

EXPLANATORY MEMORANDUM TO
THE POLYGRAPH (AMENDMENT) RULES 2022

2022 No. 191

1. Introduction

- 1.1 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 offenders are required to undertake polygraph tests as a condition of their release on licence. This instrument amends the Polygraph Rules 2009 (“the 2009 Rules”) to reflect minor operational updates to the conduct of polygraph testing of offenders on licence. Since the full implementation of polygraph testing following the conclusion of the 2009 pilot with people convicted of sexual offences, the regime has been extended to other cohorts of offenders, and operational practices have become embedded and been adjusted. This instrument makes minor amendments to terminology and process and does not contain any substantive policy changes.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

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 to England and Wales.

5. European Convention on Human Rights

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

6. Legislative Context

- 6.1 As part of the legislative regime in place to allow for management of offenders released from prison on licence into the community, the Secretary of State may impose a condition requiring certain offenders to be subject to polygraph testing. Section 28 to 30 of the Offender Management Act 2007 (“the 2007 Act”) provide for the condition’s imposition and effect, and allow for the Secretary of State to make rules relating to the conduct of polygraph sessions.
- 6.2 Polygraph testing initially only applied to specified sex offenders, and the provisions were commenced in 2009 subject to a piloting program in specified police areas. Following the successful pilot, the provisions were fully commenced in January 2014. In 2021, polygraph testing was extended to two new cohorts of offenders. In June 2021, the Counter-Terrorism and Sentencing Act 2021 introduced testing for terrorist offenders. In July 2021, the Domestic Abuse Act 2021 introduced testing for domestic abuse offenders, subject to a pilot in specified police areas.

7. Policy background

What is being done and why?

- 7.1 These amendment Rules make no substantive policy changes, rather they seek to update some outdated wording in the 2009 Rules to reflect organisational changes in the structure of the probation service, expansion of polygraph testing to other cohorts of offender, and to clarify the requirements for polygraph supervisors to quality assure polygraph testing provision.

Definitions

- 7.2 The amendment Rules add in the definition of a ‘polygraph operator’. Whilst the 2009 Rules refer to polygraph operators, they did not include a definition. Within the definition of “probation provider”, the amendments remove the reference to local probation boards. Probation structures have changed on a number of occasions since 2009, with probation boards ceasing to exist since before 2014.

Polygraph operator training requirements

- 7.3 The 2009 Rules set out the requirements for a polygraph operator to be deemed qualified. Firstly they set out the training courses that a polygraph operator must complete. The 2009 Rules separate out (i) the polygraph training programme and (ii) the post-conviction sex offender testing training. The amendment Rules combine these two elements into one requirement to reflect the fact that the post-conviction sex offender testing training has now been incorporated into the polygraph training programme.
- 7.4 The 2009 Rules set out that a polygraph operator has to complete a minimum of 20 tests “under the supervision of an American Polygraph Association examiner”. The amendments change this to state that these tests must be “reviewed by a polygraph supervisor”. This is not a change in practice, but is simply a clarification that all of the charts and reports that a polygraph operator produces in their first 20 tests are reviewed by a polygraph supervisor.
- 7.5 The 2009 Rules also set out the requirements that a polygraph operator must meet to maintain their qualification after their initial training. The 2009 Rules expect that a polygraph operator attends at least 15 hours of continuing development training every twelve months. The amendments change this to stipulate 30 hours of training every two years. This does not reduce the amount of continuing professional development training they need undertake, but it does allow for polygraph operators who may be off work for 12 months (for example maternity leave) to complete their training in the year they return to work to maintain their accreditation.
- 7.6 The Probation Service has extended its use of polygraph testing from sex offenders to terrorist offenders and domestic abuse offenders. The amendments set out that continuing professional development training for polygraph operators must include content on all of these relevant offender groups, not just sex offending.

Polygraph session requirements

- 7.7 The 2009 Rules set out the requirements that must form part of a polygraph session. This includes the number of comparison questions and relevant questions that must be asked as part of the test. The 2009 Rules specify that there must be a minimum number of one comparison question and one relevant question – in current operational

practice, however, no polygraph test ever only includes just one of each of these questions. The approved test formula is a minimum of two relevant questions, and the number of comparison questions needs to mirror that. As such, the amendment Rules have updated this to expect that a minimum of two comparison questions and two relevant questions must be asked in the test.

- 7.8 The amendments also relocate a sub-paragraph from the Schedule, 3(a)(i), to this section, for improved coherence. This requires that the polygraph operator attempts to liaise with the probation practitioner and takes their views into account when setting the questions for the polygraph test.
- 7.9 The amendments update Rule 5(5) of the 2009 Rules which states that ‘The report must include details of all questions and answers...’ to say ‘...must include details of all *relevant* questions and answers’. Other questions, such as comparison questions, will be asked during the course of a polygraph test, but these questions do not need to be referred to in the polygraph report as the outcome of them is not relevant per se – the importance of the comparison questions is to allow the polygraph examiner to assess the individual’s baseline physiological responses. Thus, only relevant questions from the polygraph test need to be referred to in the polygraph report.
- 7.10 The amendments change some of the language of the 2009 Rules to clarify the process relating to the information given to the offender explaining the testing process – typically, this information is now given to the offender by their probation practitioner in an appointment prior to the polygraph session, to make sure that they are prepared for the arrangements of the test before they attend for the test. Similarly, the amendments clarify that the offender is asked to provide written confirmation that they have had the polygraph test arrangements explained to them, and they understand them, before attending for the test, which is then saved to the offender’s case record notes by the probation practitioner, rather than being saved with the polygraph report by the polygraph operator.

Polygraph supervisor requirements

- 7.11 The quality assurance arrangements for polygraph operators include a number of elements – some of these require technical knowledge of running a polygraph test and scoring the physiological charts that are produced; and some require experience in the field of polygraphy without the technical knowledge. The amendments clarify that a polygraph supervisor must meet the qualification requirements of a polygraph operator, except where that supervisor’s only role is to review the quality of the written polygraph reports produced by the polygraph operator.

The Probation Service pay an external supplier to provide training, equipment, quality control and continuing professional development for the polygraph operators. This supplier is referred to in the definitions as ‘the polygraph provider’. The amendments clarify the 2009 Rules to require:

- That a report will be provided to the Secretary of State at least every six months (as these reports are routinely provided more regularly than every six months);
- That the report includes the total number of tests that have been reviewed by all polygraph supervisors during that period; and
- That the provider will provide an overview of reviews conducted during that period, rather than a summary of each review, given how significantly the volume of tests has increased since 2009.

- 7.12 In the Schedule, the amendments update the requirements to specify that the review conducted by the polygraph supervisor must include the charts produced during a polygraph test, rather than all of the electronic audio-visual recordings.
- 7.13 The 2009 Rules currently provide that, where a supervisor identifies a concern with practice during a review, the next two polygraph tests conducted by that operator should be reviewed. The changes provide instead for additional sessions to be reviewed. This change reflects the fact that some ‘concerns’, such as ‘overcalls’ (inaccurate conclusion of the chart outcomes) do not necessarily require a review; by opening the reviews up to a supervisor’s discretion, more effective use of their time and resource can be made, as well as allowing for them to select which subsequent sessions are suitable for such a review.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 These Rules do not consolidate any existing requirement since they amend the 2009 Rules.

10. Consultation outcome

- 10.1 The amendment Rules do not introduce any substantive policy changes, as such no consultation was undertaken specifically.

11. Guidance

- 11.1 Polygraph testing in the Probation Service is underpinned by a Policy Framework which can be found [here](#). The updated Rules will be shared specifically with key stakeholders who will be directly affected by the changes, namely polygraph operators and their line managers and the external specialist polygraph provider who provides our quality assurance arrangements.

12. Impact

- 12.1 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.
- 12.2 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.
- 12.3 An Impact Assessment has not been prepared for this instrument as the updates do not introduce any substantive policy changes and there will be minimal impact on the private or voluntary sector. An Equality Analysis has, however, been prepared for the use of polygraph testing in the Probation Service as a whole.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), the approach taken is to confine the Rules to those areas absolutely necessary to the proper delivery of polygraphy services.

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

14. Monitoring & review

14.1 These Rules will be reviewed by the policy lead responsible for polygraph testing in the Probation Service on an annual basis, to identify the need for any future changes.

15. Contact

15.1 Helen Walton at the Ministry of Justice. Telephone: 07889 405179 or email: helen.walton2@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Gordon Davison, Director for Public Protection Group at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.

15.3 Minister Kit Malthouse, at the Ministry of Justice can confirm that this Explanatory Memorandum meets the required standard.