EXPLANATORY MEMORANDUM TO

The Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) Order (Northern Ireland) 2021

SR 2021 No. 168

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 195T of the Proceeds of Crime Act 2002: Search, Seizure and Detention of Property (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. 64. This Statutory Rule revokes S.R. 2016 No. 64.

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 293A of the Proceeds of Crime Act 2002: Recovery of Cash: Search Powers (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 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 3.8 to 3.15 below. 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).

3.4. 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 4 of POCA provides for the use of confiscation orders in Northern Ireland. A confiscation order can only be made after a criminal conviction. Following conviction, a court can proceed to make a confiscation order if asked to do so by the prosecution, or if the court believes it is appropriate to do so. In cases where the law enforcement agency is considering recovering the proceeds of crime, they may start an investigation into the financial affairs of the suspect at the same time as the criminal investigation. The financial investigation is known as a confiscation investigation, which can be lengthy depending on the complexity of the matter.

3.6. The powers to search for, seize and detain property are intrusive and the code provides guidance on their lawful, effective and proportionate use. The code addresses the use of these powers, including the persons who may use them and the process for obtaining the necessary approval for exercising them. In the majority of cases, particularly those which have a degree of planning, it is expected that the approval of a lay magistrate or a senior officer would be obtained before the powers are used. However, there may be occasions where the need to act immediately is clear, particularly where there is a risk that property of interest will be lost.

3.7. The code also addresses other circumstances that could arise in the operational application of the powers, including a requirement for a senior officer to formally review the continued retention of seized property every three months.

3.8. Sections 195A to 195R of Part 4 of POCA provide for search, seizure and detention powers in Northern Ireland to prevent the dissipation of property that may be used to satisfy a confiscation order under section 156 of POCA after a defendant is convicted for a substantive criminal offence. 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.

3.9. 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 appropriate officers listed at section 195A of POCA are covered by the separate code of practice issued under section 195S of POCA by the Secretary of State.

3.10. 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.

3.11. 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.

3.12. 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. Section 31(3) of the CFA 2017 amended section 195G to enable accredited financial investigators who are members of staff of the Police Service of Northern Ireland to seek approval from a senior police officer (at least the rank of Inspector). This simplifies the process for accredited financial investigators obtaining approval; before the amendment accredited financial investigators were required to seek approval from another accredited financial investigator of a specified grade and this is not always practicable.

3.13. Section 195H of POCA requires that an appropriate officer must give a written report to a person appointed by the Home Office and the Department of Justice ("the Appointed Person") 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. The Appointed Person is another important safeguard in the use of the powers and the code provides direction on how officers should contact that person. The Appointed Person is an independent officer who oversees the use of the search and seizure powers in order to ensure that they are being used in a proportionate, effective and focused manner. In cases where judicial approval has been given or the case progresses to further detention, there is independent oversight; a lay magistrate will have considered the facts of the case in giving his or her approval and/or a court will consider the case in granting further detention

beyond 48 hours (see below). So, in all cases where the powers are exercised, their use will be considered by an independent person, whether that be a judge, a lay magistrate or the Appointed Person.

3.14. An officer may seize property in time-sensitive circumstances as set out above, but after further consideration conclude that detention of the property is not justified, or that it must be returned as the legal test for ongoing retention is not met. Alternatively, the suspect may provide a reasonable explanation as to why the property should be returned. The 48 hour period allows for a suitable period between an administrative seizure and obtaining judicial approval for retention of the seized property.

3.15. 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. 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 the Director of Public Prosecutions for Northern Ireland, when carrying out functions under sections 190A, 193A and 195J to 195P of POCA (detention of property). A National Crime Agency officer, the Director of the Serious Fraud Office 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 for these and the other relevant powers.

4. Consultation

4.1. A draft of the revised section 195T 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 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, 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 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.