

# Polygraph testing for sex offenders on licence

*by Nadia Mansfield*

On 19<sup>th</sup> January 2009, following the implementation of the Offender Management Act 2007 via the Offender Management Act (Commencement No.3) Order 2009 No 32, Leicester was chosen as one of several Midlands areas to pilot a three year scheme (ending 31<sup>st</sup> March 2012) that will subject people on licence for 'a relevant custodial sentence in respect of a relevant sexual offence' to the possibility of a polygraph testing licence condition.

The proposals were first made in 2005, by David Blunkett the then Home Secretary, following a pilot scheme that had asked for volunteer sex offenders on licence to participate in a polygraph scheme. This caused some furore in the press at the time over concerns as to the reliability of such tests.

## Who will be affected?

The act specifies that only those over 18 on release of a sentence of 12 months or more for specific sexual offences will be put forward for the new condition, if appropriate.

Section 28 of the act sets out those who qualify in detail:

## **28 Application of polygraph condition**

**(1) The Secretary of State may include a polygraph condition in the licence of a person to whom this section applies.**

**(2) This section applies to a person serving a relevant custodial sentence in respect of a relevant sexual offence who—**

**(a) is released on licence by the Secretary of State under any enactment; and**

**(b) is not aged under 18 on the day on which he is released.**

**(3) In this section “relevant custodial sentence” means—**

**(a) a sentence of imprisonment for a term of twelve months or more (including such a sentence imposed under section 227 of the Criminal Justice Act [2003 \(c. 44\)](#));**

**(b) a sentence of detention in a young offender institution for a term of twelve months or more;**

**(c) a sentence of detention under section 90 of the Powers of Criminal Courts (Sentencing) Act [2000 \(c. 6\)](#);**

- (d) a sentence of detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 for a period of twelve months or more;**
- (e) a sentence of custody for life under section 93 or 94 of the Powers of Criminal Courts (Sentencing) Act 2000; or**
- (f) a sentence of detention under section 226 or 228 of the Criminal Justice Act 2003.**

**(4) In this section “relevant sexual offence” means—**

- (a) an offence specified in Part 2 of Schedule 15 to the Criminal Justice Act 2003 (specified sexual offences);**
- (b) an offence specified in paragraphs 1 to 21 of Schedule 16 to that Act (offences under the law of Scotland); or**
- (c) an offence specified in Part 2 of Schedule 17 to that Act (offences under the law of Northern Ireland).**

**(5) In section 250(4) of the Criminal Justice Act 2003 (licence conditions for prisoners serving sentences of imprisonment of twelve months or more etc), in paragraph (b)(i) after “Criminal Justice and Court Services Act 2000” there is inserted “or section 28 of the Offender Management Act 2007”.**

The House of Commons debate on the presentation of the bill made it clear however that 80% of victims of a sexual attack knew their attacker and that the intention of the bill was largely, although not exclusively, targeted at the remaining 20% who were strangers to their victims, on the basis that the public protection would best be served by that focus (the main direction of the discussion focused around paedophiles).

This is in part backed up by the statistics on repeat offenders which show that in the four years after release, none of the sex offenders imprisoned for an offence against a child within the family had committed another sexual offence (See Findings 164 of the Research, Development and Statistics Directorate on Reconviction rates of serious sex offenders and assessments of their risk).

Who the act can cover and who the act was aimed to cover are worth knowing about, when it comes to questions over whether or not such licence conditions are appropriate for a particular defendant.

### How does a polygraph work?

A polygraph test measures a subject’s bodily reactions when asked questions. Two bands are placed around the chest and abdomen to measure breathing; a blood pressure cuff measures heart rate; and a finger stall measures galvanic sweat response. The results are plotted in real-time on a computer screen and a trained examiner will then determine whether the subject is telling the truth or not. Lying is

indicated by an abnormal reaction when giving that particular response.

### What are the concerns?

#### *(i) Confusion over the aim*

The objective behind the new condition is set out in the Regulatory Impact Assessment, entitled 'Making Provision in the Management of Offenders and Sentencing Bill for the mandatory Polygraph testing of certain Sexual Offenders' dated 6<sup>th</sup> January 2005.

Therein it is stated that compulsory testing will enable probation to establish the extent to which polygraph testing encourages sex offenders to make disclosures of behaviour that would otherwise not come to light. That information will, it is said, help target interventions used to manage an offender's risks more accurately and be used alongside traditional supervision techniques.

However, when the scheme was discussed and debated in the House of Commons on 28<sup>th</sup> February 2007 it was stated that the polygraph would be used to monitor whether offenders are engaging in risky behaviour or behaviour that puts them in breach of their licence conditions.

On the face of it the two aims aren't radically different but the latter certainly indicates an intention to use the polygraph to determine breaches of license conditions per se, rather than its use being limited to a risk management tool. If the latter approach were the true one, a failed polygraph test could lead to revocation of licence and imprisonment.

Section 29(1) of the OM Act 2007 seems to support both aims and therefore it appears that defendants may genuinely be at risk of condition breach on the basis of a polygraph test result:

#### **29 Effect of polygraph condition**

**(1) For the purposes of section 28, a polygraph condition is a condition which requires the released person—**

**(a) to participate in polygraph sessions conducted with a view to—**

**(i) monitoring his compliance with the other conditions of his licence; or**

**(ii) improving the way in which he is managed during his release on licence;**

*(2) Reliability of test results*

The Journal of Applied Psychology reported in 1997 that polygraphy worked just 61% of the time – the risk of providing a false positive or even a false negative occurred in 39% of tests. The margin of error is well beyond that of any other scientific procedure relied on within the criminal system.

The National Research Council (America) reported in 2005 that if a group of 10,000 people including 10 spies was polygraphed, 1600 innocent people would ‘fail’ and two of the spies would ‘pass’. All that polygraphs do is measure physiological reactions to verbal stimuli – fear, anger or embarrassment may just as easily produce the same reactions as lying.

These figures clearly raise enormous concerns over the reliability of test results, particularly in the face of the potential risks to liberty that a failed polygraph could entail.

*(3) Protection of Rights*

The government has tried to clearly avoid breaching the right against self incrimination – it is made absolutely clear in Section 30 of the OM Act 2007 that test results or anything said during a test cannot be used in criminal proceedings against a released person for an offence:

**30 Use in criminal proceedings of evidence from polygraph sessions**

**(1) Evidence of any matter mentioned in subsection (2) may not be used in any proceedings against a released person for an offence.**

**(2) The matters so excluded are—**

**(a) any statement made by the released person while participating in a polygraph session; and**

**(b) any physiological reactions of the released person while being questioned in the course of a polygraph examination.**

**(3) In this section “polygraph examination” and “polygraph session” have the same meaning as in section 29.**

However, there still remains possible infringement of the Article 8 right to a private life and although the House of Commons, in debate, satisfied itself that where Article 8 was engaged *'the conducting of the test and the potential use of the resulting evidence will not amount to an unjustified or disproportionate interference with an article 8 right , because of the clear benefits to effective offender management that we believe will accrue from the polygraph condition'* (column 935), their satisfaction followed discussion of the certain need for clear procedural guidance and safeguards to be in place before the act came into force.

The difficulty currently is that the act is now in force but there are no published guidelines on operating polygraphs, in spite of a consultation between the National Offender Management Service and the Ministry of Justice ending in November 2008 on exactly that issue (**Consultation Paper CP (L) 20/08**). The consultation made it clear that anyone involved with polygraphy would have to partake in extensive training, but as yet those guidelines do not appear to be available (awaiting update from the probation service). Without such safeguards in place, but with the act in force, the risks to the defendant seem enormous.

### Conclusion

The reliability of polygraph results has long been doubted, hence the reason why they are not admissible in evidence in standard criminal court proceedings in Britain. What is of concern is that public hysteria is being used to justify the imposition of an as yet unregulated, untested and unreliable method of 'treatment' that in fact exposes sex offenders on the licence condition to a genuine risk of a miscarriage of justice, where their licence is at risk of revocation mainly on the strength of a polygraph test result.

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