

# Professional Standards Authority consultation on criminal record checks – Unlock response February 2023

The Professional Standards Authority helps to protect the public through our work with organisations that register and regulate people working in health and social care. This consultation<sup>1</sup> gathers views and information about the potential to revise the Standards for Accredited Registers to include clearer requirements on safeguarding.

## General questions

1. In what capacity are you responding to this consultation?

Unlock is a national independent advocacy charity that supports, speaks up and campaigns for people facing stigma, prejudice and discrimination because of their criminal record. For more information see our website [here](#).

2. Do you agree that having a clearer requirement for Accredited Registers to request the highest level of criminal records check that a registrant is eligible for, is important to ensure protection of the public? Please explain your answer.

We agree that greater clarity for Accredited Registers would be helpful but would be cautious about requiring the highest level of check for a number of reasons. Firstly, it is important to note that the eligibility for different levels of check is specific to not just a profession but the actual role somebody is carrying out. For example, for the most stringent check, which involves considering whether somebody is on a barring list, somebody would have to be working unsupervised with children or vulnerable adults, which may not be true of everyone with a particular qualification. So, while there may be some professions which will always involve the highest level of check (for example, child psychotherapists), for others, there may only be some roles that are eligible for the highest checks. In order to ensure compliance with existing legislative frameworks (including data protection), higher level criminal record checks should only be carried out when necessary and proportionate. The most stringent checks may not be appropriate, and it is also unlawful to knowingly request an ineligible check. This means that where a role overseen by an Accredited Register is not specifically linked to working with

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<sup>1</sup> [Professional Standards Authority consultation on Strengthening our approach to safeguarding with Accredited Registers](#)

children, it would not be possible to do Enhanced and barring checks against the children list unless an individual was going to meet the requirements of working unsupervised with children. In addition, there are practical issues to consider where Enhanced checks are carried out; as for this level of check, police are asked to provide any relevant information that they hold about an individual. To accurately assess what information is relevant, police need to understand the specifics of an individual's role, not just their generic title.

Secondly, while criminal record checks can be a useful part of safeguarding the public (especially when making sure someone on a barring list is restricted from certain positions), it is important that there is not an over-reliance on checks or a presumption that they are sufficient for adequate safeguarding. Checks are only a small part of safeguarding, and any over-reliance on criminal record checks can mean that other important aspects of safeguarding are ignored.

3. Do you agree that having a clearer requirement for Accredited Registers to request the highest level of criminal records check that a registrant is eligible for is important to ensure confidence in the accreditation Quality Mark? Please explain your answer.

We agree that clarity about what checks are being done is an important part of building public confidence. We would add that it is also important that there is transparency about what policies (including details of any decision-making processes) underpin those checks. This not only benefits public confidence, but greater clarity also benefits people in a role overseen by Accredited Registers, as they can understand what information will be asked about, and what criteria will be used to assess that information. This means that people who would definitely be excluded from being accredited in a particular role can understand this without going through a lengthy application form. But it also means that people who might not be excluded due to a criminal record are not put off from either applying to be registered or at least discussing it with the Register. We often hear from people who are put off applying for a job or training in a particular role due to a fear of being excluded due to a criminal record, even where that record involves something minor and not relevant to that job or role. To avoid unnecessary exclusion of people, there should be transparency about what checks are done, as well as about what will or will not lead to an applicant being excluded. This can ensure people are not unduly and unnecessarily put off.

It is also important to point out that there are numerous other steps that can and should be taken to ensure confidence in the accreditation Quality Mark, including not just transparency about policies on carrying out checks, but clarity about the accreditation process and what it means. It might also be good practice to ensure Accredited Registers have clear processes in place to deal with any complaints about individuals on their Register, as well as a wider safeguarding policy which covers things like escalating any reported concerns.

4. Do you agree that if a registrant has already been subject to an appropriate level of criminal records check by an employer, then an Accredited Register should not need to do so providing they can see evidence of this?

Yes. Generally, if an appropriate level of check has already been carried out, there is no need for an Accredited Register to repeat the process. However, there may be situations where a Register should carry out a check themselves. For example, if someone is rejected by an employer on the basis of their criminal record, this should not automatically mean that that person should be

rejected by the Accredited Register for a couple of reasons. The first is that just because someone might not be appropriate for a specific role, it does not mean they will always be unable to do a similar job in different circumstances (see above for the example of whether someone is working with children or not). The second reason relates to employers all having specific criteria around assessing risk. Our work with employers suggests that generally, employers all have different levels of risk-aversion and different policies and practices in place for evaluating the relevance of a criminal record. Therefore, even if the job title was the same, it doesn't mean a decision about someone's suitability would be the same at a different organisation. Thirdly, what is disclosed as part of a criminal record check does change over time (see below).

Outside of situations where the role de facto requires checking against a barring list (such as a child psychotherapist), best practice would be for decisions about someone's suitability to be added to the Register to be made on a case by case basis. A criminal record check should not be seen as a check box exercise, as just because someone has something that shows up on a check does not mean they should be excluded from being registered in a role. A criminal record check may show convictions or cautions that were a long time ago or not relevant to the role (for example, a driving offence may not be relevant to a therapeutic role), and they should therefore not lead to someone being excluded.

It is also important to remember that a criminal record check is a one-off incident which shows a snapshot of someone's record. Over time, information is filtered from what criminal record data is shared via a check, so a more recent check may be required (depending on when an employer carried out a check) to ensure the information is up to date. It is also possible that the disclosure system changes over time – for example there have been two major changes in the last decade relating to both rehabilitation periods and filtering. So up to date checks would make sure that in making any decisions about approving someone to a Register, an Accredited Register doesn't inadvertently refer to information that they are legally excluded from considering.

5. Are you aware of any examples in which risk of harm to a member of the public seeking the services of an Accredited Register practitioner could have been potentially avoided, by a criminal records check? Please do not provide sensitive personal information in your response.

No

6. In cases where Accredited Registers could access enhanced criminal records checks for applicants or registrants, and detail of spent and unspent convictions, what factors do you think are important to consider in decisions by the Accredited Register about suitability to be on the Register?

We would suggest that the following are all important factors to consider:

- Type of offence
- Seriousness of offence
- Severity of sentence/punishment (often but not always correlating to seriousness of offence)
- How long ago the offence was
- Age or maturity of individual at the time of offence

- Other relevant characteristics (for example mental health problems) at the time of the offence
- Relevance of offence to role

We would suggest that good practice is to consider the individual, specific circumstances as explained by the applicant which can include details of the offence as well as rehabilitative steps or changes in their life since that time.

Another useful step in any decision-making process would be for people to have the opportunity to appeal or discuss any decisions, to avoid situations where one person takes all the responsibility for making what are often difficult and nuanced decisions.

We would also note that in considering the suitability of someone to be on a Register, if they do have a criminal record, part of the consideration may be the value added if an individual has lived experience of certain challenging situations or health problems, which may be linked to their criminal record. For example, in response to our call for evidence (which asked people with criminal records who either work in a relevant role, or would like to, about their own experiences) one person who currently works as a clinical psychologist said:

“My current employer have really helpful wording on job adverts that they encourage applications from people with lived experience, and it's clear that this is not a tokenistic statement - employees with lived experience are openly the lifeblood of the organisation.”

It is also important that anyone being asked to make decisions about whether someone's criminal record impacts on their suitability to be on the Register should be adequately trained. Criminal record data can be difficult to understand, if someone has not received appropriate training, and the system governing disclosure is also complex, so people need appropriate support to navigate it.

7. Do you think that basic levels of criminal records checks, which may be accessed by anyone, should be considered for those not eligible for standard or enhanced levels of checks? (Applies to England, NI and Wales only).

We do not think that they should automatically be carried out, unless there is a clear reasoning why they are needed; and in those situations, information showing up on a check should only exclude someone if relevant to the role. As mentioned above, a conviction or caution would not automatically mean someone is not suitable for a role – for example, if the offence was a long time ago or not relevant. So, it is vital that any decisions about how to deal with criminal record data are based on a clear understanding on what that data is showing as well as whether it is relevant.

In addition, our advice team often hear from people who are put off applying for a job or accreditation when it is indicated that Basic checks are being carried out, as they assume it means they will be automatically excluded if they have unspent convictions. So even if the intention is to carry out nuanced decision-making on a case by case basis, asking about convictions or for someone to carry out a Basic check can have a negative consequence.

So, we would encourage Accredited Registers to think carefully about what checks they need to carry out and if they decide they do need to do checks, then draft a clear policy setting out why,

as well as how any information received due to checks is taken into consideration. This policy should be easily available (without having to ask for it) so people can understand how their criminal record might impact their application.

An additional point is that if Accredited Registers decide to ask applicants about their criminal history instead of carrying out Basic checks, this can lead to complexities when people are not sure exactly what they are required to disclose. This can lead to under-disclosure where people do not mention something that shows up on a Basic check or over-disclosure where Accredited Registers would be given information that they are legally not allowed to consider. It should be noted that individuals can only carry out their own Basic checks; individuals cannot request a Standard or Enhanced check for themselves. So, if these higher levels of checks are being requested, an Accredited Register should only use the information disclosed via the formal check rather than requesting self-disclosure from applicants.

We would also note that if checks are being carried out as part of safeguarding measures for any roles involving children or vulnerable adults, then if the role meets the requirements under safeguarding legislation, the most appropriate and effective approach is to use the barring lists to identify anyone who should be excluded from that role. If a role does not reach the threshold for an Enhanced and barring list check to be carried out, then it is important to consider what level of safeguarding is necessary and whether (or how) carrying out Basic checks would be useful.

8. Are there any other actions you think we should take to strengthen safeguarding for users of Accredited Registers

As referenced above, it is important that criminal records checks are only seen as just one small part of safeguarding. It should never be presumed that just carrying out checks can constitute successful or appropriate safeguarding. Ensuring that each individual's circumstances are considered is good practice in respect of making safeguarding decisions.

If members of the public have any concerns about safeguarding in respect of an individual registered with an Accredited Register, it is important that they are signposted to the appropriate place to raise such concerns. The first step should always be to contact the police if the concerns involve a possible criminal offence or there is an immediate risk of harm. In addition, concerns can be raised with social services as well as regulating bodies. Once any concerns have been properly investigated, the Disclosure and Barring Service (DBS) can be informed if necessary, so a decision can be made as to whether someone needs to be added to a barring list.

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22. Please set out any impacts that the proposals set out in this paper would be likely to have on your organisation or considerations that we should take into account when assessing the impact of the proposals.

Unlock's remit is to support people with criminal records, and any changes to criminal record checks being done by Accredited Registers may affect this group. Our primary concern is to ensure that if more stringent checks are carried out, they are only done when necessary and lawful and the information collected via any check is carefully considered before deciding whether it has any relevance to someone's suitability to be registered in a particular role. This

will ensure that people are not inappropriately excluded from roles, while also making sure that necessary checks can be used as part of a wider safeguarding process.

In response to our call for evidence, asking people with criminal records who either work in a relevant role, or would like to do so, one respondent who was currently working as a clinical psychologist said:

“ [,,,,,,] I think I will be limited in my ability to move role in the future because of my criminal record. My previous experiences, as well as fear, would hold me back from applying for new roles unless there was some indication that I was in with a fair chance.”

We would note that ensuring checks are necessary and lawful not only protects people with criminal records, but also means that Accredited Registers are complying with legal requirements, including for data protection, and not inadvertently considering information that they do not have a legal right to obtain.

It is also important to note that we are not against the use of checks when they are necessary and appropriate. In response to a request for people with criminal records who either currently work in therapeutic roles, or who wish to do so, some of the people who replied made it clear that they agreed criminal record checks were vital for some roles to ensure sufficient public protection. It was clear that the most important thing for people with criminal records was greater clarity about what checks were being done, why they were being done and how any information collected would be dealt with.

One respondent stated:

“I don't think that doing checks is a problem, it's not having a clear process in place to support registrants/potential registrants with a criminal record that is the problem. It's not unreasonable to do a criminal record check when working with people who may be vulnerable, but it is unreasonable to assume that if someone has a criminal record then they are inappropriate for the profession. Regarding my [.....] accreditation, if they will not let me register, then this will limit my credibility as a trauma-specialist and career progression.”

23. Are there any aspects of these proposals that you feel could result in differential treatment of, or impact on, groups or individuals based on the following characteristics as defined under the Equality Act 2010:

When considering convictions or cautions, it is relevant to be aware of existing disproportionality in respect how people are treated by the criminal justice system as well as the likely outcomes they will receive. There is extensive evidence that minoritised people (including people who are black or from minority ethnic backgrounds) are more likely to receive negative outcomes or receive more severe punishments. This means they could be more likely to have a criminal record that may impact on any applications to be included on an Accredited Register if checks are done.

In addition, women are more likely to get short prison sentences for non-violent offences than men – and receiving a prison sentence (however short) means your conviction can never be filtered and will therefore always show up on Standard or Enhanced criminal record checks. This means women may be disproportionately affected if these more stringent checks are carried out and criminal records information is not considered on a case-by-case basis (which might allow a

very short prison sentence to be considered differently than a much longer sentence for example).