



Lord Marks of Henley-on-Thames QC
House of Lords
London
SW1A 0PW

MoJ ref: SUB85748

24 February 2021

Dear Lord Marks,

POLYGRAPH LICENCE CONDITIONS: DOMESTIC ABUSE BILL AND THE COUNTER-TERRORISM AND SENTENCING BILL

Thank you for the questions relating to polygraph examinations that you raised during the Lords Committee stage debates for the Domestic Abuse (DA) and the Counter Terrorism and Sentencing (CTS) Bills on 8 and 9 February 2021 respectively. I will answer all the questions that I was not able to answer during both Committees in this letter. I will also, for clarity, confirm some answers where I know there was particular concern.

I will begin by dealing with those questions that have equal application to polygraph examinations under both Bills before responding to specific questions relating to the Domestic Abuse Bill.

Third party

The first question concerns whether information from a polygraph examination may be used in a criminal court against a third party (i.e. not the examined offender).

As I stated in Committee for the CTS Bill, it is prohibited to use information from the polygraph examination in criminal proceedings against the examined offender. This is provided for in section 30 of the Offender Management Act 2007, which reflects the Government's policy, and is not changed by either Bill. This statutory exclusion is necessary to maintain an offender's ECHR Article 6 rights against self-incrimination.

The issue of whether such information can be used against a third party gives rise to different considerations. The current legislation does not exclude the use of polygraph material in criminal proceedings against third parties. However, in practice the Crown Prosecution Service do not currently use any polygraph material as evidence in terrorism prosecutions, including against third parties, and they do not foresee this situation changing.

It is neither the intention nor the effect of the polygraph examination provisions of either Bill that they will be used for this purpose. The polygraph provisions do not permit questions to be asked probing matters which are not specifically related to monitoring compliance with the offender's

licence conditions or improving the management on release of the offender. This means questions about third parties are expressly not permitted unless related to such compliance or management.

Nonetheless, we are not of the view that there should be the same statutory prohibition for use of such information against a third party as exists against the examined offender.

In that context, I should explain that there are two different types of information collected from a polygraph examination. The first is the conversation between examiner and examinee, and the second is the polygraph chart produced from the physiological results. The latter will not be used; it has no evidential value since the results relate directly to the examinee and therefore are of no use in relation to a third party.

Our concern is with the potential value of the former in some unlikely but conceivable situations. For example, if during a polygraph examination an offender makes a serious accusation of terrorist activity against a third party, but is then unwilling, or unable, to repeat the accusation on another occasion, that evidence may be useful in a subsequent prosecution. This would be the same position as would apply in any other interview that takes place between an offender and their probation officer. Though we do not consider a single piece of evidence, such as an accusation, would likely meet the necessary prosecutorial and judicial thresholds for admissibility in any criminal trial against a third party, we believe that the prosecution and the Courts should make the decision on the admissibility of evidence, rather than excluding it in all cases by statute.

For these reasons we consider it is not appropriate to legislate to preclude the use of information obtained in a polygraph examination against a third party.

Civil or family proceedings

In the Committee for the DA Bill you asked whether polygraph information could be admitted in civil or family proceedings. Although this may in principle be possible, it would also be subject to the rulings of the trial judge or Tribunal member.

American Polygraph Association

In Committee for both Bills, concerns were raised regarding the use of American Polygraph Association Standards for application in England and Wales. As I noted in the CTS Bill Committee, these standards are those of an international professional association and are used across the world. They do not relate to the use of polygraph material but are a set of standards relating to the qualifications and behaviour of polygraph examiners, including mandatory professional training of examiners every two years to maintain their accreditation. They exist to make sure polygraph examinations are carried out to consistently high ethical and professional standards. In addition, the National Probation Service examinations are independently quality assured by an external provider, Professor Don Grubin, who addressed Peers in the polygraph briefing on 4 February 2021.

'Right to silence'

The last of the questions with equal application concerned the question raised by Lord Thomas of Gresford regarding an offender's 'right to silence'.

The 'right to silence' is a mosaic of rights arising from the common law and the ECHR. Anyone accused of a criminal offence has the right to remain silent and the right not to incriminate themselves. It is important to distinguish between these two rights. Both rights relate to the right to a fair trial as protected by Article 6 of the Convention, but that is a right which may be subject to limitations. Domestic statute provides protections, and legitimate limitations, on the right to remain silent and not to incriminate oneself.

In relation to polygraph, the right not to incriminate oneself is protected by section 30, in that no statements or physiological reactions during the polygraph examination can be utilised in proceedings against an examined person for an offence. This prohibition necessarily does not extend to statements made about third parties, as the right is confined to privilege against self-incrimination.

The right to silence more generally is specifically restricted to circumstances where a suspect is being questioned in respect of a criminal charge. Offenders subject to polygraph do not fall into the ambit of this right as they are not in police (or other enforcement agency) custody being questioned about alleged offences. They are convicted offenders serving a sentence of imprisonment handed down by a Court, of which part consists of release into the community which is conditional on compliance with conditions. The 2007 Act prescribes that questions must be answered, but also that information provided under that compulsion cannot be used in criminal proceedings against the offender, as set out above.

Polygraph conditions have been upheld by the High Court as a necessary infringement on offenders' Convention rights. The use of polygraphs is considered by the Government to be appropriate, proportionate and necessary in relation to the risk posed by these serious offenders.

In summary on these points, I emphasise that the privilege against self-incrimination is preserved by section 30, the purpose of polygraph examinations are not to gather information on third parties, and that a polygraph is a risk assessment tool first and foremost.

Questions arising from the Domestic Abuse Bill

Addressing now those questions concerned specifically with polygraph examinations under the DA Bill, Baroness Hamwee referred to the Home Office fact sheet published alongside that Bill and its reference to imposing mandatory polygraph examinations on high risk domestic abuse perpetrators who meet the eligibility criteria. I confirm that the eligibility criteria referred to are those set out on the face of the Bill and the 2007 Act, namely a relevant custodial sentence for a relevant offence involving domestic abuse. With respect to determining whether an offender meeting those criteria is high risk, this will be assessed using the National Probation Service's Offender Assessment System (OASys), which has been in operation for many years and is the primary tool used to assess an offender's risk of serious harm to others.

Baroness Hamwee also asked whether a polygraph examination can be used to prompt an investigation into whether a domestic abuse prevention order or notice has been complied with prior to custody, and also whether a court dealing with such an order can require a polygraph examination to be undertaken.

With respect to the former, polygraph examinations are only concerned with compliance with licence conditions following release from custody or improving the management of the offender on their release. As discussed in Committee, while information disclosed may be passed to the

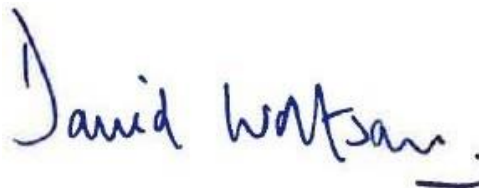
police and lead the police to investigate such compliance in accordance with their procedures, the examination itself will not probe these matters given they relate to events prior to custody.

With respect to the latter question, although the courts have no power to impose licence conditions, a sentencing court may recommend licence conditions on those it sentences to imprisonment for a term of twelve months or more. The National Probation Service would consider any such recommendations when setting the licence conditions for a particular offender.

You, Lord Marks, also asked whether following the piloting of polygraphing for domestic abuse offenders, regulations which require Parliamentary approval would be laid to make permanent the provisions for use of polygraphing on domestic abuse offenders. I am happy to repeat my commitment given in Committee that the Government will lay a copy of the evaluation report on the pilot before both Houses prior to any decision on wider rollout, enabling noble Lords to consider the findings in full.

I am copying this letter to Lord Falconer of Thoroton QC, Baroness Hamwee, Lord Kennedy of Southwark and Lord Thomas of Gresford QC. I am also placing a copy in the library of the House.

Yours sincerely,

A handwritten signature in blue ink that reads "David Wolfson". The signature is written in a cursive style with a horizontal line at the end.

**LORD (DAVID) WOLFSON
OF TREDEGAR, QC**