

EXPLANATORY MEMORANDUM TO

THE PROCEEDS OF CRIME ACT 2002 (SEARCH, SEIZURE AND DETENTION OF PROPERTY: CODE OF PRACTICE) (NORTHERN IRELAND) ORDER 2021

2021 No. 729

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 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2021 is limited to Northern Ireland.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is Northern Ireland.
- 4.2 The territorial application of this instrument is 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 is compatible with the Convention rights: the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) 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 search, seizure and detention of property powers used to support a confiscation investigation. 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 Search, Seizure and Detention of Property code of practice provides guidance and procedural requirements for the exercise of certain functions as further detailed below.
- 6.2 Sections 195A to 195R 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. A code of practice is made by the Secretary of State under section 195S of POCA in relation to the use of these powers.
- 6.3 The code of practice brought into operation by the Proceeds of Crime Act 2002 (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2021 replaces the previous code that came into force in March 2016 (as provided for by SI 2016/210). Amendments to the code have been made due to the commencement of the CFA in Northern Ireland in connection with:
- a. the carrying out by officers of Revenue and Customs, immigration officers and Serious Fraud Office (SFO) officers of the functions conferred by sections 195C to 195H of POCA in Northern Ireland,
 - b. the carrying out by senior officers of their functions under section 195G of POCA in Northern Ireland, and
 - c. the detention of property by officers of Revenue and Customs, immigration officers, SFO officers and National Crime Agency (NCA) officers under or by virtue of sections 190A, 193A and 195J to 195P of POCA 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 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. It usually forms part of the sentencing process.
- 7.6 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.
- 7.7 POCA contains powers to prevent a suspect from dissipating their assets during a confiscation investigation. Suspects may hide or dispose of their property when they recognise assets are at risk from future confiscation proceedings.
- 7.8 A restraint order can be made by the court to prevent a suspect from dealing with property, provided that the conditions set out in the statutory regime are met. A restraint order is an effective interim measure in respect of businesses and immovable property and assets such as houses, but it is less effective with portable assets such as cars, jewellery, electric goods and clothing. These assets are often of high value and are easily moved, hidden and sold.
- 7.9 Powers contained in sections 195B to 195M of POCA were taken to address this issue by allowing for the seizure and preservation of portable assets so that they are available for sale once a confiscation order has been made.
- 7.10 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 justice of the peace 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.
- 7.11 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.

- 7.12 The code of practice has been revised in accordance with changes to POCA brought about by the CFA. One change to these powers is provided in paragraph 4 of Schedule 1 to the CFA which amends section 47G(3) of POCA to include the Director of the SFO as a senior officer for the purposes of approving search and seizure powers. This is in line with the inclusion of SFO officers as appropriate officers for many of the functions under POCA. Another change is section 31(2) of the CFA which amends section 47G of POCA to enable civilian Accredited Financial Investigators (AFIs) working for police forces to seek approval for exercising functions under sections 47C to 47F of POCA from a senior police officer. This simplifies the process for AFIs obtaining approval; currently AFIs are required to seek approval from another AFI of a specified grade. This is not always practicable.
- 7.13 The Appointed Person is another important safeguard in the use of these 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 justice of the peace 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, justice of the peace or the Appointed Person.
- 7.14 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.
- 7.15 Following commencement of the CFA in England and Wales and Scotland no changes were made to the Search, Seizure and Detention of Property Code of Practice issued under section 195S of POCA. This is because the relevant CFA provisions had not yet been commenced in Northern Ireland so as to amend Part 4 of POCA to which that code related. The code now brought into force by the Proceeds of Crime Act (Search, Seizure and Detention of Property: Code of Practice) (Northern Ireland) Order 2021 will mirror the changes made to the code which determines the use of equivalent powers in England and Wales: the Search, Seizure and Detention of Property Codes of Practice, issued by the Secretary of State, pursuant to section 47S of POCA.

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 were not related to this SI and 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.