EXPLANATORY MEMORANDUM TO

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) Order (Northern Ireland) 2016

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 code of practice entitled "Code of Practice issued under section 195T of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (Northern Ireland)" comes into operation on 1st March 2016.

3. Background

3.1. Codes of practice are made under the Proceeds of Crime Act 2002 ("POCA") as guidance to officers exercising POCA functions to ensure that the functions are exercised lawfully. The codes are also of interest to persons who are the subject of the powers. The codes should be made 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. Guidance on the operation of POCA powers in Northern Ireland was covered by codes of practice issued by the Secretary of State up to the date of the coming into operation of three new Northern Ireland codes. As well as the code related to this Order, two additional codes are being brought into operation on the same date - a code entitled "Code of Practice issued under section 293A of the Proceeds of Crime Act 2002: Recovery of Cash: Search Powers (Northern Ireland)" and a code entitled "Code of Practice issued under section 377ZA of the Proceeds of Crime Act 2002: Investigations (Northern Ireland)".

3.3. The codes of practice take account of amendments to POCA, principally made by the Policing and Crime Act 2009 ("the 2009 Act") (c. 26), the Crime and Courts Act 2013 ("the 2013 Act") (c.22) and the Serious Crime Act 2015 ("the 2015 Act") (c. 9) to extend certain existing functions and create new functions. Amendments not yet in force in Northern Ireland at the date of the coming into operation of the new codes of practice will be commenced on that date. This is to bring the POCA regime in Northern Ireland up to date and into line with England, Wales and Scotland, subject to jurisdicional variations.

3.4. The "Code of Practice issued under section 195T of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (Northern Ireland)"

("the section 195T code") provides guidance on the exercise of functions under POCA as further detailed in paragraphs 3.5 to 3.11 below:

3.5. Section 57 of the 2009 Act inserts sections 195A to 195S into Part 4 of POCA (Part 4 concerns confiscation of the proceeds of crime in Northern Ireland). These new provisions provide for search and seizure powers in Northern Ireland to prevent the dissipation of realisable property that may be used to satisfy a confiscation order. Section 195C of POCA contains the seizure power, while sections 195D to 195F of POCA contain the search powers. Property may be seized in anticipation of a confiscation order being made. If a confiscation order is made, the property may be sold in order to satisfy the order. Section 195T of POCA was inserted by Article 18 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2012 (S.I. 2012/2595).

3.6. The appropriate officers who may exercise the functions are specified in section 195A of POCA and in relation to the section 195T code are a constable or an accredited financial investigator. Other approriate officers listed at section 195A of POCA are covered by a code of practice issued under section 195S of POCA by the Secretary of State.

3.7. The power in section 195C of POCA is for an appropriate officer to seize certain property if it may otherwise be made unavailable for satisfying any confiscation order made under section 156 of POCA, or the value of the property may otherwise be diminished. An appropriate officer may exercise the power to seize property conferred by section 195C of POCA if satisfied that any one of seven conditions is met. The conditions are set out in section 195B of POCA. Section 35(1) of the 2015 Act changes the test for exercising search and seizure powers in line with the change to the test for the exercise of a restraint order made by section 33(1) of the 2015 Act; the first condition contains five requirements and the fourth requirement has been amended from "there is reasonable cause to believe that the person has benefited from conduct constituting the offence" to "there are reasonable grounds to suspect that the person has benefited from conduct constituting the offence." The change is reflected in the section 195T code.

3.8. Sections 195D to 195F of POCA contain search powers which allow an appropriate officer to conduct searches of premises, people and vehicles for property which the officer has reasonable grounds for suspecting may be found and which may be seized under section 195C of POCA.

3.9. The seizure power in section 195C of POCA and each of the search powers in section 195D to 195F of POCA may only be exercised with appropriate approval unless, in the circumstances, it is not practicable to obtain such approval in advance. Appropriate approval is the prior approval of a lay magistrate or, if that is not practicable, of a senior officer. Senior officer is defined in section 195G of POCA.

3.10. Section 195H of POCA requires that an appropriate officer must give a written report to a person appointed by the Department of Justice in any case where either the officer seizes property under section 195C of POCA without the approval of a lay magistrate and any of the property seized is

not detained for more than 48 hours, or where the search powers under sections 195D to 195F of POCA are exercised without the approval of a lay magistrate but no property is seized.

3.11. Sections 195J to 195P, along with sections 190A (restraint orders: power to retain seized property) and 193A (detention of property pending appeal) of POCA concern the detention of property which has been seized by an appropriate officer. Sections 190A and 193A were inserted by section 54 of the 2009 Act. Appropriate officer has a wider definition in relation to sections 190A and 193A than section 195A of POCA (see section 190A(3) of POCA), and includes, in addition, a National Crime Agency officer and a member of staff of the relevant director (within the meaning of section 352(5A) of POCA, being, in relation to Northern Ireland, the Director of the Serious Fraud Office or the Director of Public Prosecutions for Northern Ireland). The section 195T code provides guidance to a constable, an accredited financial investigator and a member of staff of the relevant director, carrying out functions under sections 190A, 193A and 195J to 195P of POCA (detention of property). For the exercise of their other powers, a National Crime Agency officer and other appropriate officers not covered by the section 195T code should consult the code made by the Secretary of State under section 195S of POCA.

4. Consultation

4.1. A draft of the section 195T code was subject to a twelve week public consultation from 11 August 2015 to 2 November 2015 (see https://www.dojni.gov.uk/consultations/codes-practice-issued-under-proceeds-crime-act-2002). Four substantive consultation responses were received. The Department of Justice considered the representations made and modified the draft codes, where appropriate.

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 National Crime Agency is tasked with managing a training programme to cover all of the amendments to POCA to date and the codes of practice will be one component of that programme. The overall cost of the training is likely to be less than £5,000 for the United Kingdom and it is coordinated by the Home Office.

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 195T 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 and HM Revenue and Customs.

10.2. A separate code, issued under section 377A of POCA, has been prepared by the Attorney General and the Advocate General for Northern Ireland to provide guidance on the use of investigative powers of prosecutors under POCA in England and Wales and Northern Ireland and, along with four POCA codes made by the Secretary of State, will come into operation on the same date as the Northern Ireland codes.

10.3. 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 195T 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.