

EXPLANATORY NOTE:

_____ Words underlined with a solid line indicate insertions in existing provisions

[] Words in bold type in square brackets indicate omissions from existing provisions

BILL

To **amend the Prevention of Organised Crime Act, 2004, to provide for unexplained wealth orders; to provide for the confiscation and forfeiture of intended instrumentalities of offences; to provide for the seizure of tainted property without warrant; to provide for instruction of legal practitioners by the Prosecutor-General, to provide for the offence of piracy and seizure of pirate ships, to provide for the criminalisation of trafficking in persons and stolen trafficking in stolen goods; to provide for stand-alone money laundering, to provide for allocation of funds from the Criminal Asset Recovery Fund; to provide for request for information from banking institutions and other persons; to provide for the appointment of staff members; to prohibit the smuggling of migrants to effect certain textual improvements and to provide for incidental matters.**

BE IT ENACTED as passed by the Parliament, and assented to by the President, of the Republic of Namibia as follows:

Amendment of section 1 of Act No. 29 of 2004

Section 1 of the Prevention of Organised Crime Act, 2004 (hereafter referred to as “the principal Act”) is amended -

(a) By insertion after the definition of “criminal gang” of the following definition

“Delivery” means to serve copies on all parties and file the original with the Registrar of the High Court and the service or filing could be by electronic means.

(b) By the insertion after the definition of “instrumentality of an offence” of the following definition

“intended instrumentality of an offence” means any property which is intended to be used in the commission of an offence’;

(c) By insertion of the definition of “smuggling of migrants” after the definition of restraint order

“smuggling of migrants” means the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person who is not –

(a) a national or a permanent resident of Namibia; or

(b) lawfully resident in Namibia;

into Namibia or enabling such a person to remain in Namibia without complying with the law of Namibia;

(d) By amendment of the following definition

“staff member” means a staff member as defined in section 1 of the Public Service Act, 1995 (Act No. 13 of 1995), as amended, and/ or any member of the Namibian Police Force or the Anti-Corruption Commission or any other person who is authorised by any law to seize in terms of that law;

(e) By insertion of the following definition:

“Prosecutor- General” means the Prosecutor- General appointed in terms of Article 32(4)(a)(cc) of the Constitution of the Republic of Namibia or any public prosecutor authorised in writing by the Prosecutor- General to act in that capacity for a specific matter under Chapters 5, 6 and 9 of this Act.

- (f) By insertion of the following definition:

“Inspector- General” means the Inspector- General of the Namibian Police Force appointed in terms of Article 32(4) (c) of the Constitution of the Republic of Namibia or any police officer authorised in writing by the Inspector- General to act in that capacity for a specific matter in terms of this Act

- (g) By insertion after the definition of “Bank” the following definition

“Financial Intelligence Centre” means the Financial Intelligence Centre established in terms of section 7 of the Financial Intelligence Act, 2012 (Act No. 13 of 2012), as amended.

- (h) By the insertion after the definition of “staff member” the following definition

“supervisory body” means a functionary or institution set out in Schedule 2 of the Financial Intelligence Act, 2012 (Act No. 13 of 2012);

- (i) By insertion after the definition of “staff member” the following definition

“Stolen property” means Property stolen from anywhere, whether in Namibia or elsewhere, including any proceeds of that property, money for which it has been sold, and anything bought with those proceeds.”

- (j) By insertion after the definition of “preservation of property order” the following definition:

“Private ship or aircraft” means a ship or aircraft intended to be used by the persons in dominant control for the purpose of committing piracy. The same

applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

(k) Insertion of definition of “peace officer”

“peace officer” for purposes of this Act includes any member of the Namibia Defence Force, members of the Navy, members of the Namibian Police Force, Fisheries Inspector as defined in the Marine Resources Act 27 of 2000, as amended, or any person authorised by any other law to seize any ship or aircraft within the Namibian territorial or international sea waters or airspace;

(l) Insertion of the definition of “Unexplained Assets”

“Unexplained Assets” means any property -

- (a) acquired by a person who is reasonably suspected of having committed any offence the value of which is disproportionate to his or her known sources of income at or around the time of the commission of the offence and for which there is no satisfactory explanation;
- (b) the ownership, possession, custody or control of which cannot be satisfactorily accounted for by the person who owns, possesses, has custody or control of the property at or around the time of the commission of the offence and for which there is no satisfactory explanation; or
- (c) held by any person on behalf of another person to an extent which is disproportionate to the known sources of income of that other person and for which there is no satisfactory explanation at or around the time of the commission of the offence and for which there is no satisfactory explanation.’

(m) Insertion of the definition of unexplained wealth order”

“An unexplained wealth order” is an order prohibiting any person from dealing with an unexplained asset and requiring the owner of bona fide possessor of the unexplained asset to provide a statement under oath—

- (a) setting out the nature and extent of his or her interest in the property in respect of which the order is made,

- (b) explaining how he or she obtained the property (including, in particular, how any costs incurred in obtaining it were met), and if the property is held on behalf of a third party, any such information pertaining the beneficial owner of such property
- (c) setting out such other information in connection with the property as may be so specified in the order

Insertion of section 6A in Act No.29 of 2004

6A. For purposes of section 6 and in respect of any person, other than the person who committed the predicate offence, it is not necessary for there to be a conviction for the predicate offence or for the State to prove that a particular person committed a predicate offence.

Insertion of section 15 in Act No. 29 of 2004

15. Any person who participates in or who aids and abets the smuggling of migrants, as contemplated in Annex III of the Convention, by land, air or sea, in order to obtain, directly or indirectly, a financial or together material benefit, commits an offence and is liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years.

Insertion of section 15A in Act No. 29 of 2004

15A. Offence of trafficking of stolen goods

Any person who participates in the collection, importation, supply, transshipment administration, exportation, sale or transmission of stolen goods commits an offence and is liable to a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years.

Insertion of section 16 in Act No. 29 of 2004 –

16. Piracy and Other Offenses

(1) For the purpose of this Act, Piracy is:

(a) any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew, including the Master, or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a ship or aircraft contemplated in subsection (1); and

(c) any act of inciting or of intentionally facilitating an act contemplated in paragraph (a) or (b).

(2) Any act of piracy, as defined in subsection (1), committed by the crew of a warship or military aircraft, government ship or government aircraft which has mutinied and taken control of such ship or aircraft, must for purposes of this section be regarded as having been committed by the crew of a private ship or aircraft.

(3) Any person who commits an act of piracy is guilty of an offence, which may be tried in any court in the Republic designated by the Prosecutor-General and, upon conviction, is liable to a fine not exceeding N\$100 million or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.

(4) Any person who has a previous conviction under subsection (3) shall, upon a subsequent conviction, be liable to the fine and or imprisonment as stipulated under subsection (3) as well as an additional fine of N\$50 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

Insertion of section 16 A in Act No. 29 of 2004

Seizure of pirate ship or aircraft

(1) Any peace officer may seize a ship or aircraft and any property on board such ship and aircraft, and arrest any person on board such ship and aircraft in accordance with articles 105 and 107 of United Nations Convention on the Law of the Sea (UNCLOS).

(2) Notwithstanding any provision in any other law, any ship, aircraft, property seized or person arrested, in terms of this section, must be dealt with in accordance with the provisions of Chapter 5 or 6 of this Act.

Amendment of section 20 of the No. 29 of 2004

Realisable property

20. (1) Subject to subsection (2), the following property is realisable in terms of this Chapter, namely –

- (a) any property held by the defendant concerned;
- (b) any property held by a person to whom that defendant has directly or indirectly made any affected gift; or
- (c) the instrumentality of an offence or intended instrumentality of an offence attributable to the defendant.

Amendment of section 51 (2) of Act No. 29 of 2004

(2) The High court must make an order referred to in subsection (1) without requiring that notice of the application be given to any other person or the adduction of any further evidence from any other person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned –

- (a) is an instrumentality or intended instrumentality of an offence referred to in Schedule 1; or
- (b) is the proceeds of unlawful activities, or
- (c) constitutes unexplained assets as per an unexplained wealth order.

and the court is satisfied that that information shows on the face of it that there are reasonable grounds for that belief.

Amendment of section 52 (5) (d) and (e) of Act No.29 of 2004

(d) whether he or she admits or denies that the property concerned is an instrumentality of an offence, an intended instrumentality of an offence or the proceeds of unlawful activities or constitutes unexplained assets; and

(e) the –

(i) facts on which he or she intends to rely on in opposing the making of a forfeiture order or applying for an order referred to in subparagraph (c)

(ii); and the basis on which he or she admits or denies that the property concerned is an instrumentality or intended instrumentality of an offence or the proceeds of unlawful activities or constitutes unexplained assets.

UNEXPLAINED WEALTH ORDERS- TO FALL UNDER CHAPTER 6

Insertion of- Part 2A

Unexplained Wealth orders

Section 58A Unexplained wealth orders

(1) The Prosecutor- General may apply to the High Court for an unexplained wealth order prohibiting any person, subject to such condition and exceptions as may be specified in the order, from dealing in any manner with the unexplained asset, and requiring the person against whom the order is made to provide an affidavit under oath that:

- (a) sets out the nature and extent of his or her interest in the property in respect of which the order is made,
 - (b) explaining how he or she obtained the property (including, in particular, how any costs incurred in obtaining it were met), and if the property is held on behalf of a third party, any such information pertaining the beneficial owner of such property;
 - (c) setting out such other information in connection with the property as may be so specified in the order
- (2) The High Court shall make an order referred to in subsection (1) without requiring that notice of the application be given to the person against who the order is sought or the adduction of any further evidence from any person if the application is supported by an affidavit indicating that the deponent has sufficient information that the property concerned:
- (a) is an unexplained asset; and
 - (b) the person was afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income to a member of the police or the anti-corruption commission as provided for in terms of section 83A;

(c) and the court is satisfied that the information shows on the face of it that there are reasonable grounds for that belief.

(3) The High Court shall make an interim order prohibiting any person, subject to such condition and exceptions as may be specified in the order, from dealing in any manner with the unexplained asset as set out in subsection 1 and issue a rule nisi calling upon the person concerned to show cause on the return date why an unexplained wealth order should not be made.

(4) A person against whom the unexplained order is made must within 21 days deliver the affidavit under subsection (1) to the Prosecutor- General.

(5) An unexplained wealth order expires 30 days after the date the affidavit under subsection (4) must be delivered to the Prosecutor General.

Amendment of subsection 60(1) of Act No. 29 of 2004

The following section is substituted for section 60(1) of the principal Act:

“60. (1) Any person who, for reasons set out under subsection (3), failed to give notice in terms of section 52(3) within the period specified in section 52(4) may, within 14 days, of him or her becoming aware of the existence of a preservation of property order, or within 14 days the cessation of the impossibility to give notice, apply to the High Court for condonation of that failure and leave to give a notice accompanied by the required information.”

Amendment of section 61 (1) of Act No.29 of 2004

61. (1) The High Court must, subject to section 63, make the forfeiture order

applied for under section 59(1) if the court finds on a balance of probabilities that the property concerned -

(a) is an instrumentality or intended instrumentality of an offence referred to in Schedule 1; or

(b) is the proceeds of unlawful activities; or

(c) constitutes unexplained assets.

Amendment of section 61(5) of Act No. 29 of 2004

The following section is substituted for section 61(5) of the principal Act:

“On good cause shown in an application referred to in subsection (4), the High Court may vary or rescind the order made under **[that]** subsection (3) or make some other appropriate order.”

Amendment of section 62(1), (2) and (3) of Act No 29 of 2004

Notice that property is concerned in commission of offence

62. (1) A judge in chambers or a magistrate may order that a notice referred to in subsection (3) be issued on a written application by the Prosecutor-General supported by an affidavit indicating that the deponent has sufficient information which shows on the face of it that the property referred to in the application is an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

(2) The judge or magistrate must, subject to any conditions which are necessary to preserve the property, make an order referred to in subsection (1) if the judge or magistrate is satisfied that there is reason to suspect that the property concerned is an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

(3) A notice referred to in subsection (1) must be directed to a person with an interest in, or control over, the property concerned and must inform that person that there is reason to suspect that the property is an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

Amendment of section 63(3)(a), (b), 63(4), 63(5) and 63(6) of the Principal Act

63 (3) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and -

(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1; or

(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

(4) If an applicant for an order under subsection (1) adduces evidence to show that he or she did not know or did not have reasonable grounds to suspect that the property in which the interest is held, is an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1, the State may submit a return of the service on the applicant of a notice issued under section 62(4) in rebuttal of that evidence in respect of the period since the date of the service.

(5) If the State submits a return of the service on the applicant of a notice issued under section 62(4) as contemplated in subsection (4), the applicant for an order under subsection (1) must, in addition to the facts referred to in subsection (3), also prove on a balance of probabilities that, since that service, he or she has taken all reasonable steps to prevent the further use of the property concerned as an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

(6) The High Court when making an order for the exclusion of an interest in property under subsection (1) may, in the interest of the administration of justice or in the public interest, make that order on the conditions that the court deems appropriate including

a condition requiring the person who applied for the exclusion to take all reasonable steps, within a period that the court may determine, to prevent the future use of the property as an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

Amendment of Section 65 of the Principal Act

Protection of interests of third parties in forfeited property

(9) The High Court may make an order under subsection (1), in relation to the forfeiture of an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1, if it finds on a balance of probabilities that the applicant for the order had acquired the interest concerned legally, and -

(a) neither knew nor had reasonable grounds to suspect that the property in which the interest is held is an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1; or

(b) where the offence concerned had occurred before the commencement of this Act, the applicant has since the commencement of this Act taken all reasonable steps to prevent the use of the property concerned as an instrumentality of an offence or an intended instrumentality of an offence referred to in Schedule 1.

Amendment of section 67 of the principal Act:

The following section is substituted for section 67 of the principal Act:

67. (1) Where the High Court has made a forfeiture order and a *curator bonis* has not been appointed in respect of any of the property concerned or a staff member has not been directed to take care of the property, the High Court may appoint a *curator bonis* or direct a staff member to perform any of the functions referred to in section 68 in respect of that property.

(2) On the date when a forfeiture order takes effect the property subject to the order is forfeited to the State and vests in the *curator bonis* or staff member in his or her official capacity, as the case may be, on behalf of the State.

(3) When a forfeiture order takes effect the *curator bonis* or staff member in his or her official capacity, as the case may be, must take possession of that property on behalf of the State from any person in whose possession it is found.

Amendment of section 68 of Act No. 29 of 2004

68. (1) The *curator bonis* or staff member, as the case may be, must, subject to any order for the exclusion of interests in forfeited property under section 63(1) or 65(8) and in accordance with the directions of the Committee –

(a) deposit any moneys forfeited under section 67(2) into the Fund;

(b) deliver property forfeited under section 67(2) to the Fund; or

(c) dispose of property forfeited under section 67(2) by sale or any other means and deposit the proceeds of the sale or disposition into the Fund.

(2) A person who has possession, or was entitled to possession, of forfeited property immediately before the forfeiture order took effect, or any person acting in concert with, or on behalf of that person, is not eligible to purchase forfeited property at any sale held by the *curator bonis* or the staff member in his or her official capacity, as the case may be.

Amendment of section 76 to Act 29 of 2004

The following section is substituted for section 76(1) of the Principal Act

76. (1) The property and money allocated to, or standing to the credit of the Fund, may be utilised by Cabinet after considering the recommendations of the Committee, for -

(a) the allocation of property and amounts of money from the Fund to specific law enforcement agencies;

(b) the allocation of property and amounts of money from the Fund to any institution, organisation or fund contemplated in section 81(c) of this Act;

(c) the administration of the Fund, and

(d) the allocation of property and amounts of money from the Fund to the Financial Intelligence Centre or Supervisory Bodies, as defined in section 1,
only in as far as such property and money cannot constitute a replacement for any existing budgetary expenses.

Amendment of section 81 of Act 29 of 2004

The following section is substituted for section 81(1) of the Principal Act

81. (1) The Committee may make -

(a) recommendations to Cabinet with regard to the policy to be adopted concerning the confiscation, forfeiture and realisation of property and the transfer of that property to the Fund in terms of this Act or any other Act;

(b) recommendations to Cabinet with regard to the allocation of property and moneys from the Fund to specific law enforcement agencies;

(c) recommendations to Cabinet with regard to the allocation of property and moneys from the Fund to any institution, organisation or fund contemplated in section 80(c);

(d) recommendations to Cabinet regarding the allocation of moneys for the administration of the Fund; and

(e) recommendations to Cabinet with regard to the allocation of property and money from the Fund to the Financial Intelligence Centre or Supervisory Body;

only in as far as such property and money cannot constitute a replacement for any existing budgetary expenses.

Insertion of section 83 A to Act 29 of 2004

83 A. During an investigation as provided for in section 83(2) of this Act, the member of the police or the anti-corruption commission has reasonable grounds to suspect that the person to whom the investigation relates has unexplained assets; the member of

the police of the anti-corruption commission must afforded a reasonable opportunity to the person to explain the disproportion between the assets concerned and his or her known legitimate sources of income

Amendment of section 84(1)(b) of Act No. 29 of 2004

The following section is substituted for section 84(1)(b) of the principal Act:

“(b) that a financial institution, as defined in the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001), as amended, or a banking institution as defined in the Banking Institutions Act 2 of 1998 as amended, or any other person or institution immediately produce to an authorised member of the police or investigating officer of the Anti -Corruption Commission all information obtained by the person or institution about any transaction conducted by or for that person with the person or institution during any period before or after the date of the order.”

Amendment of section 85(1) of Act No. 29 of 2004

The following section is substituted for section 85(1) of the principal Act:

“85. (1) For the purposes of this section 86 and section 86A “tainted property” means

–

(a) the instrumentality or intended instrumentality of an offence referred to in Schedule 1; or

(b) the proceeds of an offence referred to in Schedule 1.”

Insertion of section 86A in Act no. 29 of 2004

The following section is inserted after section 86 of Act 29 of 2004:

“86A Seizure of tainted property without warrant

(1) Where there are reasonable grounds for believing that there is in or on any site, vehicle, vessel or aircraft any tainted property, an authorised member of the police may, without warrant, enter and search any such site, premises, building, vehicle, vessel, train or aircraft if the delay in obtaining a warrant will defeat the object of the search, providing that-

the person in charge thereof, is informed of the object of the search,

and such authorised member of the police may seize anything found upon or at or in such premises, building, vehicle, vessel, train or aircraft which he or she believes, on reasonable grounds to be tainted.

(2) the authorised member of the police referred to in subsection (1)-

(a) may use such assistants as may be reasonable in the circumstances for the purpose of the entry, search and seizure of property that he or she believes, on reasonable grounds to be tainted property; and

(b) may use such force as is reasonable in the circumstances for the purpose of effecting entry, and for breaking open anything in or on the place or thing to be searched.

(3) Every person called on to assist the authorised member of the police mentioned in subsection (1) to carry out the search and seizure contemplated in that subsection has the power described in subsection (2)(b).

(4) This section, in so far as it authorises the interference with a person’s right to privacy of his or her person and home as guaranteed by Article 13 of the Constitution, is enacted on the authority of that Article.”

Amendment to section 87 in Act no. 29 of 2004

The following section is inserted after section 87 of Act 29 of 2004:

(1)An authorised member of the police may request any person employed in or associated with an agency, office or ministry as defined in the Public Service Act, 1995 (Act No. 13 of 1995) as amended or statutory body or banking institution as defined in the Banking Institutions Act 2 of 1998 as amended or a financial institution, as defined in the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) or any other person or institution to furnish him or her free of charge and within a period specified in that request, with all information that may reasonably be required for any investigation in terms of this Act and that person must, notwithstanding anything to the contrary contained in any law which prohibits or precludes him or her -

(a)from disclosing any information relating to the activities, affairs or business of any other person; or

(b)from permitting any person to have access to any registers, records or other documents, or electronic data which have a bearing on those activities, affairs or business,

furnish the authorised member of the police with that information and permit the authorised member of the police to have access to any registers, records, documents, and electronic data, which may contain the information.

Amendment of section 89(2) of Act No. 29 of 2004

The following section is substituted for section 89(2) of the principal Act:

- “2. Save for an unexplained wealth order, a person who intentionally refuses or fails to comply with an order of court made in terms of this Act, commits an offence.”

Insertion of section 96A of Act No. 29 of 2004

The following section is inserted after section 96 of Act 29 of 2004:

“Instruction of private legal practitioners

96 A Notwithstanding the provisions of the Government Attorney Proclamation No.161 of 1982, the Prosecutor- General may perform any such functions as may be performed in accordance with the law, practice or custom by legal practitioners for the purposes of any proceedings under Chapter 5, Chapter 6 and Chapter 9 of this Act.