

## RECOVERING PROCEEDS OF CRIME –HOW CAN WE DO IT BETTER

### SYNOPSIS

Asset recovery is a relatively new and innovative way of fighting crime through civil litigation. And the rationale is an obvious one. By targeting money that flows from crime, it has the potential to make a huge difference in the fight against crime, especially those crimes that are primarily driven by profit, fraud, drug trafficking, tax evasion, human trafficking, piracy amongst many others.

A forfeiture investigation is not an enquiry into whether an offence has been committed. It is an investigation into the prospect of asking the court to make a forfeiture order for the seizure of specific property or an order for the payment of a sum of money equal to the defendant's benefit from the crime.

The recovery is carried out through a civil process implying that it is only necessary to prove a case on a balance of probabilities. The fact that asset forfeiture is relatively new and innovative also makes it challenging to implement and use effectively.

The challenges are numerous and a good starting point would be the requirement for a robust legal framework, which provides for an independent law enforcement agency supported by specialist investigators and lawyers to oversee a dynamic scheme to recover proceeds of crime. Moreover the statute must confer flexible ancillary powers to the agency to enable it to have speedy and easy access to the court for an early evidence gathering exercise and swift implementation of restraint orders. Ancillary applications before the courts being ex parte the prosecution has a duty not only to disclose the reasonable grounds which have led them to believe that a prospective defendant has benefited from proceeds of crime but also any reasons which according to the prosecution point against the grant of the order.

The level of evidence that needs to be provided to satisfy the court for ancillary order is the objective test of reasonableness which is very well established in the criminal justice system. At the same time legislation dealing with a recovery of proceeds of crime scheme would normally provide for a reversal burden of burden of proof to deal with life-style criminals. A defendant who has been convicted has the burden prove that the property he owns or has owned over the last ten years (seven in some jurisdictions) is not proceeds of crime.

The success of the scheme to recover proceeds of crime will also depend on a legal culture both at prosecutorial and judicial levels for effective implementation of the applications before courts.

Finally a well-structured mechanism to manage efficiently seized assets is realized where required and used for specific purposes to support the fight against crime.

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