Designing a civil forfeiture system: an issues list for policymakers and legislators

Anthony Kennedy
Assets Recovery Agency, Belfast, UK

Abstract

Purpose – In recent years an emerging global trend of introducing legislation to use civil procedures against criminal assets can be detected. However, these civil forfeiture models, which exist vary from jurisdiction to jurisdiction. This paper seeks to identify issues which need to be considered when such a scheme is being designed and examines the options which have been adopted.

Design/methodology/approach – The paper examines the legislative provisions in a number of jurisdictions setting out the common issues which have arisen and the range of options which have attempted as potential solutions.

Findings – The paper concludes that jurisdictions which seek to introduce civil forfeiture legislations now have various examples from which to learn but that these models will likely evolve in the face of litigation and experience as legislatures and policymakers attempt to produce fair but effective procedures for the civil recovery of criminal proceeds.

Originality/value – As further jurisdictions respond to this emerging trend and draft their own legislation, there is much to be leant from the issues which others have considered necessary to address and the way in which these issues have been dealt with.

Keywords Legislation, Civil law, Criminal forfeiture, Forfeiting

Paper type Research paper

Introduction

In recent years an emerging global trend of introducing legislation to use civil procedures against criminal assets can be detected. South Africa, Ireland, the UK, Fiji, the Canadian provinces of Ontario, Alberta, Manitoba, Saskatchewan and British Columbia, Australia and its individual states, and Antigua and Barbuda have all introduced such procedures. In addition, the Commonwealth has produced provisions, which may now serve as a template. However, the models, which exist vary from jurisdiction to jurisdiction. For those policy makers and legislators who are tasked with designing a non-conviction based forfeiture system[1], what are the lessons which can be learnt from other jurisdictions' experience? This paper seeks to identify issues which need to be considered when such a scheme is being designed and examines the options which have been adopted.

Definition of proceeds

A fundamental issue which legislation must address is how it defines the proceeds sought to be forfeited. The UK model provides that such property must have been obtained "by or in return for unlawful conduct"[2]. This is not as widely drawn as in the Irish model which defines proceeds of crime as any property obtained or received by, or as a result of, or in connection with the commission of an offence[3]. The Commonwealth model is also wider, providing that proceeds of unlawful activity

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means any property or economic advantage derived or realized, directly or indirectly, as a result of or in connection with, an unlawful activity, irrespective of the identity of the offender[4].

In the Australian model property is "proceeds" of an offence if it is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence[5]. The Victorian[6] and South Australian models[7] use similar definitions.

The Ontario model provides that "proceeds of unlawful activity" means property acquired, directly or indirectly, in whole or in part, as a result of unlawful activity[8]. The Saskatchewan model uses an identical definition[9]. The Alberta model is similar, providing that property acquired by illegal means is a reference to property that has been acquired or derived directly or indirectly through an illegal act[10].

Some jurisdictions incorporate, in effect, a "predicate offence" approach to civil forfeiture. The original New South Wales model allowed the civil forfeiture of criminal proceeds only if they came from drug trafficking crime[11]. However, this approach was subsequently abandoned and a new model introduced which allowed the forfeiture of proceeds of serious crime[12]. This approach has also been adopted in the New Zealand model where tainted property is any property that, in whole or in part, has been acquired as a result of significant criminal activity or directly or indirectly derived from significant criminal activity[13]. Significant criminal activity means any activity engaged in by a person which constitutes offending that consists of one or more offences punishable by a maximum term of imprisonment of five years or more; or from which property to a value of $30,000 or more has, directly or indirectly, been derived[14]. The approach is also evident in the Antiguan and Barbudan model which provides that civil forfeiture is available if the court makes a finding that the defendant has engaged in money laundering activity[15]. The approach may prove to be a serious weakness in that it requires plaintiffs to prove that the proceeds came from one type of crime rather than another.

The US model provides two notable definitions of proceeds. Firstly, in respect of cases involving illegal goods, illegal services and unlawful activities, proceeds is defined as property of any kind obtained directly or indirectly as a result of the commission of the offence giving rise to forfeiture and any property traceable thereto and is not limited to the net gain or profit realised from the offence[16]. In cases involving lawful goods or services that are sold or provided in an illegal manner, proceeds means the amount of money acquired through the illegal transactions resulting in the forfeiture, less the direct costs incurred in providing the goods or services. However, such direct costs do not include any part of the overhead expenses of the entity providing the goods or services or any part of the income taxes paid by the entity[17].

The South African model has perhaps the widest definition, defining "proceeds of

When policymakers and legislators reach a decision regarding the definition of "proceeds" to use in their legislation, it will have a clear impact on the range of property which is forfeitable. For example, can a regime deal with property, which has been lawfully obtained, but then retained through unlawful conduct? Although the definitions have much in common, those which include the words "in connection with" allow for the most robust application of civil forfeiture.

Proceeds of foreign crimes

Legislation should indicate whether proceeds of crimes which are committed outside the jurisdiction are subject to it. The UK model provides that proceeds of conduct which occurs in a country outside the UK and is unlawful under the criminal law of that country and, if it had occurred in a part of the UK, would have been unlawful under UK criminal law, are recoverable. This is a dual criminality provision. (It would, of course, be a very strong step to seek to adopt a single criminality test and deprive a person of property, which had been lawfully obtained in the jurisdiction where it was acquired.) The Manitoba model has a similar dual criminality provision, providing that proceeds of an activity that is an offence under an Act of Canada, Manitoba or another Canadian province or territory or an Act of a jurisdiction outside Canada, if the activity would be an offence under an Act of Canada or Manitoba if it were committed in Manitoba are forfeitable[20]. Other jurisdictions which have adopted a dual criminality provision are Ontario[21] and Saskatchewan[22]. The Commonwealth model provides likewise[23].

Some jurisdictions have adopted a modified dual criminality mechanism. The US model contains a dual criminality test but combines this with a list-based approach, providing that proceeds obtained directly or indirectly from an offence against a foreign nation are subject to forfeiture. However, there are limitations on the offences which apply. Firstly, the offence must fall into one of the categories of foreign crimes listed as specified unlawful activity[24]; secondly, it must be punishable in the foreign state by death or imprisonment for more than one year; and, thirdly, the conduct must be punishable in the USA by imprisonment for a term of more than one year if the act or activity constituting the offence had occurred there[25]. The British Columbian model provides a dual criminality test for unlawful activity but provides that acts under a particular foreign enactment or under enactments of a particular foreign jurisdiction may be prescribed as not falling within the definition of unlawful activity[26]. The government, therefore, maintains control over the proceeds of which foreign crimes are forfeitable in British Columbia.

The Alberta model provides that property acquired by illegal means refers to property that has been acquired or derived directly or indirectly through an illegal act. However, illegal act is defined as meaning anything done in contravention of the Canadian Criminal Code or anything done or carried out in contravention of an enactment of Alberta[27]. The effect of this is that proceeds of foreign crimes are incapable of being forfeited under the Alberta model.

The Irish model was silent on the issue of foreign proceeds. The High Court held in *DPP* v. *Hollman*[28] that the Act applied to criminal proceeds even if the crime was committed outside Ireland, notwithstanding the failure of the legislation explicitly to say so. Subsequently, however, the Supreme Court held in *McK* v. *D*[29] that the purpose of the legislation was to confiscate property acquired with or representing the

proceeds of crime committed in Ireland. Since, the legislation contained no indication of any broader objective, the Supreme Court held that it did not, therefore, apply to proceeds of foreign crimes. As a result of this decision the Irish parliament amended their legislation so as to apply to foreign criminal proceeds where a dual criminality test was satisfied[30]. This experience demonstrates a difficulty the authorities may face, namely that respondents defend cases on the basis that the property at issue is derived from foreign rather than domestic crime.

Identifying particular crimes

A crucial issue which the legislation must provide for is how underlying criminality is required to be proved. It will be rare that evidence will be available to link the proceeds directly to a particular offence, otherwise a criminal prosecution would have been brought.

The Australian model provides that a forfeiture order may be made if the court is satisfied that property is proceeds of one or more indictable offences even though there is no finding "as to the commission of a particular offence" but instead "can be based on a finding that some serious offence or other was committed"[31]. The Antiguan and Barbudan model uses a similar formula, providing that a finding by the court need not be based on a finding as to commission of a particular offence and can be based on a finding that "some offence or other constituting a money laundering activity" was committed[32]. The Commonwealth model states that, for greater certainty, the court need not be satisfied that the property was acquired in connection to any particular unlawful activity[33].

The UK model also makes it clear that property obtained through unlawful conduct does not have to be linked to a specific offence. The UK Act provides that, in deciding whether any property was obtained through unlawful conduct, it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct[34]. However, it does appear necessary to show at least one kind of particular unlawful conduct. Hence, a difficulty may arise if a particular range of criminal offences cannot be identified.

If the legislation does not clarify the position regarding linkage, then unfortunate results may occur. The Supreme Court of Western Australia held that, in order to obtain a freezing order, it was necessary to adduce evidence giving rise to a reasonable suspicion that the relevant property represented the proceeds of, or had been used in, an identifiable confiscation offence[35]. This clearly makes the task of the investigator much more difficult. In order to be workable, legislation must ensure that the linkage between property and specific, individual crimes does not require to be proved.

respect of property obtained before the legislation came into force, and on whether there is a general statute of limitations on civil proceedings.

A number of models provide for full retrospectivity, some focusing on when the property was obtained, others on the date of the activity which gave rise to the property. In the Manitoba model, proceeds of unlawful activity includes property acquired regardless of whether the property was acquired before or after the coming into force of the Act[37] and there is no limitation period for an application under the Act[38]. The Irish model allows forfeiture of proceeds of crime obtained at any time, whether before or after the passing of the legislation[39]. The Irish courts have held that the statute of limitations legislation has no application to Irish civil forfeiture proceedings, nor does it infringe the article of the constitution which provides that acts shall not be declared to be infringements of the law which were not so at the time of their commission[40]. The Australian model applies in relation to proceeds of an offence whether the offence occurred before or after the commencement of the legislation[41]. The Western Australian model allows for retrospectivity by applying the legislation to a person's unexplained wealth whether any property, service, advantage or benefit that is a constituent of the person's wealth was acquired before or after the commencement of the legislation[42]. The Northern Territory model is similar[43]. The Saskatchewan model provides that "proceeds of unlawful activity" includes property regardless of whether the property was acquired before or after the coming into force of the legislation[44]. The Commonwealth model provides that proceeds of unlawful activity includes property irrespective of whether the activity giving rise to it was committed before or after the commencement of the legislation[45].

The UK model provides for limited retrospectivity. The legislation states that, for the purpose of deciding whether or not property was recoverable at any time (including times before commencement), it is to be assumed that it was in force at that and any other relevant time[46]. However, the legislation contains a limitation period which prevents the recovery of property if it derived from a crime committed more than 12 years before[47]. The effect is that civil recovery proceedings must be brought within 12 years from the date when the Director's cause of action accrued, that is, the date at which the original property was obtained through unlawful conduct.

The Ontarian model also provides for limited retrospectivity, but for a longer period. It provides that "proceeds of unlawful activity" includes property regardless of whether it was acquired before or after the Act came into force[48]. However, proceedings may not be commenced after the 15th anniversary of the date proceeds of unlawful activity were first acquired as a result of the unlawful activity that is alleged[49].

Alternatively, limited retrospectivity may be for a shorter period. The British Columbian model provides for retrospective application over a period of ten years[50]. The New Zealand model provides a limitation period of seven years for a profit forfeiture order[51]. The Antiguan and Barbudan model sets an even shorter limitation period, namely six years[52]. Jurisdictions may insert a limitation period as a political compromise during the passage of legislation.

The South African experience demonstrates that silence on this issue can cause difficulties. In *National Director of Public Prosecutions of South Africa* v. *Carolus and Others*[53] the court held that it was an important legal rule that no statute was to be construed as having retrospective operation unless the legislature clearly intended the

statute to have that effect. Since, Parliament had not included a "whether before or after the commencement of this Act" formula, the court was not prepared to import a retrospective intention. Following this decision, the definition of proceeds of unlawful activities was amended to include property derived at any time before or after the commencement of the legislation[54]. This was reinforced by an additional provision which said that nothing in the legislation or in any other law should be construed so as to exclude the application of civil forfeiture on account of the fact that the unlawful activity occurred, or the proceeds were derived, before the commencement of the legislation[55].

Proceeds of criminal notoriety

An issue increasingly considered is whether to incorporate a power into civil forfeiture systems to institute proceedings to deprive persons of proceeds derived from the commercial exploitation of their notoriety from having committed criminal offences[56]. Such a provision is increasingly deemed necessary in a world where hair and fingernail clippings from a killer have been auctioned on the internet and Jeffrey Dahmer sold his infamous refrigerator for $400,000 (*The Boston Globe*, 2001).

Under the Australian model, the Director of Public Prosecutions may apply for a literary proceeds order where an indictable offence or a foreign indictable offence has been committed. Such orders require payments to the government of amounts based on the proceeds that a person has derived from the commercial exploitation of his notoriety resulting, directly or indirectly, from the offence. This commercial exploitation may be by any means, including publishing material in written or electronic form; any use of media from which visual images, words or sounds can be produced; or any live entertainment, representation or interview. The court may include in a literary proceeds order future amounts in relation to benefits that the person may derive if the court is satisfied that the person will derive them. In deciding whether to make a literary proceeds order, the court must take into account the nature and purpose of the product or activity from which the literary proceeds were derived; whether supplying the product or carrying out the activity was in the public interest; the social, cultural or educational value of the product or activity; the seriousness of the offence to which the product or activity relates; how long ago the offence was committed; and such other matters as it thinks fit. The model, therefore, allows the widest possible judicial discretion in considering whether to make such an order. The South Australian model contains a similar scheme for recovering the proceeds of criminal notoriety[57] and the Australian Capital Territory[58] model contains a widely drafted mechanism for recovering "artistic profits"[59].

The Ontarian model deals with "contracts for recounting crime", defined as contracts under which money is to be paid to a person convicted of, or charged with, a

young women and left a note signed "the Son of Sam". When arrested, it was feared that Berkowitz would have opportunities to sell his story (*New York Times*, 1987) and a statute was enacted which provided a means of depriving persons of literary proceeds of crime[62]. This provided that any legal entity which knowingly contracted for the thoughts, feelings, opinions or emotions regarding a crime by any person charged with or convicted of the crime must give written notice to the Crime Victims Board. The board was obliged to maintain proceeds from such contracts in an escrow account and distribute them to any victims who were successful in a civil action against the criminal within five years. The legislation was successfully constitutionally challenged in *Simon & Schuster Inc.* v. *New York State Crime Victims Board*[63]. A significant number of US states attempted to reform their laws so as to survive constitutional challenge. However, this second generation of Son of Sam laws have also been generally unsuccessful against literary proceeds. For example, the California Supreme Court struck down that state's legislation as unconstitutional in *Keenan* v. *Superior Court*[64]. A more successful approach has been the direct application of civil forfeiture legislation. Sammy Gravano, a former member of the Gambino organised crime family, had engaged in drug trafficking after having testified at the trial of John Gotti. Arizona filed a civil forfeiture complaint under the Arizona Racketeering Act rather than under its Son of Sam law. The application was aimed at all assets which had resulted from Gravano's racketeering activities, including his rights to royalties in connection with the publication of a book: *Underboss – Sammy the Bull Gravano's Story of Life in the Mafia*. The Arizona Court of Appeals held in *Arizona*v. *Salvatore Gravano*[65] that the forfeiture legislation applied based on the existence of a causal connection between the racketeering conduct and the proceeds. The causal connection existed because it was the storyteller's notoriety from racketeering which made the story marketable.

While the inclusion of the proceeds of criminal notoriety in a civil forfeiture regime may appear to be an unnecessary luxury, it is nevertheless an issue worth consideration.

Tracing, following and mixing

Civil forfeiture legislation must, in order to be effective, be capable of dealing with proceeds of crime which have been transferred to other people, been changed in form, or been mixed with other property as part of the money laundering process[66].

The UK model allows for the recovery of property which represents recoverable property[67]. Hence, the sale proceeds of stolen jewellery are recoverable. It also allows for the following of property into the hands of another person along, potentially, a chain of transactions[68] and allows for recoverable property to be recovered despite the fact that it may have been mixed with other, legitimate property. This enables courts to deal with, for example, stolen money which has been paid into a bank account[69].

The South Australian model deals with this issue by providing that property remains proceeds of an offence or an instrument of an offence even if it has been credited to an account, disposed of, or otherwise dealt with[70]. The legislation contains a concept of "effective control". This provides that, if property is initially owned by a person and, within six years of an application for a restraining or confiscation order being made, is transferred to another person without sufficient consideration, then the property is taken still to be under the effective control of the first person. It also

provides that, in determining whether or not property is subject to the effective control of a person, regard may be had to family, domestic and business relationships between persons having an interest in the property[71]. The Commonwealth model provides that a forfeiture order may contain provisions respecting who is the effective owner of property held by a body corporate or in trust[72].

The New Zealand model provides that, if any restrained property is converted into another form during the time that it is restrained property, the property in its converted form is restrained property for the purposes of the restraining order and any forfeiture order made in relation to that property[73].

The US model, when defining forfeitable property, frequently also includes "property traceable to such property" or "property which represents or is traceable to" such property[74].

The Commonwealth model deals with this issue by including, on a proportional basis, property into which any property derived or realized directly or indirectly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the unlawful activity[75]. The Fijian model utilizes a similar formula[76].

Standard of proof

Civil forfeiture systems are designed to ensure that respondents cannot argue that the central issue (whether the property is criminal proceeds) ought properly to be proved to the criminal standard of proof. Most models, therefore, provide that the standard of proof in such proceedings is the balance of probabilities. This is so of the UK[77], Irish[78], Australian[79], ACT[80], Northern Territories[81], New Zealand[82], Fijian[83], Ontarian[84], Manitoban[85], Albertan[86], Saskatchewan[87], South African[88], British Columbian[89], Antiguan and Barbudan[90] and Commonwealth[91] models.

Rebuttable presumptions

A number of jurisdictions provide for rebuttable presumptions in their civil forfeiture regimes. The most radical presumption is contained in the Western Australian model which provides that any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary[92]. When the court makes an unexplained wealth declaration, the respondent is liable to pay to the state an amount equal to the amount specified in the declaration as the assessed value of the respondent's unexplained wealth. The northern territory model contains a similar rebuttable presumption[93].

A limited rebuttable presumption is available under the Manitoba model in respect of members of criminal gangs. In an application for forfeiture of property which is

that a person is a member of a criminal organization if he or she has been found guilty or convicted of a criminal organization offence under the Canadian Criminal Code. A similar limited presumption is available under the Saskatchewan model[95].

The British Columbian model provides that proof that a person has participated in an unlawful activity that resulted in, or was likely to have resulted in, the person receiving a financial benefit and subsequently acquiring property or an increase in the value of property is proof, in the absence of evidence to the contrary, that the same was obtained as a result of unlawful activity[96].

In the Antiguan and Barbudan model, if evidence is given that the value of the respondent's property after money laundering activity exceeded the value of his property before the activity, the court must treat the excess as money laundering proceeds except to the extend that it is satisfied the excess was due to causes unrelated to the money laundering activity[97].

The effect of a presumption is to require less evidence than would otherwise be necessary or to make it unnecessary to call any evidence at all. It thus assists the party who bears the burden of proof[98]. The underlying thinking behind presumptions in civil forfeiture proceedings is that it is significantly easier for a person to establish that his property was lawfully acquired, or not acquired directly or indirectly from the commission of an offence, than it is for the authorities to establish the contrary.

The Irish model, while not including a rebuttable presumption, provides an alternative mechanism for giving evidential assistance to the authorities. The Irish legislation allows for a statement of belief by a police officer that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime, that the respondent is in possession of or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime property is proceeds of crime shall be evidence of that matter[99]. The court must, however, be satisfied that there are reasonable grounds for the belief. In *G* v. *Criminal Assets Bureau*[100] the court held that such evidence is not conclusive and is open to challenge by a respondent. The court also said that courts should be slow to make orders on the basis of such belief evidence without other corroborating evidence.

The Albertan model uses the mechanism of the burden of proof to achieve not dissimilar results. The onus is on the authorities at a property disposal hearing to establish that the restrained property has been acquired by illegal means. However, the onus is on a respondent to establish, with respect to the restrained property, firstly, the nature and extent of his claim to any interest in the property; secondly, that he has not been involved in the commission of the illegal act in respect of which the property was restrained, and thirdly, where the property had been acquired by illegal means and subsequent to the acquisition of the property by illegal means the property was acquired by him, that he did not know and would not reasonably be expected to know that the property had been acquired by illegal means[101].

Freezing assets

Civil forfeiture legislation must provide for the freezing of assets. Most jurisdictions allow for a court order to be obtained in an *ex parte* application so that the respondent cannot dissipate assets before the order is granted and served. Nevertheless, a number of issues arise in respect of asset freezing orders.

Firstly, what evidential threshold should the authorities be required to meet in order to obtain an asset freezing order ? In the UK, the court must grant an interim receiving order or a property freezing order if satisfied that there is "a good arguable case" that the property is recoverable[102]. A "good arguable case" has been described as "one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success"[103]. The courts have also commented that:

> . . .it is not enough to show an arguable case, namely one which a competent advocate can get on its feet. Something markedly better than that is required, even if it cannot be said with confidence that the Plaintiff is more likely to be right than wrong[104].

A more common evidential threshold is that of "reasonable cause to believe". The Manitoban model provides that the court must, unless it would clearly not be in the interests of justice, make a freezing order if it is satisfied that there are reasonable grounds to believe that the property is proceeds of unlawful activity[105]. The South African model similarly provides that a preservation of property order may be granted if there are reasonable grounds to believe that the property is the proceeds of unlawful activities[106]. The Ontarian[107], Albertan[108], Saskatchewan[109], New Zealand[110] and British Columbian[111] models each provide for asset freezing on an evidential threshold of "reasonable grounds to believe".

The level at which the evidential threshold is set for the freezing of assets in an asset forfeiture system is a crucial issue. If it is set too high, the state agency tasked with such investigations may struggle to obtain asset freezing orders. If it is set too low, this may amount to inappropriate interference with the defendant's right to peaceful enjoyment of his possessions. In this context jurisdictions ought to ask whether "reasonable cause to suspect" is an appropriate evidential threshold. The Commonwealth model suggests alternative options of the reasonable cause to believe and reasonable cause to suspect[112]. The South Australian model provides that a court must make a restraining order if satisfied that there are reasonable grounds to suspect that the property is the proceeds of a serious offence[113]. The Antiguan and Barbudan model also allows for a lower threshold, providing that, where a person is suspected of having engaged in money laundering activity, the court may make a freezing order in respect of property in which there is a reasonable suspicion he has an interest[114].

Secondly, what investigative powers should exist after the point at which assets are frozen by the court? Under the UK model a property freezing order may be obtained and, following this order, investigative orders may still be obtained. When the evidence is sufficient to prove that there is a reasonable cause to believe that the assets are

is published unless an application for a forfeiture order is laid[115]. Under the Irish model an interim order freezing assets may be obtained which lapses after 21 days unless an application for the making of an interlocutory order in respect of any of the property concerned is brought during that period[116]. In the Albertan model the court must set a date, not later than 45 days from the day of the granting of the freezing order, on which the court is to commence a property disposal hearing[117]. The Commonwealth model provides for alternatives of 21 or 90 days after which a restraining order expires, unless an application for a forfeiture order has been made[118]. The New Zealand model provides that a restraining order granted as a result of an application made without notice (restraining order A) ceases to be in force after seven days. However, if, before restraining order A expires, an application is made with notice for a restraining order (restraining order B) in relation to the property to which restraining order A relates, restraining order A continues in force until the application for restraining order B is finally disposed of. If an application is made for restraining order B, the applicant must prosecute the application with all due diligence, and if the applicant does not do so, the court may, on the application of any party to the proceedings, order that the proceedings be struck out[119]. A different solution to the issue of how long an order should last is found in the South Australian model. In addition to a restraining order, the legislation also creates a freezing order, which can be obtained under an urgency procedure and which, once obtained, ceases to be in force on the making of a restraining order in respect of the money in the account or the expiration of 72 hours after the time at which the freezing order took effect, whichever occurs first[120].

The issue is that the authorities require time to be able to investigate the property and, if the freezing order only exists for a limited period, it may be discharged before the investigation is completed, with the result that the owner has an opportunity to dissipate them. On the other hand, this public interest must be balanced against the right of the defendant that any forfeiture proceedings commence within a reasonable time. Given that particularly complex investigations may not be capable of being concluded within statutory time limits, a more appropriate mechanism may be to allow the lifespan of the freezing order to be determined by judicial discretion.

Receivers

Simply granting an asset freezing order prohibiting the disposal of property may not, in itself, be a sufficiently effective measure. Accordingly, many jurisdictions provide for the appointment of a receiver (although a different term is used to describe the role in some models). The primary function of a receiver is to secure the detention, custody or preservation of the relevant property. This is essentially a management role in respect of the disputed property, pending a full court hearing. The authorities are likely to seek the appointment of a receiver where they believe the respondent cannot be trusted not to dissipate his property. This will particularly be the case where there is a cash business. Jurisdictions which permit such receivers include the UK[121] South Africa[122] Ireland[123] South Australia[124] Alberta[125] Manitoba[126] and British Columbia[127].

The UK model is unique in that its receivers have not only a management function but also an investigative function. This function is to take an active role, on behalf of the court, in establishing whether or not the property to which the interim receiving

order applies is derived from unlawful conduct. The receiver is also responsible for reporting as to whether there is any other recoverable property in relation to the same unlawful conduct and, if so, who holds it. The receiver is, in effect, a court-appointed expert witness. The costs of the interim receiver's investigation, which are often substantial, are met by the Assets Recovery Agency and this model of receivership is, therefore, only realistic in jurisdictions which are willing to fund their authorities appropriately.

Legal expenses

Where a person's assets have been frozen by court order, legal assistance must be available to the property owner so that he can defend the proceedings against his property. Two principal options are possible. Firstly, there may be provision of public legal assistance by the state. Secondly, the respondent may be permitted to pay his legal fees from the frozen assets.

The first option is employed in the Irish model. Although the Court may make such orders as it considers appropriate in relation to any of the frozen property if it considers it essential to enable the respondent to discharge reasonable legal expenses in relation to the civil forfeiture proceedings, the usual approach in Ireland is to have resort to an *ad hoc* legal aid scheme[128]. The effect of this is that the value of the property is not reduced by the need to pay legal expenses.

The second option has been more commonly employed. The South African model, while it allows frozen assets to be used to pay legal expenses, attempts to limit the amount paid from frozen assets on legal expenses in four ways. Firstly, it provides that a court shall not make provision for such expenses unless it is satisfied that the person cannot meet the expenses out of unfrozen property. Secondly, it requires the respondent first to have disclosed all his interests in the property under oath and to have submitted to the court a sworn and full statement of all his assets and liabilities. Thirdly, it provides that legal expenses are not to be met out of frozen property in a way which exceeds any prescribed maximum allowable cost for that service. Fourthly, it allows the National Director of Public Prosecutions[129] or a *curator bonis* may apply for the legal expenses to be taxed[130]. The Ontarian model similarly provides that a person who claims an interest in frozen property may apply for an order directing that reasonable legal expenses be paid out of the property[131]. Again, however, there are a number of safeguards to try to limit the amount of frozen assets spent on legal expenses. The court may make an order for legal expenses only if it finds, firstly, that the applicant has disclosed all interests in property held by the moving party; secondly, that he has disclosed all other interests in property that, in the opinion of the court, other persons associated with the moving party should reasonably be expected to

was a reasonable balance between the interests of recovering property, which had been obtained through unlawful conduct and the interests of persons whose property was affected by the order. However, the UK experience was that legal aid was often unavailable thus preventing cases from proceeding. So the scheme was amended to allow legal expenses to be made from frozen assets in controlled circumstances[135].

Extra-territoriality

The legislation should clarify whether or not it applies to property held outside the jurisdiction. There are three options. The first of these is to limit the application of the scheme to property within the jurisdiction. Under the Manitoban model, police may apply for a forfeiture order with respect to property located anywhere in Manitoba[136]. The British Columbian model similarly applies only with respect to property or an interest in property in British Columbia[137]. The weakness inherent in this option is that respondents may attempt to defeat its operation by the retention of considerable funds outside the territorial jurisdiction of the court.

The second option is to permit application to property located overseas. The UK model specifically applies to property "wherever situated"[138]. The South Australian legislation applies to "property within or outside the state"[139]. The Western Australian model applies to property in Western Australia and to the fullest extent of the capacity of the Parliament to make laws with respect to property outside the State, to property outside Western Australia[140]. The New Zealand model provides that property means real or personal property of any description, whether situated in New Zealand or elsewhere[141]. The Fijian model provides that property includes property "whether located in Fiji or elsewhere"[142]. The Commonwealth model provides for forfeiture orders which affect property "inside or outside" the state[143].

Such provisions beg the question, how do they operate? The key lies in the *in personam* jurisdiction of the court. An individual who is before the jurisdiction of the court may be required to bring overseas funds within the territorial jurisdiction of the court. Failure to do so can result in sanctions. The weakness inherent in this option is that a defendant may refuse to repatriate funds. If the funds are substantial he may choose to suffer any sanction the court imposes rather than face the potential loss.

A third option is contained in the US model which provides that whenever property subject to forfeiture under US law is located in a foreign country, civil forfeiture proceedings may be brought in the US District Court for the District of Columbia[144]. This appears the same as other models which allow for extra territorial application. However, given the purer *in rem* jurisdiction of the US model, and the lack of *in personam* jurisdiction in US civil forfeiture law, it is dependent on the cooperation of foreign governments for any effectiveness (Cassella, 2001; Linn, 2004).

The USA has also adopted a radical fourth option. If the authorities can demonstrate that criminal proceeds were deposited into an account at a foreign bank, they may take forfeiture action against the equivalent amount of money that is found in any correspondent account of the foreign bank that is located in the USA. The authorities are not required to establish that the funds in the correspondent account are directly traceable to the criminal proceeds[145]. The idea behind this provision is that the bank will then debit the customer's account in the foreign jurisdiction, thus recompensing the bank and depriving the customer of the funds that have been forfeited. The bank has no legal right to contest the forfeiture of funds in its

correspondent account; rather only the customer who deposited the funds into the foreign bank has legal standing to contest the US forfeiture. This legislative option is only likely to be available to jurisdictions with significant economic power.

Civil or criminal classification

The purpose of introducing civil forfeiture legislation is to enable the state to deal with criminal proceeds in the possession of those who are not amenable under criminal processes. It is, therefore, essential that the regime is designed in such a way as proceedings prove capable of being classified as civil. The legislation usually addresses this issue, in part, by providing that the proceedings are civil not criminal proceedings, although other features of system design will usually be relevant (Kennedy, 2004).

The New Zealand model specifically provides that proceedings for a restraining order, an assets forfeiture order or a profit forfeiture order are civil proceedings[146]. However, some models go further. The South African model specifies that civil forfeiture proceedings are civil proceedings not criminal, and that the rules of evidence applicable in civil proceedings apply to such proceedings[147]. The Australian model provides that rules of construction applicable only in relation to the criminal law do not apply, that the rules of evidence applicable in civil proceedings do apply, and that those applicable only in criminal proceedings do not apply to the proceedings[148]. The South Australian model provides that proceedings for a freezing order, a restraining order or a confiscation order are civil proceedings and that the rules of construction applicable only in relation to the criminal law do not apply; and the rules of evidence applicable in civil proceedings apply to the proceedings[149]. The Albertan model provides that the rules and procedure that apply to civil matters apply to a civil forfeiture action[150].

The UK model is silent on the classification of its civil recovery proceedings, leaving this issue to be inferred rather than stated explicitly. The UK courts have nevertheless concluded that its civil recovery regime should be classified as civil proceedings for both domestic and ECHR purposes[151]. The Irish model of asset forfeiture was similarly silent on its face as to the issue of classification but proceedings were classified by the Irish courts as civil[152]. The issue has also been litigated in the USA[153] where a similar decision was reached.

Investigative powers

Power to obtain investigative orders is an essential part of any civil forfeiture scheme. Some court orders are common to most jurisdictions. In particular this is true of Production Orders[154] and Search and Seizure Warrants[155]. Other orders are less

required documents[162]. In a similar vein, the UK model allows for disclosure orders, which provide for compulsory questioning or document production. In the Irish model compulsory questioning is limited to matters concerning trusts[163].

The UK model provides an additional power for investigations in Northern Ireland, requiring any solicitor to furnish specified information to the investigator within a specified time and in a specified manner[164]. The information which can be specified is whether, at any time during a particular period, the person was a client of the solicitor in respect of any land, trusts, bank accounts or investments. Where the person was a client, the solicitor must furnish particular information including the client's full name; his most recent and all known previous addresses; his date of birth; other evidence of identity and details of any transaction relating to any matter in which the specified person was a client of the solicitor. They are, effectively, customer information orders applicable to solicitors.

The Irish model provides that the court may direct the respondent to file an affidavit in the specifying the property of which he possesses or controls together with his income, and the sources of that income, of the respondent during any period covering the previous ten years[165].

Domestic information gateways

Information is the raw material from which successful asset forfeiture cases are built and legislation may, therefore, need to ensure that investigators have lawful access to such information. Should investigators, however, be required to obtain every piece of necessary information by means of court orders? An alternative means of obtaining information is through information "gateways". The UK model provides that information held by certain public bodies may be disclosed to the director for the purpose of the director's functions[166]. While the Act provides a limited list of such bodies, there is also a mechanism whereby other bodies may be designated by statutory instrument[167].

The Ontarian model provides that the Attorney General may collect personal information for the purposes of determining whether a civil forfeiture proceeding should be commenced to conduct a proceeding under the legislation or to enforce an order made under the legislation[168]. The Attorney General must disclose collected information to a law enforcement agency if he is of the opinion that the disclosure would assist in the administration or enforcement of the law, would be in the public interest and would not be contrary to the interests of justice. The legislation also provides an obligation to disclose information to a reviewing authority despite any confidentiality provision in any other legislation. Under this a person who has knowledge of information that he believes would be useful for a civil forfeiture purpose must disclose it to the reviewing authority if certain criteria are met.

The British Columbian model provides that the director responsible for conducting civil forfeiture proceedings may enter into information-sharing agreements that are reasonably required in order to exercise his powers or perform his functions or duties. These include both public bodies within the province and those in jurisdictions outside Canada. Those domestic public bodies which have custody or control of information to which the director is entitled must, on request, disclose that information to the director[169].

The Irish model provides for information flows in relation to tax information, allowing that if, having regard to information obtained from the Criminal Assets Bureau or otherwise, the revenue commissioners have reasonable grounds for suspecting that a person may have derived profits or gains from an unlawful source or activity, and for forming the opinion that information in their possession is likely to be of value to any investigation of the bureau and that it is in the public interest that access to the information should be given, then, the revenue commissioners shall, notwithstanding any obligation as to secrecy or other restriction upon disclosure of information imposed by or under any statute or otherwise, provide access to, such information to a relevant person[170].

The South African model provides that the NDPP may request any person employed in or associated with a government department or statutory body to furnish him with all information that may reasonably be required for any investigation and such a person shall, notwithstanding anything in any law prohibiting him from disclosing any information must furnish the NDPP therewith[171]. The South African model also provides for the sharing of tax information in that, notwithstanding the secrecy provisions in tax legislation, the Commissioner of the Revenue Services must be notified of civil forfeiture investigations with a view to mutual cooperation and the sharing of information[172].

International information gateways

Given the propensity of respondents to move criminal assets between jurisdictions, civil forfeiture systems need to enable the authorities to obtain information from abroad. Some models include features to facilitate this.

Firstly, both the UK and Irish models have in common an agency-to-agency approach which bypasses central authorities set-up in connection with the criminal mutual legal assistance scheme. The UK model provides that the director may provide information for the purpose of any overseas criminal or civil recovery investigation[173]. (An exception to this is that revenue and customs information may only be disclosed if the commissioners consent[174].) The Irish approach is to provide that the functions of the Criminal Assets Bureau are the taking of all necessary actions for the purposes of the freezing and confiscation of assets suspected of deriving from criminal activity and that such actions include, where appropriate, subject to any international agreement, cooperation with any police force or any authority outside Ireland which has functions related to the recovery of proceeds of crime[175].

Secondly, a further method of obtaining information from abroad is making a respondent responsible for doing so. The UK model provides for requiring respondents to bring into the jurisdiction information which was outside the jurisdiction[176]. The US model goes further in respect of financial records held abroad. Where a defendant in

existing body which already has other functions? The UK, in establishing the Assets Recovery Agency[178], and Ireland, in establishing the Criminal Assets Bureau[179], have adopted the former approach. The USA has adopted the latter, allowing civil forfeiture investigations to be carried out by a range of law enforcement agencies. The New Zealand model seems to allow for movement of responsibility, defining "recovery body" as the department for the time being designated by the Attorney General as the recovery body[180]. The Commonwealth model provides for such functions being allocated to either the Director of Public Prosecutions or the Attorney General[181]. The approach adopted will depend upon a number of factors, in particular the availability of resources.

Compensation

Civil forfeiture legislation allows for a significant interference with a person's peaceful enjoyment of his possessions. The issue, therefore, arises as to whether, if the authorities cause a person's assets to be frozen for the purpose of an investigation, but are ultimately unsuccessful in satisfying the court that these are criminal proceeds, ought compensation be payable to the owner? A number of jurisdictions have provided compensation elements in their legislation.

In the UK model, where property has been subject to an interim receiving order, and the court does not make a recovery order, the Act provides that the person whose property it is may apply to the court for compensation[182]. The Act provides that, if the court is satisfied that the party has suffered loss as a result of the interim receiving order being in place, it can require the agency to pay compensation. The amount of compensation payable is what the court thinks reasonable having regard to the loss suffered and to any other relevant circumstances. The Act provides that no application for compensation may be made if a declaration has been made that the property belongs to a victim of crime. The holder of the property clearly should not be able to get compensation in these circumstances as the court has made a declaration that it is not his property.

The Irish model provides that where an interim order is discharged or lapses and an interlocutory order in relation to the matter is not made or, if made, is discharged, the court may, on an application by a person who shows to the satisfaction of the court that he is the owner of any property to which an order related, and the property does not constitute proceeds of crime or was not acquired with or in connection with property that constitutes proceeds of crime, award to the person such compensation as it considers just in the circumstances in respect of any loss incurred by the person by reason of the order concerned[183].

Third party rights

A civil forfeiture system must balance the desire to confiscate ill-gotten gains with appropriate safeguards for the protection of third party rights. How should it deal, for example, with the proceeds of drug trafficking left to a widow by her deceased husband? In the Australian model property ceases to be proceeds of an offence or an instrument of an offence in four sets of circumstances. Firstly, if it is acquired by a third party for sufficient consideration without knowing, and in circumstances which would not arouse a reasonable suspicion, that the property was proceeds of an offence or an instrument of an offence. Secondly, if the property vests in a person from the

distribution of the estate of a deceased person, having been previously vested in a person from the distribution of the estate of another deceased person while the property was still proceeds of an offence or an instrument of an offence. Thirdly, where the property has been distributed in accordance with an order in family law proceedings with respect to the property of the parties to a marriage or with a financial agreement in such a context and six years have elapsed since that distribution. Fourthly, if the property is acquired by a person as payment for reasonable legal expenses incurred in connection with proceeds of crime litigation or defending a criminal charge[184].

In the UK model a person who claims that any property alleged to be recoverable property belongs to him may apply for a declaration. If the applicant appears to the court to meet three conditions the court may make a declaration ruling that the property is not recoverable property. The conditions are that, firstly, the person was deprived of the property he claims, or of property which it represents, by unlawful conduct; secondly, the property he was deprived of was not recoverable property immediately before he was deprived of it; and, thirdly, the property he claims belongs to him[185].

In the Manitoban model, if property is found to be proceeds of unlawful activity, a person who owns or has an interest in the property is entitled to a protection order if the person proves that he acquired the property or an interest in it before notice of the forfeiture application was filed, and did not acquire the property or an interest in it as a result of unlawful activity; and that he, firstly, co-owns the property with another person whose unlawful activity led to the finding that the property is proceeds of unlawful activity, but did not know and could not reasonably have known that his co-owner's interest in the property was acquired as a result of unlawful activity or, secondly, owned or had an interest in the property before the unlawful activity occurred, and was deprived of the property or the benefit of his interest as a result of the unlawful activity or, thirdly, acquired the property or an interest in it for fair market value after the unlawful activity occurred, and did not know and could not reasonably have known at the time of the acquisition that the property was proceeds of unlawful activity or, fourthly, acquired the property or an interest in it from a person described in one of the earlier three categories[186]. The Saskatchewan model is expressed in similar terms[187].

The South African model protects third party interests by providing a mechanism for excluding certain interests from forfeiture orders. The court may exclude an interest if it finds on the balance of probabilities that the applicant had acquired the interest legally and neither knew nor had reasonable grounds to suspect that the property in which the interest was held was an instrumentality of an offence or was the proceeds of unlawful activities[188].

after-acquired, an innocent owner is one who was a bona fide purchaser or seller for value who did not know and was reasonably without cause to believe that the property was subject to forfeiture. There is, however, an exception. A person may still be an innocent owner even where they gave nothing of value for a property if they meet four criteria. Firstly, the property concerned must be the primary residence of the claimant. Secondly, depriving the claimant of the property must deprive him of the means to maintain reasonable shelter in the community for himself and all dependents residing with him. Thirdly, the property must not be, or be traceable to, the proceeds of any criminal offence. Fourthly, the claimant must have acquired his interest in the property through marriage, divorce, or legal separation, or was the spouse or legal dependent of a person whose death resulted in the transfer of the property through inheritance or probate.

The issue of third party rights is an essential feature of civil forfeiture systems. Drawn too widely and they will prevent from being recoverable criminal proceeds which have been deliberately transferred to third parties as part of the laundering process. Drawn too narrowly, and they may have the potential to operate harshly and injure genuinely innocent property owners.

Minimum thresholds

A safeguard which jurisdictions may consider incorporating to ensure that civil forfeiture proceedings are not used in trivial cases, is the employment of a minimum threshold.

In the UK model, the director may not start proceedings for a recovery order unless she reasonably believes that the aggregate value of the recoverable property which she wishes to be subject to a recovery order is not less than £10,000[190]. The aim of civil recovery is to reduce crime by attacking the profit motive and by disrupting organised crime rings. The provision, therefore, is designed to ensure the director concentrates on cases where the larger sums of money are involved, and in the light of the cost of recovery proceedings, that they would not be taken in minor or trivial cases.

In the Irish model, there is a similar minimum property threshold value of £10,000 about which the court must be satisfied before it makes a freezing order[191].

In the New Zealand model, in order to ensure that action under the legislation is appropriately targeted, the model sets a different threshold. Under this property must derive from "significant criminal activity", which is defined as either an offence punishable by at least five years imprisonment, or activity that has generated profits to a value of at least $30,000[192].

Judicial discretion

A safeguard included in some models of civil forfeiture is to create an overriding judicial discretion not to make a forfeiture order. The British Columbian model provides that if the court determines that forfeiture is not in the interests of justice it may refuse to issue a forfeiture order, limit the application of the order or put conditions on the order[193]. In the Ontarian model, if the court finds that the property is proceeds of unlawful activity, the court has a discretion not to make a forfeiture order "where it would clearly not be in the interests of justice" to do so[194]. The Irish model provides that the court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice[195].

The UK model also allows for judicial discretion but attempts to circumscribe it within particular bounds. It provides that, where the property was not acquired for value, the court has a discretion not to allow forfeiture if it would not be just and equitable to do so and if four conditions are met. Firstly, the respondent obtained the property in good faith. Secondly, he took steps after obtaining it which he would not otherwise have taken or he took steps before obtaining it which he would not have taken had he not believed he was going to obtain it. Thirdly, when he did so, he had no notice that the property was recoverable. Fourthly, because of the steps he took, a recovery order would be detrimental. In determining whether the requirements of justice and equity are met in a particular case, the court must have regard both to the degree of detriment and to the agency's interest in receiving the realized proceeds[196].

The South Australian model allows for wide judicial discretion but attempts to focus judicial minds on certain factors[197]. In considering whether it is appropriate to make a forfeiture order in respect of particular property, the court may have regard to four factors: firstly, any hardship that may reasonably be expected to be caused to any person (other than the suspect) by the operation of the order; secondly, the use that is ordinarily made, or was intended to be made, of the property; thirdly, the gravity of the offence or offences concerned; and fourthly, any other matter the court thinks fit.

Increasing or reducing the amount of judicial discretion in a civil forfeiture model can clearly have a significant impact on the way in which the legislation is applied.

Priority of criminal proceedings

Although practitioners in all jurisdictions will agree that, where the evidence is sufficient to allow either criminal or civil proceedings, it is preferable to institute criminal proceedings, the UK model is unique in providing a statutory declaration to this effect. It accomplishes this by providing that the Director of the Assets Recovery Agency must exercise her functions in the way which she considers is best calculated to contribute to the reduction of crime. Statutory guidance to the director then provides that the reduction of crime is, in general, best secured by means of criminal investigations and criminal proceedings[198]. This aspect of the UK model has not yet been litigated on. While the idea represents a safeguard to prevent law enforcement taking shortcuts and depriving respondents of rights available in criminal trials, the difficulty is that it provides a rich area for potential judicial review applications.

The US model recognises that pursuing both civil forfeiture and criminal proceedings at the same time may present difficulties. For this reason, it provides that a court shall stay civil forfeiture proceedings if the court determines that civil discovery will adversely affect the ability of the government to conduct a related criminal investigation or prosecution. In addition, if the respondent applies, the court must stay the civil forfeiture proceedings if it determines that, firstly, he is the subject

investigator. In the UK model a criminal offence is committed if a person makes a disclosure which is likely to prejudice a civil recovery investigation or he falsifies, conceals, destroys or otherwise disposes of documents relevant to the investigation[200]. In the Western Australian model, a person commits a criminal offence if he wilfully delays or obstructs a police officer, or a person assisting a police officer, in the performance of forfeiture functions[201]. The ACT model provides that a person commits an offence if he knows, or is reckless, about the fact that a person is an authorised investigator; and he obstructs, hinders, intimidates or resists the investigator in the exercise of the investigator's functions[202]. The South African model provides that any person who hinders a *curtror bonis,* a police official or any other person in the exercise, performance or carrying out of powers, functions or duties in respect of civil forfeiture proceedings is guilty of an offence[203].

Secondly, sanctions are used to punish dissipation of assets. The South Australian model provides that a person is guilty of an offence if he disposes of, or otherwise deals with, property covered by a restraining order; and knows or is reckless as to the fact that the property is covered by the order; and the disposition or dealing contravenes the order[204]. The Northern Territory model provides for an offence of dealing with restrained property and the penalty for this is imprisonment for five years[205]. The Commonwealth model provides a similar offence but leaves the penalty to the discretion of the jurisdiction concerned[206].

Thirdly, sanctions are incorporated for the protection of staff who may be operating in an organised and violent crime context. Depending on the nature of organised crime in a jurisdiction, staff who operate a civil recovery system may be in personal danger. Consideration should, therefore, be given as to whether any protection for the identities of staff is required. The UK model permits the director to allocate pseudonyms to her staff and the courts to accept evidence from pseudonym-bearing Agency staff[207]. The Irish model provides for the anonymity of staff in the Criminal Assets Bureau[208]. However, it goes further, by providing a criminal offence of uttering threats to or, in any way, intimidating or menacing a member of the staff of the bureau or any member of the family of a member of the staff of the bureau[209] and an offence of assaulting or attempting to assault a member of the bureau staff or any member of the family of a member of the bureau staff[210].

Fourthly, there may be sanctions regarding non-compliance with judicial processes. Respondents facing civil forfeiture proceedings may decline to obey orders of the court which they feel threaten their property ownership. The normal powers of the civil courts to compel compliance may not be sufficiently effective. Though the UK has established a very strong default sentencing power for failure voluntarily to satisfy a confiscation order under its criminal confiscation regime, the maximum penalty in respect of a civil contempt is two years imprisonment. Whether this is sufficient to encourage a respondent, for example, to repatriate £500,000 to the UK must be doubtful. The South African model provides a stronger sanction in that any person who intentionally refuses or fails to comply with a court order made in respect of civil forfeiture shall be guilty of an offence and is liable upon conviction to a sentence of 15 years[211].

Where a jurisdiction's legislation allows both criminal proceedings against a person and civil forfeiture proceedings against his property, there may be sanctions where the defendant flees the jurisdiction to avoid criminal prosecution. Civil forfeiture

proceedings are essentially *in rem* proceedings against property. There is no guarantee, therefore, that the owner will be present in the jurisdiction at the time the proceedings are instituted. Indeed the UK model provides that proceedings may be instituted regardless of where the property owner is "domiciled, located or resident"[212] Under the UK model there are no sanctions for a respondent who attempts to defend the proceedings from a location outside the UK. The US model, however, incorporates a fugitive disentitlement doctrine in its civil forfeiture regime. This provides that a court may disallow a person from using the resources of the courts in furtherance of a claim in a civil forfeiture action if, after receiving notice or knowledge of the fact that a warrant or process has been issued for his apprehension, he purposely leaves the jurisdiction in order to avoid criminal prosecution; he declines to enter or re-enter the USA to submit to its jurisdiction; or he otherwise evades the jurisdiction of the court in which a criminal case is pending against him[213]. The Commonwealth model provides a more limited sanction in that, if a person is a fugitive from justice at the time a forfeiture order is made, he is not entitled to an order protecting his interest in the property as a legitimate owner. A legitimate owner is defined as a person who owns property which was proceeds of unlawful activity and who was deprived of it by unlawful activity or acquired it for fair value afterwards and did not know and could not reasonably have known at the time of acquisition that it was criminal proceeds[214].

The Albertan model provides that, unless the court directs otherwise, a respondent forfeits all of his rights to the restrained property if he fails, without a reasonable excuse, after being served with notice of a property disposal hearing, to attend or to be represented at the property disposal hearing; or to attend an examination for the purposes of being examined on the respondent's affidavit; or to answer questions put to the respondent on examination or cross-examination; or to provide, as directed by the court or pursuant to an undertaking given by the respondent, any information or any documentation, whether in written or electronic form[215].

Enforcement

The legislative scheme should provide for how, once a forfeiture order has been made by a court, that order will be enforced against the property and what will happen to the money. Usually an organ of the state will sell the property. In the UK model a recovery order must vest recovered property in the trustee for civil recovery whose function is to realise the value of the property and pass the realised funds to the director[216].

Forfeited property can simply be paid over to the jurisdiction's treasury account or specific accounting arrangements can be made. The Australian model, which provides for a confiscated assets account, is an example of the latter position[217]. Likewise, in the South Australian model

In the Western Australian model, a confiscation proceeds account has been established to receive criminal proceeds. Payments out of it may be made at the direction of the Attorney General for purposes associated with the administration of the confiscation legislation; for the development and administration of programmes or activities designed to prevent drug-related criminal activity and the abuse of prohibited drugs; to provide support services and other assistance to victims of crime; to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating persons involved in the commission of a confiscation offence; to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating confiscable property; to cover any costs of storing, seizing or managing frozen or confiscated property that are incurred by the police force, the DPP or a person appointed under the legislation to manage the property; and for any other purposes in aid of law enforcement[219].

In the Manitoban model, the function of selling forfeited property is simply vested in "the government"[220]. Although the general rule is that property must be sold, the government may destroy, donate or otherwise dispose of any forfeited property that has little or no commercial value or that requires so much repair or improvement that a sale is not commercially viable[221]. There is a very strict priority for the distribution of the proceeds of forfeited property. The proceeds must be distributed, firstly, to pay any costs of the government in selling the forfeited property; and secondly, to reimburse police for expenses incurred in bringing the application for the forfeiture order. Any remaining cash or proceeds must be paid to a victims' assistance fund[222].

Under the Ontarian model proceeds of forfeited property is deposited in a separate, interest-bearing account in the consolidated revenue fund[223]. Payments may be made out of the account by the Minister of Finance for the following purposes: firstly, to compensate those who suffered losses as a result of the unlawful activity; secondly, to assist victims of unlawful activities or to prevent unlawful activities that result in victimization; thirdly, to compensate Ontario for pecuniary losses suffered as a result of the unlawful activity, including, expenses incurred in respect of any civil forefiture proceeding and expenses incurred in remedying the effects of the unlawful activity; and fourthly, to compensate a municipal corporation or a public body for pecuniary losses that were suffered as a result of the unlawful activity and that were expenses incurred in remedying the effects of the unlawful activity[224].

Under the Commonwealth model, a Confiscated and Forfeited Assets Fund is established out of which payments may be authorised, firstly, to compensate victims who have suffered loses as a result of crime; secondly, to satisfy a compensation order; thirdly, to enable law enforcement agencies to continue their fight against serious offences and terrorism; and fourthly, to share confiscated property with foreign states pursuant to asset sharing arrangements[225].

Under the Irish model, once a disposal order is made, the minister may sell or otherwise dispose of any property transferred to him, and any proceeds must be paid into, or disposed of, for the benefit of the exchequer[226].

Increasingly, the issue of asset sharing is being discussed internationally. The US model provides that forfeited proceeds may be transferred to any foreign country which participated directly or indirectly in the forfeiture where three conditions are met. These are firstly, that the Secretary of State has agreed to the transfer; secondly, that the transfer has been authorised in an international agreement between the USA

and the foreign country; and thirdly, that the country has been certified under the US Foreign Assistance legislation[227].

Instrumentalities

A fundamental issue for policymakers is whether, in addition to civil forfeiture of criminal proceeds, there should be forfeiture of instrumentalities of crime. Such provisions allow property obtained with legitimate funds, but used in the commission of a crime, to be forfeited. The application of the regime will depend on how instrumentalities are defined.

Under the Australian model, property is an instrument of an offence if, firstly, it is used in, or in connection with, the commission of an offence; or, secondly, it is intended to be used in, or in connection with, the commission of an offence[228].

The Ontarian model applies to property that is likely to be used to engage in unlawful activity that, in turn, would be likely to or is intended to result in the acquisition of other property or in serious bodily harm to any person[229]. The British Columbian model is drafted in similar terms[230].

The Commonwealth model allows for forfeiture of instrumentalities of unlawful activity, defined as property used in, or in connection with, unlawful activity that facilitates or is otherwise concerned in such activity[231].

The UK model limits civil forfeiture of instrumentalities to cash[232] which is intended by any person for use in unlawful conduct[233]. This model was a significant expansion from the previous one whereby only cash being imported to or exported from the UK was forfeitable, and even then only if it was intended by any person for use in drug trafficking[234].

The South African model provides that an application can be made for a Preservation of Property Order, and subsequently a forfeiture order, if property is an instrumentality of a scheduled offence[235]. Instrumentality of an offence is defined as any property which is concerned in the commission or suspected commission of an offence at any time before or after the commencement of the legislation whether committed within South Africa or elsewhere[236]. The disadvantages of a list-based approach have been recognised in many fields[237] and may yet be recognised here.

The question of whether civil forfeiture of instrumentalities is a proportional response to the underlying crime is a significant legal issue. In the case of *United States* v. *Bajakajian* the US Supreme Court held that forfeiture of $357,144 for failing to report that the respondent was transporting [illegible]

Value-based civil forfeiture

The vast majority of civil forfeiture regimes target specific property which is criminal proceeds. However, two models in particular have developed value-based civil forfeiture systems.

The Antiguan and Barbudan model allows an application to the court for a civil proceeds assessment order requiring a person to pay an amount assessed by the court as the value of the benefit he derived from the money laundering activities that took place more than six months before the making of the application for the order[241].

The British Columbian model also allows for a value-based system. While its definition of proceeds of criminal activity includes actual criminal proceeds, it also allows for property that is equivalent in value to either the amount of an increase in value in property or the amount of a decrease in a debt obligation where that has resulted from unlawful activity[242].

Such value-based systems may be more effective in recovering property in situations where a respondent, having both legitimate and criminal income, spends the criminal income on lifestyle expenditure but retains, in savings and property, his legitimate income.

Conclusion

A number of jurisdictions have drafted or passed legislation providing for the recovery of criminal proceeds through non-conviction based forfeiture. This legislation has been influenced by a number of factors including political, social, legislative, historical and economic context and has resulted a variety of models having been introduced. Jurisdictions which now seek to introduce civil forfeiture legislation have various examples from which to learn. This paper has attempted to set out the common issues which have arisen and the range of options which have been attempted as potential solutions. As new jurisdictions introduce legislation, these options may either expand in number or, alternatively, become more refined as an international consensus develops. Such a consensus may be assisted by the Commonwealth model civil recovery legislation which has the potential to serve as a benchmark in this field.

Nonetheless continual evolution of the various models can be anticipated. One commentator has rightly described previous proceeds of crime legislation as having been "... introduced, amended, adjusted, reviewed, reinforced, enhanced and, in some cases, repealed and then re-legislated ..." (Freiberg, 1998) Many of the civil forfeiture models are relatively new and the legislative provisions in respect of them have been subject to relatively little litigation thus far. They will undoubtedly be the subject of considerable litigation in due course and will, therefore, evolve in the face of that litigation as legislatures and policymakers attempt to produce fair but effective procedures for the civil recovery of criminal proceeds.

Notes

1. In this paper the terms "asset forfeiture" and "civil forfeiture" are used interchangeably to describe a non-conviction based criminal proceeds confiscation system. In the UK, however, the term "civil recovery" is used.
2. Proceeds of Crime Act 2002, s 242 (UK).
3. Proceeds of Crime Act 1996, s 1 (Ireland).

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36. *Kaiser Alumin*
37. Criminal Prope
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4. Commonwealth Model Legislative Provisions on the Civil Recovery of Criminal Assets Including Terrorist Property (hereafter referred to as "Commonwealth model"), s 1(h).
5. Proceeds of Crime Act 2002, section 329 (Australia).
6. Confiscation Act 1997, s 3 (Victoria).
7. Criminal Assets Confiscation Act 2005, s 7 (South Australia).
8. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 2 (Ontario).
9. The Seizure of Criminal Property Act 2005 (Saskatchewan).
10. Victims Restitution and Compensation Payment Act 2001, s 1(3) (Alberta).
11. Drug Trafficking (Civil Proceedings) Act 1990, s 9 (New South Wales).
12. Criminal Assets Recovery Act 1990, s 6 (New South Wales).
13. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, clause 5(1) (New Zealand). The model may, of course, change before it becomes law.
14. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, clause 6(1) (New Zealand).
15. Money Laundering (Prevention) Act 1996, s 20A(2) (Antigua and Barbuda).
16. 18 USC 981(a)(2)(A) (USA).
17. 18 USC 981(a)(2)(B) (USA).
18. Prevention of Organised Crime Act 1998, s 1 (as amended by the Prevention of Organised Crime Second Amendment Act 1999, s 1) (South Africa).
19. Money Laundering (Prevention) Act 1996, s 20A(1) (Antigua and Barbuda).
20. Criminal Property Forfeiture Act 2004, s 1(Manitoba).
21. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 2 (Ontario).
22. Seizure of Criminal Property Act 2005, s 2 (Saskatchewan).
23. Commonwealth model, s 1(n).
24. 18 USC 1956(c)(7)(B) (USA).
25. 18 USC 981(a)(1)(B) (USA). See, for example, *United States* v. *Vacant Land known as Los Morros, Parcel No. 266-091-72, Parcel 2 of Parcel no. 14428, County of San Diego, State of California* (1995) 885 F. Supp. 1329.
26. Civil Forfeiture Act, Bill 13 – 2005 (British Columbia). The British Columbian model may of course change before it becomes law.
27. Victims Restitution and Compensation Payment Act 2001, s 1(2) (Alberta).
28. (Unreported) 29 July 1999.
29. 17 May 2004.
30. Proceeds of Crime (Amendment) Act 2005, s 3 (Ireland).
31. Proceeds of Crime Act 2002 section 47(2) (Australia).
32. Money Laundering (Prevention) Act 1996, s 20A(3) (Antigua and Barbuda).

39. Proceeds of Crime Act 1996, s 1(Ireland).
40. *McK* v. *D* (2002) IEHC 115.
41. Proceeds of Crime Act 2002, s 14 (Australia).
42. Criminal Property Confiscation Act 19XX, s 5(1) (Western Australia).
43. Criminal property Forfeiture Act 2002, s 70 (Northern Territory).
44. Seizure of Criminal Property Act 2005, s 2 (Saskatchewan).
45. Commonwealth model, s 1(h) and (n).
46. Proceeds of Crime Act 2002, s 316(3) (UK).
47. Proceeds of Crime Act 2002, s 288 (UK).
48. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 2 (Ontario).
49. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 5 (Ontario).
50. Civil Forfeiture Act, Bill 13 – 2005, ss 2 and 35 (British Columbia).
51. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, clause 5 (New Zealand).
52. Money Laundering (Prevention) Act 1996, s 20A(2) and (5) (Antigua and Barbuda).
53. SA 1127 (SCA) E.
54. Prevention of Organised Crime Second Amendment Act 1999, s 1(b) (South Africa).
55. Prevention of Organised Crime Second Amendment Act 1999, s 1(d) (South Africa).
56. Proceeds of Crime Act 2002 ss 152- 179 (Australia).
57. Criminal Assets Confiscation Act 2005, ss 110-117 (South Australia).
58. Hereafter referred to as "ACT".
59. Confiscation of Criminal Assets Act 2003, s 20 (ACT).
60. Prohibiting Profiting from Recounting Crimes Act, 2002, s 2 (Ontario).
61. Prohibiting Profiting from Recounting Crimes Act, 2002, s 3 (Ontario).
62. New York Executive Law, section 632-a(1).
63. 502 US 105 (1991).
64. 27 Cal. 4th 413.
65. Ariz 106 (2002). The US Supreme Court denied Gravano's petition for a writ of certiorari. 124 S.Ct. 1171.
66. For examples, of how this is done see Kennedy (2005).
67. Proceeds of Crime Act 2002, s 305 (UK).
68. Proceeds of Crime Act 2002, s 304 (UK).
69. Proceeds Of Crime Act 2002, s 306 (UK).
70. Criminal Assets Confiscation Act 2005, s 7(1)(d) (South Australia).
71. Criminal Assets Confiscation Act 2005, s 6 (South Australia).
72. Commonwealth model, s 16.
73. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, clause 12(2) (New Zealand).
74. For example, 18 USC 981 (a)(1)(A) and (B) (USA).
75. Commonwealth model, s 1(h).
76. Proceeds of Crime Act 1997, s 4 (as amended in 2004) (Fiji).
77. Proceeds of Crime Act 2002, s 241(3) (UK).

78. Proceed
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98. Phipson
99. Proceeds
100. [1998] 3
101. Victims
102. Proceeds
103. *Ninemia* [1983] 2
104. *Orri* v. *M*
105. Criminal
106. Preventio
107. Remedies
108. Victims R
109. Seizure of
110. Criminal I
111. Civil Forf
112. Commonw
113. Criminal
114. Money La
115. Prevention
116. Proceeds

78. Proceeds of Crime Act 1996, s 8(2) (Ireland).
79. Proceeds of Crime Act 2002, s 317 (Australia).
80. Confiscation of Criminal Assets Act 2003, s 67 (ACT).
81. Criminal Property Forfeiture Act 2002, s 136 (Northern Territory).
82. Clause 47(1).
83. Proceeds of Crime Act 1997, s 19E (as amended in 2004) (Fiji).
84. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 16 (Ontario).
85. Criminal Property Forfeiture Act 2004, s 9 (Manitoba).
86. Victims Restitution and Compensation Payment Act 2001, s 14 (Alberta).
87. Seizure of Criminal Property Act 2005, s 13 (Saskatchewan).
88. Prevention of Organised Crime Act 1998, s 50 (South Africa).
89. Civil Forfeiture Act, Bill 13 – 2005, s 16 (British Columbia).
90. Money Laundering (Prevention) Act 1996, s 20 A (Antigua and Barbuda).
91. Commonwealth model, s 11(1).
92. Criminal Property Confiscation Act 2000, s 12(2) (Western Australia).
93. Criminal property Forfeiture Act 2002, s 71(Northern Territory).
94. Criminal Property Forfeiture Act 2004, s 11 (Manitoba).
95. Seizure of Criminal Property Act 2005, s 15 (Saskatchewan).
96. Civil Forfeiture Act, Bill 13 – 2005, s 19 (British Columbia).
97. Money Laundering (Prevention) Act 1996, s 20C(2) (Antigua and Barbuda).
98. Phipson on Evidence, 15th Edition, Sweet and Maxwell, 2000, para 4-16.
99. Proceeds of Crime Act 1996, s 8 (Ireland).
100. [1998] 3 IR 185.
101. Victims Restitution and Compensation Payment Act 2001, s 13(1) (Alberta).
102. Proceeds of Crime Act 2002, ss 246(5) and 245 A (UK).
103. *Ninemia Maritime Corporation* v. *Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyds Rep, 600, 605.
104. *Orri* v. *Moundreas* [1981] Com. L.R. 168.
105. Criminal Property Forfeiture Act 2004, s 7(2) (Manitoba).
106. Prevention of Organised Crime Act 1998, s 38 (South Africa).
107. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 4(2) (Ontario).
108. Victims Restitution and Compensation Payment Act 2001, s 14(1) (Alberta).

117. Victims Restitution and Compensation Payment Act 2001, s 5(2) (Alberta).
118. Commonwealth model, s 7.
119. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, clause 37 (New Zealand).
120. Criminal Assets Confiscation Act 2005, ss 18-21 (South Australia).
121. Proceeds of Crime Act 2002, s 246 (UK).
122. Prevention of Organised Crime Act 1998, s 42 (South Africa).
123. Proceeds of Crime Act 1996, s 7(Ireland).
124. Criminal Assets Confiscation Act 2005, s 190 (South Australia).
125. Victims Restitution and Compensation Payment Act 2001, s 5(1) (Alberta).
126. Criminal Property Forfeiture Act 2004, s 7(1) (Manitoba).
127. Civil Forfeiture Act, Bill 13 – 2005 s 8(3)(c) and 10 (British Columbia).
128. *M. (M.F.)* v. *B. (M.)* [1999] 1 IR 122.
129. Hereafter referred to as the "NDPP".
130. Prevention of Organised Crime Act 1998, ss 44(2), 45(1) and 46 (South Africa).
131. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 5(1) (Ontario).
132. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 5(2) (Ontario).
133. Proceeds of Crime Act 2002, s 252(4) (UK).
134. Hansard, House of Lords, 13 May 2002, col 110.
135. Proceeds of Crime Act 2002 (UK) as amended by the Serious Organised Crime and Police Act 2005, s 109 and Schedule 6.
136. Criminal Property Forfeiture Act 2004, s 3(2) (Manitoba).
137. Civil Forfeiture Act, Bill 13 – 2005, s 3(3) (British Columbia).
138. Proceeds of Crime Act 2002, s 316(4) (UK).
139. Criminal Assets Confiscation Act 2005, s 10 (South Australia).
140. Criminal Property Confiscation Act 2000, s 5(3) (Western Australia).
141. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, cl 5 (New Zealand).
142. Proceeds of Crime Act 1997, s 3 (as amended in 2004) (Fiji).
143. Commonwealth model, s 10(1).
144. 28 USC 1355(b)(2) (USA).
145. 18 USC 981 (k) (USA).
146. Criminal Proceeds and Instruments Bill, 21 June 2005, No. 279-1, cl 10(1) (New Zealand).
147. Prevention of Organised Crime Act 1998, s 37 (South Africa).
148. Proceeds of Crime Act 2002, s 315 (Australia).
149. Criminal Assets Confiscation Act 2005, s 218 (South Australia).
150. Victims Restitution and Compensation Payment Act 2001, s 51 (Alberta).
151. *Director of the Assets Recovery Agency* v. *Walsh* [2005] NICA 6.
152. *Murphy* v. *GM, PB, PC Ltd, and GH*, [1999] IEHC 5.
153. *United States* v. *Ursery* 518 US 276 (1996).
154. Proceeds of Crime Act 2002, s 345 (UK) and Proceeds of Crime Act 2002 ss 202-212 (Australia).
155. Proceeds of Crime Act 2002, s 352 (UK).
156. Procee (Austr
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175. Criminal Act 2005
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181. Commonw
182. Proceeds
183. Proceeds
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185. Proceeds o
186. Criminal P
187. Seizure of
188. Prevention
189. The Civil statute" do
190. Proceeds o Threshold

156. Proceeds of Crime Act 2002, s 363 (UK) and Proceeds of Crime Act 2002, ss 213-218 (Australia).
157. Proceeds of Crime Act 2002, s 370 (UK) and Proceeds of Crime Act 2002, ss 219-224 (Australia).
158. Proceeds of Crime Act 2002, ss 180-201 (Australia).
159. Proceeds of Crime Act 2002, s 185 (Australia).
160. Proceeds of Crime Act 2002, s 190 (Australia).
161. Proceeds of Crime Act 2002, s 195 (Australia).
162. Proceeds of Crime Act 2002, s 196 (Australia).
163. Proceeds of Crime (Amendment) Act 2005, s 18 (Ireland).
164. Proceeds of Crime (Northern Ireland) Order 1996, Article 49, as amended by the Criminal Justice (Northern Ireland) Order 2005, Article 15.
165. Proceeds of Crime Act 1996, s 9 (Ireland).
166. Proceeds of Crime Act 2002, s 436 (UK).
167. Proceeds of Crime Act 2002, s 436(6) (UK).
168. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 19(1) (Ontario).
169. Civil Forfeiture Act, Bill 13 – 2005, s 22 (British Columbia).
170. Disclosure of Certain Information for Taxation and Other Purposes Act 1996, s 1 (Ireland).
171. Prevention of Organised Crime Act 1998, s 71 (South Africa).
172. Prevention of Organised Crime Act 1998, s 73 (South Africa).
173. Proceeds of Crime Act 2002, s 438 (UK).
174. Proceeds of Crime Act 2002, s 437 (UK).
175. Criminal Assets Bureau Act 1996, s 5, as amended by the Proceeds of Crime (Amendment) Act 2005 (Ireland).
176. Proceeds of Crime Act 2002, s 259(2) (UK).
177. Civil Asset Forfeiture Reform Act 2000, s 17 (USA).
178. Proceeds of Crime Act 2002, s 1 (UK).
179. Criminal Assets Bureau Act 1996 (Ireland).
180. Criminal Proceeds and Instruments Bill, cl 5 (New Zealand).
181. Commonwealth model, s 10(1).
182. Proceeds of Crime Act 2002, s 283 (UK).
183. Proceeds of Crime Act 1996, s 16 (Ireland).
184. Proceeds of Crime Act 2002, s 330 (Australia).
185. Proceeds of Crime Act 2002, s 281 (UK).
186. Criminal Property Forfeiture Act 2004, s 17(1) (Manitoba).

191. Proceeds of Crime Act 1996, ss 2 and 3 (Ireland).
192. Criminal Proceeds and Instruments Bill, clause 6 (New Zealand).
193. Civil Forfeiture Act, Bill 13 – 2005, s 6 (British Columbia).
194. Remedies for Organized Crime and Other Unlawful Activities Act 2001, s 8(1) (Ontario).
195. Proceeds of Crime Act 1996, s 4(8) (Ireland).
196. Proceeds of Crime Act 2002, s 266 (UK).
197. This is in respect of forfeitures of the instrumentalities of crime, an issue which is discussed later in this paper.
198. Proceeds of Crime Act 2002, s 2 (UK).
199. USC 981(g)(1) and (2) (USA).
200. Proceeds of Crime Act 2002, s 342 (UK).
201. Criminal Property Confiscation Act 2000, s 132 (Western Australia).
202. Confiscation of Criminal Assets Act 2003, s 181 (ACT).
203. Prevention of Organised Crime Act, 1998, s 75 (South Africa).
204. Criminal Assets Confiscation Act 2005, s 33 (South Australia).
205. Criminal Property Forfeiture Act 2002, s 55 (Northern Territory).
206. Commonwealth model, s 9.
207. Proceeds of Crime Act 2002, s 449 (UK).
208. Criminal Assets Bureau Act 1996, s 10 (Ireland).
209. Criminal Assets Bureau Act 1996, s 13 (Ireland).
210. Criminal Assets Bureau Act 1996, s 15 (Ireland).
211. Prevention of Organised Crime Act 1998, s 75 (South Africa).
212. Proceeds of Crime Act 2002, s 243(2) (UK).
213. Civil Asset Forfeiture Reform Act of 2000, s 14 (USA). It must also be shown that he is not confined or held in custody in any other jurisdiction for commission of criminal conduct in that jurisdiction. The House of Lords has commented that this fugitive disentitlement doctrine was not an arbitrary deprivation of a party's right to a hearing, but was intended to be a means of securing proper obedience to the orders of the court and, although the application of the doctrine may be regarded as failing to secure all of the protection required by Article 6 of the ECHR, it was a rational approach which had commended itself to the US federal jurisdiction and, as such, it could not be described as a flagrant denial of a person's Article 6 rights or a fundamental breach of the requirements of that Article. Government of the *United States of America* v. *Montgomery (No. 2)*, [2004] 4 All ER 289.
214. Commonwealth model, ss 1(f) and 13.
215. Victims Restitution and Compensation Payment Act 2001, s 12 (Alberta).
216. Proceeds of Crime Act 2002, s 266 and 267 (UK).
217. Proceeds of Crime Act 2002, ss 295-299 (Australia).
218. Criminal Assets Confiscation Act 2005, s 209 (South Australia).
219. Criminal Property Confiscation Act, s 131 (Western Australia).
220. Criminal Property Forfeiture Act 2004, s 18(1) (Manitoba).
221. Criminal Property Forfeiture Act 2004, s 18 (Manitoba).
222. Criminal Property Forfeiture Act 2004, s 19 (Manitoba).
223. Remed
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228. Proceec
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232. "Cash" cheques shares:
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234. Drug Tı
235. Prevent
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237. "Breakir Crime",
238. 524 US
239. *United S County,* Court as
240. Criminal
241. Money L
242. Civil For

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223. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 6 (Ontario).
224. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 6(3) (Ontario).
225. Commonwealth model, s 35(2).
226. Proceeds of Crime Act 1996, s 4(Ireland).
227. 18 USC 981 (i)(1) (USA).
228. Proceeds of Crime Act 2002, section 329 (Australia).
229. Remedies for Organized Crime and Other Unlawful Activities Act, 2001, s 7 (Ontario).
230. Civil Forfeiture Act, Bill 13 – 2005, s 1 (British Columbia).
231. Commonwealth model, ss 1(c) and 10(1).
232. "Cash" is very broadly defined as including notes or coins in any currency; postal orders; cheques of and kind including traveller's cheques; banker's drafts; bearer bonds and bearer shares: Proceeds of Crime Act 2002, s 289(6) (UK).
233. Proceeds of Crime Act 2002, s 298(2) (UK).
234. Drug Trafficking Act 1994, s 43 (UK).
235. Prevention of Organised Crime Act 1998, ss 38(2) and 48(1) (South Africa).
236. Prevention of Organised Crime Second Amendment Act 1999, s 1(a) (South Africa).
237. "Breaking Down the Barriers: International Co-operation in Combating Transnational Crime", Prost K. www.oas.org/juridico/MLA/en/can/en_can_prost.en.html
238. 524 US 321.
239. *United States* v. *One Parcel of Property Located at 508 Depot Street, Garretson, Minnehaha County, South Dakota* 964 F.2d 814 (8th Cir, 1992). The case later reached the US Supreme Court as *Austin* v. *United States* 113 S. Ct. 2801 (1993).
240. Criminal Property Forfeiture Act 2004, s 14(1) (Manitoba).
241. Money Laundering (Prevention) Act 1996, s 20B (Antigua and Barbuda).
242. Civil Forfeiture Act, Bill 13 – 2005, s 1 (British Columbia).

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