EXPLANATORY MEMORANDUM TO

THE OFFENDER MANAGEMENT ACT 2007 (COMMENCEMENT NO. 6) ORDER 2013

2013 No. [DRAFT]

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 The Offender Management Act 2007 (OMA) introduced a power for the Secretary of State to include a polygraph condition into the licences of certain sexual offenders. This order commences the power across the whole of England and Wales from 6th January 2014. It replaces an earlier commencement order that was subject to time and geographical limits.

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

3.1 None.

4. Legislative Context

4.1 Piloting the use of polygraph testing for sexual offenders on licence was one of the measures introduced in recent years to protect the public from sexual abuse by offenders already convicted of a sexual offence. A new clause was introduced into the Offender Management Bill, in February 2007, at the third reading stage, to allow a pilot of mandatory polygraph testing. The late addition was brought because of the impending publication of a Home Office Review, "Review of the Protection of Children from Sex Offenders" (final publication date was June 2007) which recommended that use of mandatory polygraph testing be piloted to establish whether compulsory polygraph tests led to increased disclosure of information that would be helpful in the treatment and supervision of child sex offenders.

4.2 The government of the day advised a "cautious approach" to the introduction of polygraph testing. The OMA allowed the introduction of the polygraph testing with the following limitations:

- that use of evidence from polygraph tests would not be permitted in criminal proceedings. Section 30 of the OMA prevents any information emerging from a test being relied upon in any prosecutions brought against the sex offender.

- that it would be introduced for a pilot period only in a pilot area. Sections 28 and 29 of the Offender Management Act 2007 ("the 2007 Act") set out a power for the

Secretary of State to impose conditions relating to polygraph testing in the licences of certain offenders released from prison. The power was commenced in relation to nine police areas on 19 January 2009 by the Offender Management Act 2007 (Commencement No.3) Order 2009, and ceased under that Order on 31 March 2012.

- That a scientific research study would be commissioned to run in parallel with the pilot, to determine whether the information elicited from polygraph testing facilitated effective offender management without disproportionately affecting the rights of those tested. Assurance was given in the House of Lords that further roll-out would be sanctioned only if it could be shown that polygraph testing was a useful and objective additional tool in assessing and managing the risk posed by sexual offenders, in which case an affirmative resolution before both Houses would be required before polygraph testing across England and Wales could be commenced.

- In addition, the Polygraph Rules 2009 were made on 10 March 2009 (as SI 2009 No.619). They governed the conduct of the polygraph sessions and requirements as to qualifications and experience of the polygraph testers. During the committee and House of Lords stages, the safeguard was added that any changes to the Polygraph Rules would require a negative resolution of both Houses rather than, as was originally proposed, by the Secretary of State without any formal procedure. If this Commencement Order is passed, it is intended that any new rules governing polygraph testing will be made directly after commencement.

4.3 The pilot was successful (see paragraph 7.8) and commencement of the power in relation to England and Wales as a whole is now sought. Under section 41(4) of the 2007 Act the commencement order must be approved in draft using the affirmative resolution procedure before it can be made.

5. Territorial Extent and Application

5.1 This instrument applies to England and Wales.

6. European Convention on Human Rights

The Secretary of State for Justice has made the following statement regarding Human Rights:

In my view the provisions of the Offender Management Act 2007 (Commencement No.6) Order 2013 are compatible with the Convention rights.

7. Policy background

7.1 Sexual offending is a matter that generates great public concern and protecting the public from the problem of sexual abuse has been given priority by successive

governments across recent years. It also attracts considerable media attention. It is, therefore, important that all reasonable and effective measures that may assist in the safer management of sexual offenders are employed.

7.2 The previous Government acknowledged there had been important developments in the management of child sex offenders but established a review to carry out a careful examination of where further improvements could be made to give reassurance to the public. In June 2007 they published the "Review of the Protection of Children from Sex Offenders" which recommended harnessing new technologies to see if they could further improve the management of sexual offenders (see 4.1 above) and proposed piloting mandatory polygraph tests on sex offenders in the community.

7.3 The main purpose of the pilot was to determine whether polygraph testing was a useful risk management tool for offender managers supervising sexual offenders who had committed sexual offences against children or adults following their release from prison into the community. Following a positive evaluation (see paragraph 7.8) the Government has concluded that it should be possible for polygraph conditions to be included in the licences of sex offenders throughout England & Wales. This requires the necessary powers to be commenced afresh, but without a time limit or a geographical limit.

7.4 The polygraph is a device that measures heart activity, breathing activity and sweating. Changes in these factors can indicate whether an individual is lying (i.e. deception was indicated) or telling the truth (no deception indicated) in response to set questions. In the pilot, polygraph testing was carried out by trained polygraph examiners (polygraphers), directed by probation offender managers. Questions were formulated based on offenders' previous offending and risk of causing harm.

7.5 In the main, the polygraph test was used to establish the offender's compliance with specific licence conditions such as not to contact a specified person or not to go to specific places, by asking the offender directly whether they had complied with such a condition. Information from the polygraph test and/or information that the offender volunteered (termed a disclosure) was used to inform risk management decisions, including the decision to recall an offender back to prison because of a breach of licence condition/s.

7.6 Failing the test (deception was indicated) was not treated as a breach of the licence condition *per se* but would lead to intensive questioning from the offender manager and/or seeking other sources of information about the offender. If further information indicated a failure to comply with the licence (or increased risk to others), recall to custody was a possible outcome. Failing to comply with the instructions of the polygraph operator (including attempts to 'beat' the polygraph through use of counter-measures) and failing to attend for a polygraph test were breaches of the licence condition and resulted in the offender being recalled to custody or other actions to manage risk being undertaken.

7.7 In summary, polygraph testing was used, during the pilot, as an additional source of information for offender managers when assessing and managing a sexual offender's risks in the community.

7.8 A formal evaluation of the polygraph pilot, led by Dr Theresa Gannon of the University of Kent, concluded that mandatory polygraph testing provided information to offender managers that had the potential to improve the management of sexual offenders because offenders subject to testing made more than twice the number of "significant disclosures" (gave information relevant to managing their risk) as those who were not tested. In particular, the evaluation showed that polygraph testing seemed to increase the likelihood of preventative actions being taken by offender managers that would contribute to greater protection of the public from harm. The evaluation can be viewed at: https://www.gov.uk/government/publications/the-evaluation-of-the-mandatory-polygraph-pilot

7.9 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 was to discover more about and further refine issues such as questioning techniques, training, and reporting, and to determine the best way to regulate and monitor testing. Testing during the pilot was regulated through a combination of the Polygraph Rules and the contractual arrangements between the Secretary of State and providers of polygraph services. This framework will continue when full roll-out across England and Wales takes place. A contractor operating under a national draw-down contract with the Ministry of Justice will provide polygraph testing services to appropriate sexual offenders who are referred to the contractor by individual Probation Trusts. An outcome-based specification is being developed. Following the pilot and discussion with potential polygraph providers, it is not anticipated that the Polygraph Rules will be amended.

7.10 Following the positive evaluation of the pilot, Ministers concluded that sections 28 to 29 of the Offender Management Act 2007 should be commenced fully - i.e. beyond the time and geographical limits of the pilot. Ministers also decided that polygraph conditions should be imposed on all serious sexual offenders and that Trusts should have discretion to include the condition for other sexual offenders on licence if appropriate. In the case of indeterminate sentenced prisoners, the offender manager will need to apply to the Parole Board to include the polygraph condition in the post-release licence; in the case of determinate sentence prisoners the offender manager will make a recommendation to the prison governor. Securing the Parole Board's agreement to include the licence condition in the case of indeterminate sentenced offenders was not found to be an obstacle during the pilot.

7.11 The pilot tested *all* sexual offenders released on licence for the period of the pilot. Targeting the polygraph licence condition on those most likely to re-offend sexually, or who give greatest cause for concern to supervising agencies, ensures that extra offender management resources are focused on the most risky offenders. Ministers have therefore concluded that polygraph conditions should be targeted on the most serious sexual offenders on licence: those who are assessed as both a high risk of serious harm and a

high risk of sexual re-offending. This will be determined using NOMS-approved assessment tools that are in operation nationally - currently, Offender Assessment System (OASys) Risk of Serious Harm Score and Risk Matrix 2000 respectively. Guidance will be issued to offender managers, Probation Trusts, Parole Board members and prison governors.

7.12 Using the above definition, we estimated that about 750 sexual offenders per year will be subject to mandatory polygraph testing on a compulsory basis. The most recent figures put this number at 780. This is approximately 25% of the total population of sexual offenders on licence. Capacity to test a further 200 sexual offenders will be built into the provider's contract, to allow the testing of offenders who fall outside this definition but for whom use of the polygraph can be demonstrated to be necessary and proportionate. For example, a sexual offender may not have an extensive history of sexual offending, so will not "score" as representing a high risk of reoffending, but may be demonstrating attitudes and/or behaviour that lead to a clinical assessment that he poses a high risk of serious harm.

7.13 During the course of the pilot a legal challenge was mounted, alleging that the imposition of a polygraph condition was a violation of Article 8 of the European Convention on Human Rights and was a disproportionate measure that could not be justified in the public interest. This was successfully resisted. (*Corbett vs The Secretary of State for Justice and the National Offender Management Service -NOMS*). Though the pilot allowed the testing of all sexual offenders on licence, as described in 7.10 & 7.12 national roll-out will be targeted at serious sexual offenders and others for whom it is deemed necessary and proportionate. This will further protect offenders' rights and will limit challenges that these rights are being infringed.

7.14 Based on the costs identified of running the pilot, we estimate the annual cost of testing 950 offenders, on average twice per year, will be £570,000. This excludes management costs which include training and set up costs and is based on a figure of £300 per test. Additional project costs to NOMS to train offender managers are budgeted at £60,000 and costs to ensure technical compliance of the equipment used by the contractors and to ensure information assurance standards will be met will be included in the final budgets.

8. Consultation outcome

8.1 A public consultation about the polygraph rules was completed on 21st November 2008 and there was support for them. An additional consultation is not required in respect of this Statutory Instrument. The pilot involved testing 332 offenders across eight Probation Trusts and the evaluation clearly indicated that polygraph testing is a useful offender management tool for managing the risk to the public from serious sexual offenders. The pilot report's "lessons learned" annex captured details about refinements that would benefit full roll-out, which will be fed into the contract and planning for roll-out. A public consultation about commencement would not add to this.

9. Guidance

9.1 The planning for roll-out of polygraph testing by NOMS includes the preparation of guidance, described below, and an accompanying communications plan.

9.2 Offender managers, currently employed by Probation Trusts, will be responsible for identifying those sexual offenders who should be subject to mandatory polygraph testing as an additional licence condition. Guidance for obtaining additional licence conditions is contained in the existing Probation Instruction, PI 20/2012. Advice specific to identifying appropriate sexual offenders for polygraph testing will be provided through a new Probation Instruction that will be published in December 2013 to coincide with the setting of licence conditions for offenders due for release on the commencement date (6th January 2014 if the commencement order is granted in July 2013).Training will be provided to Probation Trusts in order to maximise the potential benefits of polygraph testing to improve the management of these offenders. Current planning is for this to take place in the three months prior to the first offenders with polygraph conditions being released.

9.3 The Parole Board determines the conditions under which offenders subject to indeterminate sentences are released, and prison governors do the same for determinate-sentenced prisoners, in both cases on the advice of offender managers. Face-to-face briefings and paper and electronic guidance and instructions will be prepared for both groups. A Prison Service Instruction will be prepared to govern the wording of the polygraph testing condition for operational staff in releasing prisons.

9.4 Information leaflets, updated from those used in the pilot in the light of learning from the pilot, will be provided to offenders subject to polygraph testing. Information (under preparation) will be provided to solicitors via EPIC advising them of the new condition and the guidance that Trusts and offenders have been given about it.

10. Impact

10.1 The impact on business, charities or voluntary bodies is limited to those which will be directly involved in providing polygraph testing to offenders. It will provide a new business opportunity, under contract to the Ministry of Justice, up to the value of £2.7m over an initial 4 year period. This will be funded by NOMS offsetting the costs against savings generated from other areas of work. This unfunded cost pressure on public services is under £5m per annum and its impact is considered in the business case process.

10.2 There is no regulatory or administrative impact on the public sector beyond what already exists to implement and manage sexual offenders on licence.

10.3 A formal Business Impact Assessment has not been prepared for this instrument as the economic and financial case are clearly set out in the Outline Business Case.

10.4 An equalities impact assessment screen has been completed and this indicated that a full EIA is not required.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 The published evaluation of the pilot reviewed the effectiveness of polygraph conditions during the pilot. Further reviews will take place in line with contract monitoring arrangements. Proposals to undertake further research into its effectiveness and the impact on recidivism will be taken to the NOMS research committee so that data can be collected to inform research from the beginning of full roll-out. It is anticipated that research will be commissioned in January 2014.

13. Contact.

Heather Sutton at the National Offender Management Service, Ministry of Justice. Tel: 0300 0474743 or email: Heather.Sutton@noms.gsi.gov.uk can answer any queries regarding the instrument.