EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (INVESTIGATIVE POWERS OF PROSECUTORS: CODE OF PRACTICE) (ENGLAND AND WALES AND NORTHERN IRELAND) ORDER 2016

2016 No. 222

1. Introduction

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

2. Purpose of the instrument

2.1 This Order is made under the Proceeds of Crime Act 2002 (c. 29) ("POCA") and creates a revised code of practice providing guidance on the exercise of certain functions under POCA which come into operation on 30th November 2015. The revised code is required because of amendments to POCA by the Serious Crime Act 2015 (c. 9) ("the 2015 Act"). It is also required to allow for commencement of amendments in Northern Ireland of POCA by the Policing and Crime Act 2009 (c. 26) ("the 2009 Act") and the Crime and Courts Act 2013 (c. 22) ("the 2013 Act"). These amendments to POCA extend certain existing functions and create new functions. The commencement date of the order is the date that the amendments to POCA will be brought into force.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

Other matters of interest to the House of Commons

3.2 Disregarding minor or consequential changes, the territorial application of this instrument includes Northern Ireland and is not a financial instrument that relates exclusively to England, Wales and Northern Ireland.

4. Legislative Context

4.1 This Order relates to four other Orders made by the Secretary of State and Department of Justice, Northern Ireland, namely:

(i) The Proceeds of Crime Act 2002 (Cash Searches: Code of Practice) Order 2016

(ii) The Proceeds of Crime Act 2002 (Investigations: Code of Practice) (England and Wales and Northern Ireland) Order 2016

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

(iv) The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (England and Wales) (No. 2) Order 2016.

4.2 This Order brings into operation a revised code of practice for prosecutors in England, Wales and Northern Ireland. This code replaces earlier codes of practice issued under

section 377A of POCA on 1st April 2008 in respect of Northern Ireland and 1st June 2015 in respect of England and Wales. An equivalent code will be made by the Scottish Ministers. The code of practice provides guidance on the exercise of certain functions under POCA as further detailed below.

The Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) (England and Wales and Northern Ireland) Order 2016

4.3 Part 8 of POCA concerns investigation powers in the United Kingdom. Amendments to Part 8 of POCA have been made, primarily by Schedule 19 to the 2013 Act and the 2009 Act. There are three main changes which relate to the code made by the Attorney General under section 377A of POCA.

4.4 The definition of a civil recovery investigation has been changed so that an investigation may begin with a person and, as property is identified and more is known about the property, become an investigation into property (see the amendments made to section 341(2) of POCA by paragraph 2 of Schedule 19 to the 2013 Act). Equally, an investigation may begin with property, and as more information about its ownership emerges, become an investigation into a particular person. The provisions were commenced in England and Wales on 1 June 2015. The revised code of practice applies to the exercise of these powers in Northern Ireland in addition to England and Wales.

4.5 Section 66 of the 2009 Act transferred applications for a production order and a search and seizure warrant for a detained cash investigation (which assist in the preparation of a case for forfeiting cash seized under Chapter 3 of Part 5 of POCA) from the High Court to the Crown Court in Northern Ireland. The change was commenced in England and Wales on 1 June 2015. The revised code of practice reflects these changes and has also been restructured to make it easier to read and understand.

4.6 Sections 375A and 375B of POCA are inserted by paragraph 26 in Part 2 of Schedule 19 to the 2013 Act. Section 375A makes provision for evidence to be obtained from a court, tribunal, government or authority outside the United Kingdom if a person or property is subject to a civil recovery investigation, a detained cash investigation or an exploitation proceeds investigation. Section 375B provides that evidence obtained by a request for assistance must not be used for any purpose other than for the purpose of the investigation for which it was obtained or for the purposes of certain proceedings, unless the court, tribunal, government or authority that received the request and provided the evidence consents to the use of the evidence for other purposes. The provisions were commenced in England and Wales on 1 June 2015. This revised code of practice applies to the exercise of these powers in Northern Ireland in addition to England and Wales.

4.7 The code of practice made by the Attorney General under section 377A of POCA applies to the exercise of functions of the following persons under Chapter 2 of Part 8 of POCA.

(a) the relevant Directors in their role as appropriate officers in civil recovery investigations in England, Wales and Northern Ireland;

(b) the relevant Directors in their role as relevant authorities in relation to an application for a disclosure order in England, Wales and Northern Ireland;

(c) a specified person in their role as relevant authority in relation to an application for a disclosure order in England, Wales and Northern Ireland; and

(d) the relevant Directors when making requests for assistance under section 375A of POCA in relation to evidence which the Director thinks is overseas in connection with a civil recovery investigation, a detained cash investigation or an exploitation proceeds investigation.

4.8 Under section 357(9) of POCA, the Secretary of State can by order specify a person as a prosecutor. By section 2C of POCA, members of staff of the relevant Directors and persons providing services under arrangements made by the relevant Directors may exercise the functions of the relevant Directors under Part 8 of POCA, provided they have been appropriately authorised. In these circumstances, the members of staff and persons providing services are also covered by the code of practice as they are exercising the functions of the relevant Directors.

4.9 Chapter 2 of Part 8 of POCA applies to England and Wales and Northern Ireland. The revised code of practice will replace both the recent one issued on 1st June 2015 in relation to England and Wales only (SI 2015/612) and the revised code issued in 2008 that relates to Northern Ireland (SI 2008/1978).

5. Extent and Territorial Application

5.1 This Order extends to England, Wales and Northern Ireland.

5.2 This Order applies to England, Wales and Northern Ireland.

6. European Convention on Human Rights

6.1 Attorney General, Jeremy Wright QC, has made the following statement regarding Human Rights

"In my view, the provisions of the Proceeds of Crime Act 2002 (Investigative Powers of Prosecutors: Code of Practice) (England and Wales and Northern Ireland) Order 2016 are compatible with the Convention rights."

7. Policy background

What is being done and why

7.1 Codes of practice are made under POCA to provide guidance to the persons exercising relevant functions under POCA to ensure that the functions concerned are exercised lawfully. The codes are also of interest to persons who are the subject of the powers, and the codes themselves make clear that they should be made widely available, for example in police stations and border control areas, where the powers are likely to be used.

7.2 When functions covered by the code of practice issued by the Attorney General under section 377A of POCA are revised, or new functions are created, the code must be revised or a new code made as necessary.

Consolidation

7.3 There is no need for consolidation.

8. Consultation outcome

8.1 A draft of the code of practice was subject to a public consultation from 13th July to 7th October 2015. See https://www.gov.uk/government/consultations/draft-code-of-practice-issued-under-section-377a-of-the-proceeds-of-crime-act-2002

9. Guidance

9.1 The code of practice brought into operation by this order constitutes guidance.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is minimal.

10.3 An Impact Assessment has not been prepared for this instrument as it has no direct impact on business, charities or voluntary bodies. The code of practice provides guidance on the use of powers under POCA by bodies in the public sector, and incorporates existing best practice, but it does not require any greater use of those powers which could result in an additional impact.

11. Regulating small business

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

12. Monitoring & review

12.1 The code will be reviewed whenever issues arise as to its operation in practice, but also whenever amendments are made to POCA which require a revised or new code of practice to be produced.

13. Contact

13.1 Alexander White at the Attorney General's Office (Tel 020 7271 2445 or email: alex.white@attorneygeneral.gsi.gov.uk) can answer any queries regarding the instrument made by the Attorney General.