Common Law Legal Systems
Model Provisions

Addressing Money Laundering, Terrorist Financing, Preventive Measures and the Proceeds of Crime
Executive Summary
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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);

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

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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.

Part I: Preliminary

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 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.
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,
The money laundering offence can be applied to proceeds whether generated domestically or generated abroad and laundered domestically.

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

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 ongoing 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).