EXPLANATORY MEMORANDUM TO

The Proceeds of Crime Act 2002 (Investigations: Code of Practice) Order (Northern Ireland) 2021

SR 2021 No. 170

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 377ZA of the Proceeds of Crime Act 2002: Investigations (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 293A of the Proceeds of Crime Act 2002: Recovery of Cash: Search Powers (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 377ZA of the Proceeds of Crime Act 2002: Investigations (Northern Ireland)" ("the section 377ZA code") provides guidance on the exercise of functions under POCA as further detailed in paragraphs 3.5 to 3.9 below.

3.4. The 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.

3.5. Part 8 of POCA concerns general asset recovery investigation powers in the United Kingdom. Chapter 2 of Part 8 of POCA applies to England and Wales and Northern Ireland. The categories of investigations for which the powers in Part 8 are available are set out in section 341 of POCA. The CFA 2017 amended some investigation powers, introduced new powers and widened the definition of an investigation for the purposes of POCA.

3.6. The revised section 377ZA code made by Department of Justice applies to the exercise of functions of constables and accredited financial investigators in Northern Ireland in relation to confiscation investigations, detained cash investigations, money laundering investigations, detained property investigations and frozen funds investigations. Detained property investigations and frozen funds investigations were introduced by the CFA 2017 and have been added to the revised code (paragraph 39 of Schedule 5 to the CFA 2017 amends section 341 of POCA to add detained property investigations and frozen funds investigations to the list of investigations in Part 8 of POCA). These new investigations correspond, respectively, to the new powers to forfeit listed items of personal (or moveable) property in Chapter 3A of Part 5 of POCA, and the powers to forfeit funds in bank and building society accounts in Chapter 3B of Part 5 of POCA. The changes have been reflected in the revised section 377ZA code.

3.7. The powers of investigation covered by the code are the powers relating to production orders, search and seizure warrants, customer information orders, account monitoring orders and disclosure orders.

3.8. Section 7 of the CFA 2017 amends sections 357 and 358 of POCA to include money laundering in the range of investigations for which a disclosure order may be sought. A disclosure order is an order authorising a law enforcement officer to give notice to any person who is considered to have relevant information requiring that person to answer questions, provide information and produce documents, in connection with an investigation. Section 7 of the CFA 2017 also changes the application authorisation process for a disclosure order by transferring this function from a prosecutor to a senior appropriate officer in confiscation and money

laundering investigations and amends section 362 of POCA to clarify that an appropriate officer applying to vary or discharge a disclosure order need not be the same officer who applied for the order. The revised section 377ZA code takes account of these changes.

3.9. The revised code also reflects the extension of the scope of confiscation investigations to better allow them to support recalculations of the amount available to satisfy a confiscation order under section 172 of POCA.

3.10. A separate code of practice made under section 377 of POCA by the Secretary of State applies to the exercise of functions of the following officers in Northern Ireland under Chapter 2 of Part 8 of POCA: National Crime Agency officers; officers of Revenue and Customs; immigration officers; and officers of the Financial Conduct Authority. The section 377 code of practice also covers the operation of functions under Part 8 of POCA by these officers and by the Director General of the National Crime Agency, constables and accredited financial investigators in England and Wales.

4. Consultation

4.1. A draft of the revised section 377ZA 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 pratice 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 377ZA 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, the Serious Fraud Office and the Financial Conduct Authority.

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 377ZA 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.