

MALAWI GOVERNMENT

**Act
No.11 of 2006
I assent**

President

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An Act to enable the unlawful proceeds of all serious crime and terrorist financing to be identified, traced, frozen, seized and eventually confiscated; to establish a Financial Intelligence Unit for the better prevention, investigation and prosecution of money laundering, terrorist financing and other financial and serious crime, to require financial institutions to take prudential measure to help combat money laundering and terrorist financing; and to provide for matters connected with or incidental to the foregoing

ENACTED by the parliament of Malawi as follows-

PART I – PRELIMINARY

1.-(1) This Act may be cited as the Money Laundering Proceeds of Serious Crime and Terrorist Financial Act, 2006.

Short title and,
commencement

(2) This Act shall come into operation on such date, being a date not earlier than the date of publication of the Act in the *Gazette* as the Minister may appoint by notice published in the *Gazette*.

2. In this Act, unless the context otherwise requires–
“account” means any facility or arrangement by which a financial institution does any one or more of the following –

Interpretation

(a) accepts deposit of currency;

(b) allows withdrawals of currency or transfers of currency Into or out of the account,

(c) pays cheques or payment orders drawn on a financial institution by, or collects cheques or payment orders on behalf of, a person;

(d) supplies a facility or arrangement for a safety deposit box;

“act or terrorism” means-

(a) an act or omission, whether committed in or outside Malawi, which constitutes an offence within the scope of a counter-terrorism convention; or

(b) an act, or threat of action in or outside Malawi which –

(i) involves serious bodily harm to a person,;

(ii) involves serious damage to property;

(iii) endangers a person’s life;

(iv) creates a serious risk to the health or safety of the public or a section of the public;

(v) involves the use of firearms or explosives;

(vi) involves releasing into the environment or any part therefore or distributing or exposing the public or any part therefore to any dangerous, hazardous, radioactive or harmful substance, any toxin chemical; or any microbial or other biological agent or toxin;

(vii) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilizes, transportation or other essential infrastructure,

(viii) is designed or intended to disrupt the provision of essential emergency services such as police, civil, defence or medical services,

(ix) involves prejudice to national security or public safety;

(x) involves participating in the activities of a terrorist group, including the supplying of information or material resource, or the funding of its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group,

and is intended, or by its nature and context, may reasonably be regarded as being intended, to intimidate the public or a section of the public, or compel a government or an international organization to do, or refrain from doing, an act, or seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization, and for the purpose of advancing a political, ideological, or religious cause, but does not include an act which disrupts any services, and is committed in pursuance of a protest, demonstration or stoppage of work, as long, and as long only, as the act is not intended to result in any harm referred in this paragraph;

“administrator” means a person appointed under section 81(2) (b) (i) or section 90(2);

“authorized officer” means a person in class of persons designated as such by the Minister;

“beneficial owner” means a person who ultimately owns or controls a customer or the person on whose behalf a transaction is being conducted, and includes any person who exercises effective control over a legal person or arrangement,

“business relationship” means any arrangement or proposed arrangement between a person and a financial institution where –
(a) the purpose or effect of the arrangement is to facilitate an occasional, frequent, habitual or regular course of dealing between the institution; and
(b) the total amount of any payment to be made by any person to any other in the course of that arrangement is not known or capable of being ascertained at the time the arrangement is made;

“collective investment scheme” means a scheme, in whatever form, in pursuance of which, members of the public are invited or permitted to invest money or other assets in a portfolio, and which scheme has the following characteristics –
(a) two or more investors contribute money or other assets to hold a participatory interest in a portfolio of the scheme through share, units or any other form of participatory interest; and
(b) the investors share the risk and the benefit of investment in proportion to their participatory interest in a portfolio of a scheme or any other basis determined in the deed;

“competent authority” means the Director of Public Prosecutions, and includes any person authorized by him in that behalf;

“counter –terrorism convention” means any of the United Nations Counter-Terrorism Conventions set out in the First Schedules,

*First
Schedule*

“court” means the ordinary courts in Malawi where civil or criminal proceedings may be instituted;

“currency” means the coin and paper money of Malawi or of a foreign country that is designated as legal tender and which is customarily used accepted as medium of exchange in the country of issue;

“customer,” in relation to a transaction or account, includes-

- (a) the person in whose name transaction or account is arranged, opened or undertaken;
- (b) a signatory to a transaction or account,
- (c) any person to whom a transaction has been assigned or transferred;
- (d) any person who is authorized to conduct a transaction, or
- (e) such other person as the Minister may by Notice published in the *Gazette* prescribe,

“defendant” means a person charged with a serious crime, whether or not he or she has been convicted of the offence, and includes, in the case of proceedings for a restraining order under *Division 6* of Part IV, a person who is about to be charged with a serious offence;

“Director” means the Director of the Financial Intelligence Unit appointed pursuant to section 13;

“document” means any record of information, and includes-

- (a) anything on which there is writing,
- (b) anything on which there marks, figures, symbols, or perforations having meaning for persons qualified to interpret them;
- (c) anything from which sounds, images or writing can be produced, with or without the aid of anything else; and
- (d) a map, plan, drawing, photograph or similar thing;

“financial institution” means any person carrying on the following businesses or activities, including but not limited to a financial institution licensed under the Banking Act -

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- (a) acceptance of deposits and other repayable funds from

the public;

- (b) lending, including consumer credit, mortgage credit, factoring (with or without recourse) and financing of commercial transactions;
- (c) financial leasing,
- (d) money transmission services;
- (e) issuing and administering means of payment, such as credit cards, traveler`s cheques and banker`s drafts;
- (f) guarantee and commitments,
- (g) trading for own account or for account of customers in money market instruments such as cheques, bills, and certificates of deposit, foreign exchange, financial futures and options, exchange and interest rate instruments, and transferable securities,
- (h) underwriting share issues and participation in such issues;
- (i) advice to undertakings on capital structure, industrial strategy and related questions, and advice services relating to mergers and the purchase of undertakings,;
- (j) money –broking;
- (k) portfolio management and advice;
- (l) safekeeping and administration of securities;
- (m) safe custody services;
- (n) gambling house;
- (o) casino and lottery; and
- (p) buying or selling of gold bullion;
- (q) a trust or company services provider not otherwise covered by this definition, which as a business, provides any of the following services to third parties as covered under the

Cap.5.02 Trustee Act –

- (i) acting as a formation agent of legal persons;
- (ii) acting as, or arranging for another person to act as, a director or secretary of a company, a partner of a partnership, or a similar position in relation to other legal persons,
- (iii) providing a registered office, business address or accommodation, correspondence or administrative address for a company, a partnership or any other legal person or arrangement,
- (iv) acting as, or arranging for another person to act as a trustee of an express trust,

(v) acting as, or arranging for another person to act as, a nominee shareholder for another person;

(r) legal practitioners, notaries, other independent legal professionals and accountants when they prepare for or carry out transactions for their client concerning the following activities-

- (i) buying and selling of real estate;
- (ii) managing of client money, securities or other assets;
- (iii) management of bank, savings or securities accounts
- (iv) organization of contributions for the creation, operation or management of companies;
- (v) creation, operation or management of legal persons or arrangements, and buying and selling of business entities.

(s) dealing in real estate, when the person dealing is involved in transactions for a client concerning the buying and selling of real estate;

(t) dealing in precious metals stone, when the person dealing engages in any cash transaction with a customer equal to or above the applicable designated threshold as the Minister may prescribe by notice published in the Gazette,

(u) such other business as the minister may prescribe by notice published in the Gazette;

“Financial Intelligence Unit means the Financial Intelligence Unit established under section 11;

“confiscation” means the permanent deprivation of property by order of a court other competent authority;

“gift” includes any transfer of property by a person to another person directly or indirectly;

- (a) after the commission of a serious crime by the first person;
- (b) for a consideration the value of which is significantly less than the value of the consideration provided by the first person, and
- (c) to the extent of the different between the market value of the property transferred and the consideration provided by the transferee,

“interest,” in relation to property, means-

- (a) a legal or equitable interest in the property;
- (b) a right, power or privilege in connection with the property;

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“money laundering” means conduct which constitutes an offence as described under section 35;

“police officer” means any police officer of or above the rank of Inspector,

“proceedings” means any procedure conducted by or under the supervision of a judge or judicial officer, however described, in relation to any alleged or proven offence, or property derived from such offence, and includes an inquiry, investigation, preliminary or final determination of facts,

“proceeds of crime” means any property derived or realized directly or indirectly from a serious crime, and includes, on a proportional basis, property into which any property derived or realized directly from the offence was later successively converted, transformed or intermingled, as well as income, capital, or other economic gains derived or realized from such property at any time since the commission of the offence;

“property” means currency and any asset of every kind, whether corporeal or incorporeal, moveable or immovable, whether situated in Malawi or elsewhere and whether tangible or intangible, and includes any legal or equitable interest in any such property;

“property of, or in the possession or control of any person” include any gift made by that person,

“Public Appointments Committee” means the public Appointment committee of the National Assembly established under section 56(7) of the Constitution;

“public official” means person holding prominent public positions in Malawi or a foreign country such as heads of state or government, politicians on the nation level, senior government, judicial, military or party officials on the national level, or senior executives of state – owned enterprises of national importance, or individual or undertakings identified as having close family ties or person or business connection to the aforementioned persons,

“realizable property” means –

- (a) any property held by a defendant;
- (b) any property possessed by a person to whom a defendant has directly or indirectly made gift caught by this Act;

“serious crime” means an offence against a provision of-

- (a) any written law in Malawi, for which the maximum penalty is death or imprisonment for life or other deprivation of liberty for a period of not less than 12 months, and includes money laundering and terrorist financing;

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(b) a law of a foreign state, in relation to acts or omissions which, had they occurred in Malawi, would have constituted a offence for which the maximum penalty is death, or imprisonment for life or other deprivation of liberty for a period of not less than 1 months, and include money-laundering and terrorist financing;

“supervisory authority” means the Reserve Bank of Malawi or any other authority having oversight over a financial institution or profession;

“tainted property” means-

- (a) property intended for use in, or used in or in connection with the commission of a serious crime; or
- (b) proceeds of crime,

“terrorist financing” means directly or indirectly providing or accumulating funds or other goods, or attempts to do so, with the intent that the funds be used or knowledge that the funds will be used in whole or in part to commit-

- (a) an act constituting an offence in regard to and in accordance with the definition of one treaties listed in the appendix to the international convention for the suppression of the Financing of Terrorism to which Malawi is a part, or
- (b) any act intended to cause the death of or serious bodily injury to any civilian or any other person not directly involved in a situation of armed conflict if, by virtue its nature or context, such act is intended to intimidate a population or compel a government or international organization to perform or refrain from performing an act of any kind;

“terrorist group” means-

- (a) an entity that has one of its activities and purposes, the committing of, or the facilitation of the commission of, a terrorist act; or ;
- (b) any other entity so specified by the Minister by notice Published in the *Gazette*;

“terrorist property” means-

- (a) proceeds from the commission of a terrorist act;
- (b) money or other property which has been, or is likely to be used to commit a terrorist act; or
- (c) money or other property which has been, is being, or is likely to be used by a terrorist group;

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“unit trust” means any arrangement made for the purpose or having the effect of providing, for a person having funds available for investment, facilities for the participation by the person as a beneficiary under a trust, in any profits or income arising from the acquisition, holding, management or disposal of any property pursuant to the trust;

Meaning of charge in relation to a serious crime

3. Any reference in this Act to a person being charged or about to be charged with a serious crime is reference to procedure, however described, in Malawi or elsewhere by which criminal proceedings may be commenced.

Meaning of conviction in relation to a serious crime

4. For the purposes of the this Act, a person shall be taken to be convicted of a serious crime if

- (a) the person is convicted of the offence;
- (b) the person is charged with, and found guilty of, the offence but is discharged without any conviction being recorded,
- (c) a court, with the consent of the convicted person, takes the offence, of which the person has not been found guilty, into account in passing sentence on the person for another serious crime

Meaning of quashing of conviction

5. For the purpose of this Act, a conviction of a person for a serious crime shall be quashed in any case –

- (a) Where section 4 (a) applies, if the finding of guilt is quashed or set a side,
- (b) Where section 4 (b) applies, if the finding of guilt is quashed or set a side,
- (c) Where section 4 (c) applies, if either –
 - (i) the conviction of the person for the other offence referred to in that section, is quashed or set a side,
 - (ii) the decision of a court to take the offence into account in passing sentence for that other offence is quashed or set a side,

Meaning of value of property, etc

6.-(1) Subject to subsections (2) and (3), for the purpose of this Act, the value of property, other than cash, in relation to any person holding the property is –

- (a) its market value of the property, or
- (b) where any other person holds an interest in the property, the market value of the beneficial interest of first mentioned person in the property less the amount required to discharge any encumbrance, other than a charging order, on that interest.

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(2) Subject to section 8(2), reference in this Act to the value, at any time referred to in subsection (3) as “the material time “of a gift or of any payment or reward, are reference to-

- (a) the value of the gift, payment or reward to the recipient when he or she received it, adjusted to take account of subsequent changes in the value of money, or
- (b) where subsection (3) applies, the value there in mentioned, whichever is the greater.

(3) Subject to section 8(2), if at the material time the recipient holds-

- (a) the property which he or she received (not being cash,) or
- (b) property which in whole or in part indirectly represents, in the recipient hands the property while he or she received,

the value referred to in subsection (2) (b) is the value to him or her at the material time of the property mentioned in subsection (2) (a) or, as the case may be, subsection 2 (b) so far as it represents the property which he or she received, but disregarding in either case any charging order.

7. For purposes of this Act, dealing with property held by any person includes –

Meaning of dealing with property

- (a) where the property is a debt owed to the person, making a payment to any person in reduction or full settlement of the amount of the debt,
- (b) making or receiving a gift of the property, or
- (c) removing the property from Malawi.

8.- (1) A gift is caught by this Act if –

Meaning of gift caught by this Act

(a) it was made by the defendant at any time after the commission of the serious crime, or if more than one, the earliest of the serious crime, or if more than one, the earliest of the offences, to which the proceedings for the time being relate, and

(b) the court consider it appropriate in all the circumstance to take the gift into account.

(2) For the purpose of this Act, the circumstance in which the defendant is to be treated as making a gift include those where the defendant transfers property to another person, directly or indirectly, for a consideration, the value of which is significantly less than the value of the consideration provided by the defendant, and the provisions of sections 6 (2) and (3) shall apply as if the defendant had made a gift of such share in the property as bears to

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	the whole property the same proportion as the difference between the values referred to under this subsection of the consideration provided by the defendant
Meaning of derived in benefit	9. A reference to a benefit derived or obtained by or otherwise accruing to, a person includes a reference to a benefit derived or obtained by, or otherwise accruing to, another person at the request or direction of the first person.
Meaning of benefiting from the proceeds of serious crime	10. For the purpose of this Act – (a) a person has benefited from an offence if the person has at any time received any payment or other reward in connection with, or derived any pecuniary advantage from, the commission of a serious crime, whether committed by that person or another person; (b) proceeds of crime of a person are any payments or other awards received by him or her in connection with, and any pecuniary advantage derived by him or her at the time from, the commission of a serious crime, and (c) the value of the proceeds of crime of a person is the aggregate of the values of the payments, rewards or pecuniary advantages received by him or her in connection with, or derived by him or her from, the commission of a serious crime.

PART II – ESTABLISHMENT OF FINANCIAL INTERLLIGENCE UNIT

Financial Intelligence Unit	11.-(1) There is hereby established a body to be known as the Financial Intelligence Unit (in this Act referred to as the “Financial Intelligence Unit”) which shall be an autonomous central national agency, having perpetual succession and a common sea with power to enter into contracts, responsible for receiving, requesting, analyzing and disseminating to competent authorities disclosures of financial information as required under this Act in order to counter money laundering and financing of terrorism. (2) The Financial Intelligence Unit – (a) shall receive, analyze and assess report of suspicious transactions issued by financial institutions pursuant to section 28, (b) shall send any report referred to in paragraph (a) to the appropriate law enforcement authorities and, the supervisory authorities if, on the basis of its analysis and assessment, the Financial Intelligence Unit has determined that there is an element of money laundering or financing of terrorism;
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(c) may enter the premises of any financial institution during ordinary business hours to inspect any record kept pursuant to section 28, and ask any question relating to such record, make notes and take copies of whole or any part of the record,

(d) shall send to the appropriate law enforcement authorities, any information derived from an inspection carried out pursuant to paragraph (c), if it gives the Financial Intelligence Unit reasonable grounds to suspect that a transaction involves proceeds of crime or terrorist financing,

(e) may instruct any financial institution to take such steps as may be appropriate to facilitate any investigation anticipated by the Financial Intelligence Unit,

(f) may compile statistics and records, disseminate information within Malawi or elsewhere, make recommendations arising out of any information received, issue guidelines to financial institutions and advise the Minister accordingly,

(g) shall create training requirements and provide such training for any financial institution in respect of transaction record –keeping and reporting obligations provided for in sections 27 and 28,

(h) may consult with any relevant person, institution or organization for the purposes of exercising its powers or duties under paragraph (e),(f) or (g),

(i) shall not conduct any investigation into money laundering or terrorist financing other than for the purpose of ensuring compliance by a financial institution with the provisions of this Act,

(j) may extend assistance to foreign jurisdictions with respect to property tracking, monitoring and confiscation orders.

(k) shall have the authority to request information from any financial institution, any supervisory agency and any law enforcement agency for purposes of this Act,

(l) may provide training programs for financial institutions in relation to customer identification, record keeping and reporting obligations and the identification of suspicious transactions,

(m) may periodically provide feedback to financial institutions and other relevant agencies regarding outcomes relating to the reports or information given under the Act,

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(n) may conduct research into trends and developments in the area of money laundering and financing of terrorism and improved ways of detecting, preventing and deterring money laundering and terrorist financing,

(o) may educate the public and create awareness on matters relating to money laundering or terrorist financing,

(p) may disclose any report, any information derived from any report or any other information it receives to an institution or agency of a foreign state or of an international organization established by the governments of foreign states that has powers and duties similar to those of the Financial Intelligence Unit as set out in section 12, if on the basis of its analysis and assessment, the Financial Intelligence Unit has reasonable grounds to suspect that a report or information would be relevant to investigating or prosecuting a money laundering offence or terrorist financing,

(q) pursuant to a memorandum of understanding enter into any agreements or arrangements with any domestic government institution or agency regarding the exchange of information,

(r) may require the police and other investigative or prosecutorial bodies to report progress and outcomes on matters referred to them, and

(s) may perform such other acts as may be necessary to fulfill the objectives of the Financial Intelligence Unit.

Disclosure to
foreign
institutions and
agencies

12. The Financial Intelligence Unit may disclose any report or information as set out under section (2) (p) to an institution or agency of a foreign state or of an international organization or body or other institution or agency established by the governments of foreign states that has powers and duties similar to those of the Financial Intelligence Unit –

(a) on such terms and conditions as are set out in the agreement or arrangement between the Financial Intelligence Unit and that foreign state or international organization regarding the exchange of such information, or

(b) where such an agreement or arrangement has not been entered into between Financial Intelligence Unit and that foreign state or international organization or body, on such terms and conditions as may be agreed upon by Financial Intelligence Unit and the institution or agency at the time of disclosure, which terms and conditions shall include the stipulation that the report or information shall be used for intelligence purposes only and be treated in a confidential manner and not be further disclosed without the express consent of the Financial Intelligence Unit.

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13.-(1) There shall be Director of the Financial Intelligence Unit (in this Act and otherwise referred to as the “Director”) who shall be appointed for a five year renewable term by the President, upon such terms as may be specified in the instrument of appointment

Appointment
and
qualifications
of Director of the
Financial
Intelligence
Unit

(2) The appointment of the Director shall be subject to the approval of the Public Appointments Committee.

(3) The Director shall be the chief executive officer of the Financial Intelligence Unit and shall perform such functions and duties, and exercise powers, as are conferred upon him or her by this Act or any other written law.

(4) A person shall not be appointed or remain Director who-

(a) is a member of parliament, or

(b) is a director, officer or servant of, has a controlling interest in any financial institution.

(5) The Director shall be a person of recognized qualifications, integrity and experience in financial or legal matters or law enforcement with financial investigative background.

(6) The Director may at any time by notice in writing to the Minister resigns his office.

(7) The Director may delegate to any person, subject to any terms and conditions that the Director may specify, any power, duty or function conferred on the Director under this Act.

(8) In the event of the absence or incapacity of the Director, or if the office of Director is vacant, the president may appoint a qualified person to hold office instead of the Director for a term of not more than six months, and the person shall, while holding that office, have all of the powers, duties and functions of the Director under this Act.

(9) If the President is satisfied that the Director –

(a) is incapacitated by physical or mental illness, or

(b) has become bankrupt or made arrangement with his creditors, or

(c) is otherwise unable or unfit to discharge the function of director,

the President may declare the office of the Director vacant and shall notify the fact in such manner as the President thinks fit, and thereupon that office shall become vacant.

14.-(1) The Director may appoint and employ, at such remuneration and subject to such terms and conditions as the Minister may approve, suitably qualified and experienced persons as officers and employees of the Financial Intelligence Unit, for the purpose of ensuring the proper performance of its functions and the attainment of its objectives.

Appointment
of other staff
of the
Financial
Intelligence
Unit

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- (2) The other staff of Financial Intelligence Unit shall include at least one legal practitioner and another person with a sound financial, economic or accounting training and experience.
- Removal from office **15.**-(1) The President may, subject to the approval of the Public Appointments Committee, remove the Director from office only on the grounds of misconduct, incapacity or incompetence.
- (2) The President may suspend the Director from office, pending –
- Confidentiality (a) the determination of any inquiry as to whether grounds of misconduct, incapacity or incompetence exist, or
(b) an investigation of alleged violation of section 16.
- Second Schedule **16.**-(1) The Director and every staff member of the financial Intelligent Unit shall –
- (a) before they begin to perform any duties under this Act, take and subscribe before a commissioner of oaths such oath of Confidentiality in the form set out in the Second Schedule, and
- (b) maintain during and after their relationship with the Financial Intelligence Unit the confidentiality of any matter relating to the performance of their duties.
- (2) Any person who contravenes this section commits an offence and on conviction, shall be liable to a fine of K100, 000 and to imprisonment for two years.
- Disclosure of Information **17.** (1) This section applies to a person while the person is or after the person ceases to be a Director, officer, employee or agent of the Financial Intelligence Unit.
- (2) Except for the purpose of the performance of his or her duties or the exercise of his or her functions under this Act or when lawfully required to in subsection (1) shall not disclose any information or matter which has been obtained by him or her in the performance of his or her duties or the exercise of his or her functions under this Act or which he or she has knowledge except for one or more of the following purpose-
- (a) the detection, investigation or prosecution of an unlawful activity, a money laundering offence or an offence of financing of terrorism, or
- (b) the enforcement of this Act.
- (3) The Director, or an officer or employee or agent of the Financial Intelligence Unit shall not disclose any information that would directly or indirectly an individual who provided a report or information to the Financial Intelligence Unit, or a person or an entity about whom a report information was provided under this Act.

Money Laundering, Proceeds of Serious Crime and Terrorist Financing 19

18.-(1) The funds of the Financial Intelligence Unit shall consist of –

Accounts of
the Financial
Intelligence
Unit

- (a) money appropriated annually by parliament for the purpose of the Financial Intelligence Unit,
- (b) any government grants made to it, and
- (c) any other money legally acquired by it, provided that the Financial Intelligence Unit may accept donations only with prior approval of the Director.

(2) The Financial years of the Financial Intelligence Unit shall be a period of twelve months commencing 1st July and ending 30th June the following year.

19. The Financial Intelligence Unit shall prepare for each new financial year an annual budget of revenue and expenditure which shall be submitted to the Minister at least three months prior to the commencement of the financial year.

Annual
budget of the
Financial
Intelligence
Unit

20.-(1) The Financial Intelligence Unit shall be subject to examination and audit by the Auditor –General

Auditor of the
Financial.
Intelligence
Unit

(2) The Auditor –General and every person acting on behalf of or under the direction of the Auditor-General shall not use or disclose any information relating to the work of the Financial Intelligence Unit that they have obtained, or to which they have had access, in the course of an audit.

21.-(1) The Director shall-

annual report
of the
Financial
Intelligence
Unit

(a) from time to time advise the Minister on the work of the Financial Intelligence Unit and in particular on matters that could affect public policy or the priorities to be set by the Financial Intelligence Unit.

(b) prepare and submit to the Minister on or before 31st December in each year an annual report reviewing the work of the Financial Intelligence Unit.

(2)The Minister shall lay or cause to be laid a copy of every annual report on the table of parliament.

22.-(1) The Director and every officer of the Financial Intelligence Unit –

Oath of office
for officer of
the Financial
Intelligence
Unit
*Second
schedule*

(a) shall, before he or she assumes office, take the oath specified in the Second Schedule,

(b) shall not, except in accordance with this Act or otherwise as authorized by law –

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- (i) divulge any information obtained in the exercise of a power or in the performance of a duty under this Act,
- (ii) divulge the source of such information or the identity of any informer or the maker, writer or issuer of a report given to the Director,

(c) shall maintain and aid in maintaining confidentiality and secrecy of the matter, document, report and other information relating to the administration of this Act that becomes known to him or her or comes in his or her possession or under his or her control.

(2) Notwithstanding subsection (1), the Director may, for the purpose of an enquiry into any matter under this Act, impact to an agency in Malawi or abroad, such information, as may appear to him to be necessary to assist an investigation or prosecution of money laundering, serious crime or terrorist financing.

(3) Any person who, without lawful excuse contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for two years and a fine of K100, 000.

Immunity of the Financial Intelligence Unit and officials

23. No action shall lie against the financial Intelligence Unit, the Director, or officer or employee of the Financial Intelligence Unit or any person acting under the direction of the Financial Intelligence Unit for anything done in good faith in the administration or discharge of any powers, duties or functions under this Act.

PART III-MONEY LAUNDERING AND TERRORIST FINANCING

Financial institutions to verify customer's identity

24.-(1) Every financial institution shall, before entering into a business relationship with a customer, ascertain the identity of the customer or beneficial owner on the basis of an official or other identifying document, and shall verify the identity of the customer on the basis of reliable and independent source documents, data or information or other evidence as is reasonably capable of verifying the identity of the customer when –

(a) a financial institution –

- (i) enters into a continuing business relationship, or
- (ii) in the absence of a business relationship, conducts any transaction,
- (b) carrying out an electronic funds transfer,
- (c) there is a suspicion of money laundering offence or the financing of terrorism, or
- (d) the financial institution has doubts about the veracity or adequacy of the customer identification and verification documentation or information it had previously obtained.

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(2) Without limiting the generality of subsection (1), every financial institution shall –

(a) When establishing a business relationship, obtain information on the purpose and nature of the business relationship,

(b) if the transacting is conducted by a natural person, adequately identify and verify the identity of the person including information relating to –

- (i) the name, address and occupation of the person,
- (ii) the national identity card or passport or the applicable official identifying document of the person,

and take reasonable measures to establish the source of wealth and source of property of the person,

(c) if the transaction is conducted by a legal entity, adequately identify and verify its legal existence and structure, including information relating to-

- (i) the name, legal form, address and directors of the entity,
- (ii) the principal owners and beneficiaries and control structure of the entity,
- (iii) provision regulating the power to bind the entity, and verify that any person purporting to act on behalf of the customer is so authorized, and identify those person,

(d) if the customer is a public official, in addition to the requirements in paragraph(b)-

- (i) have appropriate risk management system to determine whether the customer is a public official
- (ii) obtain the approval of senior management before establishing a business relationship with the customer, and
- (iii) conduct regular enhanced monitoring of the business relationship.

(3) Every financial institution shall take reasonable measures to ascertain the purpose of any transaction in excess of such amount as the Minister may prescribe, from time to time by notice published in the *Gazette*, and the origin and ultimate destination of funds involved in the transaction.

(4) Every financial institution shall, in relation to its cross –border correspondent banking and other similar relationship,

(a) adequately identify and verify the respondent institution with which it conducts such a business relationship;

(b) gather sufficient information about the nature of the business of the correspondent institution,

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- (c) determine from publicly available information the reputation of the person and the quality of supervision to which the correspondent institution is subject,
- (d) assess the anti- money laundering and terrorist financing controls of the correspondent institution,
- (e) obtain approval from senior management before establishing a new correspondent relationship,
- (f) document the responsibilities of the financial institution and the correspondent institution,

(5) where the relationship is a payable-through account, a financial institution shall ensure that the institution with whom it has established the relationship –

(a) has verified the identify of, and performed on –going due diligence on such of, the customers of the institution that have direct access to accounts of the financial institution, and

(b) is able le to provide the relevant customer identification data upon request to the financial institution.

(6) where financial institution relies on an intermediary or third party to undertake its obligations under subsections (1) or(2) or to introduce business to it, it shall-

- (a) immediately obtain the information and documents required by subsections (1)and (2),
- (b) ensure that copies of identification data and other relevant documentation relating to the requirements in subsection(1),(2) and (3)will be made available to the intermediary or the third party upon request without delay,

(c) satisfy itself that the third party or intermediary is regulated and supervised for, has measures in place to comply with the requirements set out in section 25, 26 and 27.

(7)Subsection (1),(2) or(3) does not apply –

(a) if the transaction is part of an existing and regular business relationship with person who has already produced satisfactory evidence of identify, unless the financial institution has reason to suspect that the transaction is suspicious or unusual,

(b) if the transaction is an occasional transaction not exceeding such amount as the Minister may prescribe by notice published in the *Gazette*, unless the financial institution has reason to suspect the transaction is suspicious or unusual; or

(c)to such other person as the Minister may prescribe by notice published in the *Gazette*,

(8)The Minister, may by notice published in the *Gazette*, prescribe-

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(a) the official or identifying documents, or the reliable and independent source documents, data or information or other evidence that is required for identification or verification of any particular customer or class of customers,

(b) the threshold for, or the circumstances in which, the provisions of this section shall apply in relation to any particular customer or class of customers.

(9) In the case of an existing customer, financial institution shall verify the identity of the customer within such period as the Minister may prescribe by notice published in the Gazette.

(10) A person who contravenes this section shall be liable
(a) in the case of a fine natural person, to imprisonment for two years and to a fine of K100,000, or

(b) in the case of a corporation, to a fine of K500,000 and loss of business authority.

25.-(1) If satisfactory evidence of the identity of a customer is not produced to, or obtained by a financial institution in accordance with section 24, the financial institution shall report the attempted transaction to the Financial Intelligent Unit and shall not proceed any further with the transaction, unless directed to do so by the Financial Intelligence Unit.

Necessity of identification to conduct business

(2) A person who contravenes this section shall be liable –
(a) in the case of a natural person, to imprisonment for two years and to a fine of K100, 000, or
(b) in the case of a corporation, to a fine of K500,00 and loss of business authority.

26.-(1) A financial institution that maintains accounts shall maintain them in the true name of the account holder.

Financial institution to maintain accounts in true name

(2) A financial institution shall not open, operate or maintain any anonymous account or any account which is in a fictitious, false or incorrect name.

(3) A person who contravenes this section shall be liable –
(a) in the case of a natural person, to imprisonment for two years and to a fine of K100,000, or
(b) in the case of a corporation, to a fine of K500,00 and loss of business authority.

27.-(1) Every financial institution shall establish and maintain records of -

Financial institutions to establish and maintain customers records

(a) the identity of a person obtained in accordance with section 24,

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(b) all transactions carried out by it and correspondence relating to the transactions as is necessary to enable the transaction to be readily reconstructed at any time by the Financial Intelligence Unit or competent authority, and shall contain particulars as the Minister may prescribe by regulation,

(c) all reports made to the Financial Intelligence Unit under section 28, and

(d) enquiries relating to money laundering and financing of terrorism made to it by the Financial Intelligence Unit.

(2) The records mentioned in subsection (1) must be kept for a minimum period of seven years from the date-

(a) the evidence of a person's identify was obtained,

(b) of any transaction or correspondence,

(c) the account is closed or business relationship ceases, whichever is the later.

(3) The records established and maintained for purpose of subsection (1) shall be –

(a) sufficient to enable the transaction to be readily reconstructed at any time by the Financial Intelligence Unit or competent authority to provide, if necessary, evidence for prosecutions of any offence,

(b) maintained in a manner and form that will enable the accountable institution to comply immediately with requests for information from the law enforcement or Financial Intelligence Unit.

(4) where any record is required to be kept under this Act, a copy of it, with the appropriate back-up and recovery procedures, shall be kept in a manner as the Minister may prescribe by regulation.

(5) The records maintained under subsection (1) shall be made available upon request to the Financial Intelligence Unit, or competent authority for purpose of ensuring compliance with this Act and for purpose of an investigation and prosecution of an offence.

(6) A person who contravenes this section shall be liable –

(a) in the case of a natural person, to imprisonment for two years and to a fine of K10, 000, and

(b) in the case of a corporation, to a fine of K500,000 and loss of business authority.

Financial institution to report suspicious transactions

28.-(1) Whenever a financial institution processes a transaction exceeding such amount of currency or its equivalent in foreign currency as the Minister may, from time to time, prescribe by notice published in the *Gazette*, or suspects or has reasonable grounds to

suspect that any transaction is related to the commission of a money laundering offence or terrorist financing, it shall as soon as possible but not later than three working days after forming that suspicion and wherever possible before the transaction is carried out-

(a) take reasonable measures to ascertain the purpose of the transaction,, the origin and ultimate destination of the funds involved and the identity and address, of any ultimate beneficiary;

(b) prepare a report of the transaction in accordance with subsection (2), and communicate the information contained in the report to the Financial Intelligence Unit in writing or in such other form as the Director, may from time to time, approve.

(2) A report required under subsection (1) shall-

- (a) contain particulars of the matters specified in subsection (1) (a) and in section 24 (2);
- (b) contains a statement of the grounds on which the financial institution holds the suspicion; and
- (c) be signed or otherwise authenticated by the financial institution.

(3) A financial institution which has reported a suspicious transaction in accordance with this section shall, if requested to do so by the Financial Intelligence Unit, give such further information as it has in relation to the transaction.

(4) If the Financial Intelligence Unit, after consulting a financial institution required to make a report under subsection (1), has reasonable grounds to suspect that a transaction or a proposed transaction may involve an offence of money laundering or financing of terrorism, it may direct the financial institution in writing or by telephone to be followed up in writing within one working day, not to proceed with the carrying out of that transaction or proposed transaction or any other transaction in respect of the funds affected by that transaction or proposed transaction for a period as may be determined by the Financial Intelligence Unit, which may not be more than five working days, in order to allow the Financial Intelligence Unit-

- (a) to make necessary inquiries concerning the transaction; and
- (b) if the Financial Intelligence Unit deems it appropriate, to inform and advise a competent authority.

(5) A person who contravenes this section shall be liable-

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- (a) in the case of a natural person, to imprisonment for two years and to a fine of k100,000; or
- (b) in the case of a corporation, to a fine of K500,000 and loss of business authority.

Supervisory authority or auditor to report suspicious transactions

29. - (1) Where the supervisory authority or an auditor of a financial institution suspects or has reasonable grounds to suspect that information that it has concerning any transaction or attempted transaction may be-

- (a) related to the commission of a money laundering offence or an offence of financing of terrorism;
- (b) of assistance in the enforcement of this Act;
- (c) relevant to an act preparatory to the offence of financing of terrorism,

the supervisory authority or the auditor of the financial institution, as the case may be, shall forthwith report the transaction or attempted transaction to the Financial Intelligence Unit.

- (2) An auditor who contravenes this section shall be liable –
 - (a) in the case of a natural person, to imprisonment for one year and to a fine of K100,000; or
 - (b) in the case of a corporation, to a fine of K500,000 and loss of business authority.

Disclosure of suspicious transaction reports and other information

30.-(1) No person or institution shall disclose to any person-

- (a) that a report to the Financial Intelligence Unit under section 28 (1) or 29 has been or may be made, or further information has been given under section 28 (3);
- (b) that the financial institution has formed a suspicion in relation to a transaction for purposes of section 28 (1); or
- (c) any other information from which the person to whom the information is disclosed could reasonably be expected to infer that a suspicion has been formed or that a report has been or may be made.

- (2) A person who contravenes subsection (1) shall be liable-
 - (a) in the case of a natural person, to imprisonment for two years and to a fine of K100,000; or
 - (b) in the case of a corporation, to a fine of K500,000 and loss of business authority.
- (3) Any person who-
 - (a) knows or suspects that a report under section 24 (1) is being prepared or has been sent to the Financial Intelligence Unit; and

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(b) discloses to another person information or other matter which is likely to prejudice any investigation of an offence or possible offence of money laundering under section 35 or terrorist financing under section 36, commits an offence and shall be liable on conviction to imprisonment for ten years and a fine of K10,000,000.

(4) In proceedings for an offence against subsection (3), it is a defence to prove that the person did not know or have reasonable grounds to suspect that the disclosure was likely to prejudice any investigation of an offence or possible offence of money laundering or terrorist financing.

31.- (1) A person shall not disclose any information that will identify or is likely to identify-

Protection of identity of persons and information in suspicious transaction reports

- (a) any person who has handled a transaction in respect of which a suspicious transaction report has been made
- (b) any person who has prepared a suspicious transaction Report;
- (c) any person who has made a suspicious transaction report;
- or
- (d) any information contained in a suspicious transaction report or information provided pursuant to section 28 (3),

except for the following purposes, namely, the investigation or prosecution of a person or persons for a serious crime, a money laundering offence or an offence of financing of terrorism; and the enforcement of this act.

(2) Nothing in this section prohibits the disclosure of any Information for the purposes of the prosecution of any offence against any of the provisions of section 29.

- (3) A person who contravenes this section shall be liable –
- (a) in the case of a natural person, to imprisonment for two years and to a fine of K100,000; or
 - (b) in the case of a corporation, to a fine of K 500,000 and loss of business authority.

32.- (1) Every financial institution shall-

- (a) appoint a compliance officer who shall be responsible for ensuring the financial institution’s compliance with the requirements of this Act;
- (b) establish a maintain procedures and systems to-
 - (i) implement the customer identification requirements under section 24;

Financial institutions to establish and maintain internal reporting procedures

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(ii) implement record keeping and retention requirements
Under section 26 and 27;

(iii) implement the reporting requirements under section 28;

(iv) make its officers and employees aware of the laws and regulations relating to money laundering and financing of terrorism;

(V) make its officers and employees aware of the procedures, policies and audit systems adopted by it to deter money laundering and financing of terrorism;

(vi) screen persons before hiring them as employees;

(c) train its officers and employees and agents to recognize suspicious transactions, trends in money laundering and financing of terrorism activities and money laundering and financing of terrorism risks within the financial institution's products, services and operations; and

(d) establish an audit function to test its anti-money laundering and financing of terrorism procedures and system.

(2) A compliance officer appointed pursuant to this section shall-

(a) be a senior officer with relevant qualifications and experience to enable him to respond sufficiently well to enquiries relating to the financial institution and the conduct of its business;

(b) be responsible for establishing and maintaining such manual of compliance procedures in relation to its business as the supervisory authority or the Financing Intelligence Unit may, from time to time, require;

(c) be responsible for ensuring compliance by staff of the financial institution with the provisions of this Act and other law relating to money laundering or financing of terrorism and the provisions of any manual of compliance procedures established pursuant to this section; and

(d) act as the liaison between the financial institution and the Supervisory authority and the Financial Intelligence Unit in matters relating to compliance with the provisions of this Act and any other law or directive with respect to money laundering or financing of terrorism.

(3) Subsection (1) (a) and (d) does not apply to a financial institution Which, in the course of carrying on its business, does Not employ more than five persons.

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- (4) A person who contravenes this section shall be liable –
 - (a) in the case of a natural person, to imprisonment for two years and to a fine of K100,000, or
 - (b) in the case of a corporation, to a fine of K500,000 and loss of business authority.

33.-(1) Every institution or person that is licensed to do business in Malawi as a financial institution under the Banking Act or a money transmission service provider shall include accurate originator information and other related messages on electronic funds transfers and such information shall remain with the transfer.

Financial institutions and money transmission services providers to include originator information
Cap.44.01

(2) Subsection (1) shall not apply to –

- (a) an electronic funds transfer, other than a money transfer effected from the use of a credit or debit card as means of payments that results from a transaction carried out using a credit or debit card.

Provided that the credit or debit card number is included in the information accompanying such a transfer, and

- (b) electronic funds transfer and settlements between financial institutions where the originator and beneficiary of the funds transfer are acting on their own behalf.

- (3) A person who contravenes this section shall be liable –
 - (a) in the case a natural person, to imprisonment for two years and to a fine of K100,000, or
 - (b) in the case of a corporation, to a fine of K500,000 and loss of business authority.

34.-(1) Every financial institution shall pay special attention to-

Financial institution to monitor transactions

- (a) any complex, unusual or large transactions that have no apparent or visible economic or lawful purpose,
- (b) business relations and transactions with persons in jurisdiction that do not have adequate systems in place to prevent or deter money laundering or terrorist financing,
- (c) electronic fund transfers that do not contain complete originator information.

(2) In relation to subsection (1), every financial institution shall –

- (a) verify the background and purpose of the transactions or business relations and record its findings in writing, and
- (b) upon request, shall make available such findings to the Financial Intelligence Unit or to the supervisory authority.

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(3) Every financial institution shall monitor its business relationship and the transactions undertaken throughout the course of the relationship to ensure that its obligations under section 24 are met, and that the transactions conducted are consistent with the information that the financial institution has of its customer and the profile of the business of the customer.

(4) A person who contravenes this section commits an offence and shall, on conviction, be liable-

(a) in the case of a natural person, to imprisonment for two years and to a fine of K100,000, or

(b) in the to case of the a corporation to affine of K500,000 and loss of business authority.

Money
laundering
offences

35.-(1) A person commits the offence of money laundering if the person knowing or having reasonable grounds to believe that any property in whole or in the part directly represents any persons proceeds of crime –

(a) converts or transfers property knowing or having reason to believe that property is the proceeds of crime, with the aim of concealing or disguising he illicit origin of that property, or of aiding any person involved in the commission of the offence to evade the legal consequences thereof,

(b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of that property knowing or having reason to believe that the property is the proceeds of crime,

(c) acquires, possesses or uses that property, knowing or having reason to believe that it is derived, directly or indirectly, from proceeds of crime,

(d) Participates in, associate with or conspires to commit, attempts to commit and aids, abets and facilities the commission of any or omission referred to in paragraph (a), (b) or (c).

(2) For purpose of proving of the money laundering offence under subsection (1), it is not necessary that the serious crime be committed.

(3) A person who contravenes this section commits an offence and shall, on conviction, be liable –

(a) in the case of a natural person, to imprisonment for ten years and, to affine of K2.000.000,and

(b)in the case of a corporation, a fine of K10,00,000 and loss of business authority.

Terrorist
financing
offences

36.-(1) Every person who, by any means whatever, engages in terrorist financing activities, commits an offence.

(2)Every person who –

(a) organizes or directs others to commit, or

- (b) attempts to commit; or
 - (c) conspires to commit; or
 - (d) participates as an accomplice to a person committing, or attempting to commit an offence under subsection (1), commits an offence.
- (3) Any person who commits an offence under this section shall, on conviction, be liable-
- (a) in the case of a natural person, to imprisonment for fifteen years and to a fine of K3,000,000 or
 - (b) in the case of a corporation, to a fine of K15,000,000 and loss of business authority.

37. A person who in making a report under section 24, 25, 29 or 34 makes any statement that the person knows is false or misleading in a material particular or omits from any statement any matter or thing without which the person knows that the statement is false or misleading in a material particular commits an offence and shall be liable on conviction-

- (a) in the case of a natural person, to imprisonment for two years and to a fine of K100,000; or
- (b) in the case of a corporation, to a fine of K500,000; and loss of business authority.

False or misleading statements

38.(1) Any person who leaves or arrives in Malawi with more than an amount in currency or negotiable bearer instruments as may be prescribed by the Ministry by notice published in the Gazette, on his or her person or in his or her luggage shall report the fact to an authorized officer at the port of his or her departure or arrival, as the case may be; and the authorized officer shall without delay send a copy of the currency report to the Financial Intelligence Unit.

Seizure and detention of suspicious imports or exports of currency

- (2) Any person who contravenes subsection (1) is guilty of an offence and shall, on conviction, be liable-
- (a) in the case of a natural person, to a fine of K50,000 or imprisonment for six months; or
 - (b) in the case of a corporation, to a fine of K100,000.
- (3) Where a person is about to leave Malawi or has arrived in Malawi, or is about to board or leave, or has boarded or left, any ship or aircraft, an authorized officer may, with such assistance as is reasonable and necessary, and with use of force as is necessary-
- (a) examine any article which a person has with him or her or in his or her luggage, and
 - (b) if the authorized officer has reasonable grounds to suspect that an offence under subsection (1) may have been or is being committed, search the person,

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for the purpose of determining whether the person has in his or her possession, any currency or negotiable bearer instruments in respect of which a report under subsection (1) is required; and an authorized officer, and any person assisting such officer, may stop, board and search any ship, aircraft or conveyance for the purposes of exercising the powers conferred by this subsection.

(4) Where an authorized officer has reasonable grounds to believe that currency or negotiable bearer instruments found in the course of an examination or search, conducted under subsection (3) may afford evidence as to the commission of an offence under this section, a serious crime, a money laundering offence or an offence of financing of terrorism, the officer may seize the currency or negotiable bearer instruments.

(5) An authorized officer who has seized currency and negotiable Bearer instruments under subsection (4) shall report such seizure to the Financial Intelligence Unit.

(6) For the purpose of this section-

(a) “authorized officer” means a police officer or a customs officer,

(b) “negotiable bearer instrument” means a document representing ownership of debts or obligations, including bills of exchange, promissory notes or certificates of deposit, whether made payable to bearer or not.

Seizure of **39.**-(1) An authorized officer may seize and detain any currency or negotiable bearer instruments which is being imported into, or exported from, Malawi, in any form or manner if he or she has reasonable grounds for suspecting that it is-

(a) derived from a serious crime or a money laundering offence or an offence of financing of terrorism; or

(b) intended by any person for use in the commission of a serious crime or a money laundering offence or an offence of financing of terrorism.

(2) For the purpose of this section-

(a) “authorized officer” means a police officer or a customs officer;

(b) “negotiable bearer instrument” means a document representing ownership of debts or obligations, including bills of exchange, promissory notes or certificates of deposit, whether made payable to the bearer or not.

40.-(1) Currency and negotiable bearer instruments seized under section 38 or 39 shall not be detained for more than seven days after seizure, unless a court grants an order of continued detention for a period not exceeding three months from the date of seizure, upon being satisfied that-

Detention and
release of
currency or
negotiable
bearer
instruments
seized

(a) There are reasonable grounds to suspect that the currency or negotiable bearer instrument was derived from a serious crime, a money laundering offence or an offence of financing of terrorism, or is intended by any person for use in the commission of any such an offence, and

(b) the continued detention of the currency or negotiable bearer instrument is justified while its origin or derivation is further investigated.

(2) The court may subsequently order, after hearing, with notice to all parties concerned, the continued detention of the currency and negotiable bearer instruments if satisfied of the matter mentioned in subsection (1), but the total period of detention shall not exceed two years from the date of the order.

(3) Subject to subsection (5), currency and negotiable bearer instruments detained under this section shall be released in whole or in part to the person from whom it was seized or to other persons claiming an interest in the currency or negotiable bearer instrument-

(a) by order of a court that its continued detention is no longer justified, upon application by or on behalf of that person and after considering any views of the competent authority to the contrary, or

(b) by an authorized officer, if satisfied that its continued detention is no longer justified.

(4) Where the currency and negotiable instruments have not been claimed by any person within two years of it being seized or detained, an authorized officer may make an application to the court that such cash or negotiable instrument be forfeited to the Government.

(5) No cash or negotiable bearer instruments detained under this section shall be released where –

- (a) an application is made under Part IV for the purpose of –
 - (i) the confiscation of the whole or any part of the currency or negotiable bearer instrument, or
 - (ii) the continued detention of the currency or negotiable bearer instrument pending determination of its liability to confiscation, or

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(b) proceedings are instituted in Malawi or elsewhere against any person for an offence with which the currency or negotiable bearer instrument is connected,

unless and until the proceedings relating to the relevant application or the proceedings for the offence, as the case may be, have been concluded.

Power of
Financial
intelligence
unit to obtain
search
warrant

41.-(1) The Financial Intelligence Unit may apply to court for a warrant to enter any premises belonging to or in the possession or control of a financial institution, or any officer or employee thereof and to search the premises and remove any document, material or other thing therein for the purpose of the Financial Intelligence Unit, as ordered by the court and specified in the warrant.

(2)The court may grant the application if it is satisfied that there are reasonable ground to believe that-

(a)the financial institution has failed to keep a transaction record, or report a suspicious transaction, as required by this Act,
(b) an officer or employee of a financial institution is committing, has committed or is about to commit an offence of money laundering or financing terrorism.

Property
tracking and
monitoring
orders

42. For purposes of determining whether any such property belongs to or is in the possession or under the control of any person, the competent authority may, upon application to the court, obtain an order-

(a)that any document relevant to-
(i) identifying, locating or quantifying any such property, or
(ii) identifying or locating any document necessary for the transfer of any such property,
belonging to, or in the possession or control of the person be delivered forthwith to the competent authority,

(b) that the financial institution produce forthwith to the competent authority all information obtained about any transaction conducted by or for that person during such period before or after the order as the court directs

Order to
enforce
compliance
with
obligations
under this Act

43.-(1)The Financial Intelligence Unit may, upon application to the court, after satisfying the court that a financial institution has failed to comply with any obligation provide for under section 24, 25 26,27 or 28 obtain an order against all or any officers or employees of the institution in such terms as the court deems necessary, in order to enforce compliance with such obligation .

Money Laundering, Proceeds of Serious Crime and Terrorist Financing 35

(2) In granting the order pursuant to subsection (1) the court may order that should the financial institution fail to comply with all or any provision of the order, such institution, officer or employee shall pay a financial penalty in the sum and in the manner directed by the Court

(3) Enforcement of compliance with and implementation of the provision of this Act by financial institution shall be the responsibility of the supervisory authority with respect to the financial institutions under its supervision and the Financial Intelligence Unit with respect to all other financial institutions.

(4) All officers and employees of a financial institution shall take all reasonable steps to ensure the compliance by that financial institution with its obligations under this Act.

44. This Act shall have effect notwithstanding any obligation as to secrecy or other restriction on disclosure of information imposed by any other written law or otherwise, if the court so orders.

Secrecy
obligation
overridden

45. - (1) No civil, criminal, administrative or disciplinary proceedings shall be taken against—

Protection of
persons
reporting
suspicious
transactions

(a) a financial institution, an auditor, the competent authority or the supervisory authority, or

(b) an officer, employee or agent of the financial institution, or an auditor, the competent authority or the supervisory authority acting in the course of that person's employment or agency,

in relation to any action by the financial institution, the auditor, the competent authority or the supervisory authority or its officer, employee or agent taken under section 28 or 29 carried out in good faith or in compliance with directions given by the Financial Intelligence Unit pursuant to section 11(2) (e) or (k).

(2) Subsection (1) shall not apply in respect of proceedings for an offence against section 30.

46. Where an investigation has begun against a person for a serious crime and, property was restrained under this Act in relation to that offence, and any of the following occurs –

Restitution of
restrained
property

(a) the person is not charged in Malawi with the serious crime,

(b) the person is charged with a serious crime in Malawi but not convicted of the that offence,

(c) a conviction for that serious crime in Malawi is taken to be quashed and no conviction for such an offence substituted,

the court shall order restitution of the restrained property.

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Damages **47.** Nothing in this Act affects the right of a person whose property has been restrained to seek the payment of damages, either actual or punitive, in cases where it is alleged that the action of the Government involved any abuse of process,

PART IV – CONFISCATION

Division 1-Confiscation and Pecuniary Penalty Orders

Application for confiscation order or pecuniary penalty order **48.**-(1) Where a person is convicted of serious crime, the competent authority may, not later than twelve months after conviction, apply to court for one or both of the following orders-

- (a) a confiscation order against property that is tainted a property in respect of the offence, and
- (b) a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.

(2) An application under subsection (1) may be made in respect of one or more than one offence.

(3) Where an application under this section is finally determined, no further application for a confiscation order or a pecuniary penalty order may be made in respect of the offence for which the person was convicted without the leave of the court and the court shall not give such leave unless it is satisfied that-

- (a) the property or benefit to which the new application relates was identified after the previous application was determined, or
- (b) necessary evidence became available after the previous application was determined; or
- (c) it is in the interest of justice that the new application be made.

Notice of application **49.**-(1) Where the competent authority applies for a confiscation order against property under section 48 (1) –

(a) the competent authority shall give no less than fourteen days written notice of the application to the person and to any other person who the competent authority has reason to believe may have an interest in the property;

(b) the person and any other person who claims an interest in the property may appear and adduce evidence at the hearing of the application; and

(c) the court may, at any time before the final determination of the application, direct the competent authority to-

- (i) give notice of the application to any person who, in the opinion of the court, appears to have an interest in the property;
- (ii) publish in the *Gazette* or a newspaper published and circulating in Malawi, a notice of the application.

(2) Where the competent authority applies for a pecuniary penalty order under section 48 (1) –

- (a) the competent authority shall give the person against whom the application is made on less fourteen days notice of the application; and
- (b) the person against whom the application is made may appear and adduce evidence at the hearing of the application.

50.-(1) The court hearing the application under section 48 (1) may, before the final determination of the application and on the application of the competent authority, amend the application to include any other property or benefit, as the case may be, upon being satisfied that-

Amendment
of application

- (a) the property or benefit was not reasonably capable of identification when the application was made; or
- (b) necessary evidence became available only after the application was originally made.

(2) Where the competent authority applies to amend an application for a confiscation order and the amendment would have the effect of including additional property in the application for confiscation, the competent authority shall give no less than fourteen days written notice of the application to amend to any person who the competent authority has reason to believe may have an interest in the property to be included in the application for a confiscation order.

(3) Any person who claims an interest in the property to be included in the application of a confiscation order may appear and adduce evidence at the hearing of the application to amend.

(4) Where the competent authority applies to amend an application for a pecuniary penalty order against a person and the effect of the amendment would be to include an additional benefit in the application, the competent authority shall give the person no less than fourteen days written notice of the application to amend.

51.-(1) Where an application is made to the court for a confiscation order or a pecuniary penalty order under section 48 (1), the court may, in determining the application, have regard to the transcript of any proceedings against the person the offence.

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(2) Where an application is made for a confiscation order or a pecuniary penalty order to the court before which the person was convicted, and the court has not, when the application is made, passed sentence on the person for the offence, the court may, if it is satisfied that it is reasonable to do so in all the circumstances, defer passing sentence until it determined application for the order.

Procedure for
in rem
confiscation
order where
person dies or
absconds

52.-(1) Where-

(a) a person has been charged with a serious crime; and

(b) a warrant for the arrest of the person has been issued in relation to that charge,
the competent authority may apply to the court for a confiscation order in respect of any tainted property if the defendant has died or absconded.

(2) For the purpose of subsection (1), a person is deemed to have absconded if reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued, and the person shall be deemed to have so absconded on the last day of that period of six months.

(3) Where the competent authority applies under this section for a confiscation order against any tainted property the court shall, before hearing the application-

(a) require notice of the application to be given to any person who, in the opinion of the court, appears to have an interest in the Property;

(b) direct the notice of the application to be published in the Gazette and in newspaper published and circulating in Malawi containing such particulars and for so long as the court may require.

Division 2-Confiscation

Confiscation
order on
conviction

53.-(1) Where, upon application by the competent authority, the court is satisfied that property is tainted property in respect of a serious crime of which a person has been convicted, the court may order that specified property be confiscated.

(2) In determining whether property is tainted property the court may infer, in the absence of evidence to the contrary-

(a) that the property was used in or in connection with the commission of a serious crime if it was in the possession of the person at the time of, or immediately after the commission of the serious crime for which the person was convicted;

(b) that the property was derived, obtained or realized as a result of the commission of the serious crime if it was acquired by the person during or within a reasonable time after the period of the commission of the serious crime of which the person was convicted, and the court is satisfied that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the acquisition of that property.

(3) Where the court orders that property, other than money, be confiscated, the court shall specify in the order the amount that it considers to be the value of the property at the time when the order is made.

(4) In considering whether a confiscation order should be made under subsection (1) the court shall have regard to-

- (a) the rights and interest, if any, of third parties in the property;
- (b) the gravity of the serious crime concerned;
- (c) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and
- (d) the use that is ordinarily made of the property, or the use to which the property was intended to be put.

(5) Where the court makes a confiscation order, the court may give such directions as are necessary or convenient for giving effect to the order.

54.-(1) Subject to subsection (2), where a court makes a confiscation order against any property under section 53, the property vests absolutely with the Government by virtue of the order.

Effect of
confiscation
order on
conviction

(2) Where property ordered to be confiscated is registrable property-

(a) the property vests with the Government in equity but does not vest with the Government at law until the applicable registration requirements have been complied with;

(b) the Government is entitled to be registered as owner of the property;

(c) the Attorney General has power on behalf of the Government to do or authorize the doing of anything necessary or convenient to obtain the registration of the Government as owner, including the execution of any instrument to be executed by a person transferring an interest in property of that kind.

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(3) Where the court makes a confiscation order against property under section 53-

(a) the property shall not, except with the leave of the court and in accordance with any directions of the court, be disposed of, or otherwise dealt with, by or on behalf of the Government before the relevant appeal date; and

(b) if after the relevant appeal date, the order has not been discharged, the property may be disposed of and the proceeds applied or otherwise dealt with in accordance with the directions of the Attorney-General.

(4) For purpose of this section-

“registrable property” means property the title to which is passed by registration in accordance with the provisions of a written law;

“relevant appeal date” in relation to a confiscation order made in consequence of a conviction of a person of a serious crime means-

(a) the date on which the period allowed by rules of court for the lodging of an appeal against the conviction of a person or for the lodging of an appeal against the making of a confiscation order expires without an appeal having been lodged, whichever is the latter; or

(b) where an appeal against the conviction of a person or against the making of a confiscation order is lodged, the date on which the appeal lapse in accordance with the rules of court or is finally determined, whichever is the latter.

Voidable transfers

55. The court may-

(a) before making a confiscation order under section 53; and
(b) in the case of property in respect of which a restraining order was made, where the order was served in accordance with section 83,

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the restraining order, unless the conveyance or transfer was made for valuable consideration to a person acting in good faith and without notice.

Protection of third parties

56. –(1) Where an application is made for a confiscation order against property under Division 1, a person who claims an interest in the property may apply to the court, before the confiscation order is made, for an order under subsection (2).

(2) If a person applies to the court for an order under this section in respect of property and the court is satisfied on a balance of probabilities-

(a) that the person was not in any way involved in the commission of the serious crime; and
(b) where the person acquired the interest during or after the commission of the serious crime, that he or she acquired the interest-
(i) for sufficient consideration; and
(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion that the property was, the time he or she acquired it, property that was tainted property, the court shall make an order declaring the nature, extent and value at the time the order is made of the interest of the person.

(3) Subject to subsection (4), where a confiscation order has already been made directing the confiscation of property, a person who claims an interest in the property may, before the end of the period of twelve months commencing on the day on which the confiscation order is made, apply to the court for an order under subsection (2).

(4) A person who –
(a) had knowledge of the application for the confiscation order before the order was; or
(b) appeared at the hearing of that application,
shall not be permitted to make an application under subsection (3) except with leave of the court.

(5) A person who makes an application under subsection (1) or (3) shall give no less than fourteen days written notice of the making of the application to the Attorney-General who shall be a party to any proceedings in the application.

(6) An applicant or the Attorney-General may in accordance with the rules of court, appeal against an order made under subsection (2).

57. – (1) Where the court makes a confiscation order against property under section 53 in reliance on a conviction of a person of a serious crime and the conviction is subsequently quashed, the quashing of the conviction discharges the order.

Discharge of
confiscation
order on

appeal and
quashing of
conviction

(2) Where a confiscation order against property is discharged as provided for in subsection (1), or by the court hearing an appeal against the making of the order, any person who claims to have an interest in the property immediately before the making of the confiscation order may apply to the court in writing for the transfer of the interest to the person.

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(3) On receipt of an application under subsection (2) the court shall-

(a) if the interest is vested in Malawi, give directions that the property or part thereof to which the interest of the applicant relates be transferred to the person; or

(b) in any other case, direct that there be payable to the person an amount equal to that of the interest as at the time the order is made.

Payment
instead of a
confiscation
order

58. Where a court is satisfied that a confiscation order should be made in respect of the property of a person convicted of a serious crime but that property or any part thereof or interest therein cannot be made subject to such an order and, in particular, the property;

(a) cannot on the exercise of due diligence be located

(b) has been transferred to a third party in circumstances which do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the confiscation of the property.

(c) is located outside Malawi;

(d) has been substantially diminished in value or rendered worthless; or

(e) has been commingled with other property that cannot be divided without difficulty,

the court may, instead of ordering the property or part thereof or interest therein to be confiscated, order the convicted person to pay to the Government an amount equal to the value of the property, or part interest.

Application of
procedure for
enforcing
fines

59. Where the court orders a person to pay an amount under section 58, that amount shall be treated as if it were a fine imposed upon him or her in respect of a conviction for a serious crime, and the court may-

(a) notwithstanding anything contained in any other written law, impose in default of the payment of that amount, a term of imprisonment-

(i) of two years, where the amount does not exceed K100,000;

(ii) of five years, where the amount exceeds K100, 000 but does not exceed K500,000;

(iii) of ten years, where the amount exceeds K1,000,000;

(b) direct that the term of imprisonment imposed pursuant to subsection (a) be served consecutively to any other form of imprisonment imposed on that person or that the person is then serving

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(c) direct that the provisions of the Prisons Act regarding Cap.9:02 the remission of sentences of prisoners serving a term of imprisonment shall not apply in relation to a term of imprisonment imposed on a person pursuant to paragraph (a).

60.- (1) Subject to section 52(3), where an application is made to the court under section 52 (1) for a confiscation order against any tainted property in consequence of a person having died or absconded in connection with a serious crime and the court is satisfied the-

Confiscation
where a
person dies or
absconds

- (a) any property is tainted property in respect of the serious crime;
- (b) proceedings in respect of a serious crime committed in relation to that property were commenced; and
- (c) the defendant charged with the offence referred to in paragraph (b) has died or absconded,

the court may order that the property or such property as is specified by the court in the order be confiscated.

(2) the provisions of section 53, 54, 55 and 56 shall apply with such modifications as are necessary to give effect to this section.

Division 3- Pecuniary Penalty Orders

61. –(1) Subject to this section, where the competent authority applies to the court under section 48 for a pecuniary penalty order against a person in respect of the conviction of that person for a serious offence the court shall, if it is satisfied that the person has benefited from that offence, order him to pay to the Government an amount equal to the amount that might be realized at the time the pecuniary penalty order is made.

Pecuniary
penalty order
on conviction

(2) The Court shall assess the value of the benefit derived by a person from the commission of a serious offence in accordance with section 62, 63, 64 and 65.

(3) The Court shall not make a pecuniary penalty order under this section-

(a) until the period allowed by the rules of court for the lodging of an appeal against conviction has expired without such appeal having been lodged; or

(b) where an appeal against conviction has been lodged, until the appeal lapses in accordance with the rules of court or is finally determined, whichever is the later date.

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Rules of
determining
benefit and
assessing
value

62. –(1) Where a person obtains property as the result of, or in connection with, the commission of a serious crime, his or her benefit is the value of the property so obtained.

(2) Where a person derived an advantage as result of, or in connection with , the commission of a serious crime, his or her advantage shall be deemed to be a sum of money equal to the value of the advantage so delivered.

(3) In determining whether a person has benefited from the commission of a serious crime or from the offence taken together with other serious crime, the court shall, unless the contrary is proved, deem-

(a) all property appearing to the court to be held by the person, on the day on which the application is made, to be property that came into the possession or under the control of the person by the reason of the commission of that serious crime or those serious crimes for which the person was convicted; and

(b) any property received or deemed to have been received by the person at any time as a result of, or in connection with the commission by him or her of that serious crime or those serious crimes as property received by him or her free of any interest therein.

(4) Where a pecuniary penalty order has been previously made against a person, in assessing the value of any benefit derived by him or her from the commission of the serous crime, the court shall leave out of account any of the benefits that are shown to the court to have been taken into account in determining the amount to be recovered under that order.

(5) If evidence is given at the hearing of the application that the value of the property of a person at any time after the commission of the serious crime exceeded the value of the property of the person before the commission of the offence, then the court shall, subject to subsection (6), treat the value of the benefit as being not less than the amount of that excess.

(6) If, after evidence of the kind referred to in subsection (5) is given, the person satisfies the court that the whole or part of the excess of the value of property as due to causes unrelated to the commission of the serious crime, subsection (5) does not apply to the excess or, as the case may be, that part.

63. –(1) Where-

(a) a person has been convicted of a serious crime and the competent authority tenders to the court a statement as to any matters relevant to-

(i) determining whether the person has benefited from the offence or from any other serious crime of which he or she is convicted in the same proceeding or which is taken into account in determining his or her sentence; or

(ii) an assessment of the value of the benefit of the person from the offence or any other serious crime of which he or she is convicted in the same proceedings or which is taken into account; and

(b) the person accepts to any extent an allegation in the statement referred to in paragraph (a),

The court may, for the purposes of so determining or making that assessment, treat his or her acceptance as conclusive of the matters to which it relates.

(2) Where-

(a) a statement is tendered under subsection (1) (a); and

(b) the court is satisfied that a copy of that statement has been served on the person,

the court may require the person to indicate to what extent he or she accepts each allegation in the statement and so far as he or she does not accept any allegation, to indicate any matters he or she proposes to rely on.

(3) Where the person fails in any respect to comply with a requirement under subsection(2), he or she may be treated for the purposes of this section as having accepted every allegation in the statement other than-

(a) an allegation in respect of which he or she complies with the requirement; and

(b) an allegation that he or she has benefited from the serious crime or that any property or advantage was obtained by him or her as a result of or in connection with the commission of the offence.

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(4) Where-

(a) the person tenders to the court a statement as to any matters relevant to determining the amount that might be realized at the time the pecuniary penalty order is made; and

(b) the competent authority accepts to any extent any allegation in the statement,

the court may, for the purpose of that determination, treat the acceptance of the competent authority as conclusive of the matters to which it relates,

(5) An allegation may be accepted or a matter indicated for the purposes of this section either-

(a) orally before the court; or

(b) in writing in accordance with rules of court.

(6) An acceptance by a person under this section that he or she received any benefit from the commission of a serious crime is admissible in any proceeding for any offence.

Amount
recovered
under
pecuniary
penalty order

64.-(1) Subject to subsection (2), the amount to be recovered from a person under a pecuniary penalty order shall be the amount which the court assess to be the value of the benefit of the person from the serious crime, or if more than one, all the offences in respect of which the order may be made.

(2) Where the court is satisfied as to any matter relevant for determining the amount which might be realized at the time the pecuniary penalty order is made, whether by acceptance under section 63 or otherwise, the court may issue a certificate giving its opinion as to the matters concerned, and shall do so if satisfied that the amount that might be realized at the time the pecuniary penalty order is made is less than the amount it assesses to be the value of the benefit of the person from the offence, or if more than one, all the offences in respect of which the pecuniary penalty order may be made.

Variation of
pecuniary
penalty order

65.- Where-

(a) the court makes a pecuniary penalty order against a person in relation to a serious crime;

(b) in calculating the amount of the pecuniary penalty order, the court took into account a confiscation order of the property or proposed confiscation order in respect of property; and

(c) an appeal against confiscation or a confiscation order is allowed or the proceedings from the proposed confiscation order terminate without the proposed confiscation order being made,

the competent authority may apply to the court for a variation of the pecuniary penalty order to increase the amount of the order by the value of the property not so confiscated and the court may, if it considers it appropriate to do so, vary the order accordingly.

66. –(1) In assessing the value of the benefit derived by the person from the commission of a serious crime, the court may treat as property of the person any property that, in the opinion of the court, is subject to the effective control of the person whether or not he or she has-

Lifting the
corporate veil

- (a) any legal or equitable interest in the property; or
- (b) any, right, power or privilege in connection with the property.

(2) Without prejudice to the generality of subsection (1), the court May have regard to-

- (a) shareholdings in, debentures over or directorships in any company that has an interest, whether direct or indirect, in the property, and for this purpose the court may order the investigation and inspection of the books of a named company;
- (b) any trust that has any relationship to the property;
- (c) any relationship whatsoever between the persons having an interest in the property or in companies of the kind referred to in paragraph (a) or trust of the kind referred to in paragraph (b), and any other persons.

(3) Where the court, for the purposes of making a pecuniary order against a person, treats particular property as the property of a person pursuant to subsection (1), the court may, on application by the competent authority make an order declaring that the property is available to satisfy the order.

(4) Where, under subsection (3), the court declares that property Is available to satisfy a pecuniary penalty order-

(a) the order may be enforced against the property as if the property were the property of the person against whom the order is made; and

(b) a restraining order may be made in respect of the property as if the property were property of the person against whom the order is made.

(5) Where the competent authority makes an application for an order under subsection (3) that property is available to satisfy a pecuniary penalty order against a person

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(a) the competent authority shall give written notice of the application to the person and to any person who the competent authority has reason to believe may have an interest in the property; and

(b) the person and any person who claims an interest in the property may appear and adduce evidence at the hearing of the application.

Enforcement
Of pecuniary
Penalty order

67. Where the court orders a person to pay an amount under a pecuniary penalty order, section 59 shall apply with such modifications as the court may determine for the purpose of empowering the Court to impose a term of imprisonment on a person in default of compliance with a pecuniary penalty order.

Discharge of
Pecuniary
Penalty order

68. A pecuniary penalty order is discharged-

(a) if the conviction of the serious crime or offences in reliance on which the order was made is or is taken to be quashed and no conviction for the offence or offences is substituted;

(b) if the order is quashed on appeal; or

(c) on the satisfaction of the order by payment of the amount due under the order.

Division 4-Control of Property

Powers to
search for and
seize tainted
property

69. -(1) The competent authority may-

(a) search a person for tainted property,

(b) enter upon land or upon or into premises and search the land premises for tainted property:

and in either case, seize any property found in the course of the search that the competent authority believes, on reasonable grounds to be tainted property:

provided that the search or seizures is made-

(a) with the consent of the person or the occupier of the land or premises, as the case may be;

(b) under warrant issued under section 70.

(2) Where the competent authority searches a person under subsection (1), he or she may also search any property in, or apparently in, the immediate control of that person.

70.- (1) where the competent authority has reasonable grounds for suspecting that there is, or may be within the next seventy-two hours, tainted property of a particular kind

Search
warrant in
relation to
tainted
property

- (a) on a person;
- (b) in the clothing that is being worn by a person;
- (c) upon land or upon or in any premises,

the competent authority may lay before a magistrate an information on oath setting out those grounds and apply for the issue of a warrant to search the person, the land or the premises as the case may be, for tainted property of that kind.

(2) Where an application is made under subsection (1) for a warrant to search a person, land or premises, the magistrate may, subject to subsection (4), issue a warrant authorizing the competent authority, with such assistance and by such force as is necessary and reasonable-

- (a) to search the person for tainted property of that kind;
- (b) to enter upon the land or in upon premises and to search the land or premises for tainted property of that kind; and
- (c) to seize property found in the course of the search that the competent authority believes on reasonable grounds to be tainted property of that kind.

(3) A warrant may be issued under subsection (2) in relation to tainted property whether or not an information has been laid in respect of the relevant offence.

(4) A magistrate shall not issue a warrant under subsection (2) unless, where an information has not been laid in respect of the relevant offence at the time when the application for the warrant is made, the magistrate is satisfied that-

- (a) an information will be laid in respect of the relevant offence within forty-eight hours; and
- (b) the property is tainted property.

(5) A warrant issued under this section shall state-

- (a) the purpose for which it is issued, including a reference to the nature of the relevant offence;
- (b) a description of the kind property authorized to be seized

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- (c) a time at which the warrant cease to be in force; and
- (d) whether entry is authorized to be at any time of the day or night or during specified hours.

(6) If during the course of searching under a warrant issued under this section, the competent authority finds-

(a) property that the competent authority believes on reasonable grounds to be tainted property either of a type not specified in the warrant or tainted property in relation to another serious crime; or

(b) anything the competent authority believes on reasonable grounds will afford evidence as to the commission of a serious crime,

the competent authority may seize that property or thing and the warrant shall be deemed to authorize such seizure.

Searching in emergencies **71.-** (1) Where the competent authority suspects, on reasonable grounds, that-

(a) particular property is tainted property;

(b) it is necessary to exercise the power of search and seizure in order to prevent the concealment, loss or destruction of the property; and

(c) the circumstances are so urgent that they require immediate Exercise of the power without the authority of a warrant or the order of a court,

the competent authority may search a person, enter upon land, or upon or into premises and search for the property; and if property is found, seize the property.

(2) If during the course of a search conducted under this section, the competent authority finds-

(a) property that the competent authority believes, on reasonable grounds, to be tainted property; or

(b) anything the competent authority believes, reasonable grounds, will afford evidence as to the commission of a criminal offence,

the competent authority may seize that property or thing

Record of property seized **72.-** The competent authority who seizes property under section 70 or 71 shall detain the property seized, taking reasonable care to ensure that the property is preserved.

(2) The competent authority under subsection (1) shall be required to report to the Financial Intelligence Unit, on a monthly basis, on the status of all seized property.

73. -(1) Where property has been seized under section 70 or 71 otherwise than because it may afford evidence of the commission of an offence, a person who claims an interest in the property may apply to the court for an order that the property be returned to the person. Return of seized property

(2) Where a person makes an application under subsection (1) and the court is satisfied that-

(a) the person is entitled to possession of the property;

(b) the property is not tainted property; and

(c) the person in respect of conviction, charging or proposed charging the seizure of the property was made has no interest in the property,

the court shall order the return of the property to the person.

74. Where a foreign state requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction, the provisions of sections 70 and 71 apply with necessary modification. Search for and seizure of tainted property in relation to foreign offences

Division 5 – Terrorist Cash and Terrorist Property

75.- (1) Where the competent authority has reasonable grounds to suspect that any cash- Seizure and detention of terrorist

(a) is intended to be used for the purpose of terrorism;

(b) belongs to, or is held on trust for, a proscribed organization;
or

(c) is or represents property obtained through acts of terrorism,
it may seize cash

(2) The competent authority may size cash, under subsection(1) even if it reasonably suspects part only of the cash to be terrorist cash, where it is not reasonably practicable to seize that part only of the cash.

(3) The competent authority may its power under subsection (1), whether or not any proceedings have been brought for an offence in connection with the terrorist cash.

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(4) The competent authority shall, as soon as is reasonably practicable, apply to a Judge in chambers for a detention order with respect to the cash seized under subsection (1).

(5) The Judge in chambers shall not make an order for detention of the cash unless he or she is satisfied that there are reasonable grounds for suspecting that the cash-

- a. is intended to be used for the purposes of terrorism;
- b. consists of resources of a proscribed organization; or
- c. is or represents property obtained through terrorist activities.

(6) Subject to subsection (8), any order made under subsection (5) shall remain valid for a period of ninety days, and may be renewed for further periods of ninety days by the Judge in chambers, until production of the cash before the court in proceedings against any person for an offence with which the cash is connected.

(7) Any cash detained under this section shall be deposited by the competent authority in an interest-bearing account.

(8) The cash, with the interest, may be released by order of the Judge in chambers-

(a) where the conditions under subsection (5) are no longer met; or

(b) where no proceedings are brought in connection with the cash detained.

(9) For the purpose of this section, "cash" means-

- (a) coins and notes in any currency;
- (b) postal orders;
- (c) traveler's cheques;
- (d) banker's drafts;
- (e) bearer bonds and bearer shares; or
- (f) such other monetary instruments as the Minister may specify by notice published in the gazette.

Terrorist
funding

76.-(1) Any person who-

(a) solicits, receives, provides or possesses money or other property;

(b) enters into, or becomes concerned in, an arrangement as a result of which money or other property is made available or is to be made available,

Money Laundering, Proceeds of Serious and Terrorist Financing 53

for the purposes of terrorism, or for a terrorist or proscribed organization, commits an offence and shall be liable, on conviction, to imprisonment for the fifteen years, and to a fine of K15, 000, 00.

(2) The Minister may, by notice published in the *Gazette*, publish a list of terrorist or terrorist organizations.

77.- (1) Any person who enters into, or becomes concerned in, an arrangement which facilitates the retention or control by, or on behalf of, another person, of terrorist property, in any manner, including-

Dealing in
terrorist
property

- (a) concealment;
- (b) removal from the jurisdiction; or
- (c) transfer to any other person,

commits an offence and shall be liable, on conviction, to imprisonment for two years, and to a fine of K100, 000.

(2) It shall be a defence for a person charged under subsection (1) to prove that he or she did not know and had no reasonable cause to suspect that the arrangement related to terrorist property.

78.-(1) Where the supervisory authority has reason to believe or suspects that a financial institution holds an account or property on behalf of a terrorist, it shall issue a written directive to the financial institution requiring it to restrain or freeze any account or other property held by that financial institution on behalf of terrorist and the financial institution shall comply with such a directive.

Restraining
directives in
respect of
terrorist
account or
property

(2) Subject to subsection (3), a directive given by the supervisory authority pursuant to subsection (1) shall be effective for three months unless sooner revoked by the authority.

(3) The court may, upon the application of the competent authority, order the extension of a restraining or a freezing direction issued pursuant to subsection (1):

Provided that it is satisfied that the account or other property is owned by or on behalf of a terrorist.

(4) The supervisory authority may at any time revoke any directive issued under subsection (1) and shall notify the financial institution accordingly.

(5) Where the supervisory authority decides to revoke a directive which has been extended by the court under subsection (3) it shall notify the court accordingly and the court shall revoke the extension order.

(6) The revocation of a directive or extension order shall not affect the validity of any action taken on the basis of the direction of order prior to revocation

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(7) A person affected by a directive issued under subsection (1) may apply to the court for a revocation of the directive in relation to him or her.

(8) The court shall revoke the directive in relation to the applicant under subsection (7) if satisfied that the account or other property or the interest of the person in it is not owed by or on behalf of a terrorist or proscribed organization.

(9) It shall be a defence against any action brought against the supervisory authority or any person who complies with a directive issued under subsection (1) that the issuance of the directive or the compliance with it was in accordance with the provision of this section.

(10) No person shall be held liable in any court for or with respect to anything done or omitted to be done in good faith in accordance with this section.

Division 6-Restraining orders

Application
for restraining
order

79.-(1) The competent authority may apply to the court for a restraining order against any realizable property held by the defendant or specified realizable property held by a person other than the defendant.

(2) An application for a restraining order may be made *ex parte* and shall be in writing and be accompanied by an affidavit stating-

(a) where the defendant has been convicted of a serious crime, the serious crime for which he or she was convicted, the date of the conviction, the court before which the conviction was obtained and whether an appeal has been lodge against the conviction;

(b) where the defendant has not been convicted of a serious crime, the serious offence for which he or she is charged or about to be charged and grounds for believing that the defendant committed the offence;

(c) a description of the property in respect of which the restraining order is sought;

(d) the name and address of the person who is believed to be in possession of the property;

(e) the grounds for the belief that the property is tainted property in relation to the offence;

(f) the grounds for the belief that the defendant derived a benefit, directly or indirectly, for the commission of the offence;

(g) where the application seeks a restraining order against property of a person other than the defendant, the grounds for the belief that the property is tainted property in relation to the offence and is subject to the effective control of the defendant;

(h) the grounds for the belief that a confiscation order or a pecuniary penalty order may be or is likely to be made under section 48 in respect of the property.

80.- (1) Subject to this section, where the competent authority applies to the court for a restraining order under section 79 against property and the court is satisfied that-

Restraining
order

(a) the defendant has been convicted of a serious crime or has been charged or is about to be charged with a serious crime;

(b) where the defendant has not been convicted of a serious crime, there are reasonable grounds for believing that the defendant has committed a serious offence;

(c) there is reasonable cause to believe that the property is tainted property in relation to an offence or that the defendant derived a benefit directly or indirectly from the commission of the offence;

(d) where the application seeks a restraining order against property of a person other than the defendant, there are reasonable grounds for believing that the property is tainted property in relation to an offence and that the property is subject to the effective control of the defendant; and

(e) there are reasonable grounds for believing that a confiscation order or a pecuniary penalty order is likely to be made under section 48 in respect of the property,

the court may make an order in accordance with subsection (2)

(2) An order made pursuant to subsection (1) may-

(a) prohibit the defendant or any person from disposing of, or otherwise dealing with, the property or such part thereof or interest therein as is specified in the order, except in such manner as may be specified in the order; and

(b) at the request of the competent authority, where the court is satisfied that the circumstances so require-

(i) direct such person as the court may appoint to take custody of the property or such part thereof as is specified in the order and to manage or otherwise deal with all or any part of the property in accordance with the directives of the court; an

(ii) requiring any person having possession of the property to give possession thereof to the person appointed under sub-paragraph (i) to take custody and control of the property.

(3) an order under subsection (2) may be made subject to such conditions as the court thinks fit, and without limiting the generality of this subsection, may make provision for meeting out of the property or a specified part of the property, any or all of the following-

(a) the reasonable living expenses of the person, including the reasonable living expenses of the dependants of the person, if any, and reasonable business expenses;

(b) the reasonable expenses of the person in defending the criminal charge and any proceedings under this Division; and

(c) any specified debt incurred by the person in good faith.

(4) In determining whether there are reasonable grounds for believing that property is subject to the effective control of the defendant the court may have regard to the matters referred to in section 66.

(5) Where the other person appointed under subsection (2) (b) (i) is given a direction in relation to any property, he or she may apply to the court for directions or any question respecting the management or preservation of the property under his or her control.

(6) An application under subsection (1) shall be served on all persons interested in the application or such of them as the court thinks expedient and all such persons shall have the right to appear at the hearing and be heard.

(7) Where the application is made under subsection (1) on the basis that a person is about to be charged, any order made by the court shall lapse if the person is not charged-

(a) where the offence is an offence against the laws of Malawi, within three months; and

(b) where the offence is an offence against the laws of a foreign State, within twelve months.

Undertaking
by the
Government

81.- (1) Before making a restraining order under section 80, the court may require the Government to give such undertaking as the court considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and execution of the order.

(2) For the purposes of this section, the Attorney-General may give such undertaking with respect to the payment of damages or costs or both as are required by the court.

82. Before making a restraining order under section 80 the court may require notice to be given to, and may hear, any person who, in the opinion of the court, appears to have an interest in the property, unless the court is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property.

Notice of application for restraining order

83. A copy of a restraining order shall be served on a person affected by the order in such manner as the court directs or as may be prescribed by rules of court.

Service of restraining order

84. – (1) A copy of restraining order which affects land in Malawi shall be registry.

Registration of restraining order affecting land

(2) A restraining order is of no effect with respect to registered land unless it is registered as a charge with the appropriate registry.

(3) Where particulars of a restraining order affecting land are registered with appropriate registry, a person who subsequently deals with the property shall, for the purposes of section 85 be deemed to have notice of the order at the time of the dealing.

85.- (1) A person who knowingly contravenes a restraining order by disposing of or otherwise dealing with property that is subject to the restraining order is guilty of an offence and shall upon conviction be liable-

Contravention of restraining order

(a) in the case of a natural person, to imprisonment of two years and a fine of K100, 000; or

(b) in the case of a body corporate a fine of K500, 000.

(2) Where a restraining order is made against property and the property is disposed of, or otherwise dealt with, in contravention of the restraining order and the disposition or dealing was not for sufficient consideration or not in favour of a person who acted in good faith and without notice, the competent authority may apply to the court that made the restraining order for an order that the disposition or dealing be set aside.

(3) Where the competent authority makes an application under subsection (2) in relation to a disposition or dealing, the court may-

(a) set aside the disposition or dealing as from the day on which the disposition or dealing took place; or

(b) set aside the disposition or dealing as from the day of the order under this subsection,

and declare the respective rights of any persons who acquired interests in the property on, or after the day on which the disposition or dealing took place, and before the day of the order under this subsection.

Duration of
restraining
order

86. A restraining order remains in force until-

- (a) it is discharged, revoked or varied; or
- (b) the period of six months from the date on which it is made or such later time as the court may determine; or

(c) a confiscation order or a pecuniary order, as the case may be, is made in respect of property which is the subject of the order.

Review of
restraining
order

87. -(1) A person who has an interest in property in respect of which a restraining order was made under section 80 may, at any time, apply to the court for an order under subsection (4).

(2) An application under subsection (1) shall not be heard by the court unless the applicant has given to the competent authority at least three clear days notice in writing of the application.

(3) The court may require notice of the application to be given to, and may hear, any person who in the opinion of the court appears to have an interest in the property.

(4) On an application under subsection (1) the court may revoke or vary the restraining order or make the order subject to such conditions as the court thinks fit; for the purposes of this subsection the court may-

- (a) require the application to enter into recognizances;
- (b) vary the restraining order to permit the payment of reasonable living expenses of the applicant, including his dependants, if any, and reasonable legal or business expenses of the applicant.

(5) An order under subsection (4) may only be made if the court is satisfied that-

(a) the applicant is the lawful owner of the property or is entitled to lawful possession thereof and appears to be innocent of any complicity in the commission of a serious crime or of any collusion in relation to such offence; and

(b) the property will no longer be required for the purposes of any investigation or as evidence in any proceedings.

88.- (1) The competent authority may apply to the court that made a restraining order for an extension of the period of the operation of the order.

Extension of
restraining
order

(2) where the competent authority makes an application under subsection (1), the court may extend the operation of a restraining order for a specified period if it is satisfied that a confiscation order may be made in respect of the property or part thereof or that a pecuniary penalty order may be made against the person.

Division 7-Realization of Property

89.-(1) Where-

Realization
of property

- (a) a pecuniary penalty order is made;
- (b) the order is not subject to appeal; and
- (c) the order is not discharged,

the court may, on an application by the competent authority, exercise the powers conferred upon the court by this section.

(2) The court may-

- (a) appoint an administrator in respect of realizable property;
- (b) empower an administrator appointed under paragraph (a) to take possession of any realizable property subject to such conditions or exceptions as may be specified by the court;
- (c) order any person having possession of realizable property to give possession of it to any such receiver;
- (d) empower an administrator to realize any realizable property in such manner as the court may direct;
- (e) order any person holding an interest in realizable property to make such payment to the administrator in respect of any beneficial interest held by the defendant or, as the case may be, the recipient of a gift caught by this Act as the court may direct, and the court may, on the payment being made, by order transfer, grant or extinguish any interest in the property.

(3) The court shall not in respect of any property, exercise the powers conferred by paragraph (b), (c), (d) or (e) unless a reasonable opportunity has been given for persons holding any interest in the property to make representations to the court.

90.-(1) Subject to subsection (2), the following property in the hands of an administrator appointed under sections 80 or 89, that is to say-

Application
of proceeds
of realization
and other
sums

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(a) the proceeds of the realization of any property under section 90; and

(b) any other sums, being property held by the defendant,

shall, after such payments, if any, as the court may direct have been made out of those sums, be payable to the registrar or the clerk of the court and be applied on the defendant's behalf towards the satisfaction of the pecuniary penalty order in the manner provided by subsection (3).

(2) If after the amount payable under the pecuniary penalty order has been fully paid any such sums remain in the hands of such a receiver, the receiver shall distribute those sums among such of those persons who held property which has been realized under this part, and in such proportions, as the court may direct after giving a reasonable opportunity for those persons to make representations to the court.

(3) property received by the court on account of an amount payable under a confiscation order shall be applied as follows

(a) if received by him from an administrator under subsection (1), it shall first be applied in payment of the receiver's remuneration and expenses; and

(b) the balance shall be paid or, as the case may be, transferred to the Government.

Exercise of powers of public trustee

91.-(1) The following provisions of this section apply to the powers conferred on the court by sections 80, 87, 88 and 89, or on an administrator appointed under section 80 (2) (b) (i) or section 89 (2) (b).

(2) Subject to the following provisions of this section, the powers shall be exercised with a view to making available for satisfying the pecuniary penalty order or, as the case may be, any pecuniary penalty order that may be made in the defendant case the value for the time being of realizable property held by any person by the realization of such property.

(3) In the case of realizable property held by a person to whom the defendant has directly or indirectly made a gift caught by this part, the powers shall be exercised with a view to realization no more than the value for the time being of the gift.

(4) The powers shall be exercised with a view to allowing any person other than the recipient to any such gift to retain or recover the value of any property held by him or her.

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(5) An order may be made or other action taken in respect of a debt owed by the Government.

(6) In exercising the powers referred to in subject (1), no account shall be taken of any obligations of the defendant or of the recipient of any gift which conflicts with the obligation to satisfy the confiscation order or pecuniary penalty order.

92. – (1) Where a person who holds realizable property is adjudged bankrupt-
(a) property for the time being subject to a restraining order made before the order adjudging him or her bankrupt; and
(b) any proceeds of property realized by virtue of section 9 for the time being in the hands of a person appointed under section 80 (2) (b) (i) or 89 (2),

Paramountcy of this Part in bankruptcy or winding-up

is excluded from the property of the insolvent for the purposes of the Bankruptcy Act.

Cap. 11:01

(2) Where a person has been declared bankrupt, the powers conferred on the court by sections 80 and 89 or on a person appointed under section 80 (b) (i) or 89 (2) shall not be exercised in relation to property for the time being comprised in the property of the insolvent for the purposes of the Bankruptcy Act.

Cap. 11:01

(3) Where, in the case of a debtor, a receiver stands appointed under the Bankruptcy Act and any property of the debtor is subject to a restraining order, the powers conferred on the receiver by virtue of that Act do not apply to property for the time being subject to a restraining order.

Cap. 11:01

(4) Where a person is declared insolvent and has directly or indirectly made a gift caught by this Act-

(a) no order shall be made by virtue of the Bankruptcy Act in respect of the making of the gift at any time when the person has been charged with a serious offence and the proceedings have not been concluded by the acquittal of the defendant or discontinuance of the proceedings, or when property of the person to whom the gift was made is subject to a restraining order or a charge order; and

Cap. 11:01

(b) any order made under the Bankruptcy Act after the conclusion of the proceedings shall take into account any realization under this Act of property held by the person to whom the gift was made.

Cap. 11:01

93. –(1) Where realizable property is held by a company and an order for the winding up of the company has been made or a resolution has been passed by the company for its voluntary winding-up, the functions of the liquidator or any provisional liquidator shall not be exercisable in relation to-

Winding up of company holding realizable property

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(a) property for the time being subject to a restraining order made before the relevant time; or

(b) any proceeds of property realized by virtue of section 89 (2) (c) or (d) or for the time being in the hands of a person appointed under section 80 (2) (b) (i) or 89 (2),

but there shall be payable out of such property any expenses, including the remuneration of the liquidator or provisional liquidator, property incurred in the winding-up in respect of the property.

(2) Where, in the case of a company, an order for winding up has been made or a resolution for winding up has been passed, the powers conferred on the court by section 80 or 89 shall not be exercised in relation to any realizable property held by the company in relation to which the functions of the liquidator are exercisable-

(a) so as inhibit him from exercising those functions for the purpose of distributing any property held by the company to the company's creditors: or

(b) so as to prevent the payment out of any property of expenses including the remuneration of the liquidator or any provisional liquidator property incurred in the winding-up in respect of the property.

(3) Subsection (2) does not affect the enforcement of a charging order-

(a) made before the relevant time; or

(b) on property which was subject to a restraining order at the relevant time.

Cap. 46:03 (4) Nothing in the Companies Act shall be taken as restricting, or enabling the restriction of the powers conferred on the court by section 80 or 89.

(5) In this section-

Cap. 46:03 (a) "company" means any company which may be wound-up under the Companies Act;

(b) "liquidator" includes any person appointed to the office of liquidator, whether provisionally or otherwise, under the Companies Act; and

(c) "the relevant time" means-

(i) where no order for the winding-up of the company has been made, the time of the passing of the resolution for voluntary winding-up;

(ii) where an order for the winding up of a company has been made and, before the presentation of the petition for the winding-up of the company by the court, such a resolution had been passed by the company, the time of the passing of the resolution; and

(iii) in any other case where an order for the winding up of a company has been made, the time of the making of the order.

*Division 8-Production Orders and other Information
Gathering Powers*

94.-(1) Where a person has been charged with or convicted of a serious crime, and the competent authority or an authorized officer of the Financial Intelligence Unit has reasonable grounds for suspecting that any person has possession or control of-

Production
orders

(a) a document relevant to identifying, locating or qualifying property of the person or to identifying or locating a document necessary for the transfer of property of such person; or

(b) a document relevant to identifying, locating or qualifying tainted property in relation to the offence or to identifying or locating a document necessary for the transfer of tainted property in relation to the offence,

the competent authority may apply *ex parte* and in writing to a judge or magistrate in chambers for an order against the person suspected of having possession or control of a document of the kind referred to, and the application shall be supported by an affidavit.

(2) The judge or magistrate may, if he or she considers there are reasonable grounds for so doing, make an order that the person produce to the competent authority, at a time and place specified in the order, any documents of the kind referred to in subsection (1):

provided that an order under this subsection may not require the production of bankers books.

(3) The competent authority to whom documents are produced may-

(a) inspect the documents;

(b) make copies of the documents; or

(c) retain the documents for so long as is reasonably necessary for the purposes of this Act.

(4) Where the competent authority retains documents produced to him or her under subsection (3) he or she shall make a copy of the documents available to the person who produced them.

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(5) A person is not entitled to refuse to produce documents ordered to be produced under this section on the ground that-

(a) the document might tend to incriminate the person or make him liable to a penalty; or

(b) the production of the document would be in breach of an obligation, whether imposed by a written law or otherwise, of the person not to disclose the existence or contents of the document.

Evidential
value of
information

95.-(1) Where a person produces a document pursuant to an order under section 94, the production of the document, or any information, document or thing obtained as a direct or indirect consequence of the production of the document is not admissible against the person in any criminal proceedings except proceedings under section 96.

(2) For the purposes of subsection (1), proceedings on an application for a restraining order, a confiscation order or a pecuniary penalty orders are not criminal proceedings.

Failure to
comply with a
production
order

96. Where a person is required by a production order to produce a document to the competent authority, the person commits an offence against this section if he-

(a) contravenes the order without reasonable cause; or

(b) in purported compliance with the order, produces or makes available a document known to the person to be false or misleading in a material particular and does not so indicate to the competent authority and provide to the competent authority any correct information of which the person is in possession,

and on conviction shall be liable, in the case of a natural person to imprisonment for two years and a fine of K100, 000 or, in the case of a body corporate, a fine of K500, 000.

Production
orders in
relation to
foreign
offences
Cap. 8:04

97. Where a foreign State requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction and the Attorney General has, under the Mutual Assistance in Criminal Matters Act, authorized the giving of assistance to the foreign State, the provisions of section 94 apply assistance to the foreign State, the provisions of section 94 apply *mutatis mutandis*.

Power to
search for
and seize
documents
relevant to
locating
property

98. The competent authority may, with the consent of the occupier of the land or the premises, or under warrant issued under section 99-

(a) enter upon land or upon or into premises;

(b) search the land or premises for any document of the type described in section 94 (1); and

(c) seize any document found in the course of the search that the competent authority believes, on reasonable grounds, to be a relevant document in relation to a serious crime.

99.-(1) Where-

(a) a person has been charged or convicted of serious crime; or

(b) the competent authority has reasonable grounds for suspecting that there is, or may be within the next seventy-two hours, upon any land or upon or in any premises, a document of the type described in section 94 (1) in relation to the offence,

the competent authority may make application supported by information on oath to a magistrate or judge for a search warrant in respect of the land or those premises.

(2) Where an application is made under subsection (1) for a warrant to search land or premises, the magistrate or judge may, subject to subsection (4), issue a warrant authorizing competent authority, with such assistance and by such force as is necessary and reasonable-

(a) to enter upon the land or in or upon any premises and to Search the land or premises for property of that kind; and

(b) to seize property found in the course of the search that the Competent authority believes on reasonable grounds to be property of that kind.

(3) A magistrate or judge shall not issue a warrant under subsection (2) unless he or she is satisfied that-

(a) a production order has been given in respect of the document and has not been complied with;

(b) a production order in respect of the document would be unlikely to be effective;

(c) the investigation for the purpose of which the search warrant is being sought might be seriously prejudiced if the competent authority does not gain immediate access to the document without any notice to any person; or

(d) the document involved cannot be identified or described with sufficient particularity to enable a production order to be obtained.

(4) A warrant issued under this section shall state-

Search
warrant for
location
of documents
relevant to
locating
property

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(a) the purpose for which it is issued, including a reference to the nature of the relevant offence;

(b) a description of the kind of documents authorized to be seized;

(c) a time at which the warrant ceases to be in force; and

(d) whether entry is authorized to be made at any time of the day or night or during specified hours.

(5) If during the course of searching under a warrant issued under this section, the competent authority finds-

(a) a document of the type described in section 94 (1) that the police officer believes on reasonable grounds to relate to the relevant offence or to another indictable offence; or

(b) anything the competent authority believes on reasonable grounds will afford evidence as to the commission of a criminal offence,

the competent authority may seize that property or thing and the warrant shall be deemed to authorize such seizure.

Search warrants in relation to foreign offences
Cap. 8:04

100. Where a foreign state requests assistance to locate or seize property suspected to be tainted property in respect of an offence within its jurisdiction and the Attorney General has, under the Mutual Assistance in Criminal Matters Act, authorized the giving of assistance to the foreign state, the provisions of section 99 apply *mutatis-mutandis*.

Division 8-Monitoring orders

Monitoring orders

101.-(1) The competent authority may apply, *ex parte* and in writing to a judge or magistrate in chambers for an order (in this section otherwise called a “monitoring order”) directing a financial institution to give information to a police officer or an authorized officer of the Financial Intelligence Unit, and the application shall be supported by an affidavit.

(2) A monitoring order shall-

(a) direct a financial institution to disclose information obtained by the institution about transactions conducted through an account held by a particular person with the institution;

(b) not have retrospective effect; and

(c) only apply for a period of a maximum of three months from the date of the making of the order.

(3) A judge or magistrate shall not issue a monitoring order unless he or she is satisfied that there are reasonable grounds for suspecting that the person in respect of whose account the order is sought-

(a) has committed or was involved in the commission, or is about to commit or be involved in the commission of, a serious crime; or

(b) has benefited directly or indirectly, or is about to benefit directly or indirectly from the commission of a serious crime.

(4) A monitoring order shall specify-

(a) the name or names in which the account is believed to be held; and

(b) the class of information that the institution is required to give.

(5) Where a financial institution, which has been given notice of a monitoring order, knowingly-

(a) contravenes the order, or

(b) provides false or misleading information in purported compliance with the order,

the institution commits an offence and shall be liable on conviction, in the case of a natural person, to imprisonment for two years and a fine of K100, 000 and, in the case of a body corporate, to a fine of K500, 000.

102. –(1) A financial institution that is, or has been, subject to a monitoring order shall not disclose the existence or operation of the order to any person except-

Monitoring orders not to be disclosed

(a) an officer or agent of the institution for the purpose of ensuring compliance with order;

(b) a legal adviser for the purpose of obtaining legal advice or representation in respect of the order; or

(c) a police officer or an authorized officer of the Financial Intelligence Unit authorized in writing to receive the information.

(2) Any person who contravenes subsection (1) is guilty of an offence and shall be liable on conviction-

(a) in the case of a natural person, to imprisonment for two years and a fine K100, 000.

(b) in the case of a corporation, to a fine K500, 000.

(3) A person described in subsection (1) shall not disclose the existence or operation of a monitoring order except to another person described in that subsection and may do so only for the purposes of the performance of the person's duties or functions.

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(4) Any person who contravenes subsection (1) is guilty of an offence and liable to imprisonment for two years and a fine of K100, 000.

(5) Nothing in this section prevents the disclosure of information concerning a monitoring order for the purpose of, or in connection with, legal proceedings or in the course of proceedings before a court:

provided that nothing in this section shall be construed as requiring a legal practitioner to disclose to any court the existence or operation of a monitoring order.

PART VI-MISCELLANEOUS

Money
laundering
and financing
of terrorism
offences for
extradition
purposes

103. For the purpose of any law relating to extradition of fugitive offenders, money laundering and financing of terrorism shall be offences for which extradition or rendition may be granted.

mutual
assistance

104.- (1) Where for the investigation or prosecution of a serious offence or a money laundering offence or a financing of terrorism offence or for the making or execution of any order or direction made under this Act in respect of such offences, any assistance in Criminal Matters Act, may in accordance with that Act request mutual assistance from that designated country as if such investigation, prosecution, making or execution is a criminal matter within the meaning of that Act.

Cap. 8:04

Cap. 8:04

(2) Where a request is made by a foreign state in the investigation or prosecution of a serious offence, a money laundering offence or a terrorist financing offence in that country or for the making or execution of any order or direction made in that country in respect of such an offence, the Ministry may in accordance with the Mutual Assistance in Criminal Matters Act, provide such assistance as if such investigation, prosecution, making or execution is a criminal matter within the meaning of that Act.

Regulations

105. The Ministry may make regulations for carrying the purpose and provisions of this Act into effect and prescribing all matters which are necessary or convenient to be prescribed for the better carrying out of the provisions of Act

FIRST SCHEDULE (s.2)

UNITED NATIONS COUNTER-TERRORISM CONVENTIONS

Convention on Offences and Certain Other Acts committed on Board aircraft,
Signed at Tokyo on 14th September, 1963

Convention for the Suppression of Unlawful Seizure of Aircraft, done at the
Hague 16th December, 1970

Convention for the Suppression of Unlawful Acts Against the Safety of Civil
Aviation, done at Montreal on 23rd September, 1971

Convention on the Prevention and Punishment of Crimes Against
Internationally Protected Persons, including Diplomatic Agents, adopted by the
General Assembly of the United Nations on 14th December, 1973

International convention against the Taking of Hostages, adopted by the
General Assembly of the United Nations on 17th December, 1979

Convention on the Physical Protection of Nuclear Material, adopted at Vienna
On 3rd March, 1980

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving
International Civil Aviation, supplementary to the Convention for the
Suppression of Unlawful Acts against the Safety of Civil Aviation, done at
Montreal on 24th, February, 1988

Convention for the Suppression of Unlawful Acts against the Safety of
Maritime Navigation, done at Rome on 10th March, 1988

Convention on the Suppression of Unlawful Acts against the Safety of Fixed
Platforms located on the Continental Shelf, done at Rome on 10th March, 1988

Convention on the Making of Plastic Explosives for the purpose of
Detention, signed at Montreal, on 1st March, 1991

International Convention for the Suppression of Terrorist Bombings, adopted
By the General Assembly of the United Nations on 15th December, 1997

International Convention for the Suppression of the Financing of Terrorism,
Adopted by the General Assembly of the United Nations on 9th December, 1999.

Second schedule(s 22)
OATH of CONFIDENTIALITY

I,having been appointed as an
Employee of the Financial Intelligence Unit or an agent in the service of the
Financial Intelligence Unit do solemnly swear that I will not, directly, or
Indirectly divulge the business or proceedings of the Financial Intelligence Unit
Or the nature or contents of any document communicated to me any matter

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coming to my knowledge in my capacity as an employee of the Financial Intelligence Unit or an agent in the service of the Financial Intelligence Unit and That I will and truly perform the functions and duties of that office.

So help me God.

SWORN at.....

Signature of Deponent

Thisday of

Before me:

Commissioner for Oaths

Passed in parliament this fourth day of August, two thousand and six.

M. M. Katopola
Clerk of Parliament