**EXPLANATORY MEMORANDUM TO**

**The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order (Northern Ireland) 2021**

## 1. Introduction

1.1. This Explanatory Memorandum has been prepared by the Department of Justice to accompany the Statutory Rule (details above) which is laid before the Northern Ireland Assembly.

1.2. The Statutory Rule is made under the Proceeds of Crime Act 2002 (c. 29) and is subject to the draft affirmative resolution procedure.

## 2. Purpose

2.1. This Order provides that a revised code of practice entitled "Code of Practice issued under section 293A of the Proceeds of Crime Act 2002: Recovery of Cash: Search Powers (Northern Ireland)" comes into operation on 28th June 2021. The revised code is required because of amendments to the Proceeds of Crime Act 2002 ("POCA") made by the Criminal Finances Act 2017 (c. 22) ("CFA 2017"). The coming into operation date of this Order is the date that the amendments to POCA will be brought into operation by the commencement of the relevant provisions of the CFA 2017 in Northern Ireland. The outstanding commencement of the CFA 2017 will bring the POCA regime in Northern Ireland up to date and into line with England, Wales and Scotland, subject to jurisdictional variations. The previous version of the code was brought into operation on 1st March 2016 by S.R. 2016 No. 65. This Statutory Rule revokes S.R. 2016 No. 65.

## 3. Background

3.1. Codes of practice are made under POCA as guidance to officers exercising POCA functions and to establish procedural requirements to ensure that the functions concerned are exercised lawfully, proportionately, consistently and in a focussed manner. The codes are also of interest to persons who are the subject of the powers. The codes state that they should be made widely available where the powers are likely to be used, for example in police stations.

3.2. The Department of Justice is responsible for bringing forward distinct Northern Ireland codes of practice. As well as the code related to this Order, three additional codes are being brought into operation on the same date - a revised code entitled "Code of Practice issued under section 195T of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (Northern Ireland)"; a revised code entitled "Code of Practice issued under section 377ZA of the Proceeds of Crime Act 2002: Investigations (Northern Ireland)"; and a new code entitled "Code of Practice issued under section 303I of the Proceeds of Crime Act 2002: Recovery of Listed Assets: Search Powers (Northern Ireland)".

3.3. The "Code of Practice issued by the Department of Justice under section 293A of the Proceeds of Crime Act 2002: Recovery of Cash: Search Powers (Northern Ireland)" ("the section 293A code") provides guidance on the exercise of functions under POCA as further detailed in paragraphs 3.6 to 3.11 below. Section 293A of POCA was inserted by Schedule 14 and paragraph 61 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (S.I. 2010/976).

3.4. The section 293A code applies to a constable or an accredited financial investigator exercising the functions in Northern Ireland. A separate code of practice issued under section 292 of POCA applies to officers of Revenue and Customs, immigration officers and officers of the Serious Fraud Office exercising the functions in England, Wales, Scotland and Northern Ireland and to accredited financial investigators and constables in relation to the exercise of functions in England and Wales only.

3.5. The 293A code includes detailed and clear explanations of the powers and the legal requirements that must be met before they are exercised. It sets out guidance on how to consider those legal requirements, on balancing the need for using intrusive powers against the interference with a person's privacy or possessions, and what further issues should be considered when using the powers. The code requires an officer who is contemplating using the powers to consider the impact on the community in their use, balanced against the public interest and the benefit the use of the powers would add to the case. The code also contains direct operational guidance or procedural requirements in relation to various aspects of the actual use of the powers, including the time of day at which, and the manner in which, they should be used.

3.6. Chapter 3 of Part 5 of POCA provides for the search, seizure and detention of cash which is reasonably suspected of having been obtained through unlawful conduct or of being intended for use in such conduct, and for the forfeiture of such cash, in the United Kingdom. This is a civil procedure in the magistrates' court in respect of the cash itself; it does not require a criminal conviction.

3.7. The code provides guidance and procedural requirements for searches of the person, vehicles and property. This is detailed and systematic guidance which provides directions on considering the use of the powers and the actual search and subsequent requirements, including making a record of the search (to be available to the public). The code also addresses other issues that arise when using the powers, for example the procedure when a record of a search is made electronically. The code also emphasises the need to ensure an effective, proportionate and transparent use of the search powers.

3.8. Section 294 of POCA contains the power to seize cash and section 295 provides that cash can be detained for an initial period of 48 hours after which time officers can apply to the magistrates' court for an order for further detention. The procedure for forfeiting the cash by order of the magistrates' court is set out in section 298, or alternatively there is a procedure for administrative forfeiture of cash in sections 297A to 297G.

3.9. The 293A code has been revised to take account of some of the changes introduced by the CFA 2017 which relate to the search, seizure and detention of cash.

3.10. The code has been revised to take account of amendments to the definition of cash to include gaming vouchers, fixed value casino tokens and betting receipts (section 289(6) of POCA, amended by section 14(1) of the CFA 2017). This amendment was introduced in response to the widening range of methods employed by criminals to conceal and transport illicit wealth.

3.11. Section 290 of POCA provides that the powers in section 289 can only be exercised with prior approval of a judicial officer or a senior officer, except where it is not practicable to obtain prior approval. Section 290 defines the senior officers who can provide prior approval for the exercise of the powers in section 289 POCA. Civilian accredited financial investigators who are members of staff of the Police Service of Northern Ireland are now able to seek prior approval for cash searches from a senior police officer, by virtue of the amendment made to POCA by section 31(4) of the CFA 2017. Previously approval had to be sought from another accredited financial investigator of a specified grade.

## 4. Consultation

4.1. A draft of the revised section 293A code was subject to a nine week public consultation from 1 December 2020 to 1 February 2021 (see https://www.justice-ni.gov.uk/consultations/consultation-codes-practice-issued-under-proceeds-crime-act-2002). Eight consultation responses were received and the Department of Justice considered the representations made. The responses supported the amendments to account for the future commencement of the CFA 2017 in Northern Ireland in the three revised codes and the new code. No adverse impacts were identified. No amendments to the codes were deemed necessary as a result of the Department's consultation.

## 5. Equality Impact

5.1. The Department of Justice considered its responsibilities under section 75 of the Northern Ireland Act 1998 and carried out an Equality Impact Screening exercise on the draft codes of practice prior to consultation. It was concluded that a full Equality Impact Assessment was not required. No equality issues were identified in the screening exercise or in the responses to the consultation.

## 6. Regulatory Impact

6.1. There is no impact on business, charities or voluntary bodies. An impact assessment has not been prepared for this Statutory Rule.

## 7. Financial Implications

7.1. The impact on the public sector is minimal. The Proceeds of Crime Centre within the National Crime Agency is tasked with managing a training and accreditation programme to cover the exercise of POCA powers and functions. This has been updated to include changes made by the CFA 2017 and will be provided to Northern Ireland officers and financial investigators, as appropriate. The 2021 revised Northern Ireland codes of

practice and one new code will be one component of the overall training programme.

## 8. Section 24 of the Northern Ireland Act 1998

8.1. In the view of the Department of Justice the provisions of the Order and the section 293A code are compatible with section 24 of the Northern Ireland Act 1998.

## 9. EU Implications

9.1. Not applicable.

## 10. Parity or Replicatory Measure

10.1. Equivalent codes of practice for England and Wales are made by the Secretary of State and for Scotland by Scottish Ministers. Codes made by the Secretary of State also cover the use of POCA powers in Northern Ireland by reserved bodies, such as the National Crime Agency, HM Revenue and Customs, and the Serious Fraud Office.

10.2. As POCA is a United Kingdom-wide Act, and to ensure consistency of approach and language across jurisdictions, the Northern Ireland codes closely follow the equivalent codes for England and Wales, with appropriate adaptations.

## 11. Additional Information

11.1. The section 293A code will be reviewed should issues arise as a matter of its operation in practice, but also where amendments are made to POCA which require a revised or new code of practice to be produced. Any revised or new code of practice must be consulted on.