



Law Society
of Scotland



Consultation Response

Code of Practice on the Exercise by Proper Persons
of Powers Conferred by Chapter 3 of Part 8 of the
Proceeds of Crime Act 2002

3 June 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Government consultation: Code of Practice on the Exercise by Proper Persons of Powers Conferred by Chapter 3 of Part 8 of the Proceeds of Crime Act 2002 (POCA) (the consultation).

This consultation refers to Section 410 (12) of POCA requires Scottish Ministers to publish and consult on a draft of any new or revised Code of Practice. It attaches a draft Code of Practice on which the committee has the following comments to put forward for consideration.

Question 1: The draft Code will affect how proper persons in Scotland exercise their functions under Chapter 3 of Part 8 of the POCA. Do you have any comments to make in relation to the practical guidance contained within the Code?

Paragraph 1 of the draft Code of Practice: It would have been helpful if the draft Code of Practice had included a hyperlink to the current Code of Practice that it is intended to replace. Footnote 1 refers to the "Code of Practice issued under section 410 of the Proceeds of Crime Act 2002." We picked up three references¹ on the Scottish Government website. Its heading on the Code of Practice appears to be

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<https://www2.gov.scot/Publications/2008/08/21130051/0> Investigative Orders Under The Proceeds of Crime Act 2002: Code Of Practice Issued Under Section 410 of The Proceeds of Crime Act 2002

<https://www2.gov.scot/Publications/2008/08/21130051/2> INVESTIGATIVE ORDERS UNDER THE PROCEEDS OF CRIME ACT 2002 CODE OF PRACTICE ISSUED UNDER SECTION 410 OF THE PROCEEDS OF CRIME ACT 2002

<https://www2.gov.scot/Publications/2009/06/16125018/0> Investigative Orders Under the Proceeds of Crime Act 2002: Code of Practice Issued Under Section 410 of the Proceeds of Crime Act 2002

“Investigative Orders under the Proceeds of Crime Act 2002: Code of Practice issued under section 410 of the Proceeds of Crime Act 2002.” The draft Code of Practice is much wider than a reference to investigative orders in that it covers production orders, ancillary orders, search warrants, customer information orders and account monitoring orders. It is important that the name on the Code of Practice is accurate and reflects the scope of what it covers.

Also, it is important that any internet search for the Code of Practice shows the up to date Code of Practice that applies to Scotland. We query whether it may be relevant to include a link to the gov.uk website by way of a cross -reference. There are a number of POCA’s Codes of Practice relevant to England and Wales and Scotland respectively. Given the cross-border significance of POCA, we would consider that it should include, for completeness, a reference to the current Code of Practice applying to Scotland.

Paragraph 3 of the draft Code of Practice: This sets out the purpose. We query whether it should clearly state that it is to provide guidance which is covered in the preamble of the consultation where it states:

“The revised Code issued under section 410 of POCA provides guidance on the exercise...”

That makes it clear that it is guidance and advisory rather than mandatory. It would also be useful if the Code of Practice set out at whom it is aimed. It would presumably include the police, immigration officers and Revenue and Customs. It seems too at times to paraphrase the exact wording of POCA including statutory references to sections of POCA. At other times, it seems to deviate from the wording of terms of POCA. There could be greater consistency by including referencing to POCA where required and relevant.

Question 2: Do you feel that the draft Code could have an adverse impact on you or your organisation?

We refer to our answer to Question 1. It is important that the draft Code of Practice, once approved, is published so that all affected by it or who need to refer to it can be fully aware of its provisions.

Our Committee members are involved in providing advice to clients who may be subject to protection orders, ancillary orders to grant entry search warrants, customer information orders or account monitoring orders. It is essential that all those affected are aware of the operation of these powers and these powers are operated in accordance with POCA.

Question 3: Do you feel that the draft Code provides adequate guidance to a proper person on how to discharge their functions?

We refer to our answer to Question 1 where we have highlighted some points which might be helpful to take account of when publishing the Code of Practice.

Question 4: Is there any missing from the draft Code that should be added?

We refer to our answers to Question 1 and Question 5.

Question 5: Is there anything in the draft Code that should be deleted or changed?

We had some observations as we read through the draft Code of Practice which we would seek to raise in Annex A to our response.

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Annex A (Question 5)

Paragraph 6: The word “generally” does not seem correct in this context. Would it be best to refer to the definition under section 412 of POCA, then indicate that who the proper person is depends on the type of investigation and powers of investigatory power being exercised?

Footnote 2 refers to paragraph 72 of schedule 5 to the 2017 Act. The 2017 Act is presumably a reference to Criminal Finances Act 2017. That should be made clear.

Paragraph 7- 11 refers to Legal Privilege. Though the reference to guidance on legal privilege in money laundering cases refers to the guidance on the Law Society of England and Wales website, should there a link be included to the Law Society of Scotland’s website?

Paragraph 12: Should this cross-reference to the definition of “premises” in the relevant legislation, namely Section 412 of POCA?

Paragraph 13/14: Would these be best to replicate section 410(5) and (6) of POCA?

Paragraph 15: This does not state where the Code of Practice is to be available in police stations and in what form. This should be stated. It needs too to observe the requirements of the Equality Act 2010 with regard to the “protected characteristics” and making it available for those groups.

We refer to our answer to Question 1 as we suggest that there should be a need to publish this on the gov.uk website too.

Paragraph 21- 23: This refers to reasonable ground for suspicion. If it is necessary to include these paragraphs, we would suggest that there should be a reference to the admissibility of items found from a search as specified in *Lawrie v Muir*² where Lord Justice General Cooper explained that:

“the law must strive to reconcile two highly important interests which are liable to come into conflict – (a) the interest of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities, and (b) the interest of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from Courts of law on any merely formal or technical ground.”

Paragraph 24: Rather than set out the requirement for written records under each heading, should there be a requirement generally to ensure that there is a written record kept? There seems some possible duplication with other paragraphs later in the draft Code of Practice.

² 1950 JC 19

Paragraph 28: Though it specifies that it is usually 7 days, there are provisions unless “unless it appears to the sheriff that a longer or shorter period would be appropriate in the particular circumstances.”³ This should be included.

Paragraph 31: There should be a reference to POCA in relation to section 303Z3.

Paragraph 33: “In actual fact” does not replicate the wording of the legislation.

Paragraph 34: The reference to section 342 should include a reference to POCA.

Paragraph 41: This should refer to paragraphs 7- 11.

Paragraph 42: We refer to paragraph 24. Is this not duplication?

Paragraph 43: We would suggest that it might helpful to include some reference to the requirement of disclosure.

Paragraph 46: This should refer to an order granted by the court to reflect the wording in the legislation.

Paragraph 49: The reference to paragraph 11 is wrong.

Paragraph 52: The reference to section 342 should include POCA. Independent legal advice should always be available

Paragraph 54: Any application for a search warrant will be granted in accordance with the law. We would suggest the sentence relating to any further search requirements should be omitted.

Paragraph 59: The computer may only be seized if that is permitted under the terms of the search warrant.

Paragraph 63: We refer to paragraph 24. This is the same point about written records being maintained in relation to production orders.

Paragraph 67: The reference to paragraphs should be to 7-11.

Paragraph 70: This should reflect the same wording as in the legislation which is “must” rather than “compels”.

Paragraph 71: There is no need to include “in plain language.” We also note that there is no requirement imposed to ensure that the Code of Practice is available in all relevant formats and languages. Should this not be specified? Section 342 should refer to POCA.

Paragraphs 75 – 79: Is there any reason for italics?

³ section 380(6) of POCA.

Paragraph 85: Under section 404(8) of POCA has a maximum period of 90 days. This should be stated.

Paragraphs 87- 91: This includes italics for no reasons.

Annex A:

Paragraph 5: This should refer to Annex A.

Under the column headed the Purpose of the Order or Warrant, this should replicate the wording under the relevant sections of POCA – see:

- Ancillary order to grant entry – it refers to requiring a person to give a proper person access to materials on any premises
- Search warrant- it refers to entry and search of the premises
- Account monitoring orders- this refers to providing account information of the description specified in the order to the proper person in the manner, and at or by the time or times, stated in the order.