person,
- (ii) to the question whether that person has benefitted from any criminal conduct or to any question as to the extent or whereabouts of the proceeds of any criminal conduct,
- as is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purposes 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 purposes of which the warrant was issued.

Immunity

38. No action shall be brought against from suit. any police officer or member of the Reporting Authority for anything done by him, in good faith, in exercise of the powers conferred on him by this Act.

Consent of Attorney 39. No prosecution for an offence under General required section 28, 29, 30 or 31 shall be instituted for prosecution of without the consent of the Attorney General.

certain offences.

Power of

40. The Governor in Council may, by amendment. Order published in the Gazette, amend section 18 by adding to or removing from the kinds of asset referred to in that section any assets of a kind which in the opinion of the Governor in Council ought to be so added or removed.

Regulations.

41. The Governor in Council may make Regulations for the effective carrying out of the provisions of this Act.

Passed by the Legislative Council this 30th Day of September, 1997

Reuben Vanterpool
Speaker

Hugh A. Hodge
Clerk of the Legislative Council

VIRGIN ISLANDS

Proceeds of Criminal Conduct Act, 1997

Legal Report

The purpose of this Act generally is to make provision for the recovery of the proceeds of all indictable offences other than drug trafficking offences. It is an all crimes legislation covering a broad spectrum of offences other than drug trafficking offences. In effect, the Act is designed to deprive offenders from enjoying the spoils of their illegal activities.

The first heading of the Act deals with preliminary matters such as the citation and commencement of the Act and the meaning of the terms and references used in the Act. The Act is all-embracing and therefore applies to property wherever it may be situated.

Under the second heading the Act empowers the court to make confiscation orders against offenders whom it considers to have benefitted from any relevant criminal conduct. Such orders would entail the court making a determination as to the amount to be recovered and requiring the offender to pay that amount.

The third heading of the Act relates to the court's power to review and revise certain questions and determinations with respect to orders made in relation to proceeds of crime. This includes the power to receive and review fresh evidence with a view to making a new determination with respect to a confiscation order. This would ensure that an offender's proceeds of crime, wherever situated or stashed away, are recovered. The limitation period for an application in this regard is six years from the offender's date of conviction.

Matters relating to the enforcement of confiscation orders are dealt with under the fourth heading of the Act. The enforcement mechanisms stipulated, by which the court could act against offenders, are the making of restraint orders and charging orders with respect to realisable property. However, a person affected by a restraint or charging order may apply to the court for the order to be discharged or varied. Provision is also made for the appointment of a receiver to administer realisable property and the order of priority with respect to the payment of proceeds of crime. Where proceedings are instituted against a person which do not result in his conviction, or where the conviction against him is quashed, or where he is pardoned, the court may award him such compensation as the justice of the case requires.

The fifth heading of the Act deals generally with the laundering of money and other related offences. The Act allows for the establishment of a Reporting Authority comprising three persons, including the Director of Financial Services. It makes it an offence for a person to assist another to retain the benefits of his criminal conduct. Further provision makes it an offence for a person to acquire, use or possess property which he knows is, or directly or indirectly represents, another person's proceeds of criminal conduct. It is also an offence for a person to conceal or disguise property which is or represents the proceeds of criminal conduct or to convert, transfer or remove such property from the Territory with the intention of evading prosecution or the making or enforcement in his case of a confiscation order. In the same vein a person who knows or suspects an investigation into a criminal conduct commits an offence if he divulges information in relation thereto which affects or is likely to affect the investigation.

The sixth heading deals with matters relating to the enforcement and registration of external confiscation orders, while the penultimate heading deals with miscellaneous matters as they relate to the other provisions of the Act. These include such matters as the enforcement of fines, the powers of arrest reposed in police and customs officers and their immunity from liability and the amending and regulation making powers of the Governor in Council.

The Act was introduced in the Legislative Council on the 1st day of April, 1997 and passed through its remaining stages on the 30th day of September, 1997.

In my opinion His Excellency the Governor may properly assent to this Act in the name and on

behalf of Her Majesty.

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Attorney General

EXPLANATORY MEMORANDUM ON THE DRAFT
PROCEEDS OF CRIMINAL CONDUCT ACT, 1996

BACKGROUND INFORMATION

The debate over and the need to address and effectively combat the activity of money laundering around the Globe has occupied the minds of individuals, governments and international institutions for many years now. In quite a number of instances this debate has resulted in the convening of meetings and the preparation of draft model legislation on the issue of money laundering for possible adoption by various States and Territories. Leading the campaign in this respect is the Financial Action Task Force (FATF). Indeed in 1990 the FATF emerged with forty recommendations formulated with the primary objective of developing and improving national legal systems, enhancing the role of financial services institutions and encouraging and strengthening international co-operation against money laundering.

The Caribbean offshoot of FATF is the Caribbean Financial Action Task Force (CFATF) which is designed to serve as the focal point in the fight against money laundering activities in the region. The Inter-American Drug Abuse Control Commission (CICAD) has also been in the fore front in devising model regulations designed to effectively combat money laundering activities within its member States. The focus of most of these anti-money laundering institutions is towards establishing effective mechanisms to combat the laundering of drug trafficking money.

However, the 1993 meeting of the Commonwealth Heads of Government in Cyprus leaped a step further on the question of money laundering by requesting their Finance and Law Ministers to devise all-comprehensive mechanisms to tackle the laundering of the proceeds of all serious crimes. Thus the resolve was to put in place, both individually and collectively, comprehensive provisions criminalising the laundering of money in respect of all serious crimes, facilitating the disclosure of information in respect of money laundering activities, enabling the confiscation of the proceeds of crime, making offences relating to money laundering extraditable and promoting international co-operation in the investigation and prosecution of money laundering activities and in the conduct of confiscation proceedings. Thus the Commonwealth initiative has given a new momentum and broader approach to the question of money laundering taking it beyond the scope of ill-gotten gains relative to drug trafficking. This has crystallised in the enactment of all-crimes money laundering legislation in some jurisdictions.

It should be recognised that the activity of money laundering is multi-dimensional in its facets and knows no boundary and, in this regard, requires sound and well co-ordinated implementation strategies founded on supportive investigative mechanisms. Furthermore, effective co-operation, both at the investigation and prosecution stages nationally and internationally, is viewed as a sine qua non in achieving an efficient and workable strategy in combating the activities of money launderers. Thus the objective of anti-money laundering legislation is to make adequate provisions preventing criminals from enjoying the spoils of their illegal activities. In other words, the aim essentially is to deprive them and their ill-gotten gains of sanctuary and thus maintain the credibility and integrity of the financial and business markets. The political will in this respect (which is translated by the enactment of the appropriate legislation) is the primary step in making this objective a reality.

It is now generally accepted that the criminalisation of money laundering activities should be predicated on all serious offences rather than restrict the web to drug trafficking. It is against this background that the draft Proceeds of Criminal Conduct Act, 1996 ("the draft Act") has been prepared. Indeed the United Kingdom Government has recommended such legislation for the Territory and had advised that we closely follow the relevant UK Legislation on the subject. While giving adequate consideration to the advice, we have in the drafting process, adhered to the rules of consistency with existing legislation applicability and workability within the context of the BVI. This has necessitated some cross references to

existing as well as anticipated laws.

It should perhaps be pointed out that in an effort to ensure integrity and legitimacy in the conduct of financial and business transactions in the Territory, it is important (upon the enactment of the draft Act) to pay adequate attention to training, competence and experience so as to minimise or prevent undue hardship and loss to genuine investors and businessmen. By its nature, the draft Act (when enacted) would mean additional work for the investigating and prosecuting officers and adequate training is vital in its effective implementation. Ultimately, the objective is to ensure a continued legitimate and enterprising business industry that is not shackled by undue legal difficulties.

THE DRAFT PROCEEDS OF CRIMINAL CONDUCT ACT, 1996

The draft Act generally makes provision for the recovery of the proceeds of certain offences as stipulated in the Schedule. It is an all crimes legislation covering offences with punishment of imprisonment ranging from over two years to life. Since the Drugs (Prevention of Misuse) Act (Cap. 178) and the Drug Trafficking Offences Act, 1992 between them provide for the forfeiture of articles and the proceeds of drug trafficking, no attempt has been made under the draft Act to embrace this subject as it relates to drug trafficking. This is because the anti-money laundering provisions in Cap. 178 and the 1992 Act are considered quite adequate in dealing with the proceeds of drug trafficking.

CLAUSES 1-5: These clauses deal with preliminary matters that are essential in understanding the draft Act better. Clause 1 deals with the usual citation and commencement of the draft Act, while Clause 2 defines certain terms and references that are used or made in the body of the draft Act. Clause 3 defines "realisable property" and describes how a sum of money may be realised at the time of the making of a confiscation order as well as the manner of assessing the value of property (other than cash).

Where an offender makes a gift (including a gift made before the coming into force of the draft Act) after committing an offence, clause 4 makes it possible for that gift to be caught under the draft Act. Clause 5 applies the whole of the provisions of the draft Act to property wherever it may be situated.

CLAUSES 6-11: These clauses generally deal with the power of the court to make a confiscation order against an offender where it considers that the offender has benefitted from any relevant criminal conduct. Under such circumstances the court is empowered to determine the amount to be recovered and make an order requiring the offender to pay that amount. A person is considered to benefit from an offence if he obtains property as a result of or in connection with the commission of the offence and his benefit amounts to the value of the property. Thus a person deriving a pecuniary advantage in this context is to be treated

as if he had obtained a sum of money equal to the value of the pecuniary advantage. The standard of proof required in determining whether a person has benefitted from an offence and the amount to be recovered from him is that applicable in civil proceedings (that is, on a balance of probabilities).

Provision is also made enabling the court, in determining the appropriate sentence for an offence or making any order of compensation or any order under the Drugs (Prevention of Misuse) Act (Cap. 178), to take into account a confiscation order made against the offender. The court may also postpone making a confiscation order to a specified date and request for further information. In this regard, both the prosecutor and the offender may tender statements to the court that may be relevant to the making of a confiscation order. The failure by either party to respond to an allegation contained in a statement submitted by the other will enable the court to draw relevant inferences thereto.

CLAUSES 12-14: These clauses relate to the power of the court to review and revise certain questions and determinations with respect to orders made in relation to proceeds of crime. Thus clause 12, for instance, allows the prosecutor to apply to the court to consider fresh evidence which was not available to him but which he believes (if it had been considered) would

have led the court to determine that the defendant had benefitted from a relevant criminal conduct. Where the court considers the fresh evidence to be relevant to the case, it may accordingly proceed under the draft Act as if it were doing so before sentencing or otherwise dealing with the defendant in respect of a relevant criminal conduct. Such a provision is designed to ensure that all the proceeds of crime in respect of a defendant, wherever situated or stashed away, are recovered. However, for such an application by the prosecutor to be entertained, it has to be made before the end of six years beginning with the defendant's date of conviction. The same rules are made applicable to an assessment of proceeds of crime - meaning that the prosecutor could, within six years from the date of the defendant's conviction, present fresh evidence to enable a reassessment of the defendant's proceeds of crime.

CLAUSES 15-27: This part of the draft Act deals with matters relating to the enforcement of confiscation orders. In this respect, provision is made for a person against whom a confiscation order is made to pay interest on any sum remaining unpaid under the order. Provision is also made enabling the court to make restraint orders and charging orders against persons liable to be dealt with under the draft Act. A restraint order, in effect, prohibits a person from dealing with realisable property and a police officer may, in such a case, seize the property to prevent it being removed from the Territory. A charging order, on the other hand, is designed to secure the payment to the Crown (where a confiscation order has not been made) of an amount equal to the value of the property charged and (in any other case) of an amount not exceeding the amount payable under a confiscation order. The draft Act also outlines the cases in which restraint and charging orders may be made by the court (clause 16) and the circumstances in which the court may make a discharging or variation order. The court is also empowered to appoint a receiver in respect of realisable property, upon the application of a prosecutor. The receiver may be empowered to enforce any charge imposed on realisable property or on interest or dividends payable in respect of such property as well as take possession of realisable property (other than property subject to a charge). Persons in possession of realisable property may be ordered to give such possession to the receiver. Similarly, persons holding interests in realisable property may be ordered to make such payment to the receiver in respect of any beneficial interest held by the defendant or the recipient of a gift caught under the draft Act. Furthermore, the draft Act stipulates the order of payment of the proceeds of the enforcement of a charge, the proceeds of realisation and any other sums which are in the hands of the receiver.

It is worth noting that the property of a bankrupt subject to a restraint order made before the order for bankruptcy or any proceeds of his property realised under the draft Act is excluded from his property for the purposes of the Bankruptcy Act (Cap. 8). This, in effect, gives precedence to orders made under the draft Act. However, the powers conferred on the court by clauses 17 to 20 (restraint and charging orders and realisation of property and application of proceeds therewith) or a receiver are not exercisable in relation to property comprised in the bankrupt's property or to property which is to be applied for the benefit of creditors of the bankrupt under the Bankruptcy Act (Cap. 8). In the event of the winding up of a company holding realisable property, the liquidator appointed thereunder is not to exercise his functions in relation to property subject to a restraint order made before the winding up process began or to any proceeds of property already realised under the draft Act.

Clause 25 has been drafted in anticipation of the enactment of an insolvency legislation in the near future (as one of the programmes for the continued development of the financial services sector). The aim is to prevent the need for an amendment of the draft Act whenever such insolvency legislation is enacted. The provision in the draft Act essentially relates to the liabilities, powers and functions of insolvency practitioners with respect to property subject to a restraint order.

In a situation where proceedings are instituted against a person for an offence to which the draft Act applies and such proceedings do not result in his conviction or, where he is convicted, the conviction is quashed or he is pardoned, the court may award compensation where it considers such award to be fair and just in the circumstances of the particular case. The amount of compensation payable is left to the discretion of the court.

CLAUSES 28-31: These provisions basically deal with money laundering and other related offences. For instance, clause 28 makes it an offence for a person to assist another to retain

the benefit of criminal conduct. The assistance may be in the nature of concealment, removal from the Territory, transfer to nominees or otherwise of proceeds of criminal conduct. However, in order for the offence to be complete the person assisting must be shown to have known or suspected that the person being assisted is or has been engaged in criminal conduct or has benefitted from such conduct. The draft Act also makes it an offence for a person to acquire, use or possess property which he knows is, or directly or indirectly represents, another person's proceeds of criminal conduct (clause 29). Clause 30 makes it an offence for any person to conceal or disguise property which is, or directly or indirectly represents, his proceeds of criminal conduct or to convert, transfer or remove such property from the Territory for the purpose of avoiding prosecution for an offence or the making or enforcement in his case of a confiscation order. Any person assisting in such conduct is also criminally liable under the draft Act.

Clause 31 sets out the offence of tipping-off. This is a situation where a person knows or has reasonable grounds to suspect that an investigation is underway, or is about to be commenced, in respect of an offence and he discloses such knowledge or any information relating thereto which is likely to prejudice the investigation or proposed investigation.

CLAUSES 32 and 33: These two clauses relate to the enforcement of external orders. Clause 32 empowers the Governor in Council to make an Order in relation to the enforcement within the Territory of external confiscation orders and proceedings, while clause 33 empowers the court to register an external confiscation order if it is satisfied that such order is in force and not subject to appeal, adequate notice has been given to the defendant to defend the case against him and enforcing the order in the Territory would not be contrary to the interests of justice.

CLAUSES 34 - 42: These Clauses deal with miscellaneous matters as they relate to the other provisions of the draft Act. They address such matters as the enforcement of fines and confiscation orders, powers of arrest of police and customs officers, application to the court for an order against a person to make a particular material available, application for a warrant to conduct a search of specified premises, disclosure of information subject to contractual restriction upon disclosure, immunity of police and customs officers against legal action, penalties for offences committed under the draft Act and the powers of the Governor in Council to amend the Schedule and make Regulations for the effective carrying out of the provisions of the draft Act. It is important to note, however, that sub-clause (4) of clause 34 is an option provision which may or may not be adopted. A decision thereon at the policy level is considered essential.

SCHEDULE: The offences (other than drug trafficking offences) caught under the draft Act are those which are punishable with imprisonment for a term exceeding two years.