

COUNTER TERRORISM AND SENTENCING BILL
DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared by the Home Office and Ministry of Justice for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Counter-Terrorism and Sentencing Bill ('the Bill'). The memorandum identifies the provisions of the Bill which confer new powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Background and purpose of the Bill

2. The Bill will better protect the public by strengthening every stage in the process of dealing with convicted terrorist offenders. It will ensure that serious and dangerous terrorism offenders will spend longer in custody, properly reflecting the seriousness of the offences they have committed, which provides both better protection for the public and more time in which to support their disengagement and rehabilitation through a range of tailored interventions available while they are in prison. It will also improve the ability to monitor and manage the risk posed by terrorist offenders and individuals of terrorism concern outside of custody, allowing for more effective intervention when this is required. These provisions will apply UK-wide to avoid discrepancy in the treatment of terrorist offending across our three jurisdictions so the UK government is best able to protect the public.
3. The Bill:
 - a) provides for a serious terrorism sentence for certain dangerous offenders with a minimum 14 year term;
 - b) provides for a minimum 14 year term order to be given for certain terrorist offences where the court decides that the applicable sentence should be that of discretionary life imprisonment for England and Wales and makes equivalent provisions for Scotland and Northern Ireland;
 - c) provides for a new maximum of up to ten years for the licence period for specified terrorist offenders who receive an extended sentence;
 - d) adds offences for which a person may be liable for the new serious terrorism sentence to the extended sentence regimes across the UK;
 - e) extends the Sentence for Offenders of Particular Concern (SOPC) so that additional terrorist offences and offences with a terrorist connection attract this sentence (England and Wales), extends the SOPC to under 18s, and creates a new SOPC equivalent ('terrorism sentence') for Scotland and Northern Ireland;
 - f) changes the release point of extended sentence offenders convicted of relevant terrorism offences to spend the full custodial term in custody with automatic release at the end;
 - g) changes the automatic release point of relevant terrorism sentences to a two-thirds referral to the Parole Board in Northern Ireland with automatic release at the end of the custodial term;
 - h) provides for the inclusion of a polygraph testing condition in the licence of a person who has committed a relevant terrorism offence across the UK;
 - i) removes the statutory deadline for completion of the review of the Government's "Prevent" strategy;
 - j) increases the maximum sentences that are available for certain terrorism offences;

- k) extends the offences that a court may determine have been committed with a “terrorist connection”, thereby bringing such offences within the scope of the relevant regimes for aggravated sentencing, notification requirements and forfeiture provisions;
- l) brings certain terrorism offences within the scope of the notification requirements that apply to registered terrorist offenders under Part 4 of the Counter-Terrorism Act 2008;
- m) enables the police to apply for serious crime prevention orders under the Serious Crime Act 2007 in respect of crime that is terrorism-related;
- n) makes amendments to the measures which may be imposed under the Terrorism Prevention and Investigation Measures Act 2011 (TPIMA 2011);
- o) lowers the threshold for imposing a Terrorism Prevention and Investigation Measure (TPIM) so that the Secretary of State must have “reasonable grounds” for suspecting that an individual is or has been engaged in terrorism-related activity;
- p) removes the 2-year statutory time limit for a TPIM, so that it is capable of indefinite renewal.

C. Delegated powers

4. The Bill includes 7 new delegated powers in relation to measures (f), (g) (h) and (n), 1 new delegated power inserted into the Offender Management Act 2007 (OMA 2007), as well as 3 regulation-making powers to make consequential amendments, transitional or saving provision, and relating to commencement:
 - A power to make different provision for different areas and incidental, supplementary consequential and transitional provisions in relation to polygraph rules made under section 29(6) of the Offender Management Act 2007 (clause 32(3));
 - A power for the Secretary of State (‘SoS’) to make regulations restricting the ability of relevant authorities to include a terrorism-related polygraph condition in a release licence to certain descriptions of terrorist offenders (clause 35(1));
 - A power for the SoS to make regulations making provision about the conduct of polygraph sessions further to a terrorism-related polygraph condition (clause 35(2));
 - A power for the SoS to issue guidance relating to timings of polygraph sessions in Scotland and Northern Ireland (clause 35(6));
 - A power for the SoS to make regulations about the conduct of polygraph sessions required under TPIMA 2011 (clause 41(2));
 - A power for the SoS to make regulations specifying other persons and other places authorised to carry out drug testing where that is required under TPIMA 2011 (clause 42);
 - A power to state the effect of amendments made by or under the Bill in the Sentencing Code and to make consequential, transitional or savings provision in other enactments (clause 49);
 - A power for the SoS providing for consequential amendments and repeals to be made by regulations (clause 50);
 - A power for the SoS providing for consequential amendment to be made further to the abolition of sentences of detention in a young offender institution (clause 50(7));
 - A power to commence certain provisions of the Bill (clause 52(3));
 - A power to make transitional, transitory or savings provision in connection with the coming into force of the Bill (clause 52(5)).

Clause 32(3): Power to make different provision for different areas and incidental, supplementary consequential and transitional provisions in relation to polygraph rules made under section 29(6) of the Offender Management Act 2007

Power conferred on: Secretary of State

Power exercisable by: Rules made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

Context and purpose

- 1) Sections 29(6) of the OMA 2007 currently gives the SoS the power to make rules in relation to the conduct of polygraph sessions in England and Wales. The Bill will function to restrict that power to sex offender (and shortly, domestic abuse) polygraph sessions only, whilst conduct of terrorist polygraph sessions will be regulated across the UK by regulations made under new clause 35(2). While section 36 of the OMA 2007 currently gives the SoS the power to make different provision for different purposes and different areas and incidental, supplementary, consequential, saving or transitional provisions in relation to regulations or orders made under that Act, section 36 does not extend to rules under section 29(6).
- 2) Clause 32(3) gives the SoS the power to make different provision for different areas and supplementary or consequential provisions in relation to rules made under section 29(6) OMA 2007, in line with the powers already available for other types of delegated legislation under section 36 of that Act and in line with the new powers taken in clause 35 to make regulations in relation to the conduct of polygraph sessions for terrorist offenders across the United Kingdom.
- 3) The justifications for this power should be read in conjunction with those for clause 35 below, as they flow from those Bill provisions.

Justification for taking the Power

- 4) This power brings the power to make polygraph rules made under section 29(6) of OMA 2007 into line with the powers in clause 35 in to make polygraph regulations for the conduct of terrorism polygraph sessions). This will enable those two powers to be exercised in a fully aligned way, so as to create a coherent polygraph regime.
- 5) Risk management of terrorism offenders is dynamic and the Government would need to be able to respond to such risks as soon as they became apparent by making adjustments to the rules and using these additional powers to ensure the smooth transition for offenders already being tested at the point of change in the process.
- 6) The extension of the polygraph regime to the whole of the UK, as well as the multiple categories of offender who will be subject to polygraph testing (sex offenders, terrorist offenders, and soon to be domestic abuse offenders) which each extend to different areas means this power is necessary to effectively administrate and coordinate rules and regulations made under section 29(6), as well as to create consistency if one whole UK

instrument is to be created for conduct of polygraph sessions. Savings provision will be necessary where new regulations are made but savings from the previous regulations are required. Changes may be needed to the existing Polygraph Rules 2009 consequent on new rules made under section 29(6) or clause 35(2). It is considered that, since the 2015 changes to streamline and standardise secondary legislation, as rules and regulations are no longer distinguished there is no controversy in extending some of the principles in section 36 OMA to rules made via section 29 of the OMA 2009. The powers will only extend to amendments of secondary legislation. It is therefore the Government's view this power is necessary to bring polygraph rules into line with the new polygraph regulations.

Justification for the procedure

- 7) The current power to make polygraph rules for sex offenders under the OMA 2007 is subject to the negative Parliamentary process. The power to make different rules for different purposes or areas and incidental, supplementary consequential and transitional provisions in relation to such rules is therefore also suitable for that level of delegation. Any such use of the power would not amend primary legislation, but will allow practice and procedure in the application of polygraph testing to transition appropriately when updated or altered, and consistently where applied in other areas of polygraph testing. The Government's view is that regulating conduct of polygraph sessions is administrative in nature and therefore it is not necessary for such powers to be subject to parliamentary scrutiny by affirmative resolution. It is therefore considered that the negative procedure is most appropriate level of Parliamentary scrutiny for these powers.

Clause 35(1): Limitation of power to include polygraph conditions in terrorism cases

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

Context and purpose

- 8) Sections 28 to 31 of the Offender Management Act 2007 give the SoS the power to include a polygraph condition in the licence of certain specified offenders sentenced to 12 months or more imprisonment. Currently, the condition can be applied to the licence of sex offenders. In practice, owing to the scientific and evidence-based nature of polygraph testing and the stringent imposition it is considered to have on offender's right to private and family life, significant further restrictions are imposed on imposition of polygraph conditions and on testing itself. Polygraph testing as currently implemented, over the course of the last decade, has proven to be a reliable and useful risk management tool for offender management on licence.
- 9) Sections 28 to 31 of the OMA 2007 contain delegated powers to ensure polygraph as a risk management tool is strictly controlled and monitored, and enable flexibility to change polygraph processes where new research might indicate beneficial results. To provide the Committee with some background information; additional policy is in place in England and

Wales which further controls the imposition of polygraph conditions, restricting it to offenders who are assessed as high/very high risk of causing serious harm, or on a discretionary basis for offenders who are not assessed as high/very high risk, but in whose case the polygraph condition is necessary and proportionate in order to manage them in the community. Offenders who have already been released will not have the condition added to their licence unless their risk of harm substantially increases so that it is necessary and proportionate to do so to manage them in the community. This policy is to ensure the Article 8 ECHR rights of offenders are protected, and to ensure conditions are not imposed where it is not necessary and proportionate to do so.

- 10) Clause 35(1) gives the Secretary of State the power to, by regulations, limit those who can receive a terrorism-related polygraph condition to certain descriptions of offender. The Bill sets the outermost limits of cases where a terrorism related polygraph condition can be applied. This regulation-making power can limit, but not expand, that category. Subsection (4) defines “terrorism-related polygraph condition” as a polygraph condition included in a licence under section 28 of the OMA 2007, section 12AC of the Prisoners and Criminal Proceedings (Scotland) Act 1993 (as inserted by clause 33 of the Bill) or Article 8A of the Life Sentences (Northern Ireland) Order 2001 or Article 24A of the Criminal Justice (Northern Ireland) Order 2008 (as inserted by clause 34 of the Bill). Subsection (8) gives the Secretary of State the power to make different provision for different areas and supplementary or consequential provisions in relation to regulations made under clause 35(1).

Justification for taking the Power

- 11) The events of London Bridge and Streatham are examples of how the risks of terrorism posed by offenders are often in flux and evolve rapidly. The Government would need to be able to respond to such dynamic risks as soon as they became apparent by considering varying restrictions on imposition of polygraph conditions. Such variables are not considered static enough to provide for in the Bill.
- 12) As described above, the polygraph regime in England and Wales is well-established, having been extensively piloted when first introduced in 2007. This makes it desirable to replicate across the UK, as far as possible, the regime as established in England and Wales. Risk assessment in England and Wales is managed using specific tools depending on the type of offender (for example, RM2000, OASys) which are constantly under review and development. The devolved administrations have different criminal justice systems, different offender management structures for those released on licence, and different risk assessment tools, again under constant review. It is not practical to enshrine the criteria specifying to whom the polygraph condition should apply in primary legislation owing to the frequency of developments in the area of risk assessment and management. It is also essential to the sustainability of polygraph testing that the policy of application to those who are assessed as posing a certain risk to the public, and only where necessary and proportionate to do so, is maintained across the whole of the UK to ensure justification for what is an intrusive licence condition. A delegated power for the SoS to make regulations is the most effective method of ensuring this whilst ensuring appropriate Parliamentary oversight.
- 13) The power in clause 35(8) gives the SoS the power to make different provision for different areas and incidental, supplementary consequential and transitional provisions when

making regulations under clause 35(1). The extension of the polygraph regime to the whole of the UK, and making different provision for different areas may well be desirable in relation to Scotland and Northern Ireland. Savings provision will be necessary where new regulations are made but savings from the previous regulations are required. Changes may be needed to the existing Polygraph Rules 2009 consequent on new terrorism regulations under 35(1). It is therefore the Government's view this power is necessary.

Justification for the procedure

14) Affirmative procedure is not considered necessary as Parliament will have already approved the terrorism polygraph testing regime and regulations under clause 35(1) can only limit not expand the categories of terrorist offender who are eligible for the polygraph condition. Negative procedure was considered appropriate for similar powers, for example section 119 of the Terrorism Act 2000 (power to make regulations providing for certain sections of the Act to apply or not apply to certain persons). It is therefore considered that the negative procedure is most appropriate for making and amending these regulations.

Clause 35(2): Provisions for conduct of polygraph sessions in terrorism cases

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

Context and purpose

15) The Bill extends the current scheme of polygraph testing to terrorist offenders in England and Wales, and creates polygraph testing for terrorist offenders in Scotland and Northern Ireland. In order to maintain consistency throughout the UK, and maintain the reliability and integrity of polygraph testing as a risk management tool, it is necessary to replicate the existing rule-making powers in the England and Wales regime for the new terrorism-related UK-wide regime to ensure that administration of polygraph testing for terrorist offenders in Scotland and Northern Ireland can be as similar to England and Wales as possible, whilst taking into account the different offender management regimes in the devolved administrations.

16) Clause 35(2) gives the SoS the power to make provisions for how terrorist-related polygraph sessions are conducted, by regulations. Subsection (3) provides regulations made under subsection (2) may require polygraph operators to be persons who satisfy certain qualification and experience criteria, make provision about keeping records of polygraph sessions, and make provision on producing reports on results of polygraph sessions. Subsection (8) gives the SoS the power to make different provision for different areas and supplementary or consequential provisions in relation to regulations made under clause 35(2).

- 17) Clause 35(3) mirrors the existing power in section 29(6) of the Offender Management Act to make rules relating to the provision of the conduct of polygraph sessions for sexual offenders. . One set of Rules has been made under this section – the Polygraph Rules 2009.
- 18) These set out strict parameters of a polygraph test which must be followed by polygraph operators in order to maintain accuracy of testing and to control the questions to be asked within each session. Polygraph operators must be independent from the case and cannot have been involved in the management of the offender in any other capacity. All sessions are audio-visually recorded and reviewed by independent Polygraph supervisors who quality assure one in five examinations. Polygraph examiners also have their work reviewed in Quality Assurance sessions three times per annum. This includes reviewing the electronically recorded session and reviewing the report drafted by the operator as a result of the session. During the examinations, the operator must ask one or more comparison questions (questions asked to establish a baseline reaction) and at least one, but no more than four, relevant questions. The examination may be repeated for comparison of reactions and to ensure accuracy of response. The whole session includes a pre-test interview, the polygraph examinations and the post-test interview. These Rules reflect current global best-practice in polygraph testing.

Justification for taking the Power

- 19) As described above, regulation and management of polygraph testing is essential to the sustainability of the tool in an offender management context. Polygraph is a relatively new area of risk management. Best practice in this area is currently governed by the American Polygraph Association, and is constantly developing. The making of regulations is essential to keep best practice up to date, to set out practice and procedure to ensure consistency, and is therefore unsuited to set into primary legislation.
- 20) As above, the power in clause 35(8) gives the SoS the power to make different provision for different areas and incidental, supplementary consequential and transitional provisions when exercising the power under clause 35(2). The extension of the polygraph regime to the whole of the UK, as well as the multiple categories of offender who will be subject to polygraph testing which extend to different areas means this power is necessary to effectively administrate and coordinate rules and regulations made under clause 35(2). Making different provision for different areas may well be desirable in relation to Scotland and Northern Ireland. Savings provision will be necessary where new regulations are made but savings from the previous regulations are required. Once initial Rules are made, changes may be needed consequent on new terrorism regulations made under 35(2). It is therefore the Government's view this power is necessary. Risk management of terrorism offenders is dynamic and the Government would need to be able to respond to such risks as soon as they became apparent by making adjustments to the rules and using these additional powers to ensure the smooth transition for offenders already being tested at the point of change in the process.

Justification for the procedure

- 21) It is the Government's view that regulating conduct of polygraph sessions is administrative in nature and therefore it is not necessary for such procedural rules and detail to be subject to parliamentary scrutiny by affirmative resolution. The parliamentary procedure provided

for here mirrors the position with the current rule-making power in section 29(6) of the OMA 2007, and similar powers in the Terrorism Act 2000 (for example, section 4(3) to make regulations prescribing procedure for applications for description of proscribed organisations. As described above, risk management of terrorism offenders is dynamic and the Government would need to be able to respond to such risks as soon as they became apparent by making adjustments to the regulations. Such variables are not considered static enough to provide for in the Bill. Affirmative procedure is not considered necessary as Parliament will have already approved the terrorism polygraph testing regime and regulations relating to conduct of sessions are administrative in nature. This is also consistent with the negative procedure that applies to the polygraph rules made under section 29 of OMA 2007. In their 7th Report of the 2006-7 Session, the Delegated Powers and Regulatory Reform Committee commented on the polygraph rules in the Offender Management Bill (which were initially proposed to not be subject to any parliamentary procedure) as follows: “we recommend that the rules be made by statutory instrument subject to the negative procedure.”

22) It is therefore considered that the negative procedure is most appropriate for making and amending these regulations.

Clause 35(6): Power to issue guidance relating to timings of polygraph sessions

Power conferred on: Secretary of State

Power exercisable by: Guidance

Parliamentary Procedure: None

23) Clause 35(6) creates a power for the SoS to issue guidance about the timing for participating in polygraph sessions, to support the implementation of the polygraph conditions as specified in new section 12AC(4)(b) of the Prisoners and Criminal Proceedings (Scotland) Act 1993, the new Article 8A(4)(b) and the new Article 24A(4)(b) of the Criminal Justice (Northern Ireland) Order 2008. An appropriate officer must give instructions relating to timings of polygraph sessions in accordance with any relevant guidelines. Analogous provisions are contained in section 29(1)(b) of the OMA 2007. There are other subordinate provisions (not exercised via secondary legislation) for the SoS to prescribe the type of equipment which may be used for polygraph testing.

24) The current polygraph policy can be found [here](#).

Justification for taking the power

25) The powers of appropriate officers in relation to polygraph are set out on the face of the Bill. Guidance for appropriate officers as to the exercise of the timing aspect of their powers is appropriate for guidelines. Providing such guidance in this form enables it to be readily updated to take account of advances in good practice, operational experience, court judgments and other relevant factors. As testing applies in different criminal justice jurisdictions across the UK, guidelines ensure timings can be made consistent or, if appropriate, be flexible to account for regional differences, depending on the probation arrangements in each jurisdiction.

Justification for the procedure

26) As distinct from the regulations which must be followed (and therefore require Parliament oversight), guidance in this respect would be informative as to best practice and not binding. It is the Government's view that the nature of operational guidance is such that, as a general rule, it is not necessary for such guidance to be subject to parliamentary scrutiny. It is considered that the timing of polygraph sessions is of no increased sensitivity or impact on offenders who are subject to the condition than the other measures on the face of the Bill. The lack of parliamentary procedure provided for here mirrors the position with the current guidance issuing power in section 29(1)(b) of the OMA 2007 and similar powers in the Terrorism Act 2000.

Clause 41(2): Conduct of polygraph sessions for TPIM subjects

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

Context and purpose

27) The Bill allows the SoS to impose a polygraph measure on an individual who is subject to a TPIM. Where imposed, the TPIM subject will be required to undertake a polygraph examination.

28) Clause 41 inserts new paragraph 10ZA into Schedule 1 to TPIMA 2011. Paragraph 10ZA(2) gives the SoS the power to make regulations governing how TPIM polygraph sessions are conducted. The power is cast in the same terms as those in clause 35.

29) Answers given during the polygraph examination will not be used in criminal proceedings against the TPIM subject (clause 41(4)). Instead, the information will be used to assess whether the TPIM subject is complying with the other measures imposed by the TPIM, and whether it is necessary to make any changes to the package of measures as a result.

Justification for taking the power

30) The power to impose a polygraph measure on a TPIM subject is set out on the face of the Bill. Guidance as to the conduct of the polygraph sessions is appropriately a matter for secondary legislation. Polygraphing is a fairly new area of risk management. Regulation and management of polygraph testing is essential to the sustainability of the tool in the context of the management of those of terrorist concern. Best practice in this area is currently governed by the American Polygraph Association, and is constantly developing. Providing the detail in regulations enables it to be readily updated to take account of advances in good practice and operational experience.

31) Making provision about the conduct of polygraph sessions in secondary legislation is also consistent with the scheme for polygraphing certain offenders released on licence. Section

29(6) and (7) of the OMA 2007 provide for rules to be made regulating the conduct of polygraph sessions.

Justification for the procedure

32) By virtue of new paragraph 10ZA(5) of Schedule 1 to TPIMA 2011, these regulations would be subject to the negative procedure. The Government considers this affords an appropriate level of parliamentary scrutiny given the procedural matters to be dealt with in the regulations.

33) This is also consistent with the negative procedure that applies to the polygraph rules made under section 29 of the OMA 2007.

Clause 42: Persons and places authorised for carrying out drug testing on TPIM subjects

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary Procedure: Negative Resolution

Context and purpose

34) The Bill allows the SoS to impose a drug testing measure on an individual who is subject to a TPIM. Where imposed, the TPIM subject will be required to give a non-intimate sample (for example, urine or saliva) to a constable at a police station, to determine whether the individual has taken specified Class A or B drugs.

35) Clause 42 inserts new paragraph 10ZB into Schedule 1 to TPIMA 2011. Paragraph 10ZB(2) gives the SoS the power to require a TPIM subject to attend a “testing place” and provide a sample to an “authorised person”. Subsection (3) defines “testing place” as a police station, and “authorised person” as a constable, but also confers a power on the Secretary of State to make regulations prescribing other testing places and other authorised persons. Subsection (3A) gives the SoS the power to make different provision for different areas and supplementary or consequential provision.

36) Failing a drugs test would not of itself be a criminal offence. The information will be used to decide whether to mandate a TPIM subject to attend drug rehabilitation sessions under the appointments measure in TPIMA 2011.

Justification for taking the power

37) The power to impose a drug testing measure on a TPIM subject is set out on the face of the Bill, as is the expected place of testing and the person expected to carry out the test. The power to add further persons and places is provided so that, if in future it is judged operationally necessary, it will be possible to do so in a way which affords flexibility, to allow for changes in future police operations. For example, it may be considered desirable to prescribe police staff or contracted-out staff as authorised persons; or to prescribe a

police-owned building which is not a police station as a testing place. A power to make different provision for different purposes or areas would be relied on if we prescribed different authorised persons or drug testing centres for different areas in the UK (or on a more localised basis).

Justification for the procedure

- 38) By virtue of new paragraph 10ZB(4) of Schedule 1 to TPIMA 2011, these regulations would be subject to the negative procedure. This is considered appropriate given that the regulations would be limited to specifying who will take the sample and where it will be taken. It is considered that these issues are administrative, given that the detection of drugs in itself will not constitute a criminal offence so there will be fewer concerns about the chain of evidence.
- 39) There is a similar power to make rules which regulate the provision of drug samples for certain offenders released on licence (see section 64(4) of the Criminal Justice and Court Services Act 2000), which is also subject to the negative procedure (by virtue of section 76(6) of that Act).

Clause 49: Power to state the effect of amendments to the Sentencing Code

Powers conferred on: the Secretary of State

Powers exercised by: regulations made by statutory instrument

Parliamentary Procedure: no procedure

Context and Purpose

- 40) The Bill will create new sentences and amend sentencing provisions for terrorist purposes. Those amendments will, in relation to England and Wales, be made to the Sentencing Code (the “Code”) as the consolidated form of sentencing procedural law. The Sentencing Code will be a comprehensive statement of the law that applies when sentencing a person convicted of an offence after it has come into force, regardless of when the offence was committed. After commencement of the Code, which sets a common commencement date for the effect of the consolidation, where the Code is amended, it will be necessary in order to preserve the comprehensive nature of the Code to set out where certain provisions do not apply to all such convictions. The intention is that this should be made clear on the face of the Code. This will save users of the Code from needing to look at commencement orders and regulations in order to establish that a provision that appears on its face to apply to all cases actually has a more limited application. It is a key aim of simplifying the procedural law of sentencing in the Code. Clause 49 provides that the power in section 419(1) of the Code to state effect of commencement provisions applies to any amendment or repeal made under the Bill.

- 41) By way of brief explanation of section 419 of the Code, it relates to two Schedules of the Code (Schedules 22 and 23) which consolidate existing but uncommenced provisions and powers to make amendments to relevant law respectively. Section 419(1) allows regulations to make provision in connection with the coming into force of the uncommenced provisions and of provision made under those powers so that their effect is started in the Code. The regulations also will be able to make provision to secure that provisions that are to continue to have effect only for particular purposes or in particular cases remain in primary legislation instead of having effect only by virtue of transitional, transitory or saving provision (paragraph (b)). This allows regulations to provide for both the existing provision and the new provision to be included in the Code, with each stating the cases to which it applies. This will allow for parallel provisions to exist in the legislation making its application to all cases clear on its face.
- 42) Section 419(2) allows consequential amendments to be made to other legislation. Such amendments may be necessary, for example, to correct existing cross-references to provisions of the Code where parallel provisions have been added to the Code as a result of exercising the power conferred by subsection (1)(b).
- 43) The extension of this section 419 power to any amendments or repeals made by the Bill will mean it is then possible to amend the Code in the same manner as section 419 allows it to be amended for Schedules 22 and 23 to the Code, so as to specify the cases in which, or the purposes for which, the provision in question will have effect.

Justification for taking the power

- 44) In order to ensure that the Code continues to take a consistent approach where uncommenced provisions are brought into force subject to savings or transitional provisions, or amendments are made that are subject to savings or transitional provisions, it is necessary to have a power to state the effect of those savings or transitional provisions in the Code.
- 45) To ensure the continuing usefulness of the Code as a consolidation, the same clarifactory regulations are required for amending legislation such as this Bill.

Justification for the procedure

- 46) The power is subject to no Parliamentary procedure. This is because the power will not be used to make any substantive changes to the law: it will be used only to state the effect of commencement provisions. Commencement powers are not generally subject to Parliamentary procedure. Section 419 of the Code is subject to no procedure. These powers is similar in nature to the following provisions:
- section 7(2)(a) of the Offender Rehabilitation Act 2014 (which gives power to amend two sentencing Acts so as to replace a reference to a date on which a provision of the Offender Rehabilitation Act 2014 comes into force with the actual date, and insert provisions explaining this effect)

- section 104 of the Deregulation Act 2015 (confers a power on Ministers to amend legislation — primary and secondary — by statutory instrument in order to spell out dates described in it.)

None of these powers are subject to Parliamentary procedure. The power in section 7(2)(a) of the 2014 Act was welcomed by the Committee in its 1st Report of the 2013-14 session.

Clause 50(1): Power to make consequential amendments

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution</i>

Context and purpose

47) Clause 50(1) confers a power on the SoS to make consequential provision for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation (including legislation passed or made on or before the last day of the Session in which the Bill is passed).

Justification for taking the power

48) The sentencing and release legislative frameworks are many-layered and complex. In the majority of cases, prisoners are serving multiple sentences attracting different release provisions, with savings and transitional provision contained in primary and secondary legislation. Sentencing and criminal justice is also a devolved matter to Scotland and Northern Ireland and the different jurisdictions have different criminal justice systems and legislation. The consequences of missing a provision are extremely grave; this would likely produce the release of prisoners that should not be released or provide for continued detention of those who should not be detained. This would undermine the administration of justice, and would need immediate rectification. The Government therefore considers that it is essential for the Bill to contain a power to deal with any consequential provision arising from the Bill in secondary legislation.

49) The powers conferred by this clause are wide but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions in the Bill. There are precedents for such provisions, including section 23(2) of the Counter-Terrorism and Border Security Act 2019. Schedule 13 already includes some changes to other enactments as a consequence of the provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation, especially in relation to devolved administrations' legislation and with respect to the Code, which is not yet enacted.

Justification for the procedure

50) If regulations made under this power amend or repeal provision in primary legislation they will be subject to the affirmative resolution procedure (by virtue of clause 50(4)) as befitting a Henry VIII power of this type. If regulations made under this power do not amend or repeal primary legislation they will be subject to the negative resolution procedure (by virtue of clause 50(5)). Affirmative procedure is not considered necessary or suitable for any applicable amendments which might be made under clause 50(5), as criminal offences and applicable law which would affect the rights of a person will be set out in primary legislation. Any secondary legislation which might come to be affected by this clause would therefore have no impact or very little impact on rights and is generally administrative or procedural in nature.

51) It is therefore considered that negative procedure provides the appropriate level of parliamentary scrutiny for the powers to amend secondary legislation.

Clause 50(7): Power to make consequential amendments

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative resolution

Context and purpose

52) Clause 50(7) amends section 77 of the Criminal Justice and Court Services Act 2000, extending the power in section 61 of that Act which concerns the abolition of the sentence of detention in a young offender institution in England and Wales. Section 61 has not yet come into force, but is part of the procedural law of sentencing and will also be subject to consolidation in the Sentencing Act 2020 (explained in detail above). The power in section 61 is extended so that any provision made for the purposes of abolishing the sentence of detention in a young offender institution may also include provision amending or repealing any relevant provision of the Counter Terrorism and Sentencing Act 2020, enabling the Secretary of State to make consequential provision for the purposes of this Bill should DYOI be abolished.

Justification for taking the power

53) The Bill provides for the sentencing of offenders between the ages of 18 to 20 who would then have a sentence of detention in a young offender institution. The uncommenced provisions reflect a future intention to abolish this sentence and make consequential provision

relating to that. The Government therefore considers that it is essential for the Bill to contain this power to make consequential provision to this Act, to reflect any future abolition of DYOI.

54) The powers conferred by this provision are limited to any amendments made under the regulation-making power, and must be genuinely consequential on the abolition of sentences of detention in a young offender institution.

Justification for the procedure

55) If regulations made under this power amend or repeal provision in primary legislation they will be subject to the affirmative resolution procedure (as befitting a Henry VIII power of this type). If regulations made under this power do not amend or repeal primary legislation they will be subject to the negative resolution procedure. Any secondary legislation which might come to be affected by this clause would therefore have no impact or very little impact on rights and is generally administrative or procedural in nature.

56) It is therefore considered that the affirmative procedure provides the appropriate level of parliamentary scrutiny for the powers to amend primary legislation.

Clause 52(3): Commencement powers

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>None</i>

Context and purpose

56) Clause 52(3) contains a standard power for the SoS to bring a limited number of provisions of the Bill into force by commencement regulations.

Justification for the power

57) Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

58) Before implementing polygraph testing in Scotland and Northern Ireland, it is necessary to put in place the relevant infrastructure. It is appropriate to leave to secondary legislation the determination of the area or areas where implementation is to be effected and over what period where these matters will be a matter for negotiation with multiple jurisdictional stakeholders such as police forces and probation bodies.

Justification for the procedure

59) As is usual with commencement powers, regulations made under clause 52 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

60) It is accepted that, in relation to polygraph testing, this position contrasts to that in section 41(4) of the OMA 2007 which provided that an order commencing sections 28 and 29 of that Act (which provides for polygraph testing of sex offenders on licence) to be subject to the affirmative procedure. However, given that polygraph testing is now well-established in the context of managing sex offenders on licence, it is considered that the normal procedural arrangements should apply to any regulations bringing the polygraph clauses into force.

Clause 52(5): Power to make transitional or saving provision on commencement

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

61) Clause 52(5) confers on the SoS power to make such transitional or saving provisions as they consider appropriate in connection with the coming into force of the provisions in the Bill.

Justification for the power

62) This standard power ensures that the SoS can provide a smooth commencement of new legislation and transition between existing legislation without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 183(9) of the Policing and Crime Act 2017. Such a power is also essential to protect rights of offenders, where they may need to remain subject to previous sentencing or release regimes, to ensure compliance with Article 7 of the European Convention on Human Rights (the right to not be subject to a heavier penalty than that available at the time of offending).

Justification for the procedure

63) As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not

subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure.

Ministry of Justice/Home Office
July 2020