

Submission

Government call for evidence on supporting people with convictions into employment

Unlock welcomes the opportunity to provide a submission to the government in response to its call for evidence on supporting people with convictions into employment. Unlock is an independent, award-winning national charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence. Our focus is predominantly on people in England and Wales.

As a charity that uses language which identifies people as people first, we have concerns that the term ‘ex-offenders’ is unnecessarily stigmatising and contributes to stereotypes of people with a criminal record. In our experience, people with a criminal record face obstacles in gaining and keeping employment precisely because of stigma and misconceptions. The term ‘ex-offender’ implies someone with a long criminal history, yet the majority of people with a criminal record are only convicted on one occasion.¹ The term is usually taken to mean ‘ex-prisoner’ – yet more than 90% of people convicted each year do not serve a prison sentence². Nonetheless, they face discrimination in accessing education, training or employment, often for many years to come.

We acknowledge that the questions in the call for evidence broadly reflect a commitment to the term ‘people with convictions’ or ‘people with a criminal record’, terms we use in this submission, and we hope that the government’s response to this call for evidence will reflect that more inclusive terminology.

The Ministry of Justice’s Education and Employment Strategy was an important first step in recognising some of the challenges that people with convictions face, but it is essential that the government’s strategy goes further so that people with convictions are supported into education, training and, ultimately, employment regardless of whether they are a recent prison leaver or a person applying for a job in an industry that has recently adopted basic criminal records checks. Many of the same issues raised in our submission to the development of that strategy apply equally to this call for evidence.³

We are currently being supported by the Esmee Fairbairn Foundation to run a project, *Fair Access to Employment*, which includes supporting employers to develop and implement fair and inclusive policies and procedures that enable the recruitment of people with convictions and that deal fairly with criminal records.

¹ Ministry of Justice (2010) Conviction histories of Offenders between the ages of 10 and 52, London: Ministry of Justice

² Ministry of Justice (2018) Criminal Justice Statistics quarterly, England and Wales, London: Ministry of Justice

³ Our response to the strategy is available online at <http://www.unlock.org.uk/unlock-comment-ministry-of-justices-education-and-employment-strategy/>. Our original submission is available online at <http://www.unlock.org.uk/unlock-submission-employment-strategy/>.

This submission reflects the ongoing work we do with individuals, practitioners and employers and draws on three activities undertaken in 2018:

1. Firstly, a forthcoming report on a survey of 60 large employers. We analysed online applications and policies on recruiting people with convictions and found that more than two-thirds still ask all applicants to declare a criminal record at this first stage.
2. Secondly, our report on the impact of criminal records received in youth or young adulthood, published in May 2018. We surveyed a sample of 318 people with convictions and found that 87% had faced problems as a result of a conviction acquired when they were young. The survey asked whether having a conviction caused problems in early adulthood, and later in life. Issues related to employment affected almost everyone, and the proportion affected increased over time: 66% experienced problems with employment in early adulthood, increasing to 86% in later adulthood.⁴
3. Finally, we provided evidence of the impact of old and minor criminal records, particularly in relation to employment, when we acted as an Intervener in a case brought - on appeal by the government - to the Supreme Court in June 2018. The High Court ruled in 2016 that the current filtering rules are unlawful and disproportionate. The government lost in the Court of Appeal in 2017, and has continued to argue that the current disclosure regime is fair. Indeed, they found themselves arguing that employers take an inclusive approach to applicants with convictions – in contradiction with the Ministry of Justice’s Education and Employment strategy, published weeks earlier, stating “50% of employers would not even consider employing an ex-offender.”⁵

It is clear that people with criminal records face significant barriers to accessing employment and that these do not always abate with time. Our submission highlights the need for fair recruitment practices, the range of issues to consider when developing employability initiatives, and evidence on what is working and what needs to change so that law abiding people with convictions can secure employment.

In particular, in response to this call for evidence, we call on the government to:

1. Develop a cross-government strategy to increase the employment of people with convictions
2. Pilot financial incentives for employers who pro-actively recruit people with convictions
3. Put Ban the Box on a legislative footing
4. Fix the broken DBS filtering system
5. Develop a legal framework to ensure individuals’ right to be forgotten where convictions are spent
6. Support the Private Members’ Bill on amending the Rehabilitation of Offenders Act 1974

This submission does not cover all of these areas in detail. However, as a charity that ultimately seeks to achieve positive changes that benefit people with a criminal record, we look forward to working with the Cabinet Office, the Ministry of Justice and wider government in taking these forward.

Christopher Stacey, Co-director, Unlock, 31 August 2018

⁴ Unlock (2018) A life sentence for young people: a report into the impact of criminal records acquired in childhood and early adulthood

⁵ Ministry of Justice (2018) Education and Employment Strategy, London: Ministry of Justice

Theme 1 - Inclusive recruitment practices

Q1. Have you heard of the Ban the Box campaign?

Unlock was a co-founder of the campaign, and has worked with Business in the Community and others since its inception in 2011 and its launch in 2013. We promote the campaign as part of our fair access to employment project and our work to encourage fair chance recruitment practices by employers in the UK. Behind the scenes, we work with employers to help them put the principles of the campaign into practice, using our knowledge and experience of working with both individuals who have convictions as well as employers who are actively looking to improve their recruitment policies and practices so they can recruit the best candidates regardless of their background.

What's wrong with the box?

- It makes it difficult for applicants to get past the initial sift as it is often used to deselect applicants
- There is no opportunity to contextualize or to explain
- People deselect themselves from applying, so employers miss out on potential applicants
- It can lead to discrimination against people with protected characteristics – for example BAME people are disproportionately affected by criminal records
- No employer legally has to ask about criminal records at application stage

By banning the box, employers are better able to consider criminal records at a more appropriate stage in the recruitment process, and at the same time are able to give people with convictions a fair opportunity to compete for jobs. Far too often we hear from people who are unable to get past the application part of a recruitment process simply because they have to tick 'yes' to the questions about convictions. For employers, the end goal has to be to try and find the best person for the job, and with over 11 million people in the UK with a criminal record, banning the box is a key step towards this goal.

However, we encourage employers to go further and consider whether they need to ask about criminal records at all. Most jobs do not legally require applicants to disclose at any stage and there is no evidence that employees with a criminal record are any less reliable, hardworking or trustworthy than employees without. In fact, an increasing body of evidence shows that employees with criminal records are at least as good, if not better employees.

A 2017 study of 264,000 employees across 11 US companies, mainly in sales and customer service jobs, looked at retention and disciplinary rates between 2008 and 2014. They found that employees with a criminal record were less likely to quit and were no more likely to be disciplined or sacked than an employee without.⁶ Timpson recruits 10% of its workforce directly from prison, and reports that the reoffending rate of their recruits is less than 3%.⁷

⁶ Minor, D. and Persico, N. and Weiss, D. M., (2017) 'Criminal Background and Job Performance', Available at SSRN: <https://ssrn.com/abstract=2851951> or <http://dx.doi.org/10.2139/ssrn.2851951>

⁷ Telegraph Connect (2016) 'Ask John: Having ex-offenders on the team has proved an unqualified success', 4 October 2016

A 2010 study found that 60% of UK employers reported employees with a criminal record performed as well or better than those with no criminal record. Of those employers who promote the fact that they employ people with criminal records, around two-thirds (65%) report that it has had a positive impact on their corporate reputation.⁸ Out of 474 employers that recruited people with criminal records, only 23 reported negative experiences (less than 5%). 86% reported that employees with criminal records settled into work well with colleagues.⁹

A CIPD study from 2002 found that those employers that recruit people with criminal records, 87% consider them to be at least as productive, while 47% of employers say that those they've recruited with criminal records stayed for over 3 years.¹⁰ A five-year study of almost 500 people with convictions employed at John Hopkins Medical in East Baltimore showed a lower turnover for the first 40 months when compared to people without. Of the 79 with the most serious convictions, 73 were still employed at Johns Hopkins at the end of the study with only one having been sacked.¹¹

Too often, employers overlook skills, experience and qualifications if an applicant declares they have a criminal record. Employers – supported by government – should Ban the Box as the first step to recruiting the best candidates for their jobs.

Theme 3 of this submission refers to forthcoming research which will highlight how the majority of employers continue to ask for criminal records at application stage, and this raises the question of what more needs to be done to ensure significantly more employers follow a Ban the Box approach in their recruitment.

⁸ CIPD (2007), *Employing ex-offenders to capture talent*, London: CIPD

⁹ *Ibid.*

¹⁰ CIPD (2002) *Employer attitudes towards ex-offenders*, London: CIPD

¹¹ Paulk, P. (2015) *The Johns Hopkins Hospital Success in Hiring Ex-Offenders' Plenary*, 5th Annual NBCP Training Meeting, 12 May 2015 http://bgcheckinfo.cna.org/sites/default/files/public/5thMtg_1-0c-Plenary_Pamela_Paulk_Presentation.pdf

2. Do you, or any of the companies, suppliers, or contractors you use, hire people with a criminal record? /3. To what extent would you say the hiring of ex-offenders is an intentional or inadvertent recruitment practice at your organisation?
4. At what stage in the recruitment process, if at all, do you ask about criminal convictions? Please list each stage.
5. Are there any types of convictions that would prevent someone taking up specific roles in your organisation? Please list the roles and related offences.
6. What are the types of roles people with a criminal conviction can apply for in your organisation? Please give details.
7. What attitudinal or practical barriers, if any, has your organisation faced in recruiting people with criminal convictions?
8. What has been your overall experience of hiring people with criminal convictions?
9. If your organisation does not hire people with a criminal record to what extent is this an active policy?
15. Does your organisation keep a record of the number of employees it has recruited with a criminal record? If so, how do you record this?

Unlock was founded by a group of former prisoners in the 1990s, becoming a charity in 2000. Our ethos of being 'user-led' remains; we aim to have a balanced board of trustees comprising those with and those without convictions. More than half our paid staff and all of our volunteers have criminal records and have experienced imprisonment or community sentences. Regular consultation with our beneficiaries means we continue to improve our services as well as call for and gather evidence for our policy work. Coupled with our independence, we remain in a unique position to advocate by giving a voice to the ongoing law abiding people with convictions who continue to face stigma and obstacles because of their criminal record.

Candidates for volunteer and paid roles are assessed on merit. We actively engage with prisons and other organisations to advertise volunteer role. As this is a peer delivery role, applicants must have a criminal record and are asked to confirm this at the application stage. Paid positions are advertised on our website. It is not compulsory for paid staff to have a criminal record and disclosure is requested only when an offer has been accepted. Volunteers are offered an initial trial. Disclosure and a basic DBS check is requested after the role is accepted.

Those who use our services appreciate the fact that they are helped by advisors who have experienced at least some of the same issues they face. On average, more than 80% of callers to the helpline say that they feel the support they receive is better because it is delivered by people with a criminal record.

We have never rejected a candidate – voluntary or paid - on the basis of their criminal record.

Theme 2 - Employability initiatives

10. Does your organisation act to help ex-offenders on their path to employment and if so, how? Please be as specific as possible.

We support the employment of people with convictions by supporting individuals, practitioners, employers, universities and other organisations. We challenge bad practice through casework and produce evidence-based research to inform policy makers and the public.

1. Supporting individuals

- We recruit and train people with convictions as volunteers to help support the information and advice we provide
- Helpline - We provide confidential peer advice on overcoming the effects of a criminal record
- Online – our four websites enable us to reach hundreds of thousands of people each year:
 - *theInformationHub* – The country's most comprehensive source of practical self-help information for people with convictions on a range of issues including education, training and employment.
 - *theCalculator* – An online tool to calculate when convictions become 'spent' and when they need to be disclosed.
 - *theForum* – A self-supporting community where law-abiding people with convictions can share information, advice and experience
 - *theRecord* – An online magazine for law-abiding people with convictions

2. Supporting practitioners, employers and universities

- We help practitioners support people with convictions by providing criminal record disclosure training and online resources.
- We support employers and universities in the fair treatment of people with criminal records, via training, access to online tools and bespoke advice

3. Challenging bad practice

- Where an individual has been treated unfairly because of a conviction we support them to challenge bad practice themselves
- Where appropriate and necessary, we intervene and challenge bad practice directly
- We engage in consultations and public discourse to push for improvements in the way that criminal record checks operate

4. Advocating for change

- We work at a policy level to push for changes to systemic and structural issues
- We collect evidence and undertake research into the barriers caused by criminal records
- We produce reports that are available to policy makers, the press and the public
- We advocate for a fairer and more inclusive society by working at a policy level with government, employers and others

11. Are there any specific ‘types’ of ex-offenders you support and any you would not work with? Please provide details.

We provide advice and guidance on criminal records to anyone who requests it, regardless of the age or nature of the conviction, and without prejudice to any demographic characteristics. Our primary objective is to help people with convictions but we often receive calls from family members or mentors in the community, as well as practitioners and youth workers. Analysis of calls to Unlock’s helpline is carried out annually.

On the whole, the helpline receives more calls from men than women (65%/35%) which likely reflects the greater number of men with a criminal record: 1 in 3 men, compared to 1 in 9 women, have a criminal record by the age of 53.¹² The high number of calls from women – relative to the number of women with a criminal record – may reflect the particular difficulties that women face following a conviction, particularly in relation to employment. Women are more likely to apply for jobs that require an enhanced DBS and are more likely to have spent time out of work caring for children or other relatives, which can limit their ability to gain work experience or qualifications that might counter-balance a criminal record.

Usually around 40% of callers have previously served a community sentence, and around 15% have been cautioned. A small number have received another disposal – for example a fine or conditional discharge. About a quarter have previously served a prison sentence. This may suggest that people on community sentences receive less advice than people who serve a prison sentence. Calls from people currently serving either a prison or community sentence are roughly 10% each.¹³

Callers do not have to disclose the nature of their offence but sometimes advice is fact dependent. About 20% of callers have a criminal record for violence against the person, 10% drugs related, 20% theft/handling/burglary, 10% fraud, 10% sexual offences, 4% money laundering and the remainder are other types of offences.¹⁴

We would not refuse support or advice to anyone on the basis of their criminal record.

¹² Ministry of Justice (2010) Conviction histories of Offenders between the ages of 10 and 52, London: Ministry of Justice

¹³ Where calls are received on behalf of someone else, these answers relate to the person with the criminal record rather than the caller.

¹⁴ Ministry of Justice (2010) Conviction histories of Offenders between the ages of 10 and 52, London: Ministry of Justice

12. How do you identify or target the ex-offenders you support? Please provide detail

We provide support to anyone who contacts our helpline. The helpline is advertised in prisons, where the number can be dialled from the PIN phone, and in NPS and CRC and Job Centre Plus premises.

In addition, we are a 'go-to' place for charities, resettlement service providers, probation staff and others looking for advice on criminal record checking processes and the impact of these systems on the lives of their clients. Our training is endorsed by the Probation Institute and the Institute of Employability Professionals.

- Last year we provided training and support to over 400 practitioners
- We provide in-house use of our disclosure calculator (used over 40,000 times last year)
- We can provide bulk hard-copies of our materials/resources
- We can deliver disclosure workshops to individuals
- We work with a range of service providers, including probation services, employment projects, careers advisors and community support services across England & Wales. For example:
 - we provide training to all staff that work for a community-based employment project in the South East that targets young people that are out of work
 - we offer online resources that can be printed and displayed or shared in NPS, CRC or JobCentre Plus offices

13. Why did your organisation decide to offer this support to ex-offenders (whether working directly with them / supporting other organisations to do so / or running campaigns)?

As an organisation founded by a group of former prisoners, Unlock has a unique history of being user-led. Over the years we have seen evidence of law abiding people with convictions facing discrimination as they try to move on in their lives. Criminal records continue to cause difficulty for people long after their sentence is completed, whether their record will ever become spent or not. While recent changes to the disclosure regime have improved things, there is a lot of work yet to be done:

1. The introduction of basic criminal records checks in January 2018 is expected to result in almost 2 million checks being carried out this year. As the process becomes easier it is likely that more employers will ask applicants to disclose and will carry out basic checks. While they are entitled to do so under the Police Act 1997, new GDPR/DPA legislation means they must justify why they collect this information. **We are working with the ICO and employers to ensure fair treatment of people with convictions within the new data protection framework.**
2. It is an offence to 'knowingly' carry out a standard or enhanced check when the role is not eligible for one. However, no employer has ever been prosecuted for doing so. Employers continue to ask unlawful or misleading questions during the recruitment process and **we are working with the DBS, the ICO and employers to ensure the latter are only asking for information they are legally entitled to know, and are only carrying out checks at the level to which they are entitled.**
3. Information about individuals remains online and employers use this information to make decisions about applicants – often without giving the applicant the opportunity to respond. We believe that the privacy of an individual outweighs the public interest in a spent conviction. **We are working with the ICO and legal counsel to ensure that spent convictions are removed from internet search engines and news sites on request.**
4. Unlock believes the Rehabilitation of Offenders Act should apply to all people who have served their sentence. Over 7,000 people every year receive a conviction of over 4 years in prison which cannot become spent. Convictions that can never be spent are an invisible punishment that will forever shadow the individual, preventing full rehabilitation and meaningful employment even after completing their sentence. People should have the opportunity to have the positive things they have done since leaving prison recognised in law by allowing them to be 'legally rehabilitated'. **Our President, Lord Ramsbotham, introduced a Private Members' Bill on amending the Rehabilitation of Offenders Act 1974 which proposes shortening the rehabilitation periods enabling law abiding people with convictions to fully reintegrate into society.**

Theme 3: Evidence and Impact

14. What impacts do you think your recruitment practices and/or employability initiatives have had? Do you have any research or evidence to support these findings?

Unlock is being supported by the Esmee Fairbairn Foundation to run a project, *Fair Access to Employment*, which includes supporting employers to develop and implement fair and inclusive policies and procedures that enable the recruitment of people with criminal records and that deal fairly with criminal records. Our objectives are:

1. Supporting larger employers in implementing significantly fairer and more inclusive policies and practices
2. To reduce the number of unlawful checks carried out by the DBS
3. Government gives greater attention to improving the employment of people with convictions

Unlock produces reports based on evidence gathered from our work with individuals facing discrimination as a result of a criminal record. We also intervene to support individuals in challenging unfair treatment. Below are summaries of two reports produced and a precis of Unlock's intervention in a case heard at the Supreme Court, all in 2018.

1. 'A question of fairness' (forthcoming)

No employer has a legal obligation to ask about criminal records at application stage, but the majority still do. Unlock carried out a survey of 60 well-known, national employers' online application systems, and the findings will be published in full in Autumn 2018. We analysed online application forms and recruitment policies (where available) to assess employers' attitudes and approach to recruiting people with criminal records.

The employers we analysed span seven sectors: Supermarkets; Retail; Construction; Utilities and Services; Car Manufacturers; Food and Restaurants and Leisure and Tourism. The vast majority of roles at each of the employers we surveyed would be covered by the Rehabilitation of Offenders Act 1974 - meaning employers would be under no legal obligation to ask about criminal records at any stage in the process, and in most cases a criminal record would not affect an applicant's ability to carry out the job.

Although the questions alone do not reveal an employer's attitude to recruiting people with criminal records, the quality of the questions and any guidance or support offered to applicants do provide an indication of how much thought an employer has put into recruiting this group.

Summary of key findings

1. Of the 60 online applications we surveyed, over two thirds (41 employers) included a box for applicants to declare a criminal record.
2. 31 provided no guidance on answering the declaration and 8 included either an *unlawful* or a *misleading* question.
 - o Of the 9 applications that did *not* include a declaration box, one included a box that implied applicants were legally required to self-disclose, and one asked for consent to carry out 'appropriate checks' but did not explain what these were
3. Three applications ended when our test applicant ticked the box declaring an unspent conviction
4. In total, only 7 employers had banned the box – most of these in the construction industry

1. Asking about criminal records at application stage

Evidence from our helpline shows that the declaration box on application forms creates a 'chilling effect' on applicants who may be well qualified for the post but who believe that their criminal record will make it impossible for them to be considered fairly. Ban the Box calls on UK employers to create a fair opportunity for people with criminal records to compete for jobs by removing the tick box from application forms and asking about criminal records later in the recruitment process.

Our findings show that, while Ban the Box has been successful with over 100 companies, it has only really scratched the surface in so far as achieving widespread change in recruitment practice. We have advocated for Ban the Box on a legislative footing. We encourage the government to extend the Ban the Box commitment beyond the civil service to all public bodies. We also believe the government should follow the lead taken in the US by introducing 'fair chance hiring' practices, including a statutory requirement for all employers to delay the questions about criminal records until the pre-employment stage.

In addition, the General Data Protection Regulation and the Data Protection Act 2018 mean employers must demonstrate a lawful basis for collecting criminal records data, as well as a purpose for doing so. It is unlikely that collecting criminal records information at application stage would be compliant with DP legislation. Government should ensure that employers understand their responsibilities in this regard.

2. Misleading questions

Analysis of the application forms revealed a wide variation of approaches, with many asking misleading questions. The forthcoming publication will explore these issues in more detail. It is clear that, if the government is serious about ensuring people with convictions can move on into employment, work needs to be done to deal with these issues.

3. Automated decision making

Dry run applications showed that three employers rely on software that will not allow progression through the application if an applicant ticks the box to say they have an unspent criminal record. Ticking the box takes that applicant to a message such as this:

Thank You

Thank you for sending us your online job submission. Unfortunately, the information you provided does not satisfy the minimum requirements for this position and we are unable to consider you for employment at this time. We invite you to view the job openings available in our Career section and to further explore the functionalities of your account.

[View My Submissions](#) | [View the General Profile](#) | [View All Jobs](#)

Anecdotally we know that some systems redirect applications where the box is ticked so that recruiters never see them. Both are examples of automated decision making.

Where recruitment decisions are automated, applicants are not given the opportunity to explain the circumstances of their criminal record; instead they are automatically rejected. Under GDPR, applicants have the right not to be subject to a decision based solely on automated decision-making. The right applies where the decision would significantly affect the individual, which would cover a decision on whether or not to shortlist someone for employment.

4. Employers that had banned the box

It is notable that, of the 7 employers in our survey that had banned the box, the majority were in the construction industry. This reflects the work done between third sector organisations, government and the construction industry in recent years and has been driven by the skills gap in the industry. It highlights the positive steps that industry can take to remove unnecessary barriers to employment and the role government can take in supporting employers to make these changes.

2. 'A life sentence for young people' (May 2018)

In May 2018 Unlock published 'A life sentence for young people' – a report on the lifelong impact of criminal records acquired when young.¹⁵

We surveyed a sample of 318 people with convictions and found that 87% had faced problems as a result of a conviction acquired when they were young. The survey asked whether having a conviction caused problems in early adulthood, and whether it caused problems in later life.

Key findings

Respondents reported experiencing a range of problems as a result of a criminal record received as a young person – these problems began in early adulthood and persisted – sometimes in fact becoming worse – into later adulthood.

Five most common problems in early adulthood:

- Employment 66%
- University/education 49%
- Stigma/discrimination 35%
- Shame/embarrassment 25%
- Volunteering 24%

Five most common problems later in life:

- Employment 86%
- Stigma/discrimination 65%
- Shame/embarrassment 45%
- Insurance 31%
- University/education 29%

It is clear that, far from decreasing over time, most problems relating to the conviction were experienced more frequently, or by more people, over time. Respondents described leaving their past behind, gaining skills and qualifications, only to find that their chosen profession excluded them through criminal records checks. In some cases, people were required to disclose convictions as part of new terms and conditions, even though they had worked in the same field or job for many years. As can be seen above, the majority of employers continue to ask about criminal records at application stage. The availability of basic criminal records checks means that an increasing number of employers now request this level of check, regardless of its relevance to the job role, meaning that people with an unspent conviction – even if it will eventually become spent – are required to disclose.

Desistance from crime is been linked to stable employment, housing, access to education and civic participation. Intervening positively to reduce the burden of criminal records disclosure (particularly in relation to children and young adults) removes obstacles to factors which are known to promote desistance. Young adults are the age group most likely to 'grow out of crime', and young people who

¹⁵ Available at <http://www.unlock.org.uk/youth-criminal-records-report/>

commit crime typically stop doing so by their mid-20s. Thus, restricting the disclosure of criminal records for certain purposes might be seen as having considerable utility in the reduction of recidivism.

In addition to the removal of barriers to desistance, a reduction in the burden of disclosure may also improve the perceived legitimacy of the criminal justice system amongst children and young adults with convictions. That is, when a person who has already been punished by the criminal justice system continues to suffer discrimination (from potential employers and others) after their sentence has ended, they are unlikely to perceive this as legitimate. This sense of injustice is likely to be keenly felt by those who have desisted from offending or are making genuine efforts to do so. The impact of improving access to education, training and employment is likely to be greatest for young people and young adults, age groups with the highest rates of reoffending.

A related argument concerns the disproportionate exposure to potential discrimination faced by those who receive convictions at a younger age. This is particularly so for offences which cannot benefit from becoming spent or the 'filtering' system. For example, a 20-year-old who receives a conviction has a longer working life ahead of them than a person convicted at the age of 40. If both receive a conviction for an offence which cannot currently be filtered, there is a disproportionate impact on the younger person who has more years of working life ahead of them. This is particularly concerning when considered in relation to the overrepresentation of people from black and minority ethnic (BAME) communities and care experienced people at many stages of the criminal justice system, and emerging evidence of the relationships between childhood trauma, violence in the home and criminal justice involvement. In essence, the receipt of a criminal record at a younger age arguably compounds existing structural inequality, further disadvantaging already marginalised communities and undermining the legitimacy of the disclosure regime.

3. Supreme Court intervention (June 2018)

This year, for the first time in our history, Unlock acted as an intervener in R (on the application of P) v Secretary of State for the Home Department and others (Case ID: UKSC 2017/0170). The case was heard in June and a judgment is pending.

The case centred on whether it is right that old and/or minor criminal records are disclosed on standard/enhanced Disclosure and Barring Service (DBS) checks. In this case the government (the argued that it is, citing general concerns around safeguarding, default to the position that “it’s up to employers to make a decision” as to the relevance of the information disclosed.

The problem is, there is no statutory guidance or training for employers on how to make that decision. The government is devolving responsibility to employers without really knowing how employers approach this information, the decisions they make or the impact of those decisions. As the recent National Audit Office report into the DBS shows¹⁶, there are no checks on what employers do with the information provided by the DBS. The DBS itself does not provide detailed guidance or support to employers on how to carefully assess the relevance of information they receive. In our experience, employers have limited understanding of how to assess relevance and often take the simple fact of disclosure as evidence of relevance. In short, once employers know the information, they often feel compelled to act on it and exclusion is usually seen as the “safest” response.

The government’s position implies that people with criminal records do not have many problems in finding employment. Indeed, the government used an answer given by Christopher Stacey, co-director of Unlock, to the Justice Committee (“*I would be the first to say that many people with convictions do secure jobs that involve enhanced checks, having disclosed them...*”) to suggest that there isn’t really a problem. This was a rather mischievous use of that sentence, which was part of a longer answer to a question about the problems people face in employment. The sentence continued “*...there is a huge problem with the way that many employers think that somebody must have a clean DBS certificate, with nothing on it...the current system often tells employers a lot of information that is irrelevant, but as they are being told it they believe it is relevant because the Government would not be giving them that information unless it was.*”¹⁷

In arguing that the current disclosure regime is proportionate, the government suggests that employers take an inclusive approach towards criminal records. Yet this ignores their own evidence, cited in the Ministry of Justice’s Education and Employment strategy, published in May 2018. This included a YouGov poll from 2016 which found that “*50% of employers would not even consider employing an ex-offender*”¹⁸. Indeed, the online briefing to launch the strategy, begins:

*“People with a criminal conviction face several barriers on release from prison, with access to employment and education being at the forefront. Not only are many ex-offenders often unprepared for employment on release in terms of their skills and training, but there remains a stigma among some employers about hiring people with a criminal conviction.”*¹⁹

¹⁶ Available at <https://www.nao.org.uk/report/investigation-into-the-disclosure-and-barring-service/>

¹⁷ Justice Committee Oral evidence: Disclosure of Youth Criminal Records, HC 751, Wednesday 15 March 2017

¹⁸ Ministry of Justice (2018) Education and Employment Strategy, London: Ministry of Justice

¹⁹ Policy Paper: Education and Employment Strategy 2018, Ministry of Justice Education and Employment Strategy for adult prisoners, <https://www.gov.uk/government/publications/education-and-employment-strategy-2018>

In court, the government was at pains to point out that the regime is one of disclosure, not barring. By that, they mean the current disclosure system does not stop people from applying, it is simply a matter for employers how they deal with disclosure. Lord Carnwath pointed out that this approach results in the balance being skewed towards disclosure, where there's a lot of weight on what employers should do, rather than what the government should do. Unlock's view is that there needs to be some kind of automatic filtering process that remains – with some changes to the current rules so that more situations are filtered automatically – alongside a discretionary filtering process with a review mechanism.

We await the judgment – expected by the end of 2018 – but whatever the outcome, we hope the government accepts that there are problems with the current system and revisits its approach. We look forward to working with them on this, and the other issues raised in this submission, to create a fairer, more inclusive approach to helping people with convictions into employment.

More information

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