EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (CASH SEARCHES: CODE OF PRACTICE) ORDER 2021

2021 No. 728

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of Her Majesty.

1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument is made under the Proceeds of Crime Act 2002 (c. 29) (POCA). It brings into force a revised code of practice providing guidance and procedural requirements for the exercise of certain search powers in relation to cash under Chapter 3 of Part 5 of POCA. The revised code is required due to the commencement of outstanding provisions in the Criminal Finances Act 2017 (c. 22) (CFA) in Northern Ireland, which grants additional powers to law enforcement and prosecution agencies in Northern Ireland, which are already available to law enforcement and prosecution agencies in England and Wales and Scotland.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 This statutory instrument is part of a wider package of secondary legislation required to extend the Criminal Finances Act 2017 to Northern Ireland. It is being laid alongside three other Home Office SIs, and one laid by the Attorney General's Office, with a shared purpose of bringing into force five Codes of Practice, which have been amended to reflect commencement of the new powers in Northern Ireland. Further negative statutory instruments will be laid in due course to ensure relevant elements of the Criminal Finances Act are commenced in Northern Ireland at the same time.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

3.2 The territorial application of the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2021 includes Scotland and Northern Ireland.

4. Extent and Territorial Application

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

4.1 The territorial extent of this instrument is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister of State for the Home Department, Baroness Williams of Trafford, has made the following statement regarding Human Rights:

"In my view, the provisions of the following instrument are compatible with the Convention rights: the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2021"

6. Legislative Context

6.1 POCA provides powers to confiscate the proceeds of crime. This instrument brings into operation a revised code of practice concerning the use of powers to search for cash under Chapter 3 of Part 5 of POCA. An equivalent code can be made by the Scottish Ministers and the Department of Justice in Northern Ireland in respect of the use of these powers by certain law enforcement agencies in those jurisdictions. The Department of Justice in Northern Ireland will update the equivalent code to coincide with the commencement of the relevant provisions of the CFA in Northern Ireland. The recovery of cash: search powers code of practice provides guidance and procedural requirements for the exercise of certain functions as further detailed below.

6.2 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 being intended for use in such conduct, and for the forfeiture of such cash. A code of practice is made by the Secretary of State under section 292 of POCA in relation to the use of the search, seizure and detention powers.

6.3 The code of practice brought into operation by the Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2021 replaces the previous code that came into force in March 2018 (SI 2018/83). The Order brings the new code into force to reflect the introduction of the new powers to Northern Ireland. This includes removing references to certain powers in the CFA not being available in Northern Ireland.

7. Policy Background

What is being done and why?

7.1 Codes of practice are made under POCA to provide guidance to the officers and other persons exercising their functions under that Act, and to establish procedural requirements to ensure that the functions concerned are exercised lawfully, proportionately, consistently and in a focused manner. This code is also of interest to persons who are the subject of the powers.

7.2 When the function covered by the code of practice is revised or new functions are created, the existing code must be revised, and a new one made as necessary. The code is therefore being amended in light of the commencement of outstanding provisions of the CFA (which amends POCA) in Northern Ireland. Royal Assent of the CFA took place on 27 April 2017. It could not be commenced in Northern Ireland at the time, but we are now taking action to do so.

7.3 The code includes detailed and clear explanation of the powers and the legal requirements that must be met before it is 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.

7.4 The following paragraphs provide context as to how the powers might be used and the types of cases to which they apply.

7.5 Chapter 3 of Part 5 of POCA provides powers to search for, seize, detain and seek the forfeiture of cash which is either recoverable property or is intended for use in unlawful conduct. This is a civil procedure in the magistrates' courts in respect of the cash itself; it does not require a criminal conviction.

7.6 The code of practice provides guidance and procedural requirements for searches of the person, vehicles and property. This is detailed and systematic guidance and directions on considering the use of the powers, the actual search and subsequent requirements including making a record of the search (to be available to the public).

7.7 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.

7.8 The code of practice was revised in 2018 in accordance with changes to POCA in England and Wales brought about by the CFA. A complete list of the changes is available in explanatory memorandum to the Proceeds of Crime Act (Cash Search: Code of Practice) Order 2018 (SI 2018/83).

7.9 In response to the widening range of methods employed by criminals to conceal and transport illicit wealth, section 14(1) of the CFA amends section 289(6) of POCA to include gaming vouchers, fixed value casino tokens and betting receipts in the definition of items of 'cash' which may be seized and forfeited under POCA.

7.10 The recovery of cash: search powers Code of Practice Order 2021 will bring the new code into force to reflect the introduction of the new powers to Northern Ireland.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 A consolidation will not be taking place.

10. Consultation outcome

10.1 The draft revised codes of practice were subject to a nine-week public consultation from 1 December 2020 to 22 January 2021. See the following link for the consultation document: https://www.gov.uk/government/consultations/draft-codes-of-practice-issued-under-the-proceeds-of-crime-act-2002-amendments-to-codes-to-reflect-the-criminal-finances-act-2017-in-northern-ireland.

10.2 Two responses were received to the consultation; both were from law enforcement agencies. One response highlighted minor technical drafting errors which have since

been corrected. The contents of the second response, and the remainder of the first, were outside of the scope of the consultation which only sought views on the amendments of the codes in relation to the commencement of the CFA 2017 in Northern Ireland. In order to ensure that such changes are consulted on adequately, such changes will be considered as part of any future amendments to the codes.

10.3 The Home Office also invited representations from the Attorney General's Office, Her Majesty's Treasury, the Department of Justice in Northern Ireland, and the Scottish Government on the relevant draft codes of practice to the extent that the Secretary of State was required to do so under POCA. Each organisation has confirmed they are content.

11. Guidance

11.1 The code of practice brought into operation by this instrument contain guidance and operational requirements as to the use of the powers to which they relate.

12. Impact

12.1 An Impact Assessment has not been prepared for this instrument because we have considered the overall impact of commencing the CFA in Northern Ireland rather than preparing separate assessments for each statutory instrument in this package.

12.2 The overall impact of the commencement of the CFA in Northern Ireland has on business, charities or voluntary bodies has been considered and is negligible.

12.3 The impact of the commencement of the CFA in Northern Ireland on the public sector has been considered and is negligible.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring and review

14.1 The approach to monitoring of this legislation is that the codes are reviewed whenever issues arise as a matter of their operation in practice, but also where amendments are made to POCA which require a revised or new Code of Practice to be produced.

15. Contact

15.1 Chloe Wootton at the Home Office (email: chloe.wootton@homeoffice.gov.uk) can answer any queries regarding these instruments.

15.2 Maria Hannan, Deputy Director for Criminal Finances and Asset Recovery, at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 Baroness Williams at the Home Office can confirm that this Explanatory Memorandum meets the required standard.