

EXPLANATORY MEMORANDUM

This Bill would reform the law relating to the recovery of proceeds and instrumentalities of crime and, in particular, provide for such recovery through both criminal and civil proceedings.

PART I - PRELIMINARY

- Clause 1:** provides the short title.
- Clause 2:** provides definitions for certain terms used in the Bill.
- Clause 3:** sets out several interpretative provisions in respect of the term “property”.
- Clause 4:** elaborates on the concept of benefiting from criminal conduct.

PART II - CRIMINAL RECOVERY OF PROCEEDS AND INSTRUMENTALITIES OF CRIME

Division 1

Preliminary to Part II

- Clause 5:** explains what is meant by “realisable property” in relation to a defendant.
- Clause 6:** treats with the value of property generally.
- Clause 7:** deals specifically with the value of property obtained from criminal conduct.
- Clause 8:** elaborates on the concept of gifts.
- Clause 9:** deals particularly with tainted gifts.

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- Clause 10:** addresses how to calculate the value of tainted gifts.
- Clause 11:** explains the concept of a defendant's general and particular criminal conduct. General criminal conduct suggests a criminal lifestyle.
- Clause 12:** speaks to the institution and conclusion of criminal proceedings.
- Clause 13:** specifies the circumstances in which an application may be made for a confiscation or forfeiture order.

Division 2

Confiscation Orders

- Clause 14:** provides for the making of an application for a confiscation order.
- Clause 15:** sets out the procedure for making a confiscation order, which includes determining whether clause 16 applies to the defendant.
- Clause 16:** develops the idea of a defendant being engaged in general criminal conduct and connects specific offences such as money laundering and drug trafficking with such conduct.
- Clause 17:** stipulates how the amount recoverable as the defendant's benefit from his criminal conduct (the recoverable amount) is to be calculated.
- Clause 18:** sets out time periods which are relevant to calculating the defendant's benefit from his criminal conduct in different situations.

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- Clause 19:** specifies several assumptions that may be made where clause 16 applies.
- Clause 20:** states the time at which a defendant must pay the amount stipulated by a confiscation order.
- Clause 21:** provides for interest to be charged where the amount is not paid on time.
- Clause 22:** explains the effect that a confiscation order has on other powers of the court.
- Clause 23:** provides that the court may require a financial institution at which a defendant has an account to pay over money from the account where the defendant fails to satisfy a confiscation order.
- Clause 24:** provides for the court to postpone confiscation proceedings.
- Clause 25:** states the effect of a postponement under clause 24.
- Clause 26:** requires the prosecutor to give to the court a statement of information on the defendant where the prosecutor applies for a confiscation order.
- Clause 27:** gives the defendant an opportunity to respond to the statement of information provided by the prosecutor.
- Clause 28:** empowers the court to require information from the defendant himself.
- Clause 29:** provides for the circumstances in which a case can be reconsidered where the court decided not to make a confiscation order. This includes where fresh evidence becomes available.

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- Clause 30:** provides for the circumstances in which the court can reconsider a defendant's benefit from his criminal conduct where it decided not to make a confiscation order.
- Clause 31:** enables the court to reconsider a defendant's benefit even where it made a confiscation order.
- Clause 32:** enables the court to reconsider the amount available to a defendant to satisfy a confiscation order.
- Clause 33:** provides for the court to vary a confiscation order where the amount available to a defendant to satisfy it is inadequate.
- Clause 34:** permits the court to discharge a confiscation order where the amount available to a defendant to satisfy it is inadequate.
- Clause 35:** allows the court to discharge a confiscation order where the amount outstanding under it is negligible.
- Clause 36:** specifies additional cases in which a statement of information may be required by the court. These include where the court is reconsidering a case.
- Clause 37:** provides for the making of a confiscation order where a defendant absconds.
- Clause 38:** makes further provision in relation to abscondence.
- Clause 39:** provides for the variation of a confiscation order where a defendant ceases to be an absconder.
- Clause 40:** speaks to the discharge of a confiscation order related to abscondence.
- Clause 41:** provides for appeals in respect of confiscation orders.
- Clause 42:** speaks to the court's powers in such appellate proceedings.

Division 3

Forfeiture Orders

- Clause 43:** provides for the prosecutor to apply for a forfeiture order against a defendant.
- Clause 44:** sets out the procedure for the making of the forfeiture order.
- Clause 45:** speaks to the effect of a forfeiture order especially in relation to land.
- Clause 46:** provides that certain transfers of property will be voidable where the property is subject to forfeiture.
- Clause 47:** protects the rights of third parties in relation to forfeiture.
- Clause 48:** provides for the discharge of a forfeiture order.
- Clause 49:** allows for a payment to be made instead of a forfeiture order.
- Clause 50:** provides for the prosecutor to apply for a forfeiture order where a defendant absconds.
- Clause 51:** addresses the making of the forfeiture order where a defendant absconds.

Division 4

Restraining Orders and Management and Enforcement Receivers

- Clause 52:** sets out the circumstances in which the court may make a restraining order in relation to property.
- Clause 53:** gives guidance on applying for the restraining order.

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- Clause 54:* addresses the making of the restraining order and provides that conditions may be attached to the order.
- Clause 55:* provides for a restraining order to be varied or discharged in particular circumstances.
- Clause 56:* permits the use of hearsay evidence in relation to proceedings concerning restraining orders.
- Clause 57:* provides for the appointment of a management receiver to manage property that is subject to a restraining order.
- Clause 58:* provides for the appointment of an enforcement receiver in respect of realisable property, where, for instance, the court makes a confiscation order that is not satisfied.
- Clause 59:* explains the effect of a restraining order and orders appointing management and enforcement receivers.
- Clause 60:* stipulates how the sums realised by an enforcement receiver are to be applied.
- Clause 61:* gives a receiver certain protection in relation to legal action against him.
- Clause 62:* allows a receiver and other interested persons to seek directions from the court where necessary.
- Clause 63:* provides for the variation or discharge of an order appointing a receiver.
- Clause 64:* provides, in particular, for the circumstances in which a management receiver is to be discharged.
- Clause 65:* makes special provision as to what is to be done where a company that is being wound up holds realisable property.

Clause 66: stipulates, among other things, that the powers conferred on the court and on receivers in relation to realisable property must be exercised with a view to protecting the rights of third parties.

Division 5

General Provisions related to Part II

Clause 67: provides for a person who held realisable property to receive compensation in limited cases where no conviction is secured.

Clause 68: allows a magistrate, on the prosecutor’s application, to commit a person to the High Court for sentencing and the making of a confiscation or forfeiture order where appropriate.

**PART III - CIVIL RECOVERY OF PROCEEDS AND
INSTRUMENTALITIES OF CRIME**

Division 1

Preliminary to Part III

Clause 69: sets out the scope of Part III.

Clause 70: defines certain terms used in Part III.

Clause 71: explains what is meant by “unlawful conduct”.

Clause 72: explains the concept of property obtained through unlawful conduct.

Clause 73: defines “recoverable property” which encompasses both property obtained through unlawful conduct and tainted property.

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- Clause 74:** provides for tracing recoverable property.
- Clause 75:** addresses the situation where recoverable property becomes mixed with other property.
- Clause 76:** stipulates that profits accruing in respect of recoverable property are also to be treated as recoverable property.
- Clause 77:** outlines cases in which property is not or will cease to be recoverable.
- Clause 78:** empowers the Minister to prescribe cases in which property is not to be treated, among other things, as recoverable.
- Clause 79:** addresses the situation where a person grants an interest in recoverable property.
- Clause 80:** explains the concept of associated property, which is property that is related in some way to particular recoverable property.
- Clause 81:** explains what is contemplated by “obtaining and disposing of property”.

Division 2

Recovery Orders and Freezing Orders

Making of Recovery Orders and Freezing Orders

- Clause 82:** empowers the Recovery Authority, which under the Bill is the Attorney-General, to apply for a recovery order in respect of recoverable property.
- Clause 83:** empowers the Recovery Authority to apply for a freezing order in respect of property where he may institute proceedings for a recovery order in relation to the property.

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- Clause 84:** provides for the variation or setting aside of a freezing order.
- Clause 85:** sets out the types of exclusions that can be made in respect of freezing orders.
- Clause 86:** specifies the effect of a freezing order.
- Clause 87:** allows for a receiver to be appointed to deal with property that is subject to a freezing order.
- Clause 88:** provides for the receiver and any other interested person to apply to the court for directions where necessary.
- Clause 89:** gives the receiver certain protection in relation to legal action against him.
- Clause 90:** provides for the court to vary or set aside an order appointing a receiver.
- Clause 91:** imposes a duty on a receiver to report certain matters to the court.

Vesting and Realisation of Recoverable Property

- Clause 92:** provides for the making of a recovery order which vests recoverable property in a recovery trustee.
- Clause 93:** sets out the functions of a recovery trustee.
- Clause 94:** speaks to the effect of a recovery order, in particular, as it relates to rights of pre-emption.
- Clause 95:** provides for cases in which there is property that is associated or joined with the recoverable property.
- Clause 96:** allows for the court to accept an agreement made between the Recovery Authority and the person who holds the associated

or joint property, whereby the latter makes a payment to avoid having the recovery order made.

Clause 97: provides guidance as to the procedure to be followed where associated or joint property is involved but there is no agreement between the Recovery Authority and the person who holds the property.

Clause 98: provides for the court to stay proceedings for a recovery order where the parties all consent.

Clause 99: sets out certain limitations on the ability of the Recovery Authority to obtain a recovery order, for example, where a forfeiture order has already been secured.

Clause 100: outlines how sums recovered under a recovery order are to be applied.

Exemptions

Clause 101: protects certain third parties such as victims of theft, from having their property become subject to a recovery order.

Clause 102: specifies cases in which no proceedings for a recovery order may be taken.

Scope of Powers

Clause 103: outlines the scope of the court's powers as regards recovery orders generally and indicates that there must be some connection between the case and Barbados for the court to act. The First Schedule elaborates on the idea of a connection.

Clause 104: provides for compensation to be paid where a freezing order is made but the property involved is not recoverable or associated property.

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- Clause 105:** empowers the Minister to prescribe a threshold for the purposes of determining whether proceedings for a recovery order can be initiated.
- Clause 106:** provides for a limitation period of 20 years for bringing proceedings for a recovery order.
- Clause 107:** enables property acquired before the legislation comes into force to be taken into account for the purposes of determining whether property was recoverable at any time.

Division 3

Recovery of Cash in Summary Proceedings

- Clause 108:** defines recoverable cash.
- Clause 109:** provides for a law enforcement officer, that is, a police officer or a customs officer, to search for recoverable cash.
- Clause 110:** allows the law enforcement officer to seize cash where he suspects that it is recoverable.
- Clause 111:** provides for suspected recoverable cash to be detained initially for 72 hours and then for a longer period until further investigations and proceedings can be conducted.
- Clause 112:** states that the cash seized must be placed in an interest-bearing account.
- Clause 113:** provides for the release of the cash where its detention is no longer justified.
- Clause 114:** empowers the court to make a cash forfeiture order where it is determined that the cash is indeed recoverable cash.
- Clause 115:** provides for an appeal to be made against a forfeiture order.

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- Clause 116:** requires cash that has been forfeited to be paid into the Criminal Assets Recovery Fund.
- Clause 117:** protects victims and other innocent persons whose cash has been wrongfully detained.
- Clause 118:** provides for compensation to be paid where cash is detained but not forfeited.

Division 4

Recovery of Listed Assets in Summary Proceedings

- Clause 119:** defines “listed assets”. This term includes precious metals and stones as well as stamps and artistic works.
- Clause 120:** provides for a law enforcement officer, that is, a police officer or a customs officer, to search for recoverable listed assets.
- Clause 121:** allows the law enforcement officer to seize any listed asset where he suspects that it is recoverable.
- Clause 122:** provides for suspected recoverable listed assets to be detained initially for 72 hours and then for a longer period until further investigations and proceedings can be conducted.
- Clause 123:** permits a law enforcement officer to conduct tests on any item of property seized to determine whether it is indeed a listed asset.
- Clause 124:** provides for the release of a listed asset where its detention is no longer justified.
- Clause 125:** empowers the court to make a listed asset forfeiture order where it is determined that the asset is recoverable.

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- Clause 126:** provides for the treatment of property that is associated or joined with a listed asset that is recoverable.
- Clause 127:** provides for the court to honour agreements made between the Recovery Authority and the owners of property that is associated or joined with a listed asset that is recoverable.
- Clause 128:** specifies how the court must deal with cases in which there is no agreement between the Recovery Authority and the owners of such property.
- Clause 129:** allows for an appeal to be made against a listed asset forfeiture order.
- Clause 130:** provides for the realisation of the value of forfeited listed assets.
- Clause 131:** allows a victim of theft to have his property released where it was detained as a listed asset.
- Clause 132:** makes compensation payable in certain cases where property was detained as a listed asset but not forfeited.

PART IV - INVESTIGATIONS

Division 1

Preliminary to Part IV

- Clause 133:** provides definitions for certain terms used in Part IV and speaks to the application of the part.
- Clause 134:** explains what is meant by “civil recovery investigation” where an application for an order or warrant indicates that property is subject to such an investigation.

Division 2

Unexplained Wealth Orders

- Clause 135:** provides for the making of an unexplained wealth order against a person. Such an order requires a person to set out his interest in particular property and explain how he acquired the property.
- Clause 136:** sets out the requirements for the making of an unexplained wealth order. The order can only be made against certain categories of persons including politically exposed persons.
- Clause 137:** explains the effect that an unexplained wealth order will have where a person fails to comply with it. In such a case, the property in issue will be presumed to be recoverable property.
- Clause 138:** explains the effect that an unexplained wealth order will have where a person complies or purports to comply with it.
- Clause 139:** provides for freezing orders to be made and receivers to be appointed in respect of property that is the subject of an unexplained wealth order.

Division 3

Disclosure Orders, Customer Information Orders and Account Monitoring Orders

- Clause 140:** provides for the making of a disclosure order to enable a police officer to obtain answers or other information or documents from any person upon the production of a notice by him.
- Clause 141:** provides for a police officer to obtain a customer information order to require a particular financial institution or category

of financial institution to supply him with any information the institution has relating to a particular customer.

Clause 142: enables a police officer to secure an account monitoring order to require a financial institution to monitor and provide information on the account of a customer for up to 90 days.

Division 4

General Provisions on Unexplained Wealth Orders, Customer Information Orders, Accounting Monitoring Orders and Other Similar Disclosures

Clause 143: protects persons against self incrimination in relation statements made in response to unexplained wealth, disclosure, customer information and account monitoring orders.

Clause 144: provides that the orders referred to in clause 143 will have effect in spite of any duty of confidentiality that the person required to disclose has.

Clause 145: creates an exception as regards disclosure in relation to privileged information or material.

Clause 146: requires a financial institution to keep a register of documents that it releases pursuant to an order requiring disclosure.

Clause 147: permits a financial institution to voluntarily disclose information that it thinks may be useful to an investigation.

Clause 148: provides for the variation and discharge of unexplained wealth, disclosure, customer information and account monitoring orders.

Division 5

Order for Disclosure of Tax information and Similar Orders

- Clause 149:** makes special provision as regards the disclosure of tax information.
- Clause 150:** provides for Barbados Revenue Authority to object to a disclosure under clause 149.
- Clause 151:** speaks to the evidential value of copies of documents disclosed under clause 149.
- Clause 152:** imposes restrictions on the further disclosure of information released under clause 149.
- Clause 153:** provides for the disclosure of information held by government departments.

Division 6

Search and Seizure Warrants

- Clause 154:** provides for a magistrate to issue a search and seizure warrant to a police officer for the purposes of the legislation.

PART V - MISCELLANEOUS

- Clause 155:** states that the court may require the Crown to give certain undertakings where an application for a freezing or a restraining order is made.
- Clause 156:** provides for the registration of freezing and restraining orders in relation to land.

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- Clause 157:** makes it an offence for a person to contravene a freezing or restraining order.
- Clause 158:** provides for the court to enforce payment of any amount payable under the legislation by treating the amount as a fine and imposing specific terms of imprisonment for failure to pay. These terms are specified in the Second Schedule.
- Clause 159:** empowers the Minister to make regulations for giving effect to the legislation.
- Clause 160:** repeals the *Proceeds of Crime Act*, Cap. 143 and provides for the making of consequential amendments to other pieces of legislation. These are set out in the Third Schedule.
- Clause 161:** makes transitional provision as a result of the repeal of the *Proceeds of Crime Act*, Cap. 143.
- Clause 162:** provides for the legislation to commence upon Proclamation.