EXPLANATORY MEMORANDUM TO

THE PROSECUTION OF OFFENCES ACT 1985 (SPECIFIED PROCEEDINGS) (CORONAVIRUS) (AMENDMENT) ORDER 2021

2021 No. 126

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.

1.2 This memorandum contains information for the Secondary Legislation Scrutiny Committee and the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

2.1 This instrument amends the Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999 ("the 1999 Order"). It provides that all offences contrary to:

- The Health Protection (Coronavirus, International Travel) (England) Regulations 2020
- The Health Protection (Coronavirus, International Travel) (Wales) Regulations 2020
- The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (No. 2) (England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Leicester) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (No. 2) (Wales) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020
- The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Blackburn with Darwen and Bradford) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Leicester) (No. 2) Regulations 2020
- The Health Protection (Coronavirus, Restrictions on Gatherings) (North of England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Birmingham, Sandwell and Solihull) Regulations 2020
- The Health Protection (Coronavirus, Collection of Contact Details etc and Related Requirements) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020

- The Health Protection (Coronavirus, Restrictions) (North East and North West of England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Functions of Local Authorities etc.) (Wales) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020
- The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Medium) (England) Regulations 2020
- The Health Protection (Coronavirus, Local COVID-19 Alert Level) (High) (England) Regulations 2020
- The Health Protection (Coronavirus, Local COVID-19 Alert Level) (Very High) (England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (No. 3) (Wales) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (England) (No. 4) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (No. 4) (Wales) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020
- The Health Protection (Coronavirus, Restrictions) (No. 5) (Wales) Regulations 2020

(together, "the Regulations") become "specified proceedings" for the purposes of section 3 of the Prosecution of Offences Act 1985 ("the 1985 Act").

2.2 Section 3 requires the Director of Public Prosecutions (DPP), and therefore the Crown Prosecution Service (CPS), to take conduct of all criminal proceedings instituted by or on behalf of the police, apart from proceedings which are "specified proceedings". Where proceedings are specified the police may conduct the proceedings themselves. This instrument will enable the police to conduct proceedings for offences contrary to the Regulations by serving a notice and the evidence on an accused person. In such a case, if in response the accused person pleads guilty in writing or does not respond to the notice and evidence served upon them, a court can deal with the case without the CPS taking conduct of the proceedings. The CPS will as a matter of practice take conduct of proceedings if the accused pleads not guilty or does not consent to their case being dealt with by a court under this process. In this situation, before a court can begin to receive evidence in the proceedings, the CPS is obliged to take conduct of a case by virtue of section 3 and the 1999 Order.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The Attorney General acknowledges that the date for the coming into force of this Order breaches the convention that instruments subject to annulment should ordinarily be laid before Parliament for a period of no less than 21 days before coming into force, particularly in respect of an instrument that relates to criminal matters. In this case, the Attorney General considers that a departure from this general rule is justified

in order to enable the timely and efficient conduct of proceedings. This is in order to ensure the summary resolution of a volume of offences: as of 26 January, there were over 6,000 unpaid fixed penalty notices in England and Wales. Some of these are time critical, as a result of the six-month rule (which means that proceedings must be instituted no more than 6 months after the commission of the offence).

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 As the instrument is subject to negative resolution procedure there are no matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business at this stage.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 Section 3(3) of the 1985 Act provides a power for the Attorney General to specify certain proceedings by Order made by statutory instrument. "Specified proceedings" are proceedings which are an exception to the requirement in section 3(2)(a) that it is the duty of the Director of Public Prosecutions to take over the conduct of all criminal proceedings instituted on behalf of a police force.

7. Policy background

What is being done and why?

7.1 Section 3(2)(a) and (3) of the 1985 Act provide a power, exercisable by statutory instrument, to create exceptions to the general requirement that the DPP, and therefore the CPS, must take over conduct of criminal proceedings instituted by or on behalf of the police. This is in recognition of the fact that a limited category of offences may more appropriately be prosecuted in this way. Factually straightforward offences punishable only by a fine may in particular be suitable to be dealt with by a court without the CPS having conduct of the case. Previous iterations of the 1999 Order have specified certain road traffic, fireworks and minor public order offences. In this case, offences contrary to the Regulations are also likely to be factually straightforward and are punishable only by a fine. Where there is a high volume of offences to be prosecuted summarily, in addition to the usual workload of the courts, dealing with them promptly and efficiently is imperative.

7.2 A fixed penalty notice may be issued to a person who commits an offence contrary to the Regulations. A person who does not pay a fixed penalty notice becomes liable to prosecution no sooner than 28 days later. This instrument only relates to prosecutions which follow a failure, having been given sufficient opportunity, to pay a fixed penalty notice. A prosecution may be initiated under the "single justice procedure", provided for by section 16A of the Magistrates' Court Act 1980, whereby the police

serve a notice and evidence upon the accused. This procedure permits a court to deal with the accused on the basis of the evidence served on them, without their attendance at court. A justice can accept a written response indicating a guilty plea from the accused and issue a fine. Alternatively, where the accused does not respond, a judge can try the accused on the evidence served (but only the evidence served) and, if finding the person guilty, issue a fine.

7.3 The effect of section 3(2)(a) of the 1985 Act, however, is that the CPS must take conduct of all proceedings, whether those proceedings are to be dealt with under the single justice procedure or otherwise.

7.4 The Attorney General considers that it is not proportionate for the CPS to have conduct of cases where the accused pleads guilty or does not respond to the notice and evidence served upon them, in circumstances where the offences are factually straightforward and punishable only by a fine, and where, as of 26 January, there were over 6,000 unpaid fixed penalty notices in England in Wales. The instrument therefore specifies that the CPS need not take conduct of these cases.

7.5 Proceedings cease to be specified when the court begins to receive evidence other than under the single justice procedure: see 3(3) of the 1999 Order. "Receive evidence" does not include considering the evidence served where an accused has not responded under the single justice procedure outlined above, something clarified by the Prosecution of Offences Act 1985 (Specified Proceedings) (Amendment) Order 2018 ("the 2018 Order"). Therefore for a prosecution to continue when a defendant pleads not guilty or does not consent to the single justice procedure the CPS will as a matter of practice take conduct of it (and are obliged to by the time the court begins to receives evidence). Those who wish to challenge a fixed penalty notice may continue to do so in this way.

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.

9. Consolidation

9.1 None.

10. Consultation outcome

10.1 No public consultation was undertaken. The decision to specify proceedings under the Regulations was considered in conjunction with the National Police Chiefs' Council (NPCC), CPS and Her Majesty's Courts & Tribunals Service who are in support of it. In practice, this instrument will only apply in relation to individuals who plead guilty or do not enter a plea. As individuals continue to have the right to plead not guilty or indeed simply not consent to the procedure, wider consultation was not deemed necessary.

11. Guidance

11.1 The procedure is set out in section 16A Magistrates' Court Act 1980 and Part 7 of the Criminal Procedure Rules 2015. Guidance is available on the internet, for instance at: https://www.gov.uk/single-justice-procedure-notices.

12. Impact

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

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because, whilst the volume of new offences introduced by the Regulations will have an impact on the police, CPS and the courts, this instrument combined with the 1999 Order and the 2018 Order is limited to providing that the CPS will have conduct of some but not all prosecutions.

13. Regulating small business

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

14. Monitoring & review

14.1 In the early stages of coronavirus-related cases being brought to court, errors were made by police forces using the single justice procedure. The NPCC has since worked closely with all police forces, the CPS and HMCTS to understand and mitigate thematic errors. This work has including hosting single justice procedure error workshops with officials from the police, the CPS and HMCTS. After each of these workshops, the NPCC provided guidance and support to police forces to reduce errors and has seen improvements. One of the key developments has been to work with police forces to embed the required level of supervisory review at all stages of the process. A scrutiny process will be aligned to the extended use of the single justice procedure, seeking to identify and rectify errors in practice and processes.

14.2 The approach to monitoring of fixed penalty notices (FPNs) was agreed between the NPCC and Home Office and was put in place in early 2020. The initial review covered the period of 27 March to 25 May and the findings were published by the NPCC in July 2020. The second review, covering the period up to the end of the second set of national restrictions, is underway, and examines whether or not there have been changes in the demographic profile (such as age, sex, and ethnicity) of those issued with FPNs compared with the first review's findings. The analysis is likely to be published in February/March 2021. The NPCC has committed to a third review.

15. Contact

15.1 Shyam Kapila at the Attorney General's Office, telephone: 0203 443 8791 or email: shyam.kapila@attorneygeneral.gov.uk, can be contacted with any queries regarding the instrument.

15.2 Rebecca Handler, Deputy Director of the Public Law and Litigation Team at the Attorney General's Office, can confirm that this Explanatory Memorandum meets the required standard.