



**UNIVERSITY *of the*  
WESTERN CAPE**

**LLM**

**TRANSNATIONAL CRIMINAL JUSTICE: AN INTERNATIONAL AND AFRICAN PERSPECTIVE**

**RESEARCH PAPER**

**THE FRAGMENTED APPROACH TO CONFISCATING DIRTY ASSETS IN BOTSWANA**

**TYRON OSHIMA MOKGATHONG**

**STUDENT NUMBER: 3750224**

**SUPERVISOR: PROFESSOR LOVELL FERNANDEZ**

## KEYWORDS

Botswana

Confiscation

Instruments

International Best Practices

*Implementation*

*In personam*

*In rem*

*Multi-Agency Approach*

Proceeds

Specialised Asset Forfeiture Unit



## DECLARATION

I, Tyron Oshima Mokgathong, declare that “The Fragmented Approach to Confiscating Dirty Assets in Botswana” is my work and that it has not been submitted for any degree or examination in any university or institution. All the sources used, referred to or quoted have been duly acknowledged.

Student: Tyron Oshima Mokgathong

Signature:

Date:



Supervisor: Prof. L Fernandez

UNIVERSITY *of the*  
WESTERN CAPE

Signature:

Date:

## ACKNOWLEDGEMENTS

I wish to tender my sincere appreciation to the staff of the programme and my classmates for equipping me with the tools necessary to meet the target of the programme. Special thanks to my supervisor for all his efforts in assisting me with this work. I am eternally grateful to my family for all the sacrifices that they made for me to attend this programme. I am particularly proud of my family's resoluteness in facing all challenges presented by my absence from home. To my beautiful wife and two awesome daughters, whom I love beyond measure, words cannot capture my gratitude.

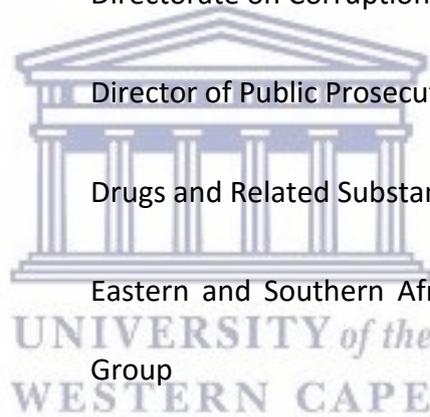


## ABBREVIATIONS AND ACRONYMS

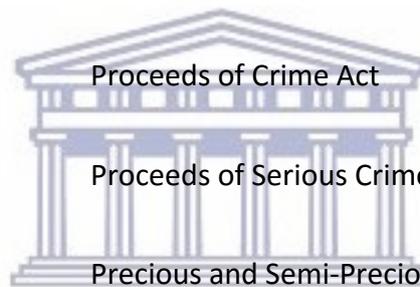
AAA:	Arms and Ammunitions Act
ACC:	Australian Crime Commission
ACS:	Australian Customs Service
AFP:	Australian Federal Police
AFU:	Asset Forfeiture Unit
AGC:	Attorney General's Chambers
ATO:	Australian Taxation Office
ARA:	Asset Recovery Agency
ARINSA:	Asset Recovery Inter-Agency Network Southern Africa
AUCPCC:	African Union Convention on Preventing and Combating Corruption
BBC:	British Broadcasting Company
BPS:	Botswana Police Service
BURS:	Botswana Unified Revenue Service
BWP:	Botswana Pula Currency Code
CACT:	Criminal Assets Confiscation Taskforce
CCU:	Centralised Confiscation Unit
CDPP:	Commonwealth Director of Public Prosecutions



CECA:	Corruption and Economic Crimes Act
CEDA:	Customs and Excise Duty Act
CIPA:	Companies and Intellectual Property Authority
CP&E:	Criminal Procedure and Evidence Act
CPS:	Crown Prosecution Service
CPSPOC:	Crown Prosecution Service Proceeds of Crime Unit
DJS	Defence, Justice and Security
DCEC:	Directorate on Corruption and Economic Crime
DPP:	Director of Public Prosecutions
DRSA:	Drugs and Related Substances Act
ESAAMLG:	Eastern and Southern African Anti-Money Laundering Group
FATF:	Financial Action Task Force
FinCen:	Financial Crimes Enforcement Network
G20:	Group of Twenty
IRS:	Internal Revenue Service
MOU:	Memorandum of Understanding
MVTA:	Motor Vehicle Theft Act
NAO:	National Audit Office



NCA:	National Crime Agency
NPA:	National Prosecuting Authority
Palermo Convention:	United Nations Convention against Transnational Organised Crime
PCLT:	Proceeds of Crime Litigation Teams
PICA:	Proceeds and Instruments of Crime Act
PIU:	Performance and Innovation Unit
POCA 1998:	Prevention of Organised Crime Act
POCA 2002:	Proceeds of Crime Act
PSCA:	Proceeds of Serious Crime Act No.19 of 1990
PSPSA:	Precious and Semi-Precious Stones Act
SAPS:	South African Police Service
SOCA:	Serious Organised Crime Agency
STA:	Stock Theft Act
UK:	United Kingdom
UN:	United Nations
UNCAC:	United Nations Convention against Corruption
UNODC:	United Nations Office on Drugs and Crime
USA:	United States of America



UNIVERSITY of the  
WESTERN CAPE

USCS:	United States Customs Service
USSS:	United States Secret Service
Vienna Convention:	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
WCNPA:	Wildlife Conservation and National Parks Act



# Table of Contents

KEYWORDS .....	ii
DECLARATION .....	iii
ACKNOWLEDGEMENTS .....	iv
ABBREVIATIONS AND ACRONYMS .....	v
CHAPTER ONE .....	1
INTRODUCTION .....	1
1.1 Background to Study .....	1
1.2 Problem Statement .....	4
1.3 Research Question .....	6
1.4 Scope of Study .....	7
1.5 Research Methodology .....	7
1.6 Chapter Outline .....	7
CHAPTER TWO .....	9
CONFISCATION FRAMEWORK IN BOTSWANA .....	9
2.1 Introduction .....	9
2.2 Objectives of Confiscation Law .....	9
2.3 International Law Obligations on Confiscation .....	11
2.4 Overview of Confiscation Laws in Botswana before PICA .....	13
2.4.1 Forfeiture of Instruments of Crime .....	13
2.4.2 Forfeiture of Prohibited and Regulated Property .....	15
2.4.3 Forfeiture of Proceeds of Crime .....	17
2.5 Confiscation under PICA .....	19
2.5.1 Conviction-Based Confiscation under PICA .....	19
a) Pecuniary Penalty Orders .....	20
b) Forfeiture Orders .....	20
c) Automatic Forfeitures .....	21
2.5.2 Non-Conviction Based Asset Forfeiture .....	22
a) Civil Penalty Order .....	22
b) Civil Forfeiture Order .....	23
c) Administrative Forfeiture .....	24
2.6 Restraining Order .....	25
2.6.1 Restraining Orders for Conviction-Based Confiscation Orders .....	26
2.6.2 Restraining Orders for Non-Conviction Based Confiscation .....	27
2.6.3 Procedure and Evidence for obtaining a restraining order .....	28
2.7 Conclusion .....	28

<b>CHAPTER THREE</b> .....	30
<b>INTERNATIONAL BEST PRACTICES</b> .....	30
<b>3.1 Introduction</b> .....	30
<b>3.2 International Duty Regarding Effective Confiscation Measures</b> .....	30
<b>3.2.1 International Organisations on How to Minimise Structural Impediments to Ensure Effective Confiscation</b> .....	31
<b>3.2.2 Recommendations by the United Nations</b> .....	31
<b>3.2.3 The Consensus for Specialised Asset Forfeiture Bodies</b> .....	34
<b>3.3 Case Studies</b> .....	35
<b>3.3.1 The Australian Experience</b> .....	36
<b>3.3.2 The South African Experience</b> .....	39
<b>3.3.3 The United Kingdom Experience</b> .....	41
<b>3.3.4 The United States of America Multi-Agency Approach</b> .....	48
<b>3.4 Conclusion</b> .....	51
<b>CHAPTER FOUR</b> .....	53
<b>THE BOTSWANA FRAGMENTED MULTI-AGENCY APPROACH</b> .....	53
<b>4.1 Introduction</b> .....	53
<b>4.2 Agencies Implementing Confiscation Laws</b> .....	53
<b>4.2.1 Director of Public Prosecutions</b> .....	54
<b>4.2.2 Attorney-General’s Chambers</b> .....	56
<b>4.2.3 Directorate on Corruption and Economic Crime</b> .....	57
<b>4.2.4 Botswana Police Service</b> .....	58
<b>4.2.5 Botswana Unified Revenue Service</b> .....	59
<b>4.3 Issues with the Constitutional Mandate of the DPP</b> .....	59
<b>4.4 Challenges of Enforcing Confiscation Orders</b> .....	61
<b>4.5 Limited Skills and Resources</b> .....	63
<b>4.6 Conclusion</b> .....	63
<b>CHAPTER FIVE</b> .....	65
<b>5.1 Conclusions</b> .....	65
<b>5.2 Recommendations</b> .....	66
<b>BIBLIOGRAPHY</b> .....	68

## CHAPTER ONE

### INTRODUCTION

---

#### 1.1 Background to Study

In the early 1990s Botswana faced rising levels of grand corruption and economic crimes in general. The laws could not cope with the high incidence of economic criminality, especially as regards the confiscation of dirty assets. At the time, the government relied solely on laws regulating the forfeiture of prohibited property and instruments of crime, given that there were no laws authorising the confiscation of proceeds of crime. The drivers of the said forfeiture laws are the Director of Public Prosecutions (DPP), the Botswana Police Service (BPS) and the Botswana Unified Revenue Service (BURS). Parliament then enacted the Proceeds of Serious Crime Act No. 19 of 1990 (PSCA). The PSCA was a three-pronged tool in that it introduced the offence of money-laundering, enhanced investigative powers, and authorised conviction-based confiscation of proceeds of crime. The DPP was tasked with conducting criminal prosecutions and applying for confiscation orders. The BPS was mandated to conduct financial investigations.<sup>1</sup>

Allegations of grand corruption, however, continued to rise, thus forcing the government to seek guidance elsewhere. It was attracted to the Hong Kong model which provided for a specialised anti-corruption agency.<sup>2</sup> Consequently, in 1994, Parliament passed the Corruption and Economic Crime Act (CECA) which provides for the creation of the

---

<sup>1</sup> See ch 2 which deals with the various laws which empower the government to forfeit illicit property.

<sup>2</sup> Kuris G, *Managing corruption risks: Botswana builds an anti-craft agency, 1994-2012*, Innovations for Successful Societies available [https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy\\_Note\\_ID233.pdf](https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy_Note_ID233.pdf) (accessed 14 April 2017).

Directorate on Corruption and Economic Crime (DCEC).<sup>3</sup> Through CECA the government expanded the offence of corruption to mean more than the offering and soliciting of bribes.<sup>4</sup> The DCEC was tasked with investigating, preventing and educating the public about economic crimes.<sup>5</sup> Furthermore, CECA reiterated the applicability of the PSCA to a conviction for any offence listed in CECA.<sup>6</sup> Accordingly, CECA did not disturb the roles hitherto played by other government agencies in the fight against economic crimes.

In 1995, Parliament extended Botswana's confiscation laws by introducing non-conviction based forfeiture of the proceeds derived from theft of motor vehicles.<sup>7</sup> In 1996, the legislature extended the civil forfeiture regime by empowering the government to confiscate proceeds derived from stealing stock without the need for a conviction.<sup>8</sup> Only the BPS was empowered to approach the courts for non-conviction based forfeiture orders against the proceeds derived from stealing vehicles and stock.<sup>9</sup>

In 2014, Botswana extended its confiscation laws by way of the Proceeds and Instruments of Crime Act No. 28 of 2014 (PICA). PICA empowers the DPP, BPS, DCEC and BURS to confiscate dirty assets on behalf of the government.<sup>10</sup> Prior to PICA, only the DCEC from the above quartet was not empowered to forfeit tainted property on behalf of the government. Accordingly, Botswana has adopted a multi-agency approach to confiscating dirty assets.

Despite being possible for decades, there is no reported case in which the government confiscated dirty assets through the MVTA and STA. Of the 79 cases of corruption

---

<sup>3</sup> Sec 3 of CECA, Chapter 08:05, Laws of Botswana. (CECA, 08:05).

<sup>4</sup> Sec 31 and 34 of CECA, 08:05 introduced the crimes of conflict of interest and possession of an unexplained property, respectively as forms of corruption.

<sup>5</sup> Sec 6 of CECA, 08:05.

<sup>6</sup> Sec 7 of CECA, 08:05.

<sup>7</sup> Sec 16 of Motor Vehicle Theft Act, Chapter 09:04, Laws of Botswana. (MVTA, 09:04).

<sup>8</sup> Sec 14 of Stock Theft Act, Chapter 09:01, Laws of Botswana. (STA, 09:01).

<sup>9</sup> Sec 16 of MVTA, 09:04 and sec 14 of STA, 09:01.

<sup>10</sup> See chapter II and chapter III of PICA, 2014.

investigated by the DCEC between 2011 and 2015, there were no parallel investigations on the tracking, identification, and seizing of the proceeds of the corruption crimes. Consequently, there were no confiscation orders applied for in those cases.<sup>11</sup> These statistics show that asset forfeiture was resorted to only hesitatingly. The reasons, so it seems, had to do with the fact that there was uncertainty as to how to go about seizing and there was also a lack of expertise in this area of the law. Notwithstanding the fact that the DPP and DCEC concentrated their efforts mainly on instituting criminal prosecutions and paid lip service to asset confiscation, Botswana's anti-corruption policy was hailed by the British Broadcasting Company (BBC) as *the 'Success Story of Africa'*.<sup>12</sup>

In practice, the so-called success story can no longer sustain itself, for corruption cases are becoming more sophisticated and even more difficult to prove. Furthermore, between 2010 and 2014, Botswana was doing well in the prosecution of petty corruption cases as opposed to grand corruption cases. In that period, the DPP failed to prosecute some of the top civil servants implicated in corruption. Among them were cabinet ministers.<sup>13</sup>

What is more, the opportunities to perpetrate economic crimes have increased. Diamond exports have been the most significant contributor to Botswana's gross domestic product for a long time. With the growing realisation of the unsustainability of relying heavily on diamonds sales and the need, therefore, to diversify the economy, the export of diamonds is now regarded as an area very susceptible to grand corruption. These risk are particularly

---

<sup>11</sup> ESAAMLG, 2<sup>nd</sup> Round Mutual Evaluation Report for the Republic of Botswana 2017, available at [http://www.esaamlg.org/userfiles/file/MER%20of%20Botswana\\_council\\_final\\_publication.pdf](http://www.esaamlg.org/userfiles/file/MER%20of%20Botswana_council_final_publication.pdf) (accessed 14 June 2017). (ESAAMLG, 2017).

<sup>12</sup> BBC News, *Botswana: Africa success story?*, available at <http://news.bbc.co.uk/2/hi/africa/4318777.stm> (accessed 14 April 2017).

<sup>13</sup> Mmegi Online News, *The losses expose the DPP sham*, available at [http://www.mmegi.bw/index.php?sid=9&aid=380&dir=2011%2FDecember%2FFriday2&fb\\_comment\\_id=10150435079048798\\_20117995#f2f0378ab5a890c](http://www.mmegi.bw/index.php?sid=9&aid=380&dir=2011%2FDecember%2FFriday2&fb_comment_id=10150435079048798_20117995#f2f0378ab5a890c) (accessed 14 June 2017).

concerning within the mining industry, given that the Auditor-General is precluded from reviewing mining contracts entered into by government.<sup>14</sup> The Mines and Minerals Act empowers private entities to own mines in Botswana, with the government having the option of buying 15 per cent of each mine.<sup>15</sup> The government has decided against taking up shares in at least six new mines, but it intends to enact a law quickly to give that option to private citizens.<sup>16</sup> This arrangement would undoubtedly create opportunities for the perpetration of grand corruption and trade-based money laundering.

Botswana also has to contend with the problem of combating transnational crimes such as money laundering, the risk of which is high. The country's booming foreign-owned second-hand car dealerships constitute a significant source of concern. So does wildlife poaching and other financial crimes such as fraud.<sup>17</sup>

By December 2016, the government had launched five confiscation proceedings under PICA in which at least 20 million Botswana Pula (BWP), equivalent to 26.7 million South African Rands, were seized.<sup>18</sup> This fact shows that there is a growing need for Botswana to implement its confiscation law properly.

## 1.2 Problem Statement

There are several factors which have affected the implementation of asset forfeiture in Botswana. Firstly, 'confiscation of proceeds of crime in general is not yet a policy

---

<sup>14</sup> World Bank Group, Botswana Mining Investment and Governance Review 2016, available at <https://openknowledge.worldbank.org/handle/10986/25225> (accessed 14 June 2017).

<sup>15</sup> Sec 40 (1), Chapter 66:01, Laws of Botswana.

<sup>16</sup> Mmegi Online news, July Parley to review mining laws, available at <http://www.mmegi.bw/index.php?aid=69465&dir=2017/june/13> (accessed 14 June 2017).

<sup>17</sup> The World Bank Group, Botswana Takes Action to Assess and Prevent Financial Crimes, available at <http://www.worldbank.org/en/news/feature/2017/03/14/botswana-takes-action-to-assess-and-prevent-financial-crimes> (accessed 14 June 2017).

<sup>18</sup> Facebook, BW Government, available at <https://www.facebook.com/Botswana.Government/posts/1346481915434463:0> (accessed 14 June 2017).

objective'.<sup>19</sup> Accordingly, investigators are not keen on conducting parallel financial investigations when investigating economic crimes while the prosecution hardly applies for confiscation of the proceeds of crime even after obtaining convictions. Therefore, prosecutors and investigators consider confiscation of tainted property as secondary to their core mandate.

However, the Eastern and Southern African Anti-Money Laundering Group (ESAAMLG), the Financial Action Task Force-style regional body, notes that through the initiative of the DPP in 2015 of establishing a specialised Asset Forfeiture Unit, there is a shift in approach towards making confiscation of tainted assets a policy objective. But this approach is presently being undermined by government's allocation of inadequate resources. Furthermore, the initiative of the DPP is hampered by its lack of autonomy from the office of the Attorney General, as the latter determines the resources allocated to the former.<sup>20</sup>

Moreover, the asset forfeiture regime is not yet fully developed with competent authorities still in the process of understanding their responsibilities and building capacity'.<sup>21</sup> The various law enforcement bodies do not have specialised units tasked with conducting parallel financial investigations into economic crimes. That has contributed to the misconception by the BPS and BURS that investigating money-laundering and conducting financial investigations, in general, was the purview of the DCEC.<sup>22</sup> Furthermore, there are very few prosecutors and investigators trained in this field. Consequently, many prosecutors and investigators do not appreciate the objectives of the confiscation law and how it ties in with their core mandates. The basic training received by some prosecutors and investigators

---

<sup>19</sup> ESAAMLG, (2017: 12).

<sup>20</sup> ESAAMLG, (2017: 66).

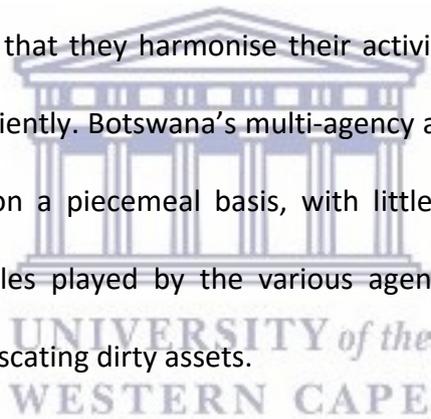
<sup>21</sup> ESAAMLG, (2017: 21).

<sup>22</sup> ESAAMLG, Mutual Evaluation Report for the Republic of Botswana 2007, available at [http://www.esaamlg.org/reports/view\\_me.php?id=167](http://www.esaamlg.org/reports/view_me.php?id=167) (accessed 12 April 2017).

on financial investigations and confiscation is obviously inadequate, as there have been cases in which investigations ought to have been instituted but were not.<sup>23</sup>

Furthermore, the government intends to use the tainted money recovered through PICA to finance the fight against crime, to capacitate the various law enforcement agencies through training and provision of resources, and to 'assist in compensation of victims of crime and support projects developed to deprive criminals of proceeds of crime'.<sup>24</sup> The multi-agency approach will invariably lead to competition for resources as well as power struggles among the law enforcement agencies concerned with the confiscation of tainted assets.

All the drawbacks mentioned point to a limited grasp of the need to structure and connect state agencies in such a way that they harmonise their activities in order to implement a confiscation legal regime efficiently. Botswana's multi-agency approach to confiscating dirty assets has been developed on a piecemeal basis, with little effort being made towards harmonising the different roles played by the various agencies. That has resulted in a fragmented approach to confiscating dirty assets.



### **1.3 Research Question**

The main research question that this paper seeks to answer is the following: How can Botswana's approach to the confiscation of dirty assets be improved?

---

<sup>23</sup> ESAAMLG, (2017: 64).

<sup>24</sup> Facebook, BW Government, available at <https://www.facebook.com/Botswana.Government/posts/1346481915434463:0> (accessed 14 June 2017).

#### **1.4 Scope of Study**

Though investigations, tracing and seizure of proceeds of crime forms an integral part of the effective implementation of confiscation, this study will not consider the investigative framework which law enforcement agencies may utilise to investigate financial crimes.

#### **1.5 Research Methodology**

This research is a desktop study which draws on primary and secondary sources. The study will analyse the primary sources such as international and regional confiscation instruments, national laws, judicial decisions of Botswana's courts and those in the comparator jurisdictions. The secondary sources include books, journals, mutual evaluation reports by ESAAMLG, research reports, media reports and electronic sources.

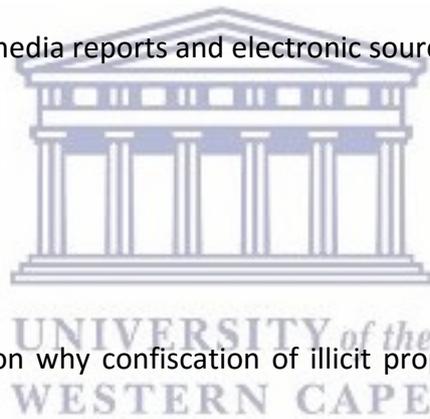
#### **1.6 Chapter Outline**

##### **Chapter Two**

The focus of this chapter is on why confiscation of illicit property is essential in the fight against economic crime. It will trace the development of confiscation laws in Botswana by having regard to international and regional treaties to which Botswana is a state party, and it will discuss Botswana's domestic laws in the area of asset confiscation.

##### **Chapter Three**

This chapter will discuss various international best practices of implementing confiscation laws by comparing the practical implementation of analogous laws in Australia, South Africa, the United States of America and the United Kingdom.



## **Chapter Four**

This chapter will analyse the various offices in Botswana that play or are supposed to play a role in implementing the confiscation laws. The chapter will deal also with the constitutional provisions that might affect the manner in which state agencies discharge their respective confiscation mandates.

## **Chapter Five**

This chapter will bring the study to an end with a few recommendations on how Botswana can improve the practice of confiscating criminal assets.



## CHAPTER TWO

### CONFISCATION FRAMEWORK IN BOTSWANA

---

#### 2.1 Introduction

This chapter aims to give an overview of confiscation law in Botswana and to measure it against the international instruments to which Botswana is a state party. As there is a knowledge deficit about asset forfeiture processes as well as how they tie in with the traditional core mandates of investigators and prosecutors, this chapter starts off by highlighting the objectives of confiscation law.

#### 2.2 Objectives of Confiscation Law

The primary aim of confiscation law is to make sure that crime does not pay. There are various secondary objectives for confiscating dirty assets based on notions of fairness and theories of crime control. As regards notions of justice, confiscation of dirty assets serves a reparative function in that it is a method through which the economic balance before the commission of an offence can be restored. That is also known as remedial justice in that 'it remedies the injustice of a criminal being allowed to retain his criminal benefits'.<sup>1</sup> Criminal law has, through the processes of compensation orders and orders for the accused to return the property to its lawful owners, been giving effect to this reparative or remedial function. These criminal law processes, however, have shortcomings which confiscation laws try to overcome.

In the first instance, the traditional criminal law processes used for reparative or remedial function are only applicable to crimes where a victim is identifiable. They are inapplicable to 'victimless offences', such as corruption and drug trafficking. Secondly, the said processes

---

<sup>1</sup> Gallant MM, *Money Laundering and the Proceeds of Crime*, (2005: 31).

only consider what the victim lost or suffered as a result of the commission of the crime. They do not concern themselves with what the criminal gained as a result of the commission of the crime.<sup>2</sup>

As stated earlier, confiscation laws, beyond notions of fairness, serve a crime control function. Financial gain primarily motivates the commission of economic offences. Taking away the financial gain will deter economic crimes. The traditional mechanisms of law enforcement are inadequate to attain this objective. The threat of criminal prosecution and imprisonment has proved inadequate for purposes of deterring the commission of financial crimes. Some criminals, particularly in organised groups, view being imprisoned as an occupational risk worth taking so long as they keep their profits after serving their sentences. Confiscating their ill-gotten assets dissuades them from committing the crime. That also reduces the impact of criminals being role models to impressionable youth as they cannot live the lavish lifestyle associated with criminal activities. Furthermore, taking away the profits disturbs the funding for the commission of further crimes.<sup>3</sup>

The profits derived from corruption, money-laundering, transnational offences and organised crimes are estimated to be astronomical amounts worldwide.<sup>4</sup> The money recovered from criminals can be used to fund law enforcement agencies and, most importantly, can sustain the implementation of confiscation laws without the need to divert other resources.<sup>5</sup>

---

<sup>2</sup> Gallant MM, (2005: 32).

<sup>3</sup> Bullock K & Lister S, Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality, in King C and Walker C, *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, (2016: 48-50).

<sup>4</sup> Ryder N, *Financial Crime in the 21<sup>st</sup> Century: law and Policy*, (2011: 4).

<sup>5</sup> G Stessens, *Money-Laundering: A New International Law Enforcement Model*, (2000: 56).

In some instances, confiscation laws also serve a punitive function. Some jurisdictions are quite open about the punishment role played by confiscation mechanisms. In Australia, one of the expressly stated principal objects of confiscation law is to punish those committing crimes.<sup>6</sup> Jurisdictions like South Africa accept the punitive element of confiscation when it is secondary to the primary objective of removing profit from crime.<sup>7</sup>

### 2.3 International Law Obligations on Confiscation

Botswana is a state party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Vienna Convention).<sup>8</sup> Article 5 of the Vienna Convention imposes an obligation on states parties to enact laws which would enable them to confiscate proceeds and instrumentalities of drug trafficking offences provided for in the treaty. The confiscation law must empower law enforcement officers to 'identify, trace and freeze or seize'<sup>9</sup> the tainted property. It also calls upon states parties to empower their law enforcement officers against bank secrecy laws by enacting laws that would give investigators access to financial records for purposes of confiscation. Article 5 of the Vienna Convention further provides machinery for international co-operation on the recovery of the proceeds and instrumentalities of drug trafficking offences.

The Vienna Convention leaves it open for states parties to consider an appropriate model of asset forfeiture. It defines confiscation as 'the permanent deprivation of property by order of a court or other competent authority'.<sup>10</sup> Furthermore, the definition provides that

---

<sup>6</sup> Grono S, Civil Forfeiture-the Australian Experience, in Young SMN, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009: 128).

<sup>7</sup> Keightley R, Asset Forfeiture in South Africa under the Prevention of Organised Crime Act 121 of 1998, in Young SMN, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009: 115).

<sup>8</sup> Adopted 19 December 1988.

<sup>9</sup> Article 5(2) of Vienna Convention, 1988.

<sup>10</sup> Article 1 of the Vienna Convention, 1998.

confiscation includes forfeiture. It is accordingly open to a state party to the Vienna Convention to adopt either a conviction-based confiscation model or a non-conviction based model or to have both. The Vienna Convention leaves the issue of reverse onus provisions, where the respondent is obliged to prove the lawful provenance of his property, open to a state party to decide for itself.<sup>11</sup>

Botswana is also a signatory to the United Nations Convention against Transnational Organised Crime of 2000 (Palermo Convention).<sup>12</sup> Article 12 of the Palermo Convention mandates Botswana as a state party to enact a law allowing for confiscation of proceeds and instrumentalities of all serious crimes. The convention defines serious crime as 'conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years'.<sup>13</sup> Botswana is also a state party to the United Nations Convention against Corruption of 2003 (UNCAC).<sup>14</sup> Article 31 of UNCAC imposes an obligation on Botswana to enact a law that will enable it to confiscate the proceeds and instruments of the corruption offences.

Chapter IV of UNCAC imposes various obligations on states parties to co-operate with other countries in the return of proceeds and instruments of corruption to the victim state. UNCAC calls on states parties to ensure that their confiscation laws allow them to enforce a confiscation order issued by foreign courts. Alternatively, states parties must empower their relevant authorities to apply for a confiscation order concerning a crime committed in another country where the proceeds are within its territory.<sup>15</sup> Unlike other international instruments, UNCAC places a hortatory obligation on Botswana to enact a confiscation law

---

<sup>11</sup> Article 5(7) of the Vienna Convention, 1988.

<sup>12</sup> General Assembly resolution 55/25 adopted on 15 November 2000.

<sup>13</sup> Article 2 of the Palermo Convention, 2000.

<sup>14</sup> General Assembly resolution 58/4 adopted on 31 October 2003.

<sup>15</sup> Article 55 of UNCAC, 2003.

that allows for non-conviction based forfeiture in suitable cases, especially where the suspect 'cannot be prosecuted by reason of death, flight or absence'.<sup>16</sup>

Continentially, Botswana is a state party to the African Union Convention on Preventing and Combating Corruption of 2003 (AUCPCC).<sup>17</sup> Article 16 of the AUCPCC also places an obligation on Botswana to enact confiscation laws targeting proceeds and instruments of corruption. Regionally, Botswana is a signatory to the Southern African Development Community Protocol against Corruption of 2001 which, through article 8, also imposes an obligation to enact confiscation laws targeting the proceeds and instruments of corruption offences.

## **2.4 Overview of Confiscation Laws in Botswana before PICA**

Before 2014, several laws dealt with the forfeiture of dirty property, and they targeted instruments of crime, prohibited or regulated property and proceeds of crime. PICA is the first instrument to combine all three categories in one piece of legislation. It is important to note, however, that PICA has not repealed some of the earlier laws governing forfeiture of dirty property. The following discussion gives an overview of such laws.

### **2.4.1 Forfeiture of Instruments of Crime**

Three key statutes deal with the forfeiture of instruments of crime. These are the Criminal Procedure and Evidence Act (CPEA)<sup>18</sup>, the Wildlife Conservation and National Parks Act (WCNPA)<sup>19</sup> and the Customs and Excise Duty Act (CEDA)<sup>20</sup>. None of these statutes defines the term 'instruments'. Furthermore, the scope of property qualifying as instruments varies

---

<sup>16</sup> Article 54(1)(c) of UNCAC, 2003.

<sup>17</sup> Adopted on 11 July 2003.

<sup>18</sup> Chapter 08:02, Laws of Botswana.

<sup>19</sup> Chapter 38:09, Laws of Botswana.

<sup>20</sup> Chapter 50:01, Laws of Botswana.

according to each statute. Section 319(2) of the CPEA targets the forfeiture of property used to commit an offence. The application for forfeiture is usually made orally before the sentencing hearing by the prosecutor. Section 319(2) of the CPEA does not envisage the forfeiture of property used to facilitate the commission of an offence. Property is said to facilitate the commission of a crime if it 'made the crime easier to commit or harder to detect'.<sup>21</sup> Thus, the prosecution has failed in its endeavours to have get-away motor vehicles used in robbery cases forfeited.<sup>22</sup> The courts have used the *conditio sine qua non* test, also known as the 'but for test', to establish whether property constituted an instrument of crime.<sup>23</sup> This test entails that if the commission of the crime was not possible other than through the utilisation of the property, such property constitutes an instrument of the crime under section 319(2) of the CPEA. Thus in an abduction case, the motor vehicle used to transport the victim was forfeited as an instrument of crime.<sup>24</sup>

In contrast to the CPEA, the forfeiture of instruments of the crime under CEDA and the WCNPA includes property used to facilitate the commission of the offence. Section 98(2) of CEDA, amongst other things, deals with the forfeiture of property used to smuggle goods, as well as property, used to facilitate the smuggling of goods. Under CEDA, an instrument of crime becomes liable for forfeiture upon an exercise of discretion by customs officers to seize such property. Such forfeiture can only be challenged by way of judicial review instituted by the owner of the property or the person from whom the property was taken. To have the forfeiture judicially reviewed the applicant must have notified the Director of

---

<sup>21</sup> Casella SD, An Overview of Asset Forfeiture in the United States, in Young SMN, *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009: 28).

<sup>22</sup> *Moneth v The State* 1989 BLR 188 (HC).

<sup>23</sup> *David July v The State*, Miscellaneous Criminal Application, MCHFT 000010-08, unreported, para 19.

<sup>24</sup> *David July v The State*, MCHFT 000010-08.

Customs within 30 days of seizure and ought to have launched the review proceedings before the court within 90 days of informing the Director.<sup>25</sup>

The effect of launching a judicial review is to suspend the forfeiture pending an enquiry as to whether the seizure complied with the law. During the judicial review, the court is not concerned with the reasonableness of the forfeiture or whether it is disproportionate to the offence in question. Furthermore, the fault of the owner of the property is irrelevant.<sup>26</sup> Accordingly, forfeitures under CEDA are non-conviction based and are without prejudice to any other penalties which may be imposed on the person contravening the Act.<sup>27</sup>

Under the WCNPA, the forfeiture of instruments of crime is broad enough to include property used to facilitate the commission on an offence. Thus, it was held on appeal that the forfeiture of a motor vehicle that was used to convey the carcass of an illegal hunt was rightly forfeited to the state.<sup>28</sup> Forfeitures in terms of the WCNPA are conviction based and are applied for by the prosecution before the sentencing hearing.<sup>29</sup>

#### **2.4.2 Forfeiture of Prohibited and Regulated Property**

The use and possession of habit-forming drugs in Botswana is prohibited.<sup>30</sup> Upon conviction for possession of habit-forming drugs, the court must issue an order for the forfeiture of such drugs.<sup>31</sup> Although the production and sale of habit-forming drugs are illegal in terms of the Drugs and Related Substance Act,<sup>32</sup> the short-coming of the law is that the government has not been empowered to forfeit the instruments that facilitate the commission of such

---

<sup>25</sup> Sec 100 of CEDA, 50:01.

<sup>26</sup> *Khanda's Express (Pty) Ltd v Botswana Unified Revenue Services*, MAHFT 000182-10, unreported, para 14-20.

<sup>27</sup> Sec 98(1) of CEDA, 50:01.

<sup>28</sup> *State v Sambona and Another* 1978 BLR 28 (HC).

<sup>29</sup> Sec 75(1) WCNPA, Chapter 38:09, Laws of Botswana.

<sup>30</sup> Sec 16(1)(b) of the Drugs and Related Substance Act, Chapter 63:04, Laws of Botswana.

<sup>31</sup> Sec 18(2) of DRSA, 63:04.

<sup>32</sup> Sec 18(1)(a) of the DRSA, 63:04.

offences. Thus, the government cannot use the statute to confiscate the house or farm used for the production or sale of the habit-forming drugs. The government is, however, empowered to forfeit the vehicle in which the habit-forming drugs were found. The forfeiture of the car is subject to the rights of innocent third parties. Accordingly, where the owner of the motor vehicle did not know that it was used to transport habit-forming drugs or could not have stopped the commission of the offence, the court could exercise its discretion not to order the forfeiture of the motor vehicle.<sup>33</sup>

The laws dealing with the forfeiture of regulated property adopt a tripartite forfeiture system of conviction-based, administrative and automatic forfeiture. For purposes of this paper, only two statutes are discussed, the Arms and Ammunition Act<sup>34</sup> and the Precious and Semi-Precious Stones Act.<sup>35</sup>

The manufacturing,<sup>36</sup> sale<sup>37</sup> and possession<sup>38</sup> of arms and ammunition are regulated in Botswana. Upon conviction for unlawfully manufacturing, possessing or selling arms and ammunition, the concerned arms and ammunition would be forfeited to the state.<sup>39</sup> The Minister of Defence, Justice and Security (DJS) is entitled to order that the 'stock in hand of the business' of a convicted arms dealer be forfeited to the state.<sup>40</sup> A police officer is empowered to seize arms and ammunition from a person who cannot produce evidence that he/she has the authority to possess such arms and ammunition. The seized weapons

---

<sup>33</sup> Secs 18(3) and (4) of the DRSA, 63:04.

<sup>34</sup> Chapter 24:01, laws of Botswana.

<sup>35</sup> Chapter 66:03, Laws of Botswana.

<sup>36</sup> Sec 12(1) of the Arms and Ammunition Act, Chapter 24:01, Laws of Botswana.

<sup>37</sup> Sec 13(1) of AAA, 24:01.

<sup>38</sup> Sec 9(1) of the AAA, 24:01.

<sup>39</sup> Secs 12(6) and 27(1) of the AAA, 24:01.

<sup>40</sup> Sec 17(d) of the AAA, 24:01.

would automatically be forfeited to the state within 30 days of the failure to produce such evidence.<sup>41</sup>

The sale and possession of rough or uncut precious stones, such as diamonds, are regulated in Botswana.<sup>42</sup> Upon conviction for the unlawful sale or possession of rough or uncut precious stones, the court can order that the concerned precious stones be returned to their lawful owner or for them to be forfeited to the state.<sup>43</sup> The Minister of DJS can order, that the holder of a prospecting licence convicted of the offence of false declaration of the discovery of precious stones, should forfeit his prospecting license to the state.<sup>44</sup> Furthermore, any property, including money which was given to the police as security for the release of seized precious stones suspected to have been possessed illegally, would automatically be forfeited to the state upon conviction of the person who gave the security for their release.<sup>45</sup>

### 2.4.3 Forfeiture of Proceeds of Crime

Before 1990, no laws targeted the forfeiture of the benefits derived from crime. In a series of three laws, the government sought to cure this mischief by enacting the Proceeds of Serious Crime Act,<sup>46</sup> Motor Vehicle Theft Act<sup>47</sup> and Stock Theft Act.<sup>48</sup> These three laws can be categorised into *in personam* and *in rem* forfeiture laws. The *in personam* forfeiture law empowered the government to forfeit the proceeds of crime by confiscating money equal to

---

<sup>41</sup> Secs 1(2) and (3) of the AAA, 24:01.

<sup>42</sup> Sec 6(1) of the Precious and Semi-Precious Stones Act, Chapter 66:03, Laws of Botswana.

<sup>43</sup> Sec 21(1) of the PSPSA, 66:03.

<sup>44</sup> Sec 3(4) of the PSPSA, 66:03.

<sup>45</sup> Sec 24(2) of the PSPSA, 66:03.

<sup>46</sup> No.19 of 1990.

<sup>47</sup> Chapter 09:04, Laws of Botswana.

<sup>48</sup> Chapter 09:01, Laws of Botswana.

the benefits received by a person from the commission of an offence. The *in personam* forfeiture law was conviction based and located in the PSCA which was repealed by PICA.

The *in rem* forfeiture laws empowered the government permanently to deprive the suspect of assets derived from crime. The *in rem* forfeiture laws were not dependent on a criminal conviction but were limited to persons who had turned into professional thieves of motor vehicles and stock. Accordingly, the *in rem* forfeitures were located in the Motor Vehicle Theft Act<sup>49</sup> and the Stock Theft Act<sup>50</sup>. To forfeit the concerned illicit assets, the police have to make an application to a Chief Magistrate or Regional Magistrate for an order entitling them to investigate people they consider to be in the business of stealing motor vehicles and stock. The asset investigation order issued by the magistrate empowers the police to seize any assets they reasonably believe to be derived from the concerned crimes. Furthermore, the asset investigation order imposes obligations on third parties, including financial institutions, to assist the police with their investigations. Once the court is satisfied that the inquiry proved that the assets identified by the police are derived from the business of stealing motor vehicles or stock, the court will order that the concerned assets be forfeited to the state.<sup>51</sup>

The potency of these *in rem* forfeiture laws is hampered by the lack of provisions dealing with the procedural aspects of the court proceedings. In the first instance, the laws do not provide how the right to be heard by the people concerned is to be secured. Secondly, they are silent on whether the proceedings are civil in nature and this creates doubts about whether a conviction is necessary for the investigation order to be granted. Furthermore, the court is not guided as to which standard of proof to apply. As these two *in rem* forfeiture

---

<sup>49</sup> Chapter 09:04, Laws of Botswana.

<sup>50</sup> Chapter 09:01, Laws of Botswana.

<sup>51</sup> Sec 16 of the MVTA, 09:04 and sec 14 of STA, 09:01.

laws are still in force, an understanding of *in rem* proceedings in PICA may shed light on how they may be implemented.

## **2.5 Confiscation under PICA**

As has been demonstrated above, the principle that criminals must not benefit from crime is an old one in our criminal law. Regrettably, the laws that had been put in place to give effect to this principle have been poorly implemented. To the extent that the poor implementation is attributable to deficiency of the law, PICA seeks to cure this mischief.

There are six procedural devices in PICA which the government can use for the confiscation of dirty assets. These procedural methods can be categorised into conviction based and non-conviction based confiscations. In addition, restraining orders are used to secure the assets pending the conclusion of the confiscation proceedings. The Office of the Receiver is entrusted with the duty to preserve the value of the assets pending the conclusion of the confiscation proceedings. PICA also contains procedural devices through which people with interests in the assets sought to be forfeited can vindicate their interests.

### **2.5.1 Conviction-Based Confiscation under PICA**

There are three conviction-based confiscation devices in PICA. These are pecuniary penalty orders, forfeiture orders and automatic forfeitures. All three may also be categorised as confiscation proceedings as they require some judicial authority to be exercised. Although these procedural devices require a criminal conviction to be instituted, they are civil in nature.<sup>52</sup> Furthermore, only the DPP can institute these confiscation proceedings in court.<sup>53</sup>

---

<sup>52</sup> Sec 69(1) of PICA, 2014.

<sup>53</sup> Secs 3(1), 18(1) and 23(1) of PICA, 2014.

### a) Pecuniary Penalty Orders

A pecuniary penalty order is a money judgment in favour of the government. To obtain a pecuniary penalty order, the DPP must prove that the respondent was convicted of a confiscation offence or a serious offence.<sup>54</sup> Furthermore, the DPP must prove that the respondent derived some benefit from the concerned offence.<sup>55</sup> A confiscation offence is defined as 'any offence under the laws of Botswana'.<sup>56</sup> A serious offence is defined as 'any offence for which the minimum penalty is a fine of P2000 or imprisonment for a period of two years, or to both'.<sup>57</sup> Accordingly, a pecuniary penalty order can be obtained for any crime committed in Botswana.

### b) Forfeiture Orders

Forfeiture orders are *in personam* proceedings as they depend on the moral blameworthiness of the owner of the property. A forfeiture order confiscates property which is proceeds of crime or an instrument of crime. Unlike penalty orders, it is not a money judgment. The DPP must prove that the defendant was convicted of any crime in Botswana to obtain the forfeiture order. Further, the DPP must demonstrate that the property which is the subject of the application for a forfeiture order constitutes the proceeds or instrument of the concerned crime. Lastly, the DPP must show that the making of the forfeiture order is just in the circumstances.<sup>58</sup>

Property received by the defendant on account of the concerned crime is said to be proceeds of crime.<sup>59</sup> Property is said to be an instrument of crime where it 'was used, or

---

<sup>54</sup> Sec 3(1) of PICA, 2014.

<sup>55</sup> Sec 4(1) of PICA, 2014.

<sup>56</sup> Sec 2 of PICA, 2014.

<sup>57</sup> Sec 2 of PICA, 2014.

<sup>58</sup> Sec 19 of PICA, 2014.

<sup>59</sup> Sec 2 of PICA, 2014.

was intended to be used in, or in connection with, the commission of an offence'.<sup>60</sup> Accordingly, PICA, unlike its predecessors, has broadened the meaning of instruments of crime to include property which facilitates the commission of a crime.

In considering whether a forfeiture order is just, the court will have regard to the interests of innocent third parties.<sup>61</sup> Where the defendant used property in which he has no interest as an instrument of crime but he has a similar property, the DPP may apply to the court for defendant's property to be forfeited as a substitute of the real instrument of crime.<sup>62</sup>

### **c) Automatic Forfeitures**

Automatic forfeiture enables the government permanently to deprive a person of his tainted assets without obtaining a confiscation order. There are two set of circumstances which give rise to automatic forfeitures under PICA. One occurs when a person has been convicted of a serious offence while the other occurs when a person is deemed to have been convicted of a serious offence. As a pre-condition, property ought to have been restrained for purposes of automatic forfeiture before the government can have it forfeited under the provisions of automatic forfeiture.<sup>63</sup>

Ideally, automatic forfeiture should be used where a person who has been convicted of a serious offence does not wish to contest the government's intention to confiscate his property. Also, it may be utilised where the suspect is a fugitive. To assist the government to know when precisely the property was forfeited, PICA has provided two declaratory orders. One declaratory order assists the DPP to ascertain the date of conviction so that it may

---

<sup>60</sup> Sec 2 of PICA, 2014.

<sup>61</sup> Sec 19(6) of PICA, 2014.

<sup>62</sup> Sec 21 of PICA, 2014.

<sup>63</sup> Sec 22 of PICA, 2014.

know when the 60-day period began.<sup>64</sup> The other declaratory order deals with confirming whether the property which was restrained for purposes of automatic forfeiture has been automatically forfeited to the government.<sup>65</sup>

## 2.5.2 Non-Conviction Based Asset Forfeiture

There are three non-conviction based asset forfeiture processes found in PICA, being civil penalty orders, civil forfeiture orders and administrative forfeiture. Civil penalty orders and civil forfeiture orders seek to implement Botswana's international obligations to assist other countries with the recovery of their stolen assets.

### a) Civil Penalty Order

This is an *in personam* proceeding against a person who has derived some benefit from a serious crime-related activity. It is also a money judgment for the person to pay the government an amount calculated to be his benefits from a serious crime-related activity.<sup>66</sup>

To obtain a civil penalty order, the DPP or prescribed person must satisfy the court that the respondent derived a benefit from a serious crime-related activity or a foreign serious crime-related activity. The serious crime-related activity or foreign serious crime-related activity must not have occurred more than 20 years prior to the making of the application.<sup>67</sup>

A serious crime-related activity 'means any act or omission that at the time of its commission, was a serious offence'.<sup>68</sup> A foreign serious crime-related activity 'means any act or omission that at the time of its commission, was a foreign offence that, if committed in Botswana, would have been a serious offence'.<sup>69</sup> It is irrelevant whether a person has been

---

<sup>64</sup> Sec 23 of PICA, 2014.

<sup>65</sup> Sec 24 of PICA, 2014.

<sup>66</sup> Sec 15(1) of PICA, 2014.

<sup>67</sup> Sec 1(1) of PICA, 2014.

<sup>68</sup> Sec 2 of PICA, 2014.

<sup>69</sup> Sec 2 of PICA, 2014.

charged, convicted or acquitted for his conduct to be considered a serious crime-related activity or a foreign serious crime-related activity. The applicant need not prove that the respondent committed a specific serious crime-related activity. It would suffice for the applicant to prove that, on the balance of probabilities, the respondent committed some form of a serious crime-related activity. The DPP or a prescribed person may apply for a civil penalty order. A prescribed person means 'any person who is appointed by the Minister by Order to discharge any function or power'<sup>70</sup> under PICA. At the moment, only the DPP can approach the court for a civil penalty order as the Minister of DJS has not appointed anyone as a prescribed person.

#### **b) Civil Forfeiture Order**

PICA expressly states that a civil forfeiture is an order *in rem*.<sup>71</sup> Accordingly, the moral blameworthiness of the owner of the property sought to be forfeited is irrelevant. To obtain a civil forfeiture order, the DPP or prescribed person must prove that the serious crime-related activity or foreign serious crime-related activity relied upon was carried out within 12 years of the making of the application.<sup>72</sup> Furthermore, the applicant must prove that the property is a proceed or instrument of a serious crime-related activity or foreign serious crime-related activity. The applicant need not prove a particular criminal offence. It is sufficient to prove that the property is derived or used as an instrument of some serious crime-related activity or foreign serious crime-related activity.<sup>73</sup> The definition of instruments of crime under PICA is wide enough to include property used to facilitate the commission of an offence as it includes property used in connection with the commission of

---

<sup>70</sup> Sec 2 of PICA, 2014.

<sup>71</sup> Sec 25 of PICA, 2014.

<sup>72</sup> Sec 26(2) of PICA, 2014.

<sup>73</sup> Sec 27 of PICA, 2014.

an offence.<sup>74</sup> PICA empowers the DPP or the prescribed person to approach the court for a civil forfeiture order. Again, as the Minister of DJS is yet to appoint anyone as a prescribed person, only the DPP can approach the court for a civil forfeiture order.

### **c) Administrative Forfeiture**

PICA has given law enforcement officers the power to forfeit dirty assets without the need for a judicial direction. Although CEDA also empowers law enforcement officers to initiate forfeiture of illicit property without judicial authority, administrative forfeiture under PICA is different from the forfeiture in CEDA. The forfeiture powers in CEDA may be described as automatic forfeiture in that the seizure of the property for purposes of forfeiture by itself results in forfeiture without the need for any other steps to be taken by the law enforcement officer. In contrast to CEDA, under PICA a law enforcement officer has to serve a person with interest in the property with a notice following the seizure of the property. Furthermore, under CEDA the property owner goes to court to have the forfeiture reviewed while under PICA the owner of the property goes to court to prevent the forfeiture from taking effect.

Administrative forfeitures are initiated by the seizure of property by the prescribed investigator.<sup>75</sup> A prescribed investigator means a police officer, a customs officer or an investigator with the DCEC. PICA empowers the Minister of DJS to declare officers from other institutions as prescribed investigators.<sup>76</sup>

The prescribed investigator is only permitted to seize currency or bearer negotiable instruments, precious or semi-precious stones or other property prescribed by the Minister

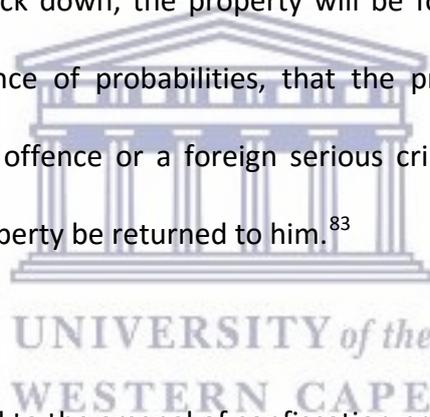
---

<sup>74</sup> Sec 2 of PICA, 2014.

<sup>75</sup> Sec 30(1) of PICA, 2014.

<sup>76</sup> Sec 2 of PICA, 2014.

of DJS.<sup>77</sup> The prescribed investigator must have reasonable grounds to suspect that such property constitutes proceeds or instruments of a confiscation offence or a serious or foreign serious crime-related activity.<sup>78</sup> The investigator must, within a reasonable time after seizing the property, serve a notice on the person from whom the property was seized and on any other person whom the officer believes has an interest in the property.<sup>79</sup> The seized property will be forfeited within 28 days from the service of the notice if no claim is lodged with the prescribed investigator for the return of the property.<sup>80</sup> Following service of a notice of claim on the investigator, the claimant must, within 60 days, file an application for a determination of the claim before a magistrates' court.<sup>81</sup> If the application is dismissed, withdrawn or struck down, the property will be forfeited to the state.<sup>82</sup> If the applicant proves, on a balance of probabilities, that the property is not a proceed or instrument of a confiscation offence or a foreign serious crime-related activity, then the court must order that the property be returned to him.<sup>83</sup>



## 2.6 Restraining Order

Restraining orders are integral to the arsenal of confiscation processes. A restraining order is 'an order that property or any interest in property shall not be disposed of or otherwise dealt with except in the manner or circumstances ... specified in the order'.<sup>84</sup> The ultimate objective of a restraining order is to make the property in question available to satisfy the confiscation order. Another goal of a restraining order is to protect the value of the property sought to be confiscated pending the finalisation of the proceedings. To this end, a

<sup>77</sup> Sec 30(1)(a), (b) & (c) of PICA, 2014.

<sup>78</sup> Sec 30(1)(c) of PICA, 2014.

<sup>79</sup> Sec 30(2) of PICA, 2014.

<sup>80</sup> Sec 31(1) of PICA, 2014.

<sup>81</sup> Sec 32(1) of PICA, 2014.

<sup>82</sup> Sec 33(6) of PICA, 2014.

<sup>83</sup> Sec 33(3) of PICA, 2014.

<sup>84</sup> Sec 35(1) of PICA, 2014.

restraining order may preserve the property in its physical form or direct that the property be sold so that its value does not depreciate. An application for a restraining order must state the purpose for which it is sought and specify which confiscation order the property will satisfy.<sup>85</sup>

### **2.6.1 Restraining Orders for Conviction-Based Confiscation Orders**

Application to restrain property so that it may be used to satisfy a conviction-based confiscation order can only be made by the DPP. The application by the DPP must be supported by an affidavit from an investigating officer. The investigating officer must hold a reasonable belief that the person against whom a confiscation order will be made, has committed a confiscation offence and that he is being investigated, has been charged or is likely to be charged for the said confiscation offence.<sup>86</sup>

Where the property will be used to satisfy a pecuniary penalty order, the investigating officer must further indicate that he has reasonable grounds to believe that the person with an interest derived a benefit from the confiscation offence.<sup>87</sup> The property sought to be restrained need not be tainted. For purposes securing the property for automatic forfeiture, the investigating officer must hold a reasonable belief that the person against whom a confiscation order will be sought, has an interest in the property in question.<sup>88</sup>

Where the property will be used to satisfy a forfeiture order, the investigating officer must indicate that he has reasonable grounds to believe that the property in question is tainted as it is either a proceed or an instrument of a confiscation order.<sup>89</sup> Alternatively, the

---

<sup>85</sup> Sec 36 of PICA, 2014.

<sup>86</sup> Sec 37 of PICA, 2014.

<sup>87</sup> Sec 37(2)(d) of PICA, 2014.

<sup>88</sup> Sec 38 of PICA, 2014.

<sup>89</sup> Sec 37(2)(c)(i) of PICA, 2014.

investigating officer must indicate that he has a reasonable belief that the property in question, though not tainted, is of the same nature or general description as the property which was used as an instrument of crime and that such property will be the subject of an application for a substituted forfeiture order as the respondent has an interest on it.<sup>90</sup>

## **2.6.2 Restraining Orders for Non-Conviction Based Confiscation**

The DPP or the prescribed person may apply to have property restrained for purposes of satisfying a civil penalty order or a civil forfeiture order. Again, the application must be supported by an affidavit from the investigating officer. For purposes of satisfying a civil penalty order, the investigating officer must set out why he has a reasonable belief that the person with an interest in the property derived a benefit from a serious crime-related activity or a foreign serious crime-related activity.<sup>91</sup> To restrain property for purposes of a civil forfeiture order, the officer must set out why he has a reasonable belief that the property is a proceed or instrument of a serious crime-related activity or a foreign serious crime-related activity.<sup>92</sup> The property sought to be restrained on account of a foreign serious crime-related activity must be located within Botswana.<sup>93</sup> Where a restraining order is requested for purposes of satisfying a non-conviction based confiscation order, the investigating officer must indicate whether he holds a reasonable belief that a substantive application for the concerned confiscation order will be made within 28 days of applying for the restraining order.<sup>94</sup>

---

<sup>90</sup> Sec 37(2)(c)(ii) of PICA, 2014.

<sup>91</sup> Sec 39(2)(c) and (d) of PICA, 2014.

<sup>92</sup> Sec 39(2)(b) of PICA, 2014.

<sup>93</sup> Sec 39(4) of PICA, 2014.

<sup>94</sup> Sec 39(2)(a) of PICA, 2014.

### 2.6.3 Procedure and Evidence for obtaining a restraining order

As a general rule, PICA envisages that an application for a restraining order will be *ex parte*. The court, however, may exercise its discretion for the application to be on notice where that will not result in the risk of loss or dissipation. The standard of proof used to evaluate whether the investigating officer has the required reasonable belief is one below the balance of probabilities. The court must evaluate whether the evidence is worthy of belief and whether it might be enough to obtain a confiscation order or conviction. The belief held by the investigating officer must be objectively reasonable.<sup>95</sup>

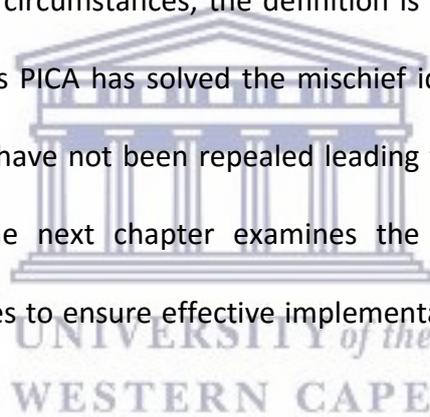
## 2.7 Conclusion

Botswana's asset forfeiture laws are in compliance with the country's international obligations. Confiscation is available for any criminal offence committed within Botswana and this goes beyond the obligation to confiscate instrumentalities and proceeds of serious crimes under the Vienna Convention. Furthermore, the definition of serious crime is broader than that in the Vienna Convention. There is also provision for both the conviction based and non-conviction based forfeiture. On that note, the country has gone beyond the call by UNCAC and made non-conviction based forfeiture available for all offences committed in Botswana. As for offences committed outside Botswana, non-conviction based forfeiture is limited to serious offences. Although none of the asset forfeiture laws in Botswana empowers the local courts to enforce foreign preservation or confiscation orders, there are government bodies empowered to approach local courts to obtain preservation and confiscation orders in respect of crimes committed in foreign countries. Accordingly Botswana is compliant with its asset recovery obligations under UNCAC.

---

<sup>95</sup> *DPP v Khato Civils and Others*, Court of Appeal Criminal Appeal No.CLCGB-040-16, unreported.

That notwithstanding, Botswana's approach of developing its asset forfeiture regime on a piecemeal basis through several laws, has not helped the relevant government bodies to effectively implement them. Some of the laws do not contain procedural provisions on how to implement them as evidenced by the in rem forfeitures orders found in the Motor Vehicle Theft Act and the Stock Theft Act. The said acts are silent about how the right to be heard by interested parties is to be secured. They are also silent on whether the proceedings are civil in nature and the standard of proof to be applied. On the other hand, laws dealing with the forfeiture of instruments of crime are inconsistent. In some instances, instruments of crime are defined broadly to include properties facilitating the commission of an offence whilst in other circumstances, the definition is limited to properties used to commit an offence. Whereas PICA has solved the mischief identified above, the old laws dealing with asset forfeiture have not been repealed leading to a fragmented approach to confiscating dirty assets. The next chapter examines the issue of best practices for structuring government bodies to ensure effective implementation of asset forfeiture laws.



## CHAPTER THREE

### INTERNATIONAL BEST PRACTICES

---

#### 3.1 Introduction

Nowadays most countries have confiscation laws, but the challenge facing most countries is how to implement them. The negligible number of asset forfeiture cases in Botswana is a clear indication that there is a problem of implementation. This raises questions of how other countries have structured their state agencies with regard to confiscation. Have they created specialised asset forfeiture units and, if so, how do these relate to the office of the public prosecutor? And how have these asset forfeiture bodies fared? What recommendations are given by international organisations regarding the question of how to structure state agencies to implement asset forfeiture laws? Is there an obligation under international law for countries to set up asset forfeiture units to ensure effective implementation? This chapter starts off by considering the last question.

#### 3.2 International Duty Regarding Effective Confiscation Measures

The Vienna Convention states that 'each party shall adopt such measures as may be necessary to enable confiscation'<sup>1</sup> of proceeds and instrumentalities of drug trafficking offences. But the Convention is silent on how states parties should go about implementing the confiscation measures. The Palermo Convention provides that 'states parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation'<sup>2</sup> of proceeds and instrumentalities of serious crimes. Again, the Palermo Convention does not prescribe how states parties should structure their bodies to ensure the effective implementation of confiscation measures. The

---

<sup>1</sup> Article 5(1) of the Vienna Convention, 1988.

<sup>2</sup> Article 12(1) of the Palermo Convention, 2000.

same can be said of the various international anti-corruption instruments that Botswana has ratified or incorporated into domestic law.

By couching the obligations in phrases such as ‘such measures as may be necessary’ or ‘to the greatest extent possible’, international instruments obligate states to implement confiscation measures, but leave it to the individual state to decide on the mechanics of implementation.

### **3.2.1 International Organisations on How to Minimise Structural Impediments to Ensure Effective Confiscation**

International organisations, such as the UN, the various regional organisations and international inter-governmental bodies such as FATF and G20, have played a huge role in encouraging countries to enact laws on asset forfeiture. They have also monitored and evaluated the implementation of confiscation laws and have formulated recommendations on how to implement them effectively.

### **3.2.2 Recommendations by the United Nations**

The UNODC had the following to say after analysing the structural impediments to effective inter-agency co-operation in combating organised crime:

‘Governments invest heavily in crafting sound legislation, building the operational, professional and technical capacity of their rule of law structures to enforce their legislation, but in many instances fail to ensure that the outputs destined for the community good are harmonised to deliver as expected. The result is often duplication of agency effort and inter-agency rivalry that places competition for turf and Government resources ahead of serving

the community; fragmented and ineffective responses to organised crime and lack of communication between key actors in the rule of law chain'.<sup>3</sup>

A review of the UNODC's Container Control Programme and the Global Programme against Money Laundering, Proceeds of Crime and the Financing of Terrorism gives insight into the approach preferred by the UN. The UN encourages governments to have dedicated bodies with a multi-agency approach in tackling organised crime and confiscating tainted assets. The dedicated bodies can be permanent bodies or temporary taskforces consisting of a team of officers from various existing law enforcement agencies.

The UNODC argues that the benefit of a multi-agency approach located within a single body is that it gives effect to 'an operational team with access to a broad range of legislation and powers, department records and information about criminals and current organised crime trends, professional skills, manpower and technical support'.<sup>4</sup> Furthermore, the team will have real-time access to the relevant information available to the agencies in the task force.

The hallmarks of the UNODC Container Control Programme are the following:

- a. It brings together various law enforcement agencies under the roof of one unit;
- b. It facilitates the signing of memoranda of agreement between and among the different law enforcement agencies to achieve operational clarity, co-operation and to ensure continuity when team members change;

---

<sup>3</sup> UNODC Working Group of Experts on Technical Assistance, Conference of the Parties to the United Nations Convention against Transnational Organized (Vienna 28-30 October 2013): Establishing Capacity Programmes for Prosecutors and Members of the Judiciary and Law Enforcement Agencies, available at [http://www.unodc.org/documents/treaties/organized\\_crime/2013\\_CTOC\\_COP\\_WG2/CTOC\\_COP\\_WG\\_2\\_2013\\_3\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2013_CTOC_COP_WG2/CTOC_COP_WG_2_2013_3_E.pdf) (accessed 29 August 2017).

<sup>4</sup> UNODC, Working Group of Experts on Technical Assistance, (2013: 3).

- c. It promotes team-building measures by encouraging collective training and equal distribution of daily tasks among members;
- d. It facilitates the establishment of a leadership structure and dispute resolution mechanisms within the team. This is often achieved by having an 'inter-agency board representing the participating agencies which transmit its decisions to the joint team members'.<sup>5</sup>

Through its Global Program, the UNODC provides technical support and funding for the Asset Recovery Inter-Agency Network Southern Africa (ARINSA). One of the primary objectives of ARINSA is for its members to create dedicated asset forfeiture units with a multi-disciplinary approach located within the prosecution agencies.<sup>6</sup> According to the UNODC, ARINSA aims to 'support national prosecution offices in identifying good practices and institutionalize more effective structures and specialisation to deal with the complexities and coordination needed in dealing with transborder crime'.<sup>7</sup> ARINSA maintains that specialised asset forfeiture units 'are vital components in developing an effective asset forfeiture regime'.<sup>8</sup> In 2008, only South Africa within the ARINSA group had an asset forfeiture unit, but at present 80 per cent of ARINSA members have asset forfeiture units within the prosecuting authorities. ARINSA comprises 12 member states.<sup>9</sup>

---

<sup>5</sup> UNODC, Working Group of Experts on Technical Assistance, (2013: 4).

<sup>6</sup> ARINSA, ARINSA Manual, available at <https://new.arinsa.org/mod/page/view.php?id=89> (accessed 29 August 2017).

<sup>7</sup> UNODC, Working Group of Experts on Technical Assistance, (2013: 6).

<sup>8</sup> ARINSA, Annual Report 2016, available at [https://new.arinsa.org/pluginfile.php/189/block\\_html/content/ARINSA%20ANNUAL%20REPORT%202016.pdf](https://new.arinsa.org/pluginfile.php/189/block_html/content/ARINSA%20ANNUAL%20REPORT%202016.pdf) (accessed 29 August 2017).

<sup>9</sup> ARINSA, Annual Report, (2016: 9).

### 3.2.3 The Consensus for Specialised Asset Forfeiture Bodies

It is agreed among the various international organisations that establishing dedicated bodies is necessary to ensure effective confiscation of dirty assets. The European Union Council encourages member states to 'establish units which are specifically dedicated to the process of tracing, seizure and confiscation of assets'.<sup>10</sup> The Working Group for the G20 countries claims that asset forfeiture 'success is closely related to the existence of specialised teams of investigators and prosecutors that focus on recovery of assets'.<sup>11</sup> The Commonwealth and FATF share the view that dedicated bodies are indispensable to effective implementation of confiscation laws, especially at the investigation stage. To this end, the Commonwealth argues that 'it is of critical importance that there are dedicated units responsible for the investigation of asset confiscation cases. Experience demonstrates that little, if any, action will be taken if enforcement is left to general police units with no specialised mandate.'<sup>12</sup> Accordingly, the Commonwealth recommends that countries should set up adequately resourced specialised units with a multi-disciplinary approach to investigate confiscation cases.<sup>13</sup>

Similarly, the FATF contends that one of the best practices for minimising structural impediments to effective confiscation is 'establishing specialised units or dedicated

---

<sup>10</sup> Recommendation 17(b) of the Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000F0503&from=EN> (accessed 30 August 2017).

<sup>11</sup> G20 Working Group, Asset Recovery Key Principles/Key Elements for an Institutional Framework, available at: [http://www.bmjv.de/SharedDocs/Downloads/EN/G20/Nine%20Key%20Principles%20on%20Asset%20Recovery.pdf?\\_\\_blob=publicationFile&v=1](http://www.bmjv.de/SharedDocs/Downloads/EN/G20/Nine%20Key%20Principles%20on%20Asset%20Recovery.pdf?__blob=publicationFile&v=1) (accessed 30 August 2017).

<sup>12</sup> The Commonwealth, Report of the Commonwealth Working Group on Asset Repatriation, available at [http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/governance/2005-meeting-of-commonwealth-law-ministers-and-senior-officials/report-of-the-commonwealth-working-group-on-asset-repatriation\\_9781848598843-23-en#.WefuEmiCzIU](http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/governance/2005-meeting-of-commonwealth-law-ministers-and-senior-officials/report-of-the-commonwealth-working-group-on-asset-repatriation_9781848598843-23-en#.WefuEmiCzIU) (accessed 31 August 2017).

<sup>13</sup> The Commonwealth, (2005: 12).

personnel'.<sup>14</sup> The FATF's interpretive note to Recommendation 30 calls on countries to consider doing the following to ensure effective confiscation:

- a. Designating one or more bodies for purposes of conducting confiscation investigations;
- b. Considering to choose anti-corruption agencies for purposes of conducting confiscation investigations;
- c. Adopting a multi-disciplinary approach when investigating confiscation cases; and
- d. Resourcing adequately the prosecution and investigative bodies seized with confiscation cases through training and the provision of the necessary tools.<sup>15</sup>

### 3.3 Case Studies

This section looks at how some countries have gone about implementing their confiscation laws. The case study will consider Australia, South Africa, the UK and the US.

Botswana's most comprehensive confiscation law, PICA, is modelled on the Australian Proceeds of Crime Act of 2002. It is, therefore, crucial to understand how Australia implemented it. Furthermore, Australia has tried out two models of structuring asset forfeiture bodies, both of which have been successful. Originally, the Australian federal government authorised only the Commonwealth Director of Public Prosecutions (CDPP) to

---

<sup>14</sup> FATF, Best Practices on Confiscation (Recommendations 4 & 38) And a Framework for Ongoing work On Asset Recovery, available at: <http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf> (accessed 30 August 2017).

<sup>15</sup> FATF, The FATF Recommendations, available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf) (accessed 30 August 2017).

confiscate tainted property. However, since 2012, the responsibility to confiscate dirty assets has effectively been the sole responsibility of the Australian Federal Police (AFP).<sup>16</sup>

Botswana relies heavily on South African jurisprudence for persuasive authority. Furthermore, both countries apply the Roman-Dutch law and the English Common law. Crucially, both countries are members of ARINSA, which calls upon its members to establish specialised asset forfeiture units within the prosecution service. The South African experience in confiscation even permeates Botswana's training programme, as all members of the DPP's Asset Forfeiture Unit are trained by the South African National Prosecution Authority's Asset Forfeiture Unit.<sup>17</sup>

The UK has adopted a multi-agency approach with clear rules as to when one agency may use its asset forfeiture powers. The UK over time has adopted various models of structuring its asset forfeiture bodies to try and ensure effective implementation. The UK experience is therefore critical in fostering an appreciation of the structural impediments that obstruct effective implementation. The US has adopted a successful multi-agency approach. It is, therefore, essential to learn how the US has overcome the challenges presented by a multi-agency approach. But for now, the discussion turns to Australia.

### **3.3.1 The Australian Experience**

The Australian federal government introduced conviction-based asset forfeiture by way of the Proceeds of Crime Act of 1987. Following the recommendations of the Australian Law Reform Commission, the forfeiture regime was extended to include non-conviction based confiscation through the Proceeds of Crime Act of 2002 (POCA 2002). Australia adopted a

---

<sup>16</sup> Goldsmith A, Gray D and Smith RG, Criminal Assets Recovery in Australia in King C and Walker C, *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, (2016: 134).

<sup>17</sup> ARINSA, Annual Report, (2016: 40).

multi-agency approach to conducting financial investigations for purposes of forfeiture while granting the Commonwealth Director of Public Prosecutions (CDPP) sole authority to litigate confiscation proceedings. The law enforcement agencies which were empowered to conduct financial investigations were the Australian Crime Commission (ACC), the Australian Customs Service (ACS), the Australian Federal Police (AFP), the Australian Securities & Investment Commission (ASIC) and the Australian Taxation Office (ATO).<sup>18</sup> The implementation of POCA 2002 was considered 'effective and successful'.<sup>19</sup> In 2006, the Sherman Report, which reviewed the impact of POCA 2002 through assessing its effectiveness and impediments, identified two key structural impediments. First, the investigative agencies experienced difficulties in sharing intelligence. Second, there was an unequal distribution of resources.<sup>20</sup>

The Australian federal government established the Criminal Assets Confiscation Task Force (CACT) in 2011. The task force has two divisions, the investigations team and the Proceeds of Crime Litigation Teams (PCLT). The Commissioner of the AFP exercises overall leadership of the CACT. The investigations team has a multi-agency approach which has been described as follows:

'Taskforce investigative teams are located in several cities around Australia and incorporate a mix of special skills from the AFP including federal agents (police officers), forensic accountants and financial investigators. The ATO provides financial analysis support through

<sup>18</sup> Parliament of Australia, Background & Overview of the Commonwealth Proceeds of Crime Regime, available at: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/AFP\\_Inquiry/report/c02](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Inquiry/report/c02) (accessed 1 September 2017).

<sup>19</sup> Gromo S, (2009, 156).

<sup>20</sup> T Sharman, Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002, available at: [http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/aqd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)\\_5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.PDF/\\$file/5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.pdf](http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/aqd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)_5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.PDF/$file/5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.pdf) (accessed 1 September 2017).

co-located officers, further support in the form of officers in its Serious Non-Compliance Teams, who take action on matters referred to them by the taskforce, where the ATO considers it appropriate. The ACC also contributes co-located officers and provides support in target identification and strategic advice on money-flows that impact on Australia'.<sup>21</sup>

To enable the PCLT division in the task force to carry out its litigation function, the federal government in 2011 extended the powers to conduct confiscation proceedings to the Commissioner of the AFP through the Criminal Amendment Act 174 of 2011. Accordingly, the task force is an amalgamation of the powers of various agencies that have 'a key role in the investigation and litigation of proceeds of crime matters'.<sup>22</sup>

Though the Commissioner of the AFP exercises overall leadership of the task force, he has delegated his powers to conduct litigation regarding proceeds of crime to the Manager of the PCLT. Though the two divisions are co-located in AFP offices across Australia, 'the litigation function is exercised independently of the investigators, and sits under a different management structure to that of the investigators'.<sup>23</sup> A memorandum of agreement between the CDDP and the AFP has 'resulted in the effective transfer'<sup>24</sup> of the litigation function under POCA 2002 to the AFP, and since 2012 all confiscation cases have been handled by the AFP. Though the federal government envisaged the situation where the AFP would conduct most of the confiscation proceedings, it still deemed it essential for the CDDP to retain the powers to institute confiscation proceedings albeit on a limited scale and only for conviction based confiscations.<sup>25</sup>

---

<sup>21</sup> Goldsmith A, Gray D & Smith RG, (2016: 133).

<sup>22</sup> Goldsmith A, Gray D & Smith RG, (2016: 134).

<sup>23</sup> Goldsmith A, Gray D & Smith RG, (2016: 134).

<sup>24</sup> Goldsmith A, Gray D & Smith RG, (2016: 133).

<sup>25</sup> Australian Government, Crimes Legislation Amendment Bill (No.2) 2011, Explanatory Memorandum, Available at: <https://www.legislation.gov.au/Details/C2011B00045/Download> (accessed 1 September

The federal government argued that the establishment of the multi-agency task force 'represents a more streamlined, efficient, coordinated and integrated methodology, with significant operational and administrative benefits, including effective collaboration in the coordinated use of resources, and the streamlining of issues between investigative and litigation resources'.<sup>26</sup>

The establishment of the task force is being heralded as a success as it equipped the state with the muscle and skill to investigate highly complex cases and to avoid duplication of roles as a result of better co-ordination. Furthermore, it has led to an increased volume in the value of restrained and confiscated amounts. The task force further has more capacity to deal with cases as resources are centralised and case referrals are easier.<sup>27</sup> The lawyers in the PCLT have varying professional backgrounds, but most of them have civil law, as opposed to criminal law, experience, and it is hoped that the 'diversity of experience will encourage innovation and support a more proactive approach to confiscation'.<sup>28</sup>

### 3.3.2 The South African Experience

A conviction based forfeiture of the proceeds of crime was introduced in South Africa by the Drugs and Drugs Trafficking Act 140 of 1992 which targeted the proceeds of drug trafficking. In 1996, conviction based forfeiture was expanded to other offences through the Proceeds of Crime Act 76 of 1996. Parliament introduced non-conviction based confiscation through the Prevention of Organised Crime Act 121 of 1998 (POCA), which repealed the Proceeds of

---

2017).

<sup>26</sup> Parliament of Australia, Crimes Legislation Amendment Bill (No.2) 2011: Addendum to Explanatory Note, available at: [http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4544\\_ems\\_81d0b363-6364-46ec-b3d2-e108f8d982e1/upload\\_pdf/360094addem.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4544_ems_81d0b363-6364-46ec-b3d2-e108f8d982e1/upload_pdf/360094addem.pdf;fileType=application%2Fpdf) (accessed 1 September 2017).

<sup>27</sup> Goldsmith A, Gray D & Smith RG, (2016: 134).

<sup>28</sup> Goldsmith A, Gray D & Smith RG, (2016: 134).

Crime Act of 1996. POCA 1998 provides for four types of orders, namely, restraint orders, preservation orders, confiscation orders and forfeiture orders. The former two are meant to protect the property against dissipation, while the latter two authorise the state to deprive criminals permanently of their ill-gotten assets. Restraint orders are used to preserve property, pending the conclusion of the proceedings to obtain a confiscation order. A preservation order is used to restrain property, pending the finalisation of the proceedings to obtain a forfeiture order. A confiscation order is conviction based and is issued before the sentencing hearing. A forfeiture order is non-conviction based and is unaffected by the outcome of the criminal charges or proceedings.<sup>29</sup>

The South African government became dissatisfied with the application of the conviction based confiscation law. Research conducted by the state established that asset forfeiture laws were hardly invoked in the absence of a specialised unit as the law is complex and involves a combination of criminal and civil procedural principles as well as unique investigation skills. Accordingly, the Asset Forfeiture Unit (AFU) was established in 1999 within the National Prosecuting Authority (NPA) to ensure effective implementation of POCA. The AFU became a full division of the NPA in 2001, with the appointment of the head of the AFU as Deputy National Director of the NPA. The AFU consists of a team of state advocates and financial investigators. The NPA directly employs some of the financial investigators, while others are seconded from the South African Police Service (SAPS) and specialist law enforcement units. The investigators employed by the AFU do not have police powers like their colleagues seconded from SAPS. The financial investigators are co-located

---

<sup>29</sup> Keightley R, (2009: 93-124).

with the state advocates. The state advocates of the AFU specialise in asset forfeiture proceedings and do not conduct criminal prosecutions.<sup>30</sup>

In its 2016/17 Annual Report, the NPA boasts of having had a successful year. The unit completed more cases than in previous years. It confiscated assets worth R 423.6 million, which represented a 20 per cent increase over the previous year. The unit achieved a success rate of 99 per cent in the cases taken to court. The Annual Report claims that the AFU is making strides in its efforts to disrupt organised crime, corruption and theft by government employees.<sup>31</sup>

### 3.3.3 The United Kingdom Experience

Confiscation of proceeds of crime in the UK is traceable to the case of *R v Cuthbertson* [1981] AC 470 in which the House of Lords held that the Misuse of Drugs Act of 1971 did not empower the government to confiscate the proceeds of drug offences. Thereupon the Hodgson Committee was established by the UK government to review the gaps in confiscation laws. It recommended the introduction of conviction based forfeiture and vesting the courts with powers to preserve the assets, pending finalisation of cases, through restraining orders and appointing a receiver.<sup>32</sup>

Several laws were enacted in line with the Hodgson Committee's recommendations. The principal laws passed were the Drug Trafficking Offences Act of 1986 and the Criminal Justice Act of 1988. The former law introduced confiscation of proceeds of drug trafficking while the later extended the government's ability to confiscate proceeds of crime to 'all

---

<sup>30</sup> National Prosecuting Authority, Taking the Profit Out of Crime- The Asset Forfeiture Unit, available at: <https://www.npa.gov.za/sites/default/files/files/FAQs%20on%20AFU.pdf> (accessed 31 August 2017).

<sup>31</sup> National Prosecuting Authority, Annual Report: National Director of Public Prosecutions 2016/17, available at: <https://www.npa.gov.za/sites/default/files/annual-reports/NDPP-Annual%20Report-2016-17.pdf> (accessed 31 August 2017).

<sup>32</sup> Bullock K & Lister S, (2016: 51).

non-drug indictable and specified summary offences'.<sup>33</sup> The confiscation orders were conviction based and were initiated by the prosecutor or by the court.<sup>34</sup>

In the UK there are many authorities, such as the Department of Social Security, the Immigration Service, the Inland Revenue and the Serious Fraud Office, all of which have prosecutorial powers. But the main prosecutorial responsibilities lie with the Crown Prosecution Service (CPS). Another body with prosecutorial powers is the Customs and Excise Authority, which may prosecute tax offences such as evasion of VAT. Furthermore, the Customs and Excise Authority was permitted by the Misuse of Drugs Act of 1971 to apply for non-conviction based forfeiture of cash recovered at the borders which represents proceeds of drug trafficking or was intended to be used for drug trafficking. The CPS and the Customs and Excise Authority, respectively, established asset forfeiture units to enable them to carry out confiscation responsibilities. The asset forfeiture units consisted of lawyers and support staff. The CPS asset forfeiture unit was called the Centralised Confiscation Unit (CCU), and was responsible for conducting all High Court confiscation applications, but the responsibility to initiate confiscation proceedings lay with prosecutors dealing with the substantive offence. In cases where the prosecutor outside the CCU was handling a confiscation case, the CCU remained available for consultation and to assist the prosecutor. The CPS asset forfeiture structure, therefore, envisaged that every prosecutor should, upon obtaining a conviction of the accused, conduct the confiscation proceedings. A study commissioned by the Home Office Police Research Group in 1992 found that the police, who themselves had limited expertise in conducting financial investigations, were

---

<sup>33</sup> Bullock K & Lister S, (2016: 52).

<sup>34</sup> Leong AVM, Assets Recovery under the Proceeds of Crime Act 2002: the UK Experience, in Young SMN, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, (2009: 192).

not confident that prosecutors outside the CCU were able to handle confiscation cases. Furthermore, the study found that the police and the customs officers tended to compete for resources due from the interest generated from restrained property, and that the competition led to duplication of investigations.<sup>35</sup> In addition, the findings of the study were that the courts, prosecutors and the police considered confiscation as secondary to the core function of criminal prosecutions and imposition of sentences. The report found additionally that conviction based forfeiture was limiting as it failed to target the big fish of organised crime. What is more, where a conviction based confiscation order was obtained, 'few had recoverable assets of value'.<sup>36</sup> That led to a high number of unenforced confiscation orders and to reluctance on the part of police and prosecutors to pursue confiscation orders.

In 2000, the Performance and Innovation Unit (PIU) in the Cabinet Office released a report on the effectiveness of the UK's confiscation laws. The report found that the CCU did most of the confiscations carried out by the CPS. It found further that a total of 38 staff members of the CCU and asset forfeiture unit of the Customs and Excise agency dealt with confiscation cases in England and Wales, and that this number of staff was inadequate for purposes of ensuring the effective implementation of asset forfeiture. The PIU recommended that a specialised body should be established to deal with asset forfeiture. The PIU advised also that civil forfeiture be introduced and even that the state be empowered to tax criminal income.<sup>37</sup> The recommendations of the PIU were incorporated into POCA of 2002.<sup>38</sup>

---

<sup>35</sup> Levi M & Osofsky L, Investigating, Seizing and Confiscating the Proceeds of Crime, Police Research Group Crime, Detection and Prevention Series Paper 61, available at: <http://webarchive.nationalarchives.gov.uk/20110218140812/http://rds.homeoffice.gov.uk/rds/prgpdf/fs/fcdps61.pdf> (accessed 3 September 2017).

<sup>36</sup> Bullock K & Lister S, (2016: 51).

<sup>37</sup> Cabinet Office, Performance and Innovation Unit (PIU), Recovering the Proceeds of Crime, (2000),

The PIU recommendations incorporated into POCA 2002 include:

- a. The establishment of the Asset Recovery Agency (ARA) as the specialised body dealing with asset forfeiture;
- b. The bringing together of asset forfeiture laws and anti-money laundering laws into a single statute;
- c. The introduction of non-conviction based forfeiture;
- d. Taxation of criminal proceeds by the ARA;
- e. Facilitating the sharing of information between the ARA and other law enforcement agencies; and
- f. Co-ordinated training for all organisations involved in forfeiture of proceeds of crime.<sup>39</sup>

POCA 2002 empowered the government to confiscate tainted property in four ways, namely, through 'criminal confiscation; civil recovery; taxation; and the seizure and forfeiture of cash'.<sup>40</sup> The police and the customs officers were entrusted with the responsibility for the seizure and forfeiture of cash, while the ARA was responsible for the implementation of the other three mechanisms.<sup>41</sup> A police or customs officer could seize cash if he reasonably believed it to be proceeds of crime or an instrument of crime, provided it met the set minimum threshold amount. To seize the cash, the officer needed a warrant from the 'Magistrate Court or a Justice of Peace, or if that was not practicable, the

---

available at:

<http://webarchive.nationalarchives.gov.uk/+/http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf> (accessed 3 September 2017).

<sup>38</sup> Bullock K & Lister S, (2016: 53).

<sup>39</sup> Leong AVM, *The Disruption of International Organised Crime: An Analysis of the Legal and Non-Legal Strategies*, (2007: 138).

<sup>40</sup> Ryder N, (2011: 198).

<sup>41</sup> Leong AVM, (2007: 138-151).

approval of a senior officer (police inspector or equivalent)'.<sup>42</sup> Where cash was seized without a warrant, the responsible officer filed a report with 'a person appointed by the Secretary of State'.<sup>43</sup>

The ARA was set up on 13 January 2003 as an independent non-ministerial body headed by a Director who was appointed by the Secretary of State. The ARA had no prosecutorial powers, and its Director reported to the Home Secretary. The ARA worked on a referral system, according to which law enforcement agencies sent cases to it. The ARA could therefore not initiate investigations for purposes of confiscation on its own. Once seized of the matter, the ARA could conduct further investigations by utilising the investigative powers provided for in POCA 2002.<sup>44</sup>

For criminal confiscations, the agency shared the powers to initiate the proceedings at court with the CPS. For the ARA to take up a civil recovery case, the CPS must have indicated that it would not pursue a criminal charge or that the criminal confiscation had failed on procedural issues. To levy tax on proceeds of crime, the ARA first had to obtain authority from the Board of Inland Revenue by serving a notice on it. The ARA would point out on the notice that the Director had a reasonable belief that the taxpayer had received income for a specified tax year from proceeds of crime. Unlike the Inland Revenue Services, the Director of ARA did not need to specify the source of the criminal income to levy tax on it.<sup>45</sup>

In 2007, the ARA was reviewed by the National Audit Office (NAO), and it was considered to be too expensive to maintain as it had recovered £8 million at the cost of £60 million. The

---

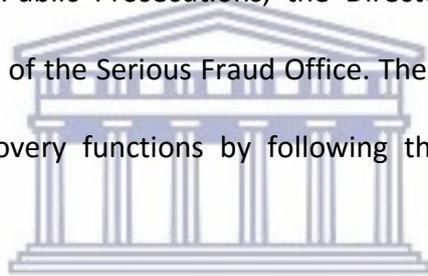
<sup>42</sup> Leong AVM, (2007: 148).

<sup>43</sup> Leong AVM, (2007: 148).

<sup>44</sup> Dayman S, Is the patient expected to live? UK civil forfeiture in operation in Young SMN, Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime, (2009: 234).

<sup>45</sup> Leong AVM, (2007: 139-150).

report noted that the referrals from law enforcement agencies were of a poor quality and that litigation was costly, as many human rights issues were litigated against POCA 2002. The NAO report also cited high fees charged by the receivers as contributing to the expensive nature of the work of the ARA. The report was critical, too, of the ARA's poor organisational structures. In response to the NAO report, the government in 2007 decided to disband the ARA and to adopt a two-pronged strategy to distributing the powers held by the ARA. Firstly, the ARA was merged with the Serious Organised Crime Agency (SOCA). The effect of the merger was that all powers held by the ARA were transferred to SOCA. Secondly, the powers of the ARA to investigate and litigate civil recovery cases were assigned to the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions and the Director of the Serious Fraud Office. The prosecuting authorities were to implement their civil recovery functions by following the guidance of the Attorney General.<sup>46</sup>



SOCA was established in 2004. It amalgamated various intelligence agencies in the UK, including 'the National Criminal Intelligence Service, the National Crime Squad, the Immigration Service responsibilities for organised crime and the investigation and intelligence responsibilities of Her Majesty's Revenue and Customs'.<sup>47</sup> The merger of the ARA with SOCA was meant to cut the costs and to improve the effectiveness of the specialised body by enabling it to initiate investigations. Furthermore, SOCA was given the powers of a financial intelligence unit, thus making more powerful its intelligence gathering function.<sup>48</sup>

---

<sup>46</sup> The National Archives, Serious Crime 2007: Explanatory Notes, available at: <https://www.legislation.gov.uk/ukpga/2007/27/notes/division/6/3/2> (accessed 29 September 2017).

<sup>47</sup> Leong AVM, (2007: 167).

<sup>48</sup> Leong AVM, (2009: 192).

In 2013, SOCA was disbanded and replaced by the National Crime Agency (NCA).<sup>49</sup> To enable it to implement its mandate on confiscating tainted property efficiently, the NCA has set up the Asset Confiscation team to co-ordinate its activities and interaction with other bodies on asset forfeiture.<sup>50</sup> The CPS on 30 June 2014 established the Proceeds of Crime Unit (CPSPUC), with its headquarters in London, and three regional bodies. The CPSPUC conducts all conviction based forfeiture cases handled by the CPS, and in some instances, it also performs non-conviction based forfeitures for the CPS. Before launching a civil recovery case, the prosecutor must ensure that the case meets the set guidelines and that he has obtained the consent of the DPP. As a general rule, the CPS will conduct civil recovery cases for matters which cannot be prosecuted in UK courts on account of lack of jurisdiction, lack of evidence or where the whereabouts of the owner of the recovered proceeds of crime cannot be established.<sup>51</sup>

The NCA was established to be an all-encompassing policing body that fights crime.<sup>52</sup> Accordingly, the disbanding of SOCA is largely related to the UK government's intention to improve the policing of crimes considered to pose a threat to national security by enhancing investigative powers and the criminal intelligence gathering functions of the various law enforcement agencies, and by bringing such agencies under a single multi-agency body. Over time the UK government has made significant strides in creating a single multi-agency body for policing, culminating in the establishment of the NCA, but it has also reversed its

---

<sup>49</sup> Section 15 as read with schedule 8 of the Crime and Courts Act 2013, (Chapter 22).

<sup>50</sup> National Crime Agency, Recovering Criminal Assets, available at: <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/recovering-criminal-assets> (accessed 29 September 2017).

<sup>51</sup> Crown Prosecution Service, CPS Proceeds of Crime (CPSPUC), available at : [https://www.cps.gov.uk/your\\_cps/our\\_organisation/cpspoc.html](https://www.cps.gov.uk/your_cps/our_organisation/cpspoc.html) (accessed 29 September 2017).

<sup>52</sup> Government UK, National Crime Agency: A Plan for the Creation of a National Crime-Fighting Capability, available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97826/nca-creation-plan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97826/nca-creation-plan.pdf) (accessed 29 September 2013).

strategy for establishing a single multi-agency body dealing with asset forfeiture. The result is that the UK government has succeeded in its strategy to disrupt organised crime through intelligence gathering but is falling short on its strategy to recover the proceeds of such crime. A report published in 2016 stated that the UK government has not managed to enforce confiscation orders to the value of £1.6 billion. The House of Commons attributes the problem partly to the lack of accountability and clear strategy which is caused by having 16 government bodies invested with powers to confiscate dirty assets independently. The House of Commons accordingly recommended that the NCA be mandated as lead agency in implementing the confiscation laws.<sup>53</sup>

### **3.3.4 The United States of America Multi-Agency Approach**

Asset forfeiture in the US dates back to colonial times. At the time, the legal theory was that the government was acting against the property which committed a crime and that the moral blameworthiness of the owner of the property was irrelevant. With time, the theory recognised that the property was not by itself committing a crime but that it was used as an instrument to commit a crime. In the 1970s, Congress expanded the forfeiture laws to include proceeds of crime and property used to facilitate the commission of the crime.<sup>54</sup>

Asset forfeiture laws in the US developed in a piecemeal manner, and there is no single all-encompassing confiscation law. That has led to inconsistent results, where in one piece of legislation only instrumentalities can be forfeited, while in another piece of legislation only proceeds can be forfeited. Furthermore, this gave rise to multiple law enforcement agencies being tasked with the implementation of the confiscation laws.

---

<sup>53</sup> Parliament UK, House of Commons Home Affairs Committee, Proceeds of Crime: Fifth Report of Session 2016-17, available at: <https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf> (accessed 29 September 2017).

<sup>54</sup> Cassella SD, (2009: 26-27).

There are three procedural devices used by the US federal government to confiscate property. These are administrative, criminal and civil forfeiture. Administrative forfeitures are implemented by the law enforcement agencies investigating the particular crime. If the law enforcement officer reasonably believes that the property is liable to forfeiture, either because it is a proceed or instrument of crime as per the dictates of the particular confiscation law, the officer will seize the property and serve a notice on the person with an interest in the property. If the concerned owner or person with an interest in the property does not wish to contest the forfeiture, the property will be forfeited within the period prescribed by the particular law. If, however, the seizure is challenged, then the state will have to elect whether to institute criminal or civil forfeiture. Criminal forfeitures are part of the sentence proceedings in a criminal matter. Upon the accused being convicted, the prosecutor requests the court to order the accused to pay a sum which represents the proceeds of crime, or to have the concerned property declared forfeit. Civil forfeitures are not linked to a criminal prosecution and are against the property itself.<sup>55</sup>

The most comprehensive confiscation law in the USA is 18 U.S.C 981, also known as the civil forfeiture Law. It 'authorises the forfeiture of the proceeds of more than 200 different state and federal crimes'.<sup>56</sup> This law authorises the Attorney General, the Treasury and the United States Postal Services (USPS) to confiscate dirty assets. The civil forfeiture law does not limit the authority of the Attorney General to invoke civil forfeiture for any of the offences stipulated in the statute, but it limits the jurisdiction of the Treasury and USPS to 'property

---

<sup>55</sup> Cassella SD, (2009: 33-41).

<sup>56</sup> Cassella SD, (2009: 33).

involved in a violation investigated by the Secretary of the Treasury or the United States Postal Service'.<sup>57</sup>

The Attorney General heads the Department of Justice, which has many law enforcement agencies 'responsible for undertaking investigations and pursuing prosecutions of suspected instances of money laundering, terrorist financing, fraud and insider trading'.<sup>58</sup> The key bodies in the Department of Justice dealing with asset forfeiture are the: Asset Forfeiture and Money Laundering Section; the Counter-Terrorism Section; the Federal Bureau of Investigations; the Drug Enforcement Administration; the US Marshals Service; and the Bureau of Alcohol, Tobacco, Firearms and Explosives. The Asset Forfeiture and Money Laundering Section plays the leading role in asset forfeiture and co-ordinates the Department of Justice's confiscation programme.<sup>59</sup>

The Department of Treasury is headed by the Secretary of the Treasury. The key bodies in the Department of Treasury dealing with asset forfeiture are the Internal Revenue Service (IRS), the United States Customs Service (USCS), the United States Secret Service (USSS) and the Financial Crimes Enforcement Network (FinCEN). FinCen is the US equivalent of a financial intelligence unit. The USCS plays a vital role in asset forfeiture as it deals with the seizure of prohibited property entering or leaving the USA. Thus the USCS deals with cash smuggling, drug trafficking and property imported or exported in contravention of the customs laws. The IRS deals with tax crimes and enforces payment of tax in the USA. The IRS

---

<sup>57</sup> 18 U.S.C 981 (b) (1).

<sup>58</sup> Ryder N, (2011: 225-226).

<sup>59</sup> Ryder N, (2011: 223-237). See also Richards JR, *Transnational Criminal Organizations, Cybercrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators*, (1999: 113-114).

plays a vital role as criminal income is taxable in the USA. The USSS, besides ensuring the protection of the US president, is tasked with credit card offences.<sup>60</sup>

The USPS has a law enforcement body called the Postal Inspection Service (PIS), which deals with mail fraud and other crimes committed through the postal services. The PIS has a specialised asset forfeiture unit that ensures the effective implementation of asset forfeiture laws in cases handled by the postal service.<sup>61</sup>

To ensure the effective co-ordination of the multi-agency approach to asset forfeiture and policing economic crimes, in 1986 the Attorney General and the Secretary of the Treasury signed a Memorandum of Understanding (MOU). The MOU designated the IRS, Customs, DEA and the FBI as the central players in fighting economic crimes.<sup>62</sup> That MOU has since been replaced by another one entered into in 1990 between the Department of Justice, Treasury and the Postal Services. The MOU appoints the following agencies as the key players in fighting economic crimes: IRS, USCS, USSS, BATF, FBI, DEA and PIS. The MOU sets out the jurisdiction of cases to be investigated by each agency to avoid duplication. The MOU makes provision for the agencies to form joint task forces and how to determine which office will lead the task force.<sup>63</sup>

### 3.4 Conclusion

International law obligates countries to ensure the effective implementation of their confiscation laws. Various studies and practices have shown that specialisation is needed to

---

<sup>60</sup> Richards JR, (1999: 118-126).

<sup>61</sup> The United States Postal Inspection Service, Annual Report 2016, available at: [https://postalinspectors.uspis.gov/radDocs/2016%20AR%20FINAL\\_web.pdf](https://postalinspectors.uspis.gov/radDocs/2016%20AR%20FINAL_web.pdf) (accessed 29 September 2017).

<sup>62</sup> Richards JR, (1999: 113).

<sup>63</sup> United States Department of Justice, Memorandum of Understanding- Investigative Authority & Procedure of Treasury & Justice Bureaus & the Postal Service under 18 U.S.C 1956 & 1957, available at: <https://www.justice.gov/usam/criminal-resource-manual-2186-memorandum-understanding-investigatory-authority-and-procedures> (accessed 29 September 2017).

ensure the effective implementation of asset forfeiture. In the absence of specialisation, law enforcement agencies tend to shy away from using the law. Although specialisation is vital, investigators and litigators must work in a co-ordinated manner. Two models are apparent. According to the first model, countries may opt for a single body with a co-location of investigators and litigators either housed within the prosecution service or in another law enforcement agency. The second model involves a multi-agency approach according to which several institutions are given more or less the same powers to confiscate ill-gotten property. Each organisation, however, must have a dedicated team. Furthermore, the government must take measures to reduce competition for resources, duplication of cases and a fragmented approach by having a clear policy on how the several institutions complete the puzzle of asset forfeiture.



## CHAPTER FOUR

### THE BOTSWANA FRAGMENTED MULTI-AGENCY APPROACH

---

#### 4.1 Introduction

Botswana has adopted a multi-agency approach to implementing its confiscation laws. This chapter first gives an overview of the structural configuration of the agencies tasked with implementing asset forfeiture laws in Botswana. The chapter then explores the challenges posed by the multi-agency approach within the context of Botswana where the DPP's constitutional mandate is limited.

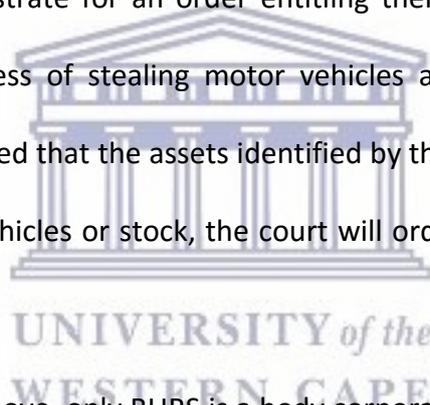
#### 4.2 Agencies Implementing Confiscation Laws

In Botswana, only the DPP may approach the courts for conviction based forfeitures. There are two routes he can take: he can use the various laws targeting instruments of crime and possession of prohibited property, or he can use PICA, which permits him to apply for pecuniary penalty orders, forfeiture orders or to initiate automatic forfeitures by applying for a restraining order to secure the property for automatic forfeiture.

There are four ways in which the government can forfeit property through the non-conviction based model. Firstly, the state can apply automatic forfeitures through the customs laws. Secondly, it can use confiscation proceedings under PICA to forfeit property through civil penalty and civil forfeiture orders. Thirdly, the state can confiscate tainted assets through administrative forfeiture by virtue of PICA. Lastly, the government can obtain a court order to forfeit assets reasonably believed to be proceeds of stealing motor vehicles and stock under the MVTA and STA respectively.

Only the Director of Customs is empowered to have illicit property forfeited through the customs law. But other law enforcement agencies can seize property under the customs law

subject to the consent of the Director of Customs. PICA empowers the DPP and a prescribed person to launch confiscation proceedings. Parliament has left the decision as to the appointment of an institution as a prescribed person to the discretion of the Minister of DJS. The Minister of DJS has yet to exercise his discretion in this matter. Administrative forfeitures are carried out by prescribed investigators. Parliament appointed officers from the DCEC, BURS and BPS as prescribed investigators. Parliament has also vested the Minister of DJS with the power to declare other law enforcement officers as prescribed investigators. The Minister has yet to exercise his discretion to appoint prescribed investigators. To forfeit illicit assets under the MVTA and STA, the police have to make an application to a Chief Magistrate or Regional Magistrate for an order entitling them to investigate people they consider to be in the business of stealing motor vehicles and stock. Once the court is satisfied that the inquiry proved that the assets identified by the police are derived from the business of stealing motor vehicles or stock, the court will order that the concerned assets be forfeited to the state.



From the institutions listed above, only BURS is a body corporate with the power to sue and be sued in its own name. All other institutions rely on the Attorney General to litigate civil matters on their behalf. Consequently, this chapter will give a synopsis of the following institutions: DPP, AG, DCEC, BPS and BURS.

#### **4.2.1 Director of Public Prosecutions**

The DPP is appointed by the President and is 'subject to the administrative supervision of the Attorney-General'.<sup>1</sup> All prosecutorial functions in Botswana vest in the DPP.<sup>2</sup> The post of the DPP was created in 2005 and prior to that the prosecutorial functions vested in the

---

<sup>1</sup> Section 51A(1) of the Constitution of Botswana, Volume 1, Laws of Botswana.

<sup>2</sup> Section 51A(3) of the Constitution of Botswana.

Attorney-General.<sup>3</sup> The Attorney-General had established a division called the Directorate of Public Prosecutions to discharge her prosecutorial function. Furthermore, due to limited resources and staff, the prosecutorial powers were delegated to Botswana Police Service (BPS). Since the establishment of the DPP, the government is working on ensuring a complete take-over of the prosecutorial duties delegated to the BPS by the DPP.<sup>4</sup>

The division of the Directorate of Public Prosecutions remains a part of the Attorney-General's office, which supports the DPP in its work and keeps it under its administrative supervision in accordance with the Constitution. The DPP staff are appointed by the Attorney-General and all the resources allocated to the DPP are determined also by the Attorney-General. The staff of the Directorate of Public Prosecutions consist of lawyers designated as prosecutors by the Attorney-General and corporate service staff also placed at the DPP by the Attorney-General.<sup>5</sup> The DPP supervises the prosecutors on his prosecutorial function and the Attorney-General plays no supervisory role in the prosecutorial functions of his employees within the DPP.<sup>6</sup>

The DPP established the Asset Forfeiture Unit in 2015. It comprises five attorneys trained through the ARINSA programme on confiscation law. In 2013, the DPP had a total of 166 prosecutors with an average annual workload of 163 cases per prosecutor.<sup>7</sup> The DPP has

---

<sup>3</sup> Section 7 of the Constitution (Amendment) Act No. 9 of 2005.

<sup>4</sup> Facebook, BWGovernment-Address by Morulaganyi Chamme, Acting Attorney-General of the Republic of Botswana On the Occasion of the Official Opening of the Legal Year 2017, available at <https://www.facebook.com/Botswana.Government/posts/1228527920563197:0> (accessed 15 April 2017).

<sup>5</sup> ESAAMLG, (2017: 66).

<sup>6</sup> Daily News, AG's Response to Article in Botswana Gazette newspaper, available at <http://www.dailynews.gov.bw/news-details.php?nid=38269> (accessed 8 September 2017).

<sup>7</sup> Sunday Standard Newspaper, DPP Bursting at the Seams, available at <http://www.sundaystandard.info/dpp-bursting-seams> (accessed 15 April 2017).

offices in five towns, namely, Gaborone, Francistown, Palapye, Maun and Lobatse. The DPP intends to open another office in Selibe-Phikwe.<sup>8</sup>

#### 4.2.2 Attorney-General's Chambers

The Attorney-General's Chambers (AGC) is an extra ministerial department under the leadership of the Attorney-General. The AGC is subsumed under the DJS.<sup>9</sup> The Attorney-General is appointed by the President and is the principal legal advisor to government.<sup>10</sup> The AGC has five departments, namely, the Directorate of Public Prosecutions; the Civil Division; the Legislative Drafting Division; the International and Commercial Division; and the Corporate Service Division. The Civil Division institutes and defends all civil legal actions for and against the government in a representative capacity. The Legislative Drafting Division supports Parliament by drafting the laws Parliament intends to pass. The International and Commercial Division advises government on the contracts it wishes to enter into with domestic or international business entities. The staff of the Corporate Service Division are all non-attorneys and support the Attorney-General to discharge his mandate as a legal advisor to the government.<sup>11</sup>

As stated earlier, the Directorate of Public Prosecutions, as a division of the AGC, exists to support the Director of Public Prosecutions to discharge his prosecutorial mandate and also to meet the constitutional demand that the Director of Public Prosecutions should be under the administrative supervision of the Attorney-General. The DPP, in the discharge of his

---

<sup>8</sup> Facebook, BWGovernment-Address by Morulaganyi Chamme, 2017.

<sup>9</sup> Government of Botswana, Attorney General's Chambers, available at <http://1govportal.imexsystems.net/en-gb/Citizens-Residents/Law%20and%20Justice/Pages/Attorney-General's-Chambers.aspx> (accessed 1 October 2017).

<sup>10</sup> Section 51 of the Constitution of Botswana.

<sup>11</sup> Government of Botswana, Attorney General's Chambers, available at <http://1govportal.imexsystems.net/en-gb/Citizens-Residents/Law%20and%20Justice/Pages/Attorney-General's-Chambers.aspx> (accessed 1 October 2017).

prosecutorial function, is fully independent and 'is not subject to the direction or control of any other person or authority'.<sup>12</sup> However, the DPP is required to consult with the Attorney-General before exercising his prosecutorial functions with respect to cases which the Attorney-General considers 'to be of national importance'.<sup>13</sup> The requirement to consult the Attorney-General does not affect the independence of the DPP in the discharge of his prosecutorial functions, but is 'intended to facilitate the constitutional mandate of the Attorney-General as the principal legal advisor to government.'<sup>14</sup> The DPP has previously consulted the Attorney-General 'in cases that involve chieftainship, the prosecution of high profile public figures and cases where there is substantial public interest'.<sup>15</sup>

#### 4.2.3 Directorate on Corruption and Economic Crime

The Directorate on Corruption and Economic Crime (DCEC) was established in 1994 as Botswana's response to the rising levels of corruption. The DCEC is an autonomous law enforcement body headed by a Director who is appointed by the President. The DCEC is tasked with educating public servants, as well as preventing and investigating economic crimes in the public service. To discharge its mandate the DCEC has four divisions consisting of Public Education, Corruption Prevention, Investigation and Corporate Services. The DCEC has offices in three towns, namely, Gaborone, Francistown and Maun.<sup>16</sup>

The Investigation Division consists of the Investigation, Intelligence, Technical Support and Legal Services Units. The Investigation Division has a board consisting of the Director,

<sup>12</sup> Section 51A(6) of the Constitution of Botswana.

<sup>13</sup> Section 51A(6)(b) of the Constitution of Botswana.

<sup>14</sup> Sechele LB, The Independence of the DPP: (A Case of Botswana), available at <http://www.justice.gov.bw/sites/default/files/General%20publications/The%20Independence%20of%20the%20DPP%20-%20A%20Case%20of%20Botswana.pdf> (accessed on 15 April 2017).

<sup>15</sup> Sechele LB, 2015.

<sup>16</sup> ESAAMLAG, (2017: 29). See also, Government of Botswana, Directorate on Economic Crime-Divisions, available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Divisions/> (accessed 1 October 2017).

Deputy Director, Head of Intelligence, Head of Investigations and Head of Legal Services. The Intelligence Unit gathers intelligence on economic crime in the public service through reports from the public and other sources. The Intelligence Unit also analyses, stores and disseminates the intelligence as determined by the Board. The Technical Support Unit assists investigators to gather evidence through provision of technical equipment. The Legal Services Unit assists investigators through the provision of legal advice and analysis of evidence.<sup>17</sup> An objective of the Legal Services Unit is, amongst others, to ensure that cases sent to the DPP for analysis and prosecution meet the *prima facie* criterion. The DCEC has investigators and attorneys trained in asset forfeiture. The first president of ARINSA is an attorney from the DCEC who was also trained in the ARINSA programme.<sup>18</sup>

#### 4.2.4 Botswana Police Service

The BPS is mandated to ensure peace and stability through, amongst other things, preventing crime and bringing offenders to book through investigations and enforcing the law.<sup>19</sup> The BPS is led by the Commissioner of Police who is appointed by the President. The BPS consists of various departments and units. The investigation of economic crimes is handled by the Fraud Squad within the Serious Crime Unit. The BPS does not have a dedicated team of financial investigators and an asset forfeiture unit despite being the sole authority to enforce forfeiture laws as contained in the Stock Theft Act and the Motor Vehicle Theft Act. In practice, the BPS refers money laundering cases to the DCEC

---

<sup>17</sup> Government of Botswana, Directorate on Economic Crime-Investigation, available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Divisions/Investigation/> (accessed 1 October 2017).

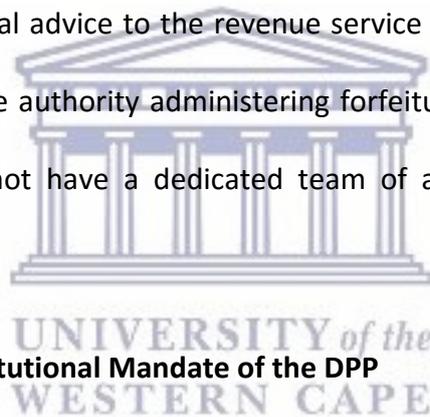
<sup>18</sup> ARINSA, Annual Report, (2016: 40).

<sup>19</sup> Government of Botswana, Botswana Police Service-Mandate, available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Botswana-Police-Service-/About-the-BPS/Mandate/> (accessed 1 October 2017).

notwithstanding the fact that some of its investigators are trained in anti-money laundering techniques and able to investigate money laundering cases.<sup>20</sup>

#### 4.2.5 Botswana Unified Revenue Service

The BURS is an entity established to enforce and promote trade laws. It is charged with establishing tax liability, the collection of tax, the prevention of tax evasion and ensuring compliance with import and export obligations.<sup>21</sup> The BURS is a body corporate capable of suing and being sued in its own name.<sup>22</sup> It has eight divisions, amongst which are the Customs and Excise and the Legal Service Divisions. The Customs and Excise Division plays a key role in protecting Botswana against the entry and exit of illicit assets.<sup>23</sup> The Legal Services Division provides legal advice to the revenue service and conducts litigation on its behalf. Despite being the sole authority administering forfeiture through the Customs and Excise Act, the BURS does not have a dedicated team of asset forfeiture and financial investigators.<sup>24</sup>



#### 4.3 Issues with the Constitutional Mandate of the DPP

The Constitution gives the DPP powers to 'institute and undertake criminal proceedings against any person'.<sup>25</sup> The Constitution does not expressly vest the DPP with powers to institute and undertake civil proceedings, neither does it state that the DPP may perform other functions as may be provided for by any other written law. This begs the question: Are

---

<sup>20</sup> ESAAMLG, (2017: 61).

<sup>21</sup> BURS, Mandate, available at <http://www.burs.org.bw/index.php/about-us/mandate> (accessed 2 October 2017).

<sup>22</sup> Section 3 of the Botswana Unified Revenue Service Act, Chapter 53:03, Laws of Botswana.

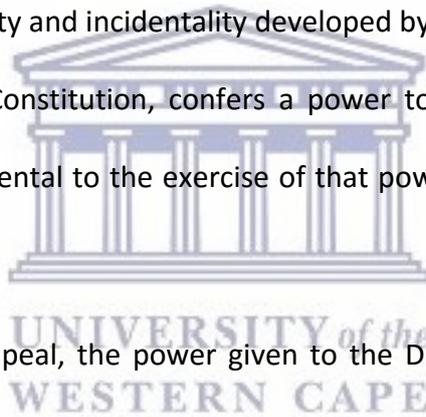
<sup>23</sup> BURS, Customs and Excise, available at <http://www.burs.org.bw/index.php/about-us/divisions/customs-a-excise> (accessed 2 October 2017).

<sup>24</sup> ESAAMLG, (2017: 61).

<sup>25</sup> Section 51A (3)(a) of the Constitution of Botswana.

the provisions empowering the DPP to launch these civil proceedings under PICA constitutional?

Since PICA came into force in January 2015, the state has yet to confiscate any assets in terms of any of the conviction based asset forfeiture procedural devices. There is, accordingly, no case law authority on the issue. However, the jurisprudence under the repealed PSCA 1990 is instructive. In the case of *Nchindo & Others v The Attorney-General & Another*<sup>26</sup> the Court of Appeal had to determine whether PSCA 1990 was inconsistent with the Constitution by giving the DPP powers to conduct civil applications in the form of restraining orders and conviction based confiscation orders. The Court of Appeal endorsed the test of reasonable necessity and incidentality developed by the court *a quo*. Accordingly, where a law, including the Constitution, confers a power to act, all such powers as are reasonably necessary or incidental to the exercise of that power are deemed to have been conferred as well.



According to the Court of Appeal, the power given to the DPP in terms of PSCA 1990 to launch a restraining order, pending the conclusion of the criminal proceedings, was not reasonably necessary for the discharge of the prosecutorial functions because it was 'quite possible to conduct the prosecution from start to finish without the order'.<sup>27</sup> By relying on the purpose of restraining orders to preserve the value of the property, pending the conclusion of the criminal trial so as to satisfy a confiscation order, the Court of Appeal found that the powers of the DPP to institute applications for restraining and confiscation orders under PSCA 1990 was incidental to the prosecutorial powers. Accordingly, the Court

---

<sup>26</sup> 2010 (1) BLR 205 (CA).

<sup>27</sup> *Nchindo v Attorney-General* 2010 (1) BLR 205 (CA) p211.

of Appeal held that PSCA 1990 was not inconsistent with the Constitution.<sup>28</sup> But the court did not enunciate the test to apply to determine that one power is incidental to another. It is submitted that the test should be whether there is a sufficient connection between the power and the purpose it is meant to achieve.

Based on *Nchindo*, it is submitted that the powers given to the DPP by PICA to institute and undertake civil proceedings as a crime control strategy are incidental to the powers of the DPP to deter crime by means of criminal prosecution. As argued in chapter two, asset forfeiture serves to deter crime. Therefore, it is submitted that courts faced with this issue in the future are likely to hold that PICA does not violate the provisions of section 51A(3) of the Constitution by granting the DPP powers to institute civil proceedings.

Contrariwise, a reasonable argument could be raised that *Nchindo* is authority for the proposition that conviction based forfeitures are incidental to the powers of the DPP. Consequently, non-conviction based forfeitures are not incidental to the powers of the DPP. Therefore, PICA 2014 violates the Constitution to the extent that it empowers the DPP to conduct non-conviction based confiscation proceedings. In my view, the argument would fail to demonstrate sufficient connection between the purposes of the powers of the DPP and the objectives of non-conviction based confiscation as a crime control measure.

#### **4.4 Challenges of Enforcing Confiscation Orders**

The proceedings under PICA are civil in nature.<sup>29</sup> The Constitution, as read with the State Proceedings (Civil Actions by or against Government or Public Officers) Act, Chapter 10:01 (State Proceedings Act), appoints the Attorney-General as the only legal representative for

---

<sup>28</sup> 2010 (1) BLR 205 (CA) p214.

<sup>29</sup> Section 69(1) of PICA, No. 28 of 2014.

government in civil matters unless provided otherwise by any other law.<sup>30</sup> The State Proceedings Act provides that 'except as may otherwise be provided actions by or against the government shall be instituted by the Attorney-General'.<sup>31</sup> Pecuniary penalty orders and civil penalty orders are money judgments in favour of the state.<sup>32</sup> As money judgments, they are enforced through 'execution against property or garnishee proceedings'.<sup>33</sup> The question that arises is whether it is the responsibility of the AG, DPP or prescribed person to approach the courts for the said enforcement proceedings.

The DPP is empowered to enforce a pecuniary penalty order by making an application that the property which was under the effective control of the accused or was a gift from the accused be sold to pay the pecuniary penalty order.<sup>34</sup> For civil penalty orders, there is no similar provision empowering the DPP or the prescribed person to apply that the property of the respondent to the civil penalty order be sold. In the absence of an express law empowering the DPP or the prescribed person to make such an application, the State Proceedings Act dictates that the Attorney-General is the sole body that could institute proceedings to enforce the civil penalty orders. Ordinarily, civil cases are conducted by the Civil Division of the Attorney-General. The result is a further fragmentation of the confiscation of dirty assets in Botswana. Furthermore, where the Civil Division of the AGC becomes involved only at the tail end of the confiscation process, there is a real risk that the Civil Division may not act upon such cases and treat them as secondary to their core mandate.

---

<sup>30</sup> *Kgarebe v The Attorney General* 2012 (2) BLR 730 (HC), 734.

<sup>31</sup> Section 3 of the State Proceedings (Civil Actions by or Against Government or Public Officers) Act, Chapter 10:01, Laws of Botswana.

<sup>32</sup> Section 6 and 15(1) of PICA, 2014.

<sup>33</sup> *Trans Mokgadikgadi Investments (PTY) Ltd v Magwadza* 2007 (1) BLR 777 (HC), 781.

<sup>34</sup> Section 9(2) of PICA, No. 28 of 2014.

#### 4.5 Limited Skills and Resources

The DPP, through the Asset Forfeiture Unit (AFU) in the DPP, has five attorneys trained in confiscation laws.<sup>35</sup> Given a total workload of 28 000 cases and a total of 166 prosecutors in the year 2013, five prosecutors in the AFU may well be too few. With the DPP set to take over prosecutions from the BPS, the workload will only become more onerous.<sup>36</sup> Furthermore, the DPP does not have any seconded or co-located financial investigators. The DCEC has investigators and attorneys trained in confiscation proceedings. This study, however, could not establish the number of the skilled personnel. But it suffices to note that one of the DCEC officers holds the presidency of ARINSA and is well equipped in the field. The BPS and BURS do not have dedicated forfeiture units and have acknowledged that their personnel require substantial training in the field. Other government bodies discussed above simply lack personnel trained in the area of forfeiture. It is apparent that the country has limited resources to train officers from the various agency simultaneously in the numbers required to make their agencies efficient in implementing their confiscation mandate.

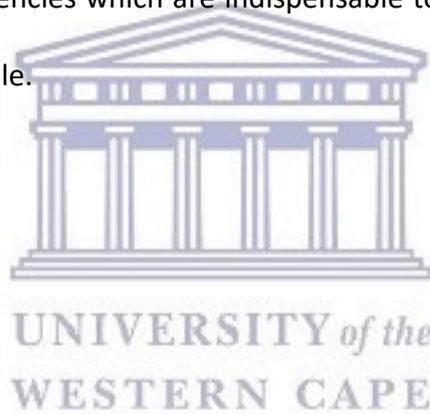
#### 4.6 Conclusion

The DPP, as the only office empowered to implement conviction based forfeitures, is indispensable to the asset forfeiture framework. In order to alleviate the possible constitutional constraints, the constitutional mandate of the DPP should be extended to include civil cases. This could be achieved without disturbing the current constitutional arrangement according to which the DPP is under the administrative supervision of the Attorney-General. However, to effectively solve the conundrum of allocation of resources

<sup>35</sup> ARINSA, Annual Report, (2016: 40).

<sup>36</sup> *Sunday Standard*, 'DPP Bursting at the Seams' available at <http://www.sundaystandard.info/dpp-bursting-seams> (accessed 15 April 2017).

by the Attorney-general to the DPP towards implementing the latter's asset forfeiture policy, the DPP needs to be liberated from the administrative supervision of the Attorney-General. To ensure efficient co-ordination of enforcement of confiscation orders, PICA or the State Proceedings Act needs to be amended to empower the DPP and prescribed person to approach the courts for an order that the property of the respondent to the civil penalty order may be sold to satisfy the money judgment. Alternatively, the Attorney-General should empower his staff from the DPP, as opposed to his staff from the Civil Division, to approach the courts for the relevant order. On the issue of resources, efforts should be made to bring together officers already trained in the field and to build capacity progressively within those agencies which are indispensable to confiscation, before moving to agencies with a marginal role.



## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

---

#### 5.1 Conclusions

Botswana's laws on confiscation mostly meet international standards. The Director of Public Prosecution, the Customs and Excise Division and the Botswana Police Service failed to implement the forfeiture laws efficiently prior to the enactment of PICA. Botswana does not have a national plan on asset forfeiture, which accounts for why asset forfeiture is ignored by the law enforcement agencies concerned. Notwithstanding the failure of the organisations mentioned above, the government has extended the multi-agency approach to include the Directorate on Corruption and Economic Crime through PICA. Furthermore, PICA empowers the Minister to add more agencies to complement the multi-agency approach.

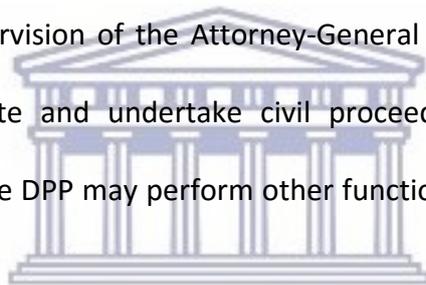
Countries are obligated under international law to devise measures to ensure effective implementation of confiscation laws. International best practices show that a dedicated team is needed, whether the state adopts one specialised body to confiscate property or a multi-agency approach. Where a multi-agency method is used, efforts must be made to reduce duplication of roles and to prevent inter-agency rivalry while adequately resourcing all agencies involved.

The implementation of Botswana's confiscation system faces enormous challenges should the courts hold the view that the DPP does not have the constitutional mandate to conduct civil cases. Accordingly, the government should extend the constitutional mandate of the DPP to include civil cases. The constitutional arrangement between the office of the Attorney-General and the DPP wherein the former administratively supervises the latter,

negatively impacts on the DPP's ability to confiscate dirty assets. Furthermore, there is likely to be an enforcement gap for civil penalty orders as PICA does not empower the DPP and the prescribed person to enforce the orders by approaching the courts for an order to sell the property of the respondent. There is a paucity of skills required to implement a broad multi-agency approach envisaged by the government. Nevertheless, a multi-agency approach, adopted progressively in a co-ordinated manner as recommended below, can be useful.

## 5.2 Recommendations

It is recommended that parliament should amend the constitution by removing the DPP from the administrative supervision of the Attorney-General and by expressly vesting the DPP with powers to institute and undertake civil proceedings or inserting a general provision to the effect that the DPP may perform other functions as may be provided for by any other written law.



UNIVERSITY of the  
WESTERN CAPE

It further recommended that the Minister of DJS should declare the DCEC to be the prescribed person as it has the officers and resources to discharge its mandate as both the prescribed investigator and the prescribed person. For the multi-agency approach to work efficiently, it is recommended that the DCEC should conduct non-conviction based forfeitures for economic crimes involving public servants. The DPP will be responsible for conviction based confiscation and non-conviction based forfeiture in all other cases not dealt with by the DCEC. This is because all such cases will invariably end up before the DPP for assessment of evidence and possible prosecution. Financial investigators must be co-located with prosecutors in the Asset Forfeiture Unit to strengthen the DPP's ability to confiscate tainted assets. This reinforcement could be achieved by seconding to the DPP

personnel from the BPS and BURS. To ensure effective co-ordination and a clear understanding of the roles to be played by each agency, the DPP, BPS, DCEC and BURS should conclude a memorandum of agreement.

It is further recommended that the Attorney-General allow his officers from the DPP to enforce the civil penalty orders as opposed to giving the mandate to the Civil Division of the AGC. Finally, it is recommended, too, that a dedicated task team be established within the Ministry of Defence, Justice and Security which will co-ordinate the activities of the prescribed investigators in confiscating dirty assets through administrative forfeiture.

The recommendations above are meant to reduce competition for resources between the agencies and to utilise the skills already at the disposal of the concerned authorities without the need for exponential investment in training.



## BIBLIOGRAPHY

### PRIMARY SOURCES

#### International Instruments

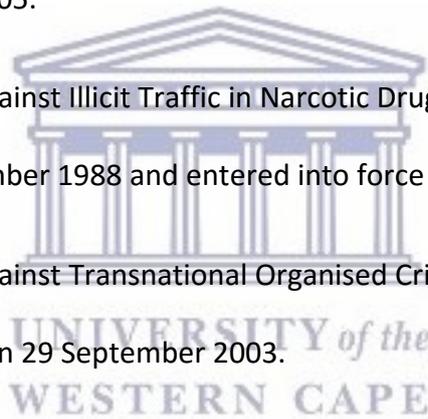
African Union Convention on Preventing and Combating Corruption adopted 11 July 2003 and entered into force on 5 August 2006.

Southern African Development Community Protocol against Corruption adopted 14 August 2001 and entered into force on 6 August 2003.

United Nations Convention against Corruption adopted on 31 October 2003 and entered into force on 14 December 2005.

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances adopted 19 December 1988 and entered into force on 11 November 1990.

United Nations Convention against Transnational Organised Crime adopted on 15 November 2000 and entered into force on 29 September 2003.



#### National Laws of Botswana

Arms and Ammunition Act (Chapter 24:01), Laws of Botswana.

Botswana Unified Revenue Service Act, Chapter 53:03, Laws of Botswana.

Corruption and Economic Crimes Act (Chapter 08:05), Laws of Botswana.

Constitution of Botswana, Volume 1, Laws of Botswana.

Constitution (Amendment) Act No.9 of 2005.

Criminal Procedure and Evidence Act (Chapter 08:02), laws of Botswana.

Counter-Terrorism Act, No. 24 of 2014.

Customs and Excise Duty Act (Chapter 50:01), Laws of Botswana.

Drugs and Related Substance Act (Chapter 63:04), Laws of Botswana.

Precious and Semi-Precious Stones Act (Chapter 66:03), Laws of Botswana.

Proceeds and Instruments of Crime Act No.28 of 2014.

Proceeds of Serious Crime Act No.19 of 1990.

State Proceedings (Civil Actions by or Against Government or Public Officers), (Chapter 10:01), Laws of Botswana.

Stock Theft Act (Chapter 09:01), Laws of Botswana.

Theft of a Motor Vehicle Act (Chapter 09:04), Laws of Botswana.

Wildlife Conservation and National Parks Act (Chapter 38:09), Laws of Botswana.

### **National Laws of Australia**

Criminal Amendment Act No.174 of 2011.

Proceeds of Crime Act No.85 of 2002.

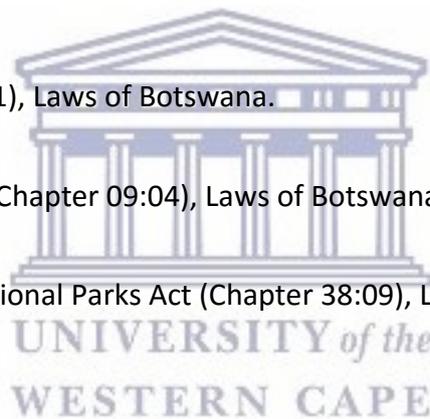
Proceeds of Crime Act No.87 of 1987.

### **National Laws of South Africa**

Drugs and Drugs Trafficking Act No.140 of 1992.

Prevention of Organised Crime Act No.121 of 1998.

Proceeds of Crime Act No.76 of 1996.



## **National Laws of the United Kingdom**

Crime and Courts Act 2013, (Chapter 22).

Criminal Justice Act 1988 (Chapter 33).

Drug Trafficking Offences Act 1986 (Chapter 32).

Misuse of Drugs Act 1971, (Chapter 38).

Proceeds of Crime Act of 2002 (Chapter 29).

Serious Organised Crime and Police Act 2005 (Chapter 15).

## **National Laws of the United States of America**

18 U.S.C 981 (b) (1).

### **Cases**

*David July v The State, Miscellaneous Criminal Application, MCHFT 000010-08, unreported.*

*DPP v Khato Civils and Others, Court of Appeal Criminal Appeal No.CLCGB-040-16, unreported.*

*Kgarebe v The Attorney General 2012 (2) BLR 730 (HC), 734.*

*Khanda's Express (Pty) Ltd v Botswana Unified Revenue Services, MAHFT 000182-10, unreported.*

*Moneth v The State 1989 BLR 188 (HC).*

*Nchindo & Others v The Attorney-General & Another 2010 (1) BLR (CA).*

*State v Sambona and Another 1978 BLR 28 (HC).*

*Trans Mokgadikgadi Investments (PTY) Ltd v Magwadza* 2007 (1) BLR 777 (HC), 781.

## SECONDARY SOURCES

### BOOKS

Bullock K & Lister S 'Post-Conviction Confiscation of Assets in England and Wales: Rhetoric and Reality' in King C and Walker C *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, (2016), Oxfordshire: Ashgate Publishing.

Casella SD 'An Overview of Asset Forfeiture in the United States' in Young SMN *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009), Cheltenham: Edward Elgar Publishing Limited.

Dayman S 'Is the patient expected to live? UK civil forfeiture in operation' in Young SMN *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009), Cheltenham: Edward Elgar Publishing Limited.

Gallant MM *Money Laundering and the Proceeds of Crime: Economic Crime and Civil Remedies*, (2005), Cheltenham: Edward Elgar Publishing Limited.

Goldsmith A *et al* 'Criminal Assets Recovery in Australia' in King C and Walker C *Dirty Assets: Emerging Issues in the Regulation of Criminal and Terrorist Assets*, (2016), Oxfordshire: Ashgate Publishing.

Grono S 'Civil Forfeiture-the Australian Experience' in Young SMN *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009), Cheltenham: Edward Elgar Publishing Limited.

Keightley R 'Asset Forfeiture in South Africa under the Prevention of Organised Crime Act 121 of 1998' in Young SMN *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime*, (2009), Cheltenham: Edward Elgar Publishing Limited.

Leong AVM 'Assets Recovery under the Proceeds of Crime Act 2002: the UK Experience' in Young SMN *Civil Forfeiture of Criminal Property: Legal Measures for Targeting the Proceeds of Crime* (2009), Cheltenham: Edward Elgar Publishing Limited.

Leong AVM *The Disruption of International Organised Crime: An Analysis of the Legal and Non-Legal Strategies*, (2007), Hampshire: Ashgate Publishing Limited.

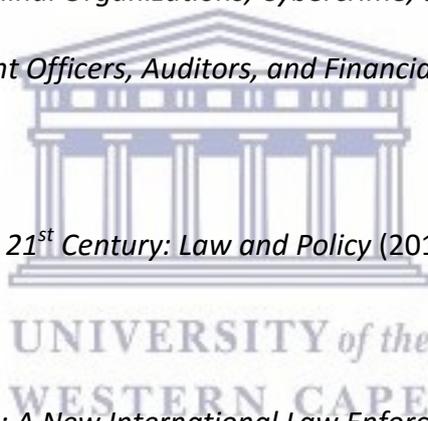
Richards JR *Transnational Criminal Organizations, Cybercrime, and Money Laundering: A Handbook for Law Enforcement Officers, Auditors, and Financial Investigators*, (1999), Washington, D.C: CRC Press.

Ryder N *Financial Crime in the 21<sup>st</sup> Century: Law and Policy* (2011), Cheltenham: Edward Elgar Publishing Limited.

Stessens G *Money-Laundering: A New International Law Enforcement Model* (2000), Cambridge: Cambridge University Press.

### **Reports and Guides**

Australian Government, Crimes Legislation Amendment Bill (No.2) 2011, Explanatory Memorandum, available at:  
<https://www.legislation.gov.au/Details/C2011B00045/Download> (accessed 1 September 2017).



Cabinet Office, Performance and Innovation Unit (PIU), Recovering the Proceeds of Crime, (2000), available at:

<http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/crime.pdf> (accessed 3 September 2017).

ESAAMLG, Mutual Evaluation Report for the Republic of Botswana 2007, available at

[http://www.esaamlg.org/reports/view\\_me.php?id=167](http://www.esaamlg.org/reports/view_me.php?id=167) (accessed 12 April 2017).

ESAAMLG, 2<sup>nd</sup> Round Mutual Evaluation Report for the Republic of Botswana 2017, available at

[http://www.esaamlg.org/userfiles/file/MER%20of%20Botswana\\_council\\_final\\_publication.pdf](http://www.esaamlg.org/userfiles/file/MER%20of%20Botswana_council_final_publication.pdf) (accessed 14 June 2017).

FATF, Best Practices on Confiscation (Recommendations 4 & 38) And a Framework for Ongoing work On Asset Recovery, available at: [http://www.fatf-](http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf)

[gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf](http://www.fatf-gafi.org/media/fatf/documents/reports/Best%20Practices%20on%20Confiscation%20and%20a%20Framework%20for%20Ongoing%20Work%20on%20Asset%20Recovery.pdf)

Government UK, National Crime Agency: A Plan for the Creation of a National Crime-Fighting Capability, available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97826/ncfa-creation-plan.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97826/ncfa-creation-plan.pdf) (accessed 29 September 2013).

G20 Working Group, Asset Recovery Key Principles/Key Elements for an Institutional Framework available at:

[http://www.bmjv.de/SharedDocs/Downloads/EN/G20/Nine%20Key%20Principles%20on%20Asset%20Recovery.pdf?\\_\\_blob=publicationFile&v=1](http://www.bmjv.de/SharedDocs/Downloads/EN/G20/Nine%20Key%20Principles%20on%20Asset%20Recovery.pdf?__blob=publicationFile&v=1) (accessed 30 August 2017).

Levi M & Osofsky L Investigating, Seizing and Confiscating the Proceeds of Crime, Police Research Group Crime, Detection and Prevention Series Paper 61, available at:

<http://webarchive.nationalarchives.gov.uk/20110218140812/http://rds.homeoffice.gov.uk/rds/prqpdfs/fcdps61.pdf> (accessed 3 September 2017).

The National Archives, Serious Crime 2007: Explanatory Notes, available at:

<https://www.legislation.gov.uk/ukpga/2007/27/notes/division/6/3/2> (accessed 29 September 2017).

Parliament of Australia, Background & Overview of the Commonwealth Proceeds of Crime Regime, available at:

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal and Constitutional Affairs/AFP Inquiry/report/c02](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/AFP_Inquiry/report/c02) (accessed 1 September 2017).

Parliament of Australia, Crimes Legislation Amendment Bill (No.2) 2011: Addendum to Explanatory Note, available at:

[http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4544\\_ems\\_81d0b363-6364-46ec-b3d2-e108f8d982e1/upload\\_pdf/360094addem.pdf;fileType=application%2Fpdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4544_ems_81d0b363-6364-46ec-b3d2-e108f8d982e1/upload_pdf/360094addem.pdf;fileType=application%2Fpdf)

(accessed 1 September 2017).

Parliament UK, House of Commons Home Affairs Committee, Proceeds of Crime: Fifth Report of Session 2016-17, available at:

<https://publications.parliament.uk/pa/cm201617/cmselect/cmhaff/25/25.pdf> (accessed 29 September 2017).

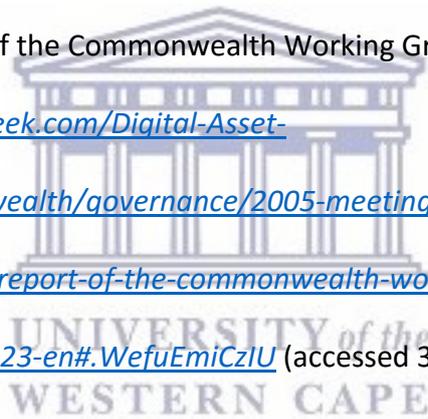
Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000F0503&from=EN> (accessed 30 August 2017).

Sharman T, Report on the Independent Review of the Operation of the Proceeds of Crime Act 2002, available at: [http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/aqd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\) 5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.PDF/\\$file/5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.pdf](http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/aqd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF) 5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.PDF/$file/5POCA+report+-+Sherman+review+-+PDF+version+-+2+Report.pdf.pdf) (accessed 1 September 2017).

The Commonwealth, Report of the Commonwealth Working Group on Asset Repatriation, available at [http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/governance/2005-meeting-of-commonwealth-law-ministers-and-senior-officials/report-of-the-commonwealth-working-group-on-asset-repatriation\\_9781848598843-23-en#.WefuEmiCziU](http://www.keepeek.com/Digital-Asset-Management/oecd/commonwealth/governance/2005-meeting-of-commonwealth-law-ministers-and-senior-officials/report-of-the-commonwealth-working-group-on-asset-repatriation_9781848598843-23-en#.WefuEmiCziU) (accessed 31 August 2017).

World Bank Group, Botswana Mining Investment and Governance Review 2016 available at <https://openknowledge.worldbank.org/handle/10986/25225> (accessed 14 June 2017).

UNODC Working Group of Experts on Technical Assistance, available at [http://www.unodc.org/documents/treaties/organized\\_crime/2013\\_CTOC\\_COP\\_WG2/CTOC\\_COP\\_WG.2\\_2013\\_3\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2013_CTOC_COP_WG2/CTOC_COP_WG.2_2013_3_E.pdf) (accessed 29 August 2017).



## Internet Sources

ARINSA, ARINSA Manual, available at <https://new.arinsa.org/mod/page/view.php?id=89>

(accessed 29 August 2017).

ARINSA, Annual Report 2016, available at

[https://new.arinsa.org/pluginfile.php/189/block\\_html/content/ARINSA%20ANNUAL%20REPORT%202016.pdf](https://new.arinsa.org/pluginfile.php/189/block_html/content/ARINSA%20ANNUAL%20REPORT%202016.pdf) (accessed 29 August 2017).

Botswana Government, Botswana Defence Force-Functions of the BDF, available at

<http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Botswana-Defence-Force-BDF/About-the-BDF1/Ranks-and-Insignia1/> (accessed 2 October 2017).

Botswana Government, Attorney General's Chambers, available at

<http://1govportal.imexsystems.net/en-gb/Citizens-Residents/Law%20and%20Justice/Pages/Attorney-General's-Chambers.aspx> (accessed 1 October 2017).

Botswana Government, Botswana Police Service-Mandate, available at

<http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Botswana-Police-Service-/About-the-BPS/Mandate/> (accessed 1 October 2017).

Botswana Government, Directorate on Economic Crime-Divisions,

available at <http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Divisions/> (accessed 1 October 2017).

Botswana Government, Directorate on Economic Crime-Investigation, available at

<http://www.gov.bw/en/Ministries--Authorities/Ministries/State-President/Department-of-Corruption-and-Economic-Crime-DCEC/Divisions/Investigation/> (accessed 1 October 2017).

Botswana Government, Ministry of Transport and Communication, available at

<http://www.gov.bw/en/Ministries--Authorities/Ministries/Ministry-of-Transport-and-Communications/Departments/Department-of-Geological-Surveys11/Department-of-Geological-Surveys/> (accessed 2 October 2017).

BBC News, *Botswana: Africa success story?*, available at

<http://news.bbc.co.uk/2/hi/africa/4318777.stm> (accessed 14 April 2017).

BURS, Customs and Excise, available at <http://www.burs.org.bw/index.php/about-us/divisions/customs-a-excise> (accessed 2 October 2017).

BURS, Mandate, available at <http://www.burs.org.bw/index.php/about-us/mandate> (accessed 2 October 2017).

CIPA, CIP Organisational Structure, available at:

<http://www.cipa.co.bw/content/organisational-structure> (accessed 3 October 2017).

Crown Prosecution Service, CPS Proceeds of Crime (CPSPoC), available at

[https://www.cps.gov.uk/your\\_cps/our\\_organisation/cpspoc.html](https://www.cps.gov.uk/your_cps/our_organisation/cpspoc.html) (accessed 29 September 2017).

Daily News, AG's Response to Article in Botswana Gazette newspaper, available at

<http://www.dailynews.gov.bw/news-details.php?nid=38269> (accessed 8 September 2017).



Facebook, BW Government, available at

<https://www.facebook.com/Botswana.Government/posts/1346481915434463:0> (accessed 14 June 2017).

Facebook, BWGovernment-Address by Morulaganyi Chamme, Acting Attorney-General of the Republic of Botswana On the Occasion of the Official Opening of the Legal Year 2017, available at <https://www.facebook.com/Botswana.Government/posts/1228527920563197:0> (accessed 15 April 2017).

Kuris G *Managing corruption risks: Botswana builds an anti-craft agency, 1994-2012*,

Innovations for Successful Societies available

[https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy\\_Note\\_ID233.pdf](https://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy_Note_ID233.pdf) (accessed 14 April 2017).

Mmegi Online news, July Parley to review mining laws, available at

<http://www.mmegi.bw/index.php?aid=69465&dir=2017/june/13> (accessed 14 June 2017).

Mmegi Online News, The losses expose the DPP sham available at

[http://www.mmegi.bw/index.php?sid=9&aid=380&dir=2011%2FDecember%2FFriday2&fb\\_commentid=10150435079048798\\_20117995#f2f0378ab5a890c](http://www.mmegi.bw/index.php?sid=9&aid=380&dir=2011%2FDecember%2FFriday2&fb_commentid=10150435079048798_20117995#f2f0378ab5a890c) (accessed 14 June 2017).

National Crime Agency, Recovering Criminal Assets, available at:

<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/recovering-criminal-assets>

(accessed 29 September 2017).



National Prosecuting Authority, Annual Report: National Director of Public Prosecutions 2016/17, available at: <https://www.npa.gov.za/sites/default/files/annual-reports/NDPP-Annual%20Report-2016-17.pdf> (accessed 31 August 2017).

National Prosecuting Authority, Taking the Profit Out of Crime- The Asset Forfeiture Unit, available at: <https://www.npa.gov.za/sites/default/files/files/FAQs%20on%20AFU.pdf> (accessed 31 August 2017).

Sechele LB, The Independence of the DPP: (A Case of Botswana), available at <http://www.justice.gov.bw/sites/default/files/General%20publications/The%20Independence%20of%20the%20DPP%20-%20A%20Case%20of%20Botswana.pdf> (accessed on 15 April 2017).

Sunday Standard Newspaper, DPP Bursting at the Seams, available at <http://www.sundaystandard.info/dpp-bursting-seams> (accessed 15 April 2017).

United States Department of Justice, Memorandum of Understanding- Investigative Authority & Procedure of Treasury & Justice Bureaus & the Postal Service under 18 U.S.C 1956 & 1957, available at: <https://www.justice.gov/usam/criminal-resource-manual-2186-memorandum-understanding-investigatory-authority-and-procedures> (accessed 29 September 2017).

United States Postal Inspection Service, Annual Report 2016, available at: [https://postalinspectors.uspis.gov/radDocs/2016%20AR%20FINAL\\_web.pdf](https://postalinspectors.uspis.gov/radDocs/2016%20AR%20FINAL_web.pdf) (accessed 29 September 2017).

The World Bank Group, Botswana Takes Action to Assess and Prevent Financial Crimes,  
available at

<http://www.worldbank.org/en/news/feature/2017/03/14/botswana-takes-action-to-assess-and-prevent-financial-crimes> (accessed 14 June 2017).

