

EXPLANATORY MEMORANDUM TO

THE POLYGRAPH RULES 2009

2009 No. 619

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 Certain sex offenders are required to undertake regular polygraph tests as a condition of their release on licence. These Rules relate to the conduct of polygraph tests. In particular, they set out qualification requirements for polygraph operators and supervisors, requirements for the conduct of polygraph test sessions, make provision for regular review of the polygraph tests, and provide for regular reporting to the Secretary of State.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1 The Labour Party Manifesto for the 2005 general election contained a commitment to test the use of mandatory polygraph tests on sex offenders in the community. The case for the pilot was also considered in the context of the Child Sex Offender Review, published on 13 June 2007. The Review recommended that a pilot of compulsory polygraph testing be conducted. The necessary legal powers for polygraph testing were included in sections 28 and 29 of the Offender Management Act 2007 (“the OMA”).

4.2 Sections 28 and 29 of the OMA were commenced on 19 January 2009 by the Offender Management Act 2007 (Commencement No.3) Order 2009, relying on section 41(2) and (5)(a) of the OMA to commence those provisions only in relation to areas specified in that Order and only for a specified period. Sections 28 and 29 were commenced for 9 police areas within the Midlands and will cease to be in force on 31 March 2012.

4.3 The commencement of sections 28 and 29 OMA allowed a new polygraph condition to be included in the licence of certain sex offenders on their release from prison from 19 January 2009. From 8 April 2009, polygraph testing may be carried on out those sex offenders. These Rules will govern the conduct of polygraph sessions run during the course of the pilot.

4.4 The purpose of this pilot is to determine whether polygraph testing is a useful risk management tool for offender managers supervising sex offenders in the community.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

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

7. Policy background

- *What is being done and why*

7.1 The OMA provides for polygraph testing to be undertaken for the purpose of monitoring sex offenders' compliance with their licence conditions and in order to improve the management of sex offenders on licence following their release from prison. The OMA allows for this polygraph testing to be undertaken initially as a pilot.

7.2 A polygraph is a device which measures heart activity, breathing activity and sweating. Proponents of the polygraph believe these factors can indicate whether an individual is lying or telling the truth in response to set questions. Information obtained from the polygraph tests will be used by offender managers for risk management purposes in line with the statutory purposes of the tests. Such information will not be relied upon in any prosecutions brought against the sex offender tested for further offences they may have committed, in accordance with section 30 of the OMA, which was commenced in England and Wales on 19 January 2009.

7.3 Sexual offending is a matter that invokes great public concern, and considerable media attention. Re-offending rates of sex offenders on licence are low, but the degree of harm suffered by victims of sexual offending is likely to be high. It is therefore important that all reasonable measures that may assist in the safer management of sexual offenders are tested.

7.4 It is important that where it is utilised, polygraph testing is conducted to a high standard and in a way that is fair and effective. Part of the aim of the pilot is to discover more about, and further refine issues such as questioning techniques, training, reporting etc and to determine the best way to regulate and monitor polygraph testing. For the duration of the pilot, polygraph testing will be regulated by a combination of these Rules and the contractual arrangements between the Secretary of State and providers of polygraph services. The relationship between the contractual arrangements and the Rules will be considered when the regulation of the polygraph testing is evaluated and any lessons learned will be taken into account should polygraph testing be extended beyond the end of the pilot.

7.5 These Rules focus on areas not covered by the contractual arrangements. They lay down the requirements for conducting polygraph test sessions and specify

that the tests must be conducted by properly trained staff. They aim to ensure that sex offenders subject to testing are treated fairly and informed exactly what will be done during the session, and how information they give during the session will be used. Provision is also made for the appointment of a supervisor who will regularly review the tests to ensure that appropriate standards are being upheld.

- ***Consolidation***

7.6 These are the first Rules to be made under section 29 of the OMA. Therefore, there are no earlier instruments to be consolidated

8. Consultation outcome

8.1 A public consultation concerning the content of the rules for polygraphy was carried out between 19th September 2008 and 21st November 2008. Nine weeks were allowed for the consultation, as opposed to the usual twelve week period. These Rules are intended to be in place for the start of polygraph testing for the pilot in April 2009. The shortened consultation period allowed more time for the responses to be considered, and more time for the draft Rules to be amended to take account of issues identified through the consultation process, while still allowing the legislation to be brought in force in time for the pilot.

8.2 The consultation document was sent to 7 organisations with an interest in management of offenders, child protection, sex offender treatment, or human rights, and was also published on the Ministry of Justice website.

8.3 A total of 7 responses were received. These responses were broadly supportive of the proposals for the Rules, and a number of suggestions were made as to how the draft Rules could be improved. These suggestions have been taken into account and incorporated where possible. In addition, a number of suggestions made during the consultation period are addressed in the contract between the Secretary of State and the polygraph provider, which sets out in some detail how polygraph testing is to be conducted.

8.4 A more detailed analysis of the results of the consultation, and how they have influenced the development of these Rules, has been published on the Ministry of Justice website. This response to the consultation also details those issues raised in the consultation that have already been addressed in the contract between the Secretary of State and the polygraph provider.

9. Guidance

9.1 These Rules will be not be supplemented by guidance.

10. Impact

10.1 The impact on business, charities or voluntary bodies is that any organisation providing polygraph services as specified in the Rules will be required to comply with the Rules.

10.2 The impact on the public sector is any public organisation providing polygraph services as specified in the Rules will be required to comply with the Rules.

10.3 An Impact Assessment has not been prepared for this instrument as there will be minimal impact on the private or voluntary sector. An Equality Impact Assessment has however been prepared for the polygraph testing pilot as a whole.

11. Regulating small business

11.1 The legislation applies to small business.

11.2 To minimise the impact of the requirements on firms employing up to 20 people, the approach taken is to confine the Rules to those areas absolutely necessary to the proper delivery of polygraphy services.

11.3 The basis for the final decision on what action to take to assist small business was that Rules should be confined to the minimum necessary to regulate mandatory polygraphy properly.

12. Monitoring & review

12.1 The success of these Rules will be evaluated as part of the overall evaluation of the polygraph pilot. This will take part in two phases. First, there will be a process evaluation that will take place during the first year of the pilot, which will assess the degree to which polygraph pilot is being carried out in line with its objectives. Secondly, there will be an overall evaluation as to the effectiveness and value of polygraph testing and whether the pilot has contributed to public protection. A report of this evaluation will be produced following the conclusion of the pilot. This report will consider of the best means of regulating any wider roll-out of mandatory polygraphy, including the role of these Rules.

13. Contact

Mark Farmer at the Ministry of Justice Tel: 0207 217 0672 or email: mark.farmer5@justice.gsi.gov.uk can answer any queries regarding the instrument.