

**Lexbridge**

**DEVELOPMENT OF A PACIFIC MODEL LEGAL  
FRAMEWORK FOR  
NON-CONVICTION-BASED  
CRIMINAL ASSET CONFISCATION  
AND MONEY LAUNDERING OFFENCE PROVISIONS**

**CONCEPT PAPER**



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# 1. Introduction

This paper presents a concise summary of a proposal to develop a model anti-money laundering (AML) and proceeds of crime (POC) asset confiscation legal framework (the Model Framework), which will be available for adoption by countries in the Pacific region. The Model Framework will reflect modern best practice legal standards and will be tailored for adoption and implementation by smaller Pacific Island countries to best meet their needs in their particular circumstances.

The project will be delivered through a series of stages culminating in delivery of the Model Framework for adoption by receiving countries:

- Stage 1 - development of the concept in consultation with Pacific Island countries who may benefit from the Model Framework. Stage 1 is being supported and funded by ABA ROLI.
- Stage 2 - development of a policy paper setting out the key policy considerations underpinning the Model Framework.
- Stage 3 - drafting the Model Framework including the AML offence regime, the POC confiscation and forfeiture regime, and the international cooperation regime.
- Stage 4 - development of the implementation support and training program and resources.<sup>1</sup>

The proposed Model Framework will constitute a stand-alone legal framework capable of fully replacing existing legal regimes, rather than requiring a patchwork of amendments and additions. Where adopting countries prefer to supplement or update their existing legislative framework there will be scope for them to adopt specific components of the Model Framework. This will also allow for adjustments by countries in light of their policy aims.

The creators of the proposal aim to create a Model Framework that will be fit not just for current challenges but also those of the future. The Model Framework will enable adopting countries to not only meet their existing international treaty obligations, but also to implement best practice standards such as those recommended by the Financial Action Task Force (FATF).<sup>2</sup>

International obligations, such as those arising under the 1988 *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*,<sup>3</sup> to which many Pacific Island countries are parties<sup>4</sup> require member States to be effective in their efforts to investigate and prosecute money laundering, and to deprive persons and criminal enterprises of their illicit gains, and repatriate funds back to victim jurisdictions, particularly in corruption cases. Many countries—including those within the Pacific region—are not fully meeting international obligations, and money laundering prosecution and criminal asset confiscation rates remain worryingly low. One of the reasons for this is inadequate and outdated legal frameworks which are not well suited to tackling the transnational crime challenges of the 21st century.

The Model Framework will provide for enhanced investigative powers and sophisticated offence provisions, which will facilitate efficient and effective AML investigations and prosecutions, whilst providing robust due process protections to ensure the civil liberties of accused.

A key feature of the Model Framework will be the introduction of a non-conviction based (NCB) POC asset confiscation and forfeiture regime. NCB POC confiscation laws allow confiscation of

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<sup>1</sup> Stages 2 – 4 are currently unfunded.

<sup>2</sup> FATF (2012-2022), International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, FATF, Paris, France, [www.fatf-gafi.org/recommendations.html](http://www.fatf-gafi.org/recommendations.html).

<sup>3</sup> See <https://www.unodc.org/unodc/en/treaties/illicit-trafficking.html>

<sup>4</sup> See [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=VI-19&chapter=6](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6).

proceeds of crime without reliance on a criminal conviction. Instead, confiscation can occur where it is demonstrated at the civil balance of probabilities standard that ownership of property is illegitimate. Such regimes protect innocent rights by enabling parties to provide evidence of the lawful source of property.

NCB POC confiscation laws have been proven to be a highly effective method to confiscate the POC from those who profit from, but distance themselves from the criminal act. This is particularly important in transnational crime cases where frequently convictions cannot be secured in the country where the predicate offence occurred. This can be due to corrupt influences or a lack of investigative capability, or where proceeds of crime have been sent to smaller jurisdictions who are unable to seek domestic confiscation in the absence of a criminal conviction—effectively making them a safe haven for criminals to conceal and enjoy their wealth.

NCB POC confiscation laws have been in operation in the larger Pacific Region countries for several years, since 2003 in Australia, since 2005 in Papua New Guinea (PNG) and Fiji, and since 2009 in New Zealand. In Australia, prior to the introduction of the NCB provisions, the average annual amount confiscated from criminals in the Commonwealth jurisdiction in the decade from 1995 to 2005 was just over AUD \$7 million.<sup>5</sup> In September 2022, the Australian Federal Police reported they had restrained over \$600 million in the three years prior.<sup>6</sup>

The proposed Model Framework will include a suite of protection measures ensuring judicial oversight of all applications, protection of innocent interests in property and provisions to address hardship issues which might arise.

The Model Framework will also include provisions relating to international cooperation mechanisms to enable adopting countries to cooperate more effectively internationally in their AML and asset confiscation efforts.

If adopted and implemented by Pacific Island countries, the Model Framework would potentially be the most significant advancement in the Pacific Region to combat financial crime for the past 20 years. As will be demonstrated in this paper, the Model Framework can be reasonably expected to provide multiple positive flow-on effects to the region, and be the single most effective tool to combat corruption in the region and foster stronger regional cooperation against transnational crime and illicit financial flows.

Consultation will be a key part of the process to ensure the Model Framework is fit for purpose, and meets the needs and policy aims of countries in the region. The project will include delivery of a questionnaire allowing for potential adopting countries to provide feedback that will shape the Model Framework. In addition, direct presentations from project authors and group forum discussions will be held with key stakeholders.

The proposal has been developed by a multidisciplinary team of experts who together bring decades of hands-on practical experience in working on AML/CFT in the Pacific, advising on compliance with international obligations and standards, and working with and for governments across the region on major legislative development projects—including with significant experience in cross-cultural settings.

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<sup>5</sup> [Bartels, L. Australian Institute of Criminology Reports: Technical and Background Paper: A review of confiscation schemes in Australia, 2010, Table 2, page 7.](#)

<sup>6</sup> [Australian Federal Police Media Releases: AFP strips more than half a billion dollars from criminals, 5 September 2022.](#)

The following sections of the paper set out in further detail the objectives of a model law and its benefits for Pacific Island countries, as well as outlining the envisaged content of such a law and summarising the specific phases of work that would be required to develop it.

## **2. Project Objectives**

The key goal of the project is to assist Pacific Island countries in their efforts to combat the threat of money laundering linked to corruption and serious and organised crime, through the development of model laws and implementation guidance for effective criminal assets confiscation (Model Framework).

The Model Framework would be designed to be adapted and implemented by countries to strengthen their legal, policy and operational frameworks to enable improved capability in the location and confiscation of unlawfully derived assets, including those obtained from persons who profit from, but distance themselves, from the criminal act.

The Model Framework would provide the tools for building an effective criminal asset recovery regime. This will assist countries to combat illicit financial flows entering into, departing from, or being generated from within their jurisdictions, and to improve and maintain compliance with international treaties and FATF standards.

ABA ROLI is providing support for the first phase of the project. In the next stages, subject to future funding, the Model Framework would ideally be accompanied by multijurisdictional and individual country implementation assistance, training and materials. Training and guidance materials would be tailored to the Pacific Island region and, in particular, smaller jurisdictions who might otherwise consider implementation of such laws beyond their existing capability.

The overall project would aim to achieve its goal through three main objectives:

### **Objective 1**

Identify regional policy positions, practices, interests and concerns that may affect the establishment of an effective criminal asset confiscation regime through direct consultation.

### **Objective 2**

Develop a comprehensive model law, including both conviction and non-conviction-based criminal asset confiscation and recovery measures, and related offences such as money laundering and dealing with property reasonably suspected of being the proceeds of crime.

### **Objective 3**

Develop supporting instruments and materials to assist jurisdictions to effectively apply and implement the Model Framework.

### 3. Money Laundering Risks and Challenges related to Assets Confiscation for Pacific Island Countries

There are a range of risks associated with money laundering and other financial crimes in Pacific Island jurisdictions; this remains a significant challenge for the region, that many countries and relevant organisations are taking action to address. The Asia Pacific Group on Money Laundering (APGML), in its 2022 Yearly Typology Report identified several money laundering practices prevalent in several Pacific Island countries, a number of which appear to be on the rise when considered in light of previous years’ findings. These include cash smuggling; wire transfers; structured cash deposits and the use of remittances. The APGML has also highlighted an increased presence of criminal gangs, often linked to tribal and familial groupings. Additionally, the APGML observes the increased use of some Pacific Island countries as tax havens in which to hide illegal funds.<sup>7</sup> Transparency International New Zealand has examined the strong links between corruption and money laundering and identified these as ‘related and self-reinforcing phenomena’.<sup>8</sup>

Pacific Island jurisdictions who are members of the APGML undertake a peer review of their self-assessed AML/CTF risks as part of their periodic evaluation on compliance with the FATF recommendations and outcomes. This is intended as an ongoing process of assessment and review to ensure continuous monitoring of the degree, likelihood, and consequence of risks, and to allow these to be factored into domestic AML/CTF policy and appropriately addressed by industry groups.

An example of a Pacific Island country risk summary looking at likely predicate crimes is shown below:

Threat	Likelihood	Consequence	Risk Level
Bribery & Corruption	Highly Likely	Major	High
Drugs Transnational	Highly Likely	Major	High
Drugs Domestic	Highly Likely	Major	High
Tax Penalties	Possible	Moderate	Medium
Fraud	Likely	Minor	Medium
Trade Based Crime	Likely	Moderate	High
Immigration	Unlikely	Minor	Low
Terrorism Financing	Highly Unlikely	Minor	Low
Illicit Cross Border Currency Movements	Likely	Minor	Medium
Environmental Crime	Possible	Minor	Low

<sup>7</sup> See APG, *Yearly Typologies Report 2022: Methods and Trends of Money Laundering and Terrorism Financing*, July 2022.

<sup>8</sup> Transparency International New Zealand, *Corruption and Money Laundering in the Pacific: Intertwined Challenges and Interlinked Responses*, 2022.

A review of the sectoral risk for the same country illustrates the sectors considered most at risk of being exploited for ML and TF.

Sector	Risk Level
Money Transfer / Currency Exchange	High
Domestic & International Banks	High
Lawyers & Accountants	High
Real Estate (Agents & Conveyancers)	High
Companies	High
Life Insurance <sup>1</sup>	Medium-High
Credit Unions	Low
Non-Bank Non-Deposit Taking Lenders	Low
NPOs and Societies	Low

The list of predicate crimes and sectoral risks will vary for individual countries, however this list could be considered typical for countries in the region. This highlights the diverse nature of crime in the region and in particular the following key points:

1. Many financial crimes are transnational and often all or part of the predicate crimes will occur outside the jurisdiction where money laundering takes place.
2. Evidence of the predicate offences, the laundering of criminal proceeds, and the ownership of targeted property is likely to be located in foreign jurisdictions.
3. Witnesses and co-offenders are likely to be located in foreign jurisdictions.
4. Money generated from the predicate crimes and property used in their commission may be wholly or partially located in a foreign country.
5. Professional service providers involved in laundering criminal proceeds may be wholly or partially located in a foreign country.

In August 2022, the Australian Transaction Reports and Analysis Centre (AUSTRAC) hosted the inaugural Pacific Financial Intelligence Analyst Course. AUSTRAC CEO, Nicole Rose PSM, highlighted how the transnational nature of financial crimes underlies the need for international cooperation and regional solutions:

Criminal and security threats to financial systems go to the heart of national security and prosperity, whether transnational organised crime or corruption. The ease of movement of goods, people, and money globally means an agile and collaborative approach is needed to combat financial crime .... We need to follow the money as it crosses borders and enters different financial ecosystems, and we do this by sharing intelligence and financial tools with partners.<sup>9</sup>

Experts have recently highlighted the growing presence of transnational crime, particularly drug trafficking, and money laundering in the Pacific Region:

<sup>9</sup> [AUSTRAC Media Release: AUSTRAC partners with Pacific to combat money laundering and boost regional security, 1 August 2022.](#)

The Pacific islands are increasingly being used as a transit point for transnational crime, including drug trafficking and money laundering, experts say. Criminal organizations from Asia and the Americas are exploiting limited law enforcement resources on these islands, and drug problems are rising on these tourist paradise locations, according to experts and local reports, mainly from Fiji and Palau.<sup>10</sup>

It was further observed that the Pacific is caught in the nexus between the drug cartels of South America and Central America and Asian and Southeast Asian cartels’.

As many Pacific Island states lack capacity to patrol and enforce their borders, there has been an uptick in the movement of drugs through the region.<sup>11</sup> However, in a troubling development, indigenous criminal networks have also been created, that work with transnational syndicates and facilitate their operations in the region, mostly in Fiji, Papua New Guinea and Tonga along with Marshall Islands and Northern Marianas.<sup>12</sup>

One notable example occurred in 2012, when a yacht containing 204 one-kilo blocks of cocaine worth an estimated AU\$160 million and the decomposing body of a dead crew member was found washed up on a reef off Tonga's main island Nuku'alofa.<sup>13</sup>



**Unusual discovery: A shipwrecked yacht called Jereve containing £80million of cocaine and the decomposing body of a dead crew member has been found by divers in the Pacific**

<sup>10</sup> [Voice of America, Pacific Islands Increasingly Used as Crime Transit Point, Experts Say, 25 October 2022.](#)

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> [Daily Mail Australia, Decomposing body and cocaine worth £80million found on yacht run aground on Pacific reef, 17 November 2012.](#)



More recently, on 8 February 2023, 3.2 tonnes of cocaine worth an estimated NZ\$500 million was found by New Zealand Police floating in the Pacific Ocean attached to buoys, and was seized by New Zealand Police. This was the single biggest haul of drugs ever seized by New Zealand Police.<sup>14</sup>



Image recorded on Yahoo news. For the full article: <https://au.news.yahoo.com/record-breaking-500m-find-middle-of-the-pacific-ocean-025727186.html>

However, the challenge is not limited to drug smuggling. Criminals have also used Pacific Island countries to facilitate high value tax evasion. An example of this is the subject of the long running Australian tax evasion investigation known as Project Wickenby. This investigation uncovered the large-scale of movement of money to Pacific Island countries by a number of Australians nationals through various mechanisms for tax evasion purposes. Over AU\$430 million was believed to have been laundered through these schemes, which included:

1. False invoices and fake invoices
2. Sham loans and back-to-back Loans
3. Sham labour hire agreements
4. Hidden trade accounts
5. Fictitious gifts, inheritances and expenses

In many cases funds were transferred through bank accounts held in Pacific Island countries and employed the use of local facilitators and financial institutions before being returned to Australia or secreted in another offshore jurisdiction.<sup>15</sup>

This raises the question, are current money laundering and conviction-based criminal asset confiscation laws capable of dealing with the value and complexity of existing and future threats?

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<sup>14</sup> New Zealand Police News: Operation Hydros: Police, Customs and NZDF recover half a billion dollars' worth of cocaine at sea, 8 February 2022.

<sup>15</sup> See [Commonwealth Director of Public Prosecutions, \*Crimes We Prosecute, Project Wickenby\*](#).

Additionally, are they sufficient to deter criminals from transiting their money through Pacific Island countries or holding their money and other assets in Pacific Island countries?

Criminal enterprises operate in much the same way as any business. There are risks to avoid, and if successful, profits to enjoy. If there is a significant risk of having money seized and confiscated, then efforts will be made to mitigate or avoid that risk, perhaps looking for a less risky location. This drives criminals to exploit the weakest jurisdictions, where they believe their money will be safest, both from discovery and from confiscation.

There are some common challenges faced by smaller jurisdictions when undertaking asset confiscation work. These include:

1. a lack of experience due to infrequent use of asset confiscation provisions;
2. a need for regular specialist training for police and prosecutors;
3. a need for access to technical specialists such as forensic accountants;
4. a need for access to technology specialists particularly for electronic/digital evidence;
5. the requirement to undertake formal and informal international requests for evidence;
6. the requirement to register orders in foreign jurisdictions; and
7. challenges associated with management of assets, including storage of physical assets in a tropical climate.

#### **4. International Obligations and Standards for Criminal Asset Confiscation**

There are a number of specific international obligations and standards for criminal asset confiscation that Pacific Island Countries must take into account.

FATF Recommendation 4 states:

Countries **should consider** adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction-based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.

Significant results have been achieved by countries who have moved to a predominantly NCB asset confiscation approach compared with those which have not. It is demonstrably the case for the larger Pacific Island countries which have transitioned to NCB asset confiscation measures, that they have achieved significantly improved results when compared to the period prior to their use of NCB forfeiture provisions.

The FATF recommendations refer to articles in a number of international conventions and guidelines in respect to how proceeds and instrumentalities of crime should be dealt with, including the:

1. *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*,<sup>16</sup> Article 5
2. *United Nations Convention Against Transnational Organized Crime*,<sup>17</sup> Article 12; and
3. *G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets*,<sup>18</sup> which also encourage states to consider NCB asset confiscation at paragraph 26.

Key extracts are provided below:

**Article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances** states the following:

*Each Party shall adopt such measures as may be necessary to enable confiscation of:*

- a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;*
- b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.*

Article 5 does not require signatories to implement NCB asset confiscation measures however it does note the following:

*Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.*

**Article 12 of the United Nations Convention Against Transnational Organised Crime** states the following:

*States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:*

- (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;*
- (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.*

Article 12 does not require signatories to implement NCB asset confiscation measures however it does note the following:

*States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.*

**The G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets** also encourage states to consider NCB asset confiscation at paragraph 26:

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<sup>16</sup> (adopted 19 December 1988, entered into force 11 November 1990), 1582 UNTS 95.

<sup>17</sup> (adopted 15 November 2000, entered into force 29 September 2003, 2225 UNTS 209.

<sup>18</sup> [US Department of Justice, G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets, 2004.](#)

*Where they have not already done so, States are encouraged to examine the possibility to extend, to the extent consistent with the fundamental principles of their domestic law, confiscation by: permitting the forfeiture of property in the absence of a criminal conviction; requiring that the lawful origin of alleged proceeds of crime or other property be demonstrated by the claimant.*

Most of the Pacific Island countries have acceded to or ratified the above treaties—creating binding obligations upon them to take appropriate anti-money laundering and asset confiscation measures. The Model Law will enable these countries to not only meet these obligations, but also to incorporate asset confiscation regimes which meet the higher standards, reflected by the non-binding recommendations, based around NCB asset confiscation.

## **5. Why focus on NCB Forfeiture? The anticipated benefits of NCB Forfeiture**

Taking the profit out of crime causes maximum disruption to criminal enterprises: it makes crime less lucrative, deprives criminals of their power, and prevents the reinvestment of illicit profits into further criminal ventures. Where criminal proceeds are placed into the course of normal business, it can employ uncompetitive behaviour, driving legitimate business enterprises out of the market. This can cause long term disruption in any market sector but particularly in cash intensive businesses where criminals may be enticed to place cash generated from criminal activity.

Being able to focus on those who profit from, but distance themselves from the criminal act hits at the highest level of a criminal enterprise. It is unlikely to have much of an impact on a criminal organisation to arrest and prosecute a drug or currency courier when the person behind the network remains untouched along with their assets.

The two key aspects of a NCB forfeiture regime, the criminal offence and ownership of assets, are determined by a court looking at the available evidence and determining guilt and ownership of property based on the civil standard of balance of probabilities. The cases are heard in the court's civil jurisdiction, not the criminal jurisdiction. Once a case is put before the court by the applicant (prosecutor), the respondent is then required to provide evidence of the lawful source of the funds or they can choose to not contest the case.

Having the ability to investigate a suspect whose wealth cannot be readily explained from lawful sources is a significant change in traditional investigations which tend to be undertaken in response to the commission of an identified offence with a focus on proving that offence before considering the financial aspects of the crime. A focus on a suspects unexplained wealth breaks that nexus between linking a person and a specific criminal act thereby providing an avenue to target money generated from unlawful activity.

Whilst debating the introduction of the United Kingdom's NCB asset confiscation measures in parliament in 2002, Lord Goldsmith explained the rationale in the following terms:

Someone at the centre of a criminal organisation may succeed in distancing himself sufficiently from the criminal acts themselves so that there is not sufficient evidence to demonstrate actual criminal participation on his part. Witnesses may decline to come forward because they feel intimidated. Alternatively, there may be strong evidence that the luxury house ... the yachts and the fast motor cars have not been acquired by any lawful activity because none is apparent. It may also be plain from intelligence that the person is someone engaged in criminal activity, but it may not be clear what type of crime. It could be drug trafficking, money laundering or bank robbery. However, the prosecution

may not be able to say exactly what is the crime, and thus the person will be entitled to be acquitted of each and every offence. If, in a criminal trial, the prosecution cannot prove that the person before the court is in fact guilty of this bank robbery or that act of money laundering, then he is entitled to be acquitted. Yet it is as plain as a pikestaff that his money has been acquired as the proceeds of crime.<sup>19</sup>

An insidious crime that impacts all jurisdictions is corruption, including public officials and those elected to government. Corruption and money-laundering are related and self-reinforcing phenomena. A robust and effectively implemented criminal asset confiscation legal framework will therefore be a powerful tool in combatting corruption through focusing on the money and those who benefit financially through the abuse of their office.

Another key benefit of an effective asset confiscation regime is the recovery of money both for victims who have suffered a financial loss and to enable money realised from the sale of confiscated assets to be reinvested into the community. This could include measures such as crime prevention programs, public education programs and crime diversion programs focused on preventing crime and rehabilitating those who may have been using illicit substances. Some countries have used confiscated assets to fund delivery of investigations training and the provision of specialist equipment and support to investigation agencies.

In 2018, the Council of Europe passed Resolution 2218 inviting member States to provide for non-conviction-based confiscation in their national laws.<sup>20</sup> This recommendation was based on a report of the Council of Europe Committee on Legal Affairs and Human Rights which found NCB confiscation to be an efficient means to tackle the fast-growing financial power of organised crime, in defence of democracy and the rule of law, and compatibly with human rights.<sup>21</sup>

In a region where the four largest countries have NCB forfeiture and a world where many larger countries including the USA, UK, Ireland and South Africa have NCB forfeiture, having an NCB legal framework can greatly assist in undertaking transnational cases enabling the registration of foreign court issued freezing, restraining and confiscation orders and enabling the request and transfer of evidence in the absence of a criminal prosecution.

## 6. How do NCB Provisions compare to Conviction-Based Provisions?

### Comparative Example – Conviction vs NCB forfeiture Process

This is a fictitious hypothetical case based on elements from, and processes used in actual investigations in NCB asset forfeiture proceedings.

#### **Initial referral to Police from the FIU**

A suspicious transaction report has been received by the FIU from a local financial institution. The report indicates that a number of cash deposit transactions have been made into a single account just below the significant cash transaction reporting threshold of \$10,000.00. These have occurred during the past 3 months and now total \$230,000.00.

<sup>19</sup> House of Lords Debate 25 June 2002, vol 636, cols 1270-71, per Lord Goldsmith.

<sup>20</sup> [Council of Europe, Resolution 2218 \(2018\)](#).

<sup>21</sup> Council of Europe, Committee on Legal Affairs and Human Rights, Report Doc. 14516, 26 March 2018.

Previously the account received a similar pattern of transactions and after 3 months the total balance was transferred to a single account in New Zealand (NZ).

**Subsequent Enquiries Made by Police**

The account holder is a 23 year old male named Loto who lives in the capital city. He does local labouring work for anyone who will employ him and prior to his recent pattern of transactions never held a balance over \$1,500.00. Loto is recorded as having flown to New Zealand a month ago and has not returned.

**FIU Enquiries via the Egmont Group**

The FIU have made a request to the New Zealand FIU and ascertained the account in New Zealand is held by a 28 year old female who is a citizen from your country named Talia.

**Police intelligence reports**

NZ Police have linked Talia to an Outlaw Motorcycle Gang (OMCG) known as the Rebel Yellers. This gang includes many Pacific Islanders who have made New Zealand their home. They are believed to be importing and selling narcotics, predominantly methamphetamine into New Zealand as well as their home countries.

Conviction-based Process	NCB Process
<p>Case assessed by Police for suspicion of money laundering however the account holder is overseas and the depositors have not been identified.</p> <p>Asset restraint laws enable the restraint of assets however the owner of the funds must be charged within 48 hours for a serious offence otherwise the order lapses. The owner and source of the funds in the account is unclear.</p> <p>You have requested the bank assist by holding the funds temporarily or for a limited period permitted at the direction of the FIU.</p>	<p>Case assessed by Police for suspicion of money laundering however the account holder is overseas and the depositors have not been identified.</p> <p>Funds in the account are suspected of being proceeds of crime. No action is required to be taken against the account holder and the owner of funds does not need to be identified.</p> <p>An urgent application for a restraining order (or freezing order) is made to the court and funds are then transferred to a suspense account by the bank pending further court orders.</p>

<p>New Zealand Police are notified in case they can obtain an order over funds held in the account in your country.</p> <p>New Zealand Police obtain an NCB restraining order over funds held in Talia's NZ account on a suspicion they are proceeds of crime. The order also specifies the funds in the account held by Loto in your country as being under the effective control of Loto who is suspected of committing multiple serious offences in NZ.</p> <p>Your country cannot register an NCB order under your Mutual Assistance Law as you have no comparable provision and there is still no indictment against the account holder or confirmation of the funds owner.</p> <p>Consideration is given to seeking the arrest and extradition of Loto back to your country however it is assessed that there is insufficient evidence to support the request.</p>	<p>Your Police work with NZ Police to secure further information about the OMCG, Loto and Talia.</p> <p>New Zealand Police obtain an NCB restraining order over funds held in Talia's NZ account on a suspicion they are proceeds of crime.</p> <p>New Zealand Police serve copies of your restraining order on Loto, Talia and the headquarters of the OMCG.</p> <p>No application for revocation of the restraining order is made and no exclusion applications are made against the funds restrained.</p> <p>An application is filed for the forfeiture of restrained funds with copies served on the bank, Loto, Talia and the OMCG.</p>
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6 Months Later

<p>Funds held in the account in your country totalling \$230,000.00 plus accrued interest have had to be released by the bank back into the account as no action has progressed in the past 6 months.</p> <p>Funds are transferred by remote direction from the account holder to an account in Hong Kong where they are ultimately used to pay for methamphetamines which are trafficked through the Pacific region.</p>	<p>As no application has been filed to contest the forfeiture of restrained funds or seek exclusion of all or part of the funds, the court issues forfeiture.</p> <p>No evidence of the source of the funds, or ownership of the funds is required. The Police provide an affidavit from New Police stating their service of documents on Loto, Talia and the OMCG.</p> <p>Funds held in the account in your country totalling \$230,000.00 plus accrued interest are forfeited. These funds are ultimately used to provide education and health services for those affected by illicit drug use and drug prevention education for school aged children.</p> <p>Funds held in Talia's account are similarly forfeited in NZ.</p>
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## 7. Proposed elements of the Model Law

The model law would cover the following key aspects of the proposed legal framework, including:

1. Investigation powers
2. Freezing orders
3. Restraining orders
4. Examination orders (coercive hearings)
5. Unexplained wealth Orders
6. Exclusion and revocation orders
7. Protection of third-party innocent interests and rights
8. Forfeiture orders (conviction and non-conviction based)
9. Pecuniary penalty orders (conviction and non-conviction based)
10. Asset management
11. Offence for money laundering and
12. Offence for Possessing Property reasonably Suspected of Being Proceeds of Crime

It is intended that the model law will be adaptable and customizable by countries based on their individual circumstances and policy settings. For example, a jurisdiction may decide to exclude unexplained wealth orders.

Unexplained wealth orders are perhaps the newest tool to combat serious and organised crime. Fiji introduced these measures in 2012, Australia introduced them in 2009 and the UK introduced them 2017. In describing the provision in the explanatory memoranda to the Australian legislation, the provision was described as follows:

While the Act contains existing confiscation mechanisms, these are not always effective in relation to those who remain at arm's length from the commission of offences, as most of the other confiscation mechanisms require a link to the commission of an offence. Senior organised crime figures who fund and support organised crime, but seldom carry out the physical elements of crimes, are not always able to be directly linked to specific offences.

The intention of the model law is for it to provide a stand-alone framework for a complete repeal and replacement of existing proceeds of crime laws and if necessary, money laundering offences, rather than a patchwork of amendments and additions. For some states though it might be preferable for it to be used to review or update their existing legislative framework to ensure it meets international standards and achieves improved operational outcomes. The proposed POC law would also include a suite of protection measures ensuring judicial oversight of all applications, protection of innocent interests in property and allowance to address hardship issues which might arise. In addition, it would address international cooperation to seek and provide mutual assistance in relation to POC proceedings.



In 2016 the Commonwealth Secretariat, in collaboration with the UNODC and the International Monetary Fund delivered a comprehensive model law titled, *Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime*. In the preface it states:

The model provisions form a starting point for states to evaluate the measures that should be incorporated into their domestic law to prevent, detect and effectively sanction money laundering and terrorism financing and to recover the proceeds of crime, with the overall objective of maintaining compliance with the revised Financial Action Task Force (FATF) Recommendations.

The Commonwealth Secretariat model law includes NCB forfeiture provisions.

This project is intended to produce similar outcomes by developing a regionally-focused model law in consultation with local jurisdictions to ensure it is tailored for the needs of smaller jurisdictions. By taking a regional approach in developing a model law, it is intended that countries which adopt it in whole or part will be better able to work collaboratively through shared training for police and prosecutors, access to specialist knowledge, shared operational experience and comparable legal processes when cases cross between countries.

Additionally, the existing regional networks such as the Pacific Transnational Crime Coordination Centre (PTCCC) could help link in expertise from larger jurisdictions as they currently do for criminal investigations. There will be a critical requirement to provide experience and guidance when needed noting that for small jurisdictions there is likely to remain an infrequent use of these provisions.

The PTCCC hold a membership in the Asset Recovery Interagency Network – Asia Pacific (ARIN-AP) on behalf of its members which enables informal requests to be made through the network and into linked networks in Europe, South America, Africa and North America. This is the key asset confiscation practitioner network for the Asia/Pacific region.

## **8. Key Benefits of a Model Law**

### **Compliance with international obligations and standards and practical effectiveness**

The Model Law would implement the technical FATF Recommendations and treaty obligations, in addition to providing investigators and prosecutors with a comprehensive legal framework to achieve higher levels of effectiveness in combating money laundering and recovering proceeds of crime. The Model Law would also provide for a more effective investigation approach providing for a parallel investigation and prosecution model as recommended by the FATF and which the smaller Pacific Island jurisdictions have not been able to apply to date due to deficiencies in their existing legal frameworks.

### **Harmonisation of domestic regimes**

The harmonisation of existing legislation (at both international and national levels) is essential for good cooperation and the proper functioning of these mechanisms. A Model Law would provide a higher degree of consistency across the region, which would have benefits in training, development and cooperation.

### **Applying an integrated approach / coordination between domestic institutions**

Institutions and bodies involved in asset recovery should work as a network, in a coordinated manner. This will enable them to be more efficient and be able to recover assets more quickly and with less expenditure of resources.

### **Speed and autonomy**

States need legislation that allow them to recover assets faster. For greater speed in asset recovery, states can take advantage of the inherent brevity of NCB forfeiture proceedings, which require only a civil standard of proof. Freezing of assets should be carried out as early as possible in the process so that when the judgment is obtained, it will not be too late to recover them.

### **Cost saving**

A Model Law would provide a significant cost saving for Pacific Island jurisdictions, as well as for other regional stakeholders that are working to support the improvement of Pacific laws and practices. Consideration to undertake the significant changes necessary to adopt a comprehensive NCB forfeiture framework would normally be prohibitively costly and overly complex for smaller jurisdictions to develop on their own or with the assistance of donor funds. The development of a regionally-focused model law which can be used as a framework will be a more cost-effective and time efficient method of undertaking the initial preparation required.

### **International cooperation**

The Model Law would address international cooperation to seek and provide mutual assistance in relation to POC proceedings. Both formal and informal cooperation between States is vital in the fight against organised crime. Fuelled by the accelerated globalisation we are undergoing, almost all such crime is transnational. All countries benefit from everyone having effective money laundering laws and criminal asset confiscation regimes. History has shown that money flows to the weakest and least effective jurisdictions. Consistent approaches across regions also foster better outcomes in terms of regional cooperation. For example, if a country introduces NCB criminal assets confiscation laws, another country with equivalent laws could request mutual legal assistance more readily in a civil action to give effect to civil restraint and forfeiture orders. A Model Law would foster stronger regional cooperation against transnational crime and illicit flows. It would also support broader regional cooperation efforts in support of Pacific Island priorities, for example the recent initiative of the US and other States to establish the 'Partners in the Blue Pacific'.

### **A transformative impact on combating financial crime in the region**

Such a Model Law would have multiple positive flow-on effects, and arguably be the single most effective tool to combat corruption in the region. If adopted and implemented by Pacific countries, a model law of this kind would potentially be the most significant advancement in the Pacific to combat financial crime for the past 20 years. The development of a Model Law would present a major step forward, in an ongoing process to support Pacific Island countries to strengthen their policy, legal and operational frameworks to detect, deter and deprive persons of their illicit financial flows.

## **9. Plan and Methodology**

The following outlines the main phases of work that would be envisaged for the Model Law project as a whole.

### **A. Promotion and consultation**

The concept paper is accompanied by a questionnaire seeking initial feedback from regional jurisdictions, after which the project managers will hold individual, panel or roundtable consultations (as appropriate) with subject matter experts from across the region, to explore key themes in the development of an effective asset management framework. Outcomes will be collated in a report, which will inform the drafting of the proposed model law and supporting materials.

### **B. Development of Policy Paper**

A policy paper would be developed in consultation/with the assistance of subject matter experts. The paper would comprehensively cover key policy and practice issues to be explored when developing an effective criminal assets confiscation regime, including:

1. Investigative and information-gathering tools to support proceedings
2. Pathways for asset recovery
3. Mechanisms to prioritise asset recovery in investigations
4. Rationale underpinning conviction-based and non-conviction-based forfeiture
5. Protection of third-party rights
6. Best practices for international cooperation

### **C. Development of a Model Asset Confiscation Law**

The policy paper would be used to inform the development of drafting instructions, which in turn would be used as the basis for the development of a Model Law. The Model Law would draw on relevant precedents, particular from jurisdictions that have effectively applied NCB forfeiture laws. The Model Law will be developed in consultation with, and with the assistance of, subject matter experts. It will provide for both conviction-based confiscation and NCB confiscation options.

### **D. Development of Model Money Laundering Offences**

Model laws will be developed for the offence of money laundering and a complementary offence of 'dealing with property reasonably suspected of being proceeds of crime'. These will be informed by the policy paper, and draw on precedents from jurisdictions, particularly those who have recently updated their money laundering offences. The Model Law offence provisions would

be developed in consultation/ with the assistance of subject matter experts and would be drafted to be fully compliant with current FATF assessment criteria.

### **E. Development of supporting materials**

A range of materials would be developed to support the effective uptake and implementation of the model legal framework, which could be collated in a comprehensive Criminal Assets Confiscation Manual for investigators and litigators/prosecutors. These materials would be developed in consultation / with the assistance of, subject matter experts.

It is envisaged that they could include:

1. *Commentary*: This would be a description of how the powers and tools in the Model Law would be intended to be applied in practice, and would include:
  1. case examples
  2. schematics (flow charts) on various asset recovery pathways.
  3. description of linkages between powers
  4. chronology of events
2. *Template applications, affidavits and orders*: - such as template applications for restraint and forfeiture orders.
3. *An asset management operational manual*, including template forms, flow charts and Standard Operating Procedures to effectively preserve and dispose of assets.

### **F. Development of Desktop Training Resources**

This would involve development of preliminary training materials, including a range of desktop hypothetical 'real-life' asset confiscation cases, with additional training modules to accompany the hypotheticals. The hypothetical examples would provide a basis upon which future training could be developed or delivered by a country itself in implementing the Model Framework. In addition, the training materials could include modules for training to be delivered to the judiciary on criminal asset confiscation laws.

## **10. Conclusion**

This concept paper has sought to outline key money laundering risks for Pacific Island Countries, the relevant international obligations and standards that need to be taken into account, and the significant practical benefits that the development of a Model Legal Framework for NCB forfeiture would offer. It has also provided an overview of the key proposed elements of a Model Legal Framework, and the broad vision for what the different phases necessary to develop such a framework would entail –underpinned at every phase by the principle of operating in close consultation with regional stakeholders and subject matter experts. This concept paper offers a starting point for Pacific Island Countries' consideration of this important set of issues—and the intention is to refine the proposal for a Model Legal Framework further, based on the initial consultation and outreach being undertaken by Lexbridge with the support of ABAROLI. We look forward to your feedback.