

REPUBLIC OF NAURU

PROCEEDS OF CRIME (AMENDMENT) BILL 2023

EXPLANATORY MEMORANDUM

The *Proceeds of Crime (Amendment) Bill 2023* is a Bill for the *Proceeds of Crime (Amendment) Act 2023*.

This memorandum provides an explanation of the Bill and is only intended to indicate the general effect.

EXPLANATION OF CLAUSES

Clause 1 provides that, once enacted, the short title of the Bill will be the *Proceeds of Crime (Amendment) Act 2023*.

Clause 2 sets out that the commencement of the Bill once passed will be on the date it is certified by the Speaker.

Clause 3 is the enabling provision for the amendment of the *Proceeds of Crime Act 2004* ('Act').

Clause 4 provides for the amendment of Section 3. The crucial terms being amended are '*serious offence*' and '*tainted property*'.

The term '*serious offence*' is proposed to be amended to include *financial crime and criminal conduct* under the *Anti-Money Laundering and Targeted Financial Sanctions Act 2023*. It is also proposed to include offences under the *Counter Terrorism and Transnational Organised Crime Act 2004*. Therefore, any reference in the Act to the term '*serious offence*' includes offences under those respective legislation.

The term '*tainted property*' is proposed to be amended to include **criminal property** under the *Anti-Money Laundering and Targeted Financial Sanctions Act 2023* and **terrorist property** under the *Counter Terrorism and Transnational Organised Crime Act 2004*. Any reference in the Act to the term '*tainted property*' includes properties under those respective legislation.

The other amendments provided in this clause are in relation to amendments to provide for clarity. This Clause domesticates Recommendation 3 and 4 of the FATF standards.

Clause 5 inserts a new Section. Section 4A is inserted after Section 4. Section 4A provides for the definition of '*effective control*'. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 6 amends Section 16. The current Section 16 is deleted and substituted with a new provision which provides that a forfeiture order must not be made against any piece of land in the Republic. Nauruan land is owned by a family. They each hold the title to the land as tenants in common. Accordingly, the crime by a co-owner should not deprive the other co-owners of their land. In any event, it is highly unlikely that Nauruan land will be utilised for criminal conduct to constitute it as a criminal property.

Clause 7 provides for the amendment of Part 2. This Clause amends the Heading of Division 2 of Part 2 of the Act, by deleting ‘**Division 2—Forfeiture Orders**’ and substituting with ‘**Division 2—Forfeiture Orders for Criminal Property Upon Conviction**’. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 8 provides for the amendment of Section 17. This Clause inserts a new subclause (2A) after Section 17(2) to provide that the Supreme Court may infer in the absence of evidence to the contrary that certain property had been intended for use in, or had been used in or in connection with, the commission of serious offence if it had been in the person’s possession at the time of, or immediately after, the commission of the serious offence for which the person was convicted or the property was derived, obtained or realised as a result of the commission of the serious offence if it was acquired by the person before, during or within a reasonable time after the period of the commission of the serious offence for which the person was convicted. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 9 provides for the amendment of Section 20. It deletes from subsection (3) ‘6’ and replaces it with ‘12’. The intention is to increase the period by which a person with an interest in property that is about to be forfeited, may make an application to the court relating to such property. It also deletes from subsection (5) ‘*reasonable written notice*’ and substitutes it with ‘*notice within 14 days*’. The intention is to provide clarity.

Clause 10 provides for the amendment of Section 21. Subsection (2) is deleted and replaced with a new subclause (2) which provides that where a person is taken to have absconded in relation to an offence or is dead, the Court may order that the property or part of it be forfeited to the Republic.

Clause 11 provides for the amendment of Section 23. This amendment inserts into Section 23 a new paragraph (e) providing where property has been substantially diminished in value or rendered worthless. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 12 inserts a new Division 2A in Part 2. Division 2B, provides for forfeiture of restrained property upon conviction of criminal conduct. This Division inserts new Sections ‘**25A Forfeiting restrained property without a forfeiture order if a person has been convicted of criminal conduct,**’ ‘**25B Notice of date of forfeiture under this Part,**’ ‘**25C Making an extension order extending the period before property is forfeited,**’ ‘**25D Excluding property**

from forfeiture under this Part,’ and ‘25E Compensating for proportion of property not derived or realised from commission of any offence.’

Division 2B establishes a statutory forfeiture regime, which automatically forfeits certain restrained property owned or controlled by the offender upon conviction unless the offender is able to demonstrate the lawful source of funds used to acquire the property. These are new provisions.

The introduction of the additional forfeiture option is intended to meet more clearly the objectives of the *United Nations Convention Against Corruption* (Article 31, paragraph 8) and the *United Nations Convention on Transnational Organised Crime* (Article 12, paragraph 7). Nauru is a party to both Conventions.

This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 13 provides for the amendment of Section 27. This Clause inserts new subclauses (5) to (7) into Section 27.

Subclause (5) provides that where evidence is given at the hearing of the application that the value of the person’s property at any time after the commission of the serious offence exceeded the value of the person’s property before the commission of the offence, the Supreme Court must, subject to subclause (6) treat the value of the benefit as being not less than the amount of that excess.

Subclause (6) provides that where, after evidence of the kind referred to in subclause (5) is given, the person satisfies the Supreme Court that the whole or part of the excess was due to causes unrelated to the commission of the serious offence, subclause (5) will not apply to the excess or that part.

Subclause (7) provides for the clarification of terms. The term **‘tainted property’** includes property that is held by a person but under the effective control of another person and **‘derives an advantage’** includes reducing or avoiding a cost or loss.

This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 14 provides for the amendment of Section 28. This Clause inserts after subsection (3) a new subclause (3A). The proposed subclause provides that where the person tenders to the Supreme Court a statement as to any matters relevant to determining the amount that might be realised at the time the pecuniary penalty order is made, and the Secretary for Justice accepts to any extent any allegation in the statement, the Supreme Court may, for the purposes of that determination, treat the acceptance of the Secretary for Justice as conclusive of the matters to which it relates.

Clause 15 provides for the amendment of Section 34. This Clause deletes Section 34 and substitutes it with a new Section 34. It sets out the circumstances in which a pecuniary order can be discharged. This Section 34 is drawn from what was previously Section 72 of the *Anti-Money Laundering Act 2008*.

This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 16 provides for the amendment of Section 35. Section 35 sets out the grounds on which a police officer may apply for a warrant to search a person, land or premises for criminal property or terrorist property. It also provides for associated processes related to the issuance and execution of such a warrant, and the powers that can be exercised by a police officer, including for the seizure of property.

This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 17 inserts a new Section 35A. Section 35A provides for search and seizure without a warrant. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 18 provides for the amendment of Section 36. This clause amends the Section heading by deleting it and substituting it with **‘Police may seize any tainted property not included in the warrant’**. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 19 inserts a new Section 36A. It sets out specific duties of a police officer who seizes any property under this Part, namely to detain the property seized, to make a written record and to take reasonable care to ensure the preservation of the property. This proposed Section is drawn from what was previously Section 42 of the *Anti-Money Laundering Act 2008*. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 20 provides for the amendment of Section 37. This clause inserts new subclause (3). The court shall not make an order for the return of the property where the property becomes part of the evidence for the purposes of a proceeding relating to any serious offence. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 21 amends Section 38 of the Act to extend the period for which seized property may be retained from 48 hours to 28 days where no information has been laid. The purpose of extending the time frame is to allow sufficient time for police to advance their investigation, noting that 48 hours was an unreasonable time frame to expect responses to complex local and international enquiries including any required access to technical or specialist assistance.

Clause 22 amends Section 39 of the Act by deleting ‘14 days’ from subsection (1)(b) and substituting a longer time period of ‘28 days’. The purpose of extending the time frame is to allow sufficient time for police to advance their investigation, noting that 14 days was an unreasonable time frame to expect responses to complex local and international enquiries

including any required access to technical or specialist assistance necessary to prepare and progress a restraining or forfeiture order application.

Clause 23 amends Section 44. This Clause inserts new subclause (3). The court shall not make an order for the return of the property where the property becomes part of the evidence for the purposes of a proceeding relating to any serious offence. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 24 provides for the amendment of Section 48. This Clause deletes Section 48 and substitutes it with a new Section 48. This proposed Section 48 is a revision of the deleted Section 48 and what was previously Section 54 of the *Anti-Money Laundering Act 2008*. It sets out the circumstances for, and processes pertaining to, an application for a restraining order against any realizable property held by the defendant. It also includes a restraining order against any specified realizable property held by a person other than the defendant or any terrorist property. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 25 repeals Section 49. There is no need for this provision as there is already provided for in the Bill, a mechanism that provides for a person with an interest in forfeited or restrained property to make the necessary application to the Court.

Clause 26 provides for the amendment of Section 50. This Clause amends Section 50 to include additional matters required for the application of a restraining order. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 27 provides for the amendment of Section 51. This clause deletes Section 51 and substitutes it with a new Section 51. The proposed Section 51 provides that for the purposes of making an order under Section 50 or any other Parts of the *Proceeds of Crime Act 2004*, the Republic is not required to give an undertaking as to damages or cost. The Republic has the treasury fund. The Republic has the funds to pay damages and cost in the event that became necessary. There is no need for the undertaking as it will be an unenforceable order. Execution of judgments and orders against the Republic for monetary sums is permissible through a special process. The Republic is always in a position to pay the damages and costs.

Clause 28 provides for the amendment of Section 57. This Clause deletes the heading to Section 57 which is '*Court may revoke restraining order*' and substitutes it with '*Variation, Discharge or dissolution of restraining order on provision of security or undertakings*'. The change is intended to reflect better the effect of the Section. It also provides a new subclause (3) which provides that a person who has an interest in property in respect of which a restraining order was made may at any time apply to the Supreme Court for an order. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 29 inserts a new Subsection 84A, which sets out the powers of a police officer to search for and seize documents that are relevant to locating property. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 30 provides for the amendment of Section 85. This Clause deletes Section 85 of the Act and substitutes it with a new Section 85. This proposed Section 85 is a revision of the deleted Section 85 and what was previously Section 50 of the *Anti-Money Laundering Act 2008*. It sets out the circumstances in which a police officer may make an application to a Judge for a search warrant. It also provides the requirements relating to the application and issuance of such a warrant and a police officer's powers of seizure if, during the course of searching under the warrant, a police officer finds a property-tracking document that the police officer believes on reasonable grounds to relate to other criminal conduct or to terrorist property or any thing that the police officer believes on reasonable grounds will afford evidence as to the commission of criminal conduct. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 31 provides for the amendment of Section 86. This Clause deletes Section 86 and substitutes it with a new Section 86. The proposed Section 86 is drawn from what was previously Section 51 of the *Anti-Money Laundering Act 2008*. The new Section 86 specifies that the provisions of Division 4 apply with appropriate modifications if a foreign State requests assistance to locate or seize property that is suspected to be criminal property or terrorist property. That is, property in respect of an offence within the foreign jurisdiction. The provisions apply where the Director for Public Prosecutions has under Part 8 authorised the giving of assistance to the foreign State. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 32 provides for the amendment of Section 87. This Clause deletes Section 87 and substitutes it with new Section 87 regarding the application for and issuance of monitoring orders. This proposed Section 87 is a revision of the deleted Section 87 and what was previously Section 52(1) to (3) of the *Anti-Money Laundering Act 2008*. This Clause domesticates Recommendations 4 and 38 of the FATF Standards.

Clause 33 provides for the amendment of Section 96. This Clause deletes Section 96 and substitutes it with a new Section 96. This proposed Section 96 is a revision of the deleted Section 96. It relates to procedures concerning cross-border movement of currency and certain other items, and applies to any person who is about to leave or who has arrived in the Republic of Nauru with more than \$10,000 in cash, bearer negotiable instruments, precious metals or precious stones. This Clause domesticates Recommendations 4, 32 and 38 of the FATF Standards.

Clause 34 inserts new Sections 96 and 96B Section 96A relates to the cross-border movement of currency and certain other items, and applies to the physical transportation in and out of the Republic of Nauru of currency or such other items. This ensures that the declaration obligation

contained in Section 96 for travellers is also applied to in-bound and out-bound physical transportation of cash, bearer negotiable instruments, precious metals and precious stones worth \$5,000 or more, conducted through cargo or the mail.

Section 96B sets out requirements for the authorised officer to report the matter in writing to the Financial Intelligence Unit within 24 hours of forming a suspicion that a declaration under Section 96 or Section 96A should have been made but was not, or that a false or misleading declaration was made.

This Clause domesticates Recommendations 4, 32 and 38 of the FATF Standards.

Clause 35 provides for the amendment of Section 97. This Clause deletes Section 97 of the Act and substitutes it with a new Section 97. This proposed Section 97 is a revision of the deleted Section 97. It sets out the circumstances in which an authorised officer may seize and detain any cash, bearer negotiable instrument (also known as negotiable bearer instruments) or precious metals or stones that are being imported into or exported from the Republic. This Clause domesticates Recommendations 4, 32 and 38 of the FATF Standards.

Clause 36 provides for the amendment of Section 98. This Clause amends Section 98(1) of the Act by extending the timeframe from ‘48 hours’ to ‘28 days’. The purpose is to allow sufficient time for the authorised officer to undertake enquiries concerning the seized currency or bearer negotiable instruments, noting that 48 hours was an unreasonable time to expect responses to what can often be complex local and international enquiries including any required access to technical or specialist assistance.

Clause 37 provides for the amendment of Section 107 by deleting it and substituting with a new Section 107. The proposed Section 107 provides that the Secretary for Justice may in accordance with the rules of the court appeal any order made under any Part of the Bill or made under any provision of the Bill. This Clause domesticates Recommendations 4, and 38 of the FATF Standards.

Clause 38 provides for new Sections 108 and 109.

The proposed Section 108 provides for the Application of the Bill once enacted. It provides that the Bill applies to the process, procedure and enforcement of the confiscation, forfeiture, determination of competing interest of persons or disposal of criminal property or terrorist property under the *Anti-Money Laundering and Targeted Financial Sanctions Act 2023* and *Counter Terrorism and Transnational Organised Crime Act 2004*. The intention is to ensure that the required proceedings under the Act apply to the *Anti-Money Laundering and Targeted Financial Sanctions Act 2023* and *Counter Terrorism and Transnational Organised Crime Act 2004*.

Section 109 provides for the Regulations making power. This Section was formerly Section 107 under the Act. It provides clarity as to the scope of the regulations that may be made for the purposes of the Act.

This Clause domesticates Recommendations 4 and 38 of the FATF Standards.