

Common Law Legal Systems
Model Provisions

Addressing Money Laundering, Terrorist Financing, Preventive Measures and the Proceeds of Crime



The Commonwealth



UNODC

United Nations Office on Drugs and Crime



Executive Summary

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Printed and published by the Commonwealth Secretariat.

Executive Summary

Introduction

Corruption undermines the rule of law, good governance, and sustainable growth and development. Most countries have prohibited all forms of corruption, yet corruption persists due largely to a lack of appropriate strategies and structures to inhibit it. Such strategies include effective and comprehensive legal frameworks to prevent, punish and take the profit out of corruption.

Acknowledging this gap, Commonwealth Heads of Government, at their meeting in Durban, South Africa in 1999, endorsed the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption. They gave a firm commitment to tackling systemic corruption (including extortion and bribery). At a subsequent meeting in Abuja, Nigeria, in December 2003, the Heads of Government urged Commonwealth member countries to implement the United Nations Convention Against Corruption (UNCAC), a global anti-corruption legal framework to root out systemic corruption at both national and international levels. All but five Commonwealth countries are party to UNCAC. A number of them face challenges in implementing the Convention and the 40 standard setting Financial Action Task Force (FATF) Recommendations to combat systemic corruption, money laundering, terrorism financing and the recovery of the proceeds of crime.

Commonwealth Law Ministers meeting in Edinburgh, Scotland, in 2008, approved the framework for the Commonwealth anti-corruption strategy. The strategy was developed using UNCAC as its starting point. It outlined concrete actions and tools on anti-corruption measures for

implementation in the Commonwealth. The Commonwealth Secretariat has consistently followed this strategy to deliver technical assistance to member countries.

UNCAC provides a comprehensive and joined-up approach to tackling corruption, ranging from preventive measures and criminalisation to international co-operation and assets recovery. Though most Commonwealth jurisdictions have in place legislation that is either fully or partially compliant with UNCAC and a firm grasp in combating corruption, some aspects of the anti-corruption strategy are yet to be fully appreciated and/or deployed to achieve the effectiveness required. Notably, jurisdictions are challenged by the practical aspects of addressing the consequential crimes of corruption, such as money laundering and terrorism financing. There is also little or no recognition of the importance of asset forfeiture and mechanisms for recovery and repatriation as deterrents to corrupt practices.

To meet these challenges, the Secretariat complemented its capacity building programmes with the development of a technical and legislative guide to assist member countries to implement the provisions of UNCAC and the FATF Recommendations. In April 2009, the Secretariat in collaboration with the UN Office on Drugs and Crime (UNODC) and the International Monetary Fund (IMF), developed and produced Common Law Legal Systems Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (Model Provisions), a guide to assist member states in drafting appropriate legislation.

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Commonwealth jurisdictions are challenged by the practical aspects of the consequential crimes of corruption, such as money laundering and terrorism financing.

The Model Provisions enables Commonwealth countries to evaluate measures that can be incorporated into domestic law to prevent, detect and effectively sanction money laundering and terrorism financing.

Commonwealth Heads of Government are firmly committed to tackling systemic corruption. All but five member countries are parties to the UN Convention Against Corruption (UNCAC) on which the Commonwealth anti-corruption strategy is based.

Since the publication of the Model Provisions, jurisprudence on money laundering, terrorism financing, proceeds of crime, civil forfeiture and sanctions has evolved. When the FATF Recommendations were revised in 2012, it became necessary to revise the Model Provisions. Experts, including participants from the Commonwealth Secretariat, the IMF and the UNODC, participated in the revision exercise, which took place between 2013 and late 2015 in London. The updated Model Provisions reflects the changes in the relevant international instruments concerning money laundering and terrorism financing including confiscation and forfeiture, as well as the June 2015 publication, FATF Guidance for a Risk-Based Approach to Virtual Currencies.

The revised Model Provisions enables Commonwealth countries to evaluate measures that can be incorporated into domestic law to prevent, detect, and effectively sanction money laundering and terrorism financing and to recover the proceeds of crime, while maintaining compliance with the revised FATF Recommendations. The revised Model Provisions also demonstrates how to effectively incorporate UN resolutions and sanctions into domestic legislation.

'Drafting Notes' in the Model Provisions guide Commonwealth jurisdictions in adapting the underlying concepts and specific language of international instruments to accord with constitutional and fundamental legal principles in their systems and to ensure that the provisions are compatible with other legal concepts and existing legislation. The Model Provisions may be supplemented with additional measures that jurisdictions consider are suited to recovering the proceeds of crime, money laundering and terrorism financing in the national context.

The various parts of the Model Provisions are intended to be free standing modular units, although there is a degree of interdependence. Taken together they present a comprehensive legal framework against money laundering, terrorism financing and recovery of proceeds and instrumentalities of crime. If only selected parts are used it may be necessary to adjust the definitions. The parts include:

- Criminalisation of money laundering and terrorism financing and related offences;
- Recovery of proceeds and instrumentalities of crime;
- Preventive and investigative measures;
- Establishment of the financial intelligence unit (FIU);

Corruption undermines:

- the rule of law
- good governance
- sustainable growth and development

Effective and comprehensive legal frameworks prevent, punish and take the profit out of corruption.

Rule of Law



Public Sector Governance



Sustainable Growth and Development



- Detection of cross border transportation of cash and bearer negotiable instruments;
- Implementation of international obligations in relation to financial sanctions and for ancillary purposes.

The Model Provisions sets out two separate mechanisms for depriving criminals of the proceeds and instrumentalities of crime. First, through confiscation following a criminal conviction and, second, through non-conviction based measures pursuant to civil process, also referred to as 'civil forfeiture'.

Part I: Preliminary

The first Part provides for a national anti-money laundering entity to co-ordinate the money laundering and terrorism financing risk assessment in accordance with FATF Recommendation 1. It provides for a designated national authority, or other mechanism, with responsibility for co-ordinating the development and implementation of national policies and activities on anti-money laundering, countering terrorism financing and combating the financing and proliferation of weapons of mass destruction, in line with FATF Recommendation 2. Both FATF Recommendations suggest that the designation of a competent authority is one possible avenue for jurisdictions to comply with the FATF requirements. The body should comprise representatives of all relevant authorities, including prosecution, law enforcement, supervisory authorities, customs, judiciary and, where useful, relevant authorities such as the ministries of finance and justice. Its power should be expanded to include tasks such as co-ordination of the country's mutual evaluation.

Part II: Preventive Measures

These measures, to be applied by financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs), aim to combat money laundering and terrorism financing. This part of the Model Provisions could either be adopted as a separate legislation or in combination with other parts. When introducing preventive measures, jurisdictions are advised to choose the appropriate legal tool, whether primary or secondary legislation or other enforceable means. However, the following aspects of the FATF standards must be set out in primary legislation:

- The principle of undertaking customer due diligence;
- Record-keeping requirements for transactions and customer due diligence information;
- The obligation to promptly report suspicious transactions to the financial intelligence unit.

Not only does the Model Provisions introduce the general obligations for FIs/DNFBPs to apply due diligence, keep records and file suspicious transaction reports (STRs), it also prescribes these obligations in great detail. Drafting authorities can choose whether to include some of these detailed provisions in secondary legislation, regulations or other enforceable instruments rather than to address them through primary legislation. This approach would provide for greater flexibility should an amendment to the relevant requirements become necessary.

The definition section of Part II provides detailed guidelines on the key terms. For instance it defines currency as coin and paper money of any jurisdiction that is designated as legal tender or is customarily used and accepted as a medium of exchange, including virtual currency as a means of payment.

Provision is made for a national entity, with representatives of all relevant authorities, to co-ordinate policies and actions on money laundering and terrorism financing.

States should consider legislation or regulations to ensure the FIU is free from undue influence or interference within the state system.

Part III: Financial Intelligence Unit

This Part provides for the establishment of a national financial intelligence unit (FIU) to receive and analyse suspicious transaction reports and other information relevant to money laundering, associated predicate offences and terrorism financing. The information is generated as a result of the preventive measures obligations provided for in Part II.

Typically, this Part will be integrated in some way with preventive measures provisions since, as noted, it establishes the unit that will receive the suspicious transaction reports required by those provisions. Definitions of the terms appear in Part II. Other than the core responsibility of receiving, analysing and disseminating information on suspected money laundering, associated predicate offences and terrorism financing, the Model Provisions recognises FIU responsibilities may vary significantly from state to state, as will its powers and organisational structure. An FIU may be located within a police service, the prosecutor's office, the central bank or a ministry of finance or justice and benefit from the infrastructure and resources of these services, or it may be established as an independent office. The Model Provisions in this Part cover only basic core elements.

In order to provide additional details on the procedural aspects of the FIU, a model template is attached to the Model Provisions. The model advocates that states consider provisions in law or regulations in support of the FIU's operational independence and autonomy to ensure that it is free from undue influence or interference within the state system. For instance, provisions could limit reviews of decisions by the FIU director or set a fixed term for the director with dismissal permissible only in the case of verifiable misconduct.

Part IV: Money Laundering and Terrorism Financing Offences

This Part of the Model Provisions provides for the criminalisation of money laundering and terrorism financing in accordance with FATF Recommendation 3 and consistent with the UN Convention against Transnational Organized Crime known as the Palermo Convention. It generally defines money laundering as the conversion, transfer, concealment, disguising, acquisition, possession or use of the proceeds of crime. The term 'proceeds of crime' covers any property or funds derived from or obtained as a result of, or in connection with, an 'offence'. Funds or assets are 'proceeds of crime' and thus fall under the scope of the money laundering provision only if they are proceeds of an 'offence'. To appreciate the scope of the definition of the money laundering offence, the Drafting Note advises drafting authorities in the various countries to choose an approach to defining the term 'offence'. It provides alternative variants for their consideration:

- Variant 1 covers all offences under domestic law
- Variant 2 covers only those offences with a particularly serious sanction
- Variant 3 covers only offences specifically listed in a schedule.

Whichever approach is adopted, each country should at a minimum provide a range of offences within each of the designated categories of offences that appear in the Glossary to the FATF Recommendations. These are: participation in an organised criminal group and racketeering; terrorism, including terrorism financing; trafficking in human beings and migrant smuggling; sexual exploitation, including sexual exploitation of children; illicit trafficking in narcotic drugs and psychotropic substances; illicit arms trafficking; illicit trafficking in stolen and other goods; corruption and bribery; fraud; counterfeiting currency; counterfeiting and piracy of products; environmental crime; murder,

grievous bodily injury; kidnapping, illegal restraint and hostage-taking; robbery or theft; smuggling; tax crimes (in relation to customs and excise duties and taxes, and to direct taxes and indirect taxes); extortion; forgery; piracy; and, insider trading and market manipulation.

The Model Provisions, in accordance with the Interpretative Notes to Recommendation 3 of the FATF Recommendations, advises that 'countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences may be described by reference to all offences, or to a threshold linked either to a category of serious offences, or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches. It provides guidance in a situation where countries decide to apply a threshold approach that predicate offences should at a minimum comprise all offences that fall within the category of serious offences under their national law or should include offences that are punishable by a maximum penalty of more than one year's imprisonment or for those countries that have a minimum threshold for offences in their legal system, predicate offences should comprise all offences, that are punished by a minimum penalty of more than six months imprisonment.'

Part IV provides that the money laundering offence can be applied not only to proceeds generated domestically but also to proceeds that were generated abroad and laundered domestically. It is therefore important that the term 'offence' is defined to cover both situations. Part IV suggests variant provisions for countries to choose from.

The Model Provisions establishes money laundering as an offence distinct from predicate offence and extends it to any type of property, regardless of value, that directly or indirectly represents criminal proceeds and self-laundering.

In respect of terrorism financing, Part IV includes guidance and options to the definition of 'terrorist act' and defines 'terrorist organisations' as it appears in the Glossary to the FATF Recommendations.

Part V: Conviction-based Confiscation, Benefit Recovery and Extended Benefit Recovery Orders

This Part of the Model Provisions implements FATF Recommendation 4 and the associated Interpretative Notes. The Model Provisions comprises three sets of provisions on the issue of confiscation and provisional measures:

- Mandatory provisions to comply with basic international standards;
- Additional provisions recommended for an effective and comprehensive asset recovery regime but not required under the FATF standard;
- Provisions that are optional and reflect best practice.

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

Part V applies where there is a conviction for any criminal offence for an order in rem, which is directed against the proceeds and instrumentalities of crime, or in personam, which is a value order designed to neutralise the benefit from the crime and directed against persons. The scope of these provisions is broad enough to capture funds raised or provided in a terrorism financing setting either as objects, proceeds or instrumentalities of a terrorism financing offence. Likewise, it

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The obligation to declare should apply both to travellers carrying cash or bearer negotiable instruments and to the cross-border transportation used.

covers cases where membership in a terrorist organisation is a criminal offence and deals with the assets of such an organisation.

Part V provides for orders to 'confiscate' proceeds, objects and instrumentalities and to recover benefits, and guidance on how these terms are used in different jurisdictions. It also provides guidance on how restraint and confiscation provisions are made available in the domestic setting for authorities to use in the case of foreign proceedings, whereby an external request is received relating to an investigation or conviction in another state.

Part VI: Civil Forfeiture

Civil forfeiture relates to the making and enforcement of orders with respect to property proved to be derived from unlawful conduct. These forfeiture orders are civil in nature and therefore application is made in the civil courts. They are available notwithstanding the existence of a prosecution or a conviction, or indeed if there is an acquittal following a criminal trial. Part VI provides for a mechanism to freeze property that is, or will become, the subject of proceedings. This is to ensure that the property is not dispersed pending the outcome of the proceedings.

Also included are important provisions related to the management and sale of property in particular circumstances. There may be occasions where the assets are by nature perishable. In such circumstances the best option would be to enable the enforcement authority, or trustee or receiver, to step in and sell the assets while they still have a value rather than await the outcome of prolonged litigation when they would have no value. The same principle might apply when balancing the expense of maintaining assets against their actual value. In those circumstances it may also be appropriate to permit the enforcement authority or trustee or receiver to sell such assets since the cost of their continued maintenance would outweigh any value ultimately recovered. It

would be important in such cases to have a court order that authorises disposal of assets in order to avoid later claims for compensation by a person or persons declaring the assets were irreplaceable.

Part VII: Investigative Orders

This Part contains provisions relating to ancillary orders, which will assist in the investigation of asset recovery cases, whether in the criminal or civil context. Chronologically, the first in many investigations will be the customer information order, followed by the monitoring order, the production order and finally the search and seizure order. It may not be necessary or indeed appropriate to use all these orders in each case.

While the production order and the search and seizure order will be familiar to most jurisdictions, the Model Provisions introduces the customer information order, monitoring order and disclosure order to investigative techniques and with considerable potential for added value in financial investigations. All these orders are included for civil recovery investigations.

Part VIII: Cross Border Transportation of Currency and Bearer Negotiable Instruments

Part VIII sets out provisions to assist with the implementation of FATF Recommendation 32 on the physical cross-border transportation of currency and bearer negotiable instruments. It should be adopted in conjunction with Part II on preventive measures to combat money laundering and terrorism financing. The Model Provisions offers options to be implemented either through a declaration system, which requires all persons to make a declaration when moving specified assets, or as a disclosure system, which requires those moving specified assets in excess of a defined amount to make a disclosure upon request by the competent authorities. The obligation to declare or disclose should apply both to travellers carrying

cash or bearer negotiable instruments and to the cross-border transportation of such cash or bearer negotiable instruments by way of cargo, mail or any other means.

Part IX: Cash Forfeiture

Although it is optional, this Part of the Model Provisions represents good practice in the UK and can be a valuable tool in the arsenal of authorised officers. These provisions introduce a new power for them to seize cash discovered during investigations or at the point of import or export, provided there is reasonable suspicion it is derived from, or intended for use in, criminal activity or the instrumentalities of such activity. In such cases, the Model Provisions provides that an application may be made to the appropriate court for the forfeiture of the cash. No conviction is required to obtain an order for cash forfeiture since cash forfeiture proceedings are civil proceedings and the civil standard of proof applies. The Model Provisions defines the term 'authorised officer' as an agent of the state empowered to search, seize, detain and apply to forfeit.

Part X: Unexplained Wealth Orders

This Part is based on the unexplained wealth provisions enacted by the Australian Commonwealth (Proceeds of Crime Act 2002), Western Australia (Criminal Property Confiscation Act 2000), Northern Territory (Criminal Property Forfeiture Act 2002), New South Wales (Criminal Assets Recovery Act 1990) and South Australia (Serious and Organised Crime (Unexplained Wealth) Act 2009). They are included here as best practice options. The order is assessed as the difference between the total value of the person's wealth and the value of the person's lawfully acquired wealth. If there is unexplained wealth in relation to these provisions then the burden shifts to the respondent to establish that the wealth was lawfully acquired. The respondent is liable to pay the state an amount equal to the amount specified in the unexplained wealth declaration.

The burden of proving the legitimacy of the respondent's wealth lies with the respondent, the rationale being that the task of establishing the lawful source of wealth is less onerous on the person who has acquired it.

Part XI: Asset Management

The Model Provisions recognises that effective proactive asset management is critical to the success of any forfeiture legislation, whether criminal or civil. If assets are allowed to disperse or disappear, the forfeiture programme will be undermined. In jurisdictions that have provided for this role to be carried out by traditional court appointed receivers, asset management has proven to be very costly in terms of net recoveries. Occasionally enforcement authorities have had to pay monies to the receiver out of taxpayer funds because the assets recovered were insufficient to cover the cost of the receiver. Accordingly, this Part seeks to identify who should be responsible within the enforcement authority to manage and if necessary realise property subject to court orders.

There are four stages of assets management envisaged by the Model Provisions, namely:

- The initial freezing of the property – how can the property be secured pending the final outcome of the forfeiture case? Some types of property, like cash or a vehicle, may need to be physically removed and held while other types of property, like real estate, might need to be secured by means such as a notice on land title. Pre-seizure planning is a vital part of the asset recovery process.
- The on-going management of property, after restraint, but before the final outcome of the case – how can it be preserved pending the forfeiture hearing? Again, the type of property will define the technique needed. A bank account might be effectively frozen by an order binding on the financial institution;

a vehicle may need to be securely stored; complex properties, like an on-going business, will require complex management (paying employees and suppliers, collecting revenues and so on).

- The final disposition of property – in the event that forfeiture is ordered, how can the property be sold or disposed of? Some types of property, contraband or weapons for example, may need to be destroyed but most property will be sold. In the event that the court refuses forfeiture, the property must be returned and questions such as the liability of public bodies will need to be considered.
- Consideration by drafting authorities as to whether the powers of a property manager apply to cash that has been seized. This may be viewed as unduly bureaucratic given that cash can readily be accounted for and simply deposited in an escrow account.

Part XII: Recovered Assets Fund

The focus of this Part is on best practice in the management of recovered assets. It looks at establishing recovered assets funds to receive all such assets from criminal confiscations or civil forfeiture proceedings. Another way is simply to provide that the forfeited funds are credited to the state's general revenue.

Part XIII: Implementing the United Nations Targeted Financial Sanctions under the Al-Qaida and 1988 Sanctions Regimes

This Part provides guidance on key requirements that states may wish to consider when designing their national framework for implementing the UN Al-Qaida and 1988 sanctions regimes. It does not attempt to provide a model. The UN Al-Qaida sanctions regime falls under UN Security Council Resolutions (UNSCR) 1267 (1999), 1989 (2011) and 2083 (2012) and the 1988 sanctions regime under UNSCR 1988 (2011) and 2082 (2012).

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