



OFFICE OF  
THE DIRECTOR OF  
PUBLIC PROSECUTIONS  
CAYMAN ISLANDS



**POLICY – PROCEEDS OF CRIME / ASSET RECOVERY<sup>1</sup>**

**PREAMBLE**

*The recovery of criminal proceeds, instrumentalities and property of equivalent value should be proactively pursued in all money laundering (“ML”), terrorist financing (“TF”), proliferation financing (“PF”) and major proceeds generating cases.*

*In line with international standards, as set out in FATF Recommendation 30, law enforcement authorities should develop a pro-active parallel financial investigation when pursuing money laundering, associated predicate offences, and major proceeds-generating offences (whether committed within or outside the jurisdiction).*

*Restraint orders, confiscation orders, and other orders under the Proceeds of Crime legislation are essential tools with which to deprive offenders of the proceeds of crime. The use of such tools can disrupt offending, deter the commission of offences within the jurisdiction; and reduce profits which would otherwise be available for use in the commission of further offending.*

*The commitment of the Cayman Islands to the fight against ML, TF, PF, and other forms of financial crime can best be demonstrated by:*

- a. the prioritisation the recovery of assets linked to such offending;*
- b. the pursuit of all recoverable assets of those who profit from such offending;*
- c. the pursuit of all instrumentalities linked to such offending;*
- d. the effective provision of international legal assistance in all matters relating to asset deprivation; and*
- e. the effective enforcement of orders relating to asset recovery.*

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<sup>1</sup> Issued 10.05.2017, re-issued 24.01.2020

*Prosecutors should consider asset recovery in every case in which a person appears to have benefitted from criminal conduct, and should instigate confiscation proceedings, upon conviction, in appropriate cases. Where criminal charges leading to confiscation proceedings are not feasible, consideration must always be given to alternative asset recovery outcomes.*

*Under the FATF standards on mutual legal assistance in freezing and confiscation, jurisdictions are required to be able to share confiscated property with other jurisdictions, particularly when confiscation is directly or indirectly a result of co-ordinated law enforcement actions.*

*The sharing and return of assets are important standards for international cooperation which are also addressed in major international conventions. The Cayman Islands shares assets with other jurisdictions in line with these standards.*

*The Cayman Islands utilises funds secured by means of asset sharing, in circumstances where such funds cannot be used to compensate any identifiable victim of an offence, for the purposes of law enforcement and crime reduction.*

#### **Financial Investigations (including Parallel Investigations)**

1. When asked to advise in any case in which a financial investigation has been conducted (or is being considered), Counsel should be alive to the need for the financial investigator to consider all aspects, including:
  - i. consider whether any offence under investigation triggers the “lifestyle” assumptions under s.19 of the Proceeds of Crime Law (2020 Revision) [“POCL”];
  - ii. conduct a thorough financial investigation utilising all investigative tools at their disposal (including the use of court orders);

- iii. consider the lifestyle of each suspect / defendant and whether it correlates with his known income / assets;
- iv. conduct appropriate research in cases potentially involving high risk jurisdictions;
- v. consider whether any recoverable assets may be held in the name of a legal person rather than any subject;
- vi. consider whether any recoverable assets may have been transferred (especially under the guise of a financial arrangement designed for that purpose);
- vii. enlist further investigative assistance (either from within their agency or from any other local agency who may be in a position to provide such assistance);
- viii. consider whether any information obtained in the course of the financial investigation gives rise to a necessity to investigate further offending, e.g. money laundering;
- ix. liaise with local supervisors and regulators as appropriate.

### **Restraint Orders**

- 2. Following the commencement of a criminal investigation, an application for a restraint order can be made at any time if the conditions set out at section 44 of POCL are satisfied.
- 3. A restraint order may be made against a person who is under investigation, or who is facing a criminal charge. It may also be made against any other person who appears to hold recoverable property, and it should be served on any person who appears to be in a position to exercise control over such property.
- 4. In any case where Counsel is instructed to advise (either pre-charge or post charge), they should consider whether there may be any assets held by a suspect / defendant which are at risk of dissipation. If so, the possibility of a restraint order should be immediately canvassed with the investigating officer and any application dealt with as a priority.
- 5. Counsel should monitor the need for a restraint order (or any variation of such an order) throughout the investigation / criminal proceedings. If there is any risk of dissipation of

assets, Counsel must advise the investigating officer to prepare the necessary paperwork in support of an application for a restraint order and assist with the making of any such application on request.

6. Counsel should always consider whether a restraint order should include any ancillary orders for the purposes of increasing its effectiveness (section 45(5) POCL).
7. Where an application for a restraint order is made, the Court Registry (POCL) number of the application, the affidavit in support, any order made, and the outcome must be filed with CC1FC or CC1F. This information should include the total value of the known assets which are subject to the restraint order.

#### **Receivership Orders**

8. In the event that assets subject to a restraint order are at a risk of being devalued whilst subject to such an order, CC1FC or CC1F must contact the Official Receiver with a view to the making of an application for a management receivership order under section 52 of POCL.

#### **“Account Freezing” Orders**

9. In the event that Counsel is contacted by the Financial Reporting Authority with a request for advice or assistance as to the making of an application for an “account freezing” order under section 4(2)(b) and 4(3) of POCL, Counsel shall immediately notify either CC1FC or CC1F to ensure that any application is dealt with as a priority.
10. Counsel must also advise the FRA to identify and liaise with a financial investigator in order to ensure that appropriate action is taken prior to the expiration of any such order (e.g. the opening of an investigation and an application for a restraint order).

### **Charging Decision**

11. Where an advice file is received in which a POCL charge is recommended by the investigator, the file will be assigned to Crown Counsel 1 (Financial Crime) ("CC1FC"), or Crown Counsel 1 (Fraud) ("CC1F"), as directed by the DPP or Deputy DPP. Support staff must be notified to register the case as an "ML" case in the case management system.
12. Where a charge under POCL is not recommended by the investigator, Counsel must nevertheless consider whether any such charge would be appropriate and, if so, mark the relevant section of the ruling form. If such a charge is recommended, a copy of the ruling form must also be provided to CC1FC or CC1F for review / logging. Support staff must be notified to register the case as an "ML" case in the case management system.
13. At the charging stage, Counsel must also consider:
  - i. whether any recoverable property may be identified upon further investigation and advise accordingly;
  - ii. whether any recoverable property has been identified and should be the subject of restraint / property freezing orders and advise accordingly; and
  - iii. whether the matter should be referred to a financial investigator for a parallel financial investigation and advise accordingly.
14. If ii. or iii. above apply, a copy of the ruling form must be sent to CC1FC or CC1F. CC1FC or CC1F must send a copy of the ruling to the head of the FCIU IPT (or equivalent), requesting the urgent assignment of a financial investigator.
15. At the outcome of every case where proceeds of crime are recovered by confiscation / forfeiture / compensation, the file must be clearly endorsed with "proceeds of crime" and the outcome endorsement and this should also appear on the finished memo. Support staff must provide CC1FC or CC1F with a copy of all such finished memos.

16. CC1FC or CC1F will hold quarterly meetings with the Court Listing Officer to ensure that progress of all POCL matters is suitably monitored.

### **Confiscation Proceedings**

17. Throughout any criminal proceedings for any offence with a financial element, Counsel must keep under review the question of whether there are any assets that may be available to satisfy a confiscation order (and/or a compensation order) in the event of a conviction. If such assets appear to be available, contact should be made with a financial investigator in order to ensure that steps are taken to preserve such assets for potential confiscation.
18. In the event that a defendant has benefitted from criminal conduct and realisable assets appear to exist (whether hidden or identifiable), Counsel should seek to pursue confiscation proceedings in the event of conviction. Only in very limited circumstances may it not be appropriate to seek to open confiscation proceedings, e.g.:
- i. where, in a simple benefit case, the defendant has voluntarily paid full compensation to the victim or victims, or is ready, willing and able immediately to repay all of the victims to the full amount of their losses, and has not otherwise profited from his crime;
  - ii. where the proper application of the POCL would compel the court to find that property obtained in the most part legitimately, and to which the defendant would have been entitled but for his criminal conduct, must be treated as benefit;
  - iii. where an undertaking has been given that confiscation proceedings will not be pursued;

In such circumstances, the decision as to whether to pursue confiscation should be referred to CC1FC or CC1F.

19. Any application for a confiscation order must be supported by an accurate and detailed statement of information setting out the alleged benefit of the defendant's criminal conduct and the realisable assets available for the making of an order.

20. In the event of conviction, Counsel should ensure that any restraint order remains in force until a confiscation order is satisfied. Should it become necessary, a Court-approved variation order may be prepared to permit the sale of assets (for proper value at arm's length) to satisfy the order, in a manner which does not give rise to any risk of dissipation.
21. In the event of an acquittal, a restraint order should only be discharged in circumstances where the relevant financial investigator has confirmed that he is unaware of any other basis upon which the restrained assets may be recovered.

### **Enforcement**

22. Upon receipt of notification that the deadline for satisfaction of a confiscation order has passed, Counsel will be assigned to take steps to enforce the order. Where possible, this should be counsel who had conduct of the confiscation proceedings.
23. Counsel will, upon being so notified, verify the information and ensure that all necessary documentation prepared for service on the Court and the party in default. Counsel will also authorise the issuance of a summons for the party in default to be brought to court within 21 days. Consideration should be given to the making of an application for an enforcement receiver (in conjunction with the Official Receiver) under section 52 of POCL, or an application for an order for payment under section 61 POCL.

### **Civil Recovery**

24. In the event that Counsel does not provide positive charging advice, they must consider whether civil recovery proceedings may be brought, and provide written advice accordingly. Civil recovery may be appropriate in cases where:
- a. The only known criminality is overseas, and there is no extra-territorial jurisdiction to pursue a criminal case in the Cayman Islands;
  - b. There is no identifiable living suspect who is within the jurisdiction or realistically capable of being brought within the jurisdiction;

- c. Proceeds of crime can be identified but cannot be linked to any individual suspect or offence;
- d. A law enforcement authority considers that an investigation could not generate sufficient evidence to create a realistic prospect of conviction;
- e. A criminal investigation has been conducted but the prosecuting authority considers that there is insufficient evidence to create a realistic prospect of conviction; and
- f. A prosecution has been conducted but has not resulted in a conviction.

25. Where a conviction is possible, a civil recovery might better serve the overall public in the following circumstances:

- a. Where there is an urgent need to take action to prevent or stop offending which is causing immediate harm to the public, even though this might limit the availability of evidence for a future prosecution;
- b. It is not practicable to investigate all of those with a peripheral involvement in the criminality, and a strategic approach is taken in order to achieve a manageable and successful prosecution;
- c. Where a better deployment of resources to target someone with significant property which cannot be explained by legitimate income;
- d. The offender is being prosecuted in another jurisdiction and is expected to receive a sentence that reflects the totality of the offending, so the public interest does not require a prosecution in the Cayman Islands.

26. Decisions as to whether to instigate civil recovery proceedings should be referred to CC1FC or CC1F.

***24<sup>th</sup> January 2020***