

# A question of fairness – summary

Research into employers asking about criminal records at application stage

In 2018, Unlock carried out a survey of 80 well-known national employers' online application systems to assess their approaches to recruiting people with criminal records. We selected companies based on an in-house poll of large employers. The earlier report is available [here](#). We have now conducted a comparable survey in 2023, to explore whether practice has changed. We found:

- **60% (48 employers)** asked about criminal records on their online application form. There was a decrease in the percentage of employers who asked criminal record questions in the application stage (from 70% to 60%). A heartening 15 employers had stopped asking about criminal records since the first report. 3 employers had started asking where they had not previously.
- **83% of employers** who asked the question provided no guidance to applicants – on the application form or in their wider information.
- **14%** of employers had phrased the question about criminal records in a way that was either potentially **unlawful** or **misleading**. This showed a decrease since the last report (from 22%)
- Only **one** employer had a policy available that described their process for criminal record checks
- **None** of the online application forms automatically stopped a candidate proceeding after selecting 'yes' to a criminal record question. Our earlier report indicated that some platforms did this.

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Overall, a majority of employers continue to ask criminal record questions at application stage. This is disappointing but there has been some welcome improvement since our last survey five years ago. Fewer employers are asking about criminal records in the initial stages of the application process.

By making judgements on the basis of criminal records, employers are missing out on skilled and capable candidates. At a time when 41% of employers in the UK report hard-to-fill vacancies, practice needs to change<sup>i</sup>. In fact, 86% of employers who have (knowingly) recruited someone with a criminal record report a positive experience<sup>ii</sup>.

## Asking questions about criminal records early in recruitment can:

### **Deter applicants**

- Asking questions about criminal records in the early stages of recruitment deters prospective applicants. Over half of those with a criminal record report reluctance to apply for a role if there is a criminal record question on the application form<sup>iii</sup>. By asking these questions early in recruitment, employers convey that an applicant's criminal record will form an important part of how they are assessed, rather than their professional experience, aptitude or character.
- Intimidating and stigmatising language used in many of the questions we surveyed suggests that the employer assumes that people with criminal records are likely to be dishonest. Applicants may infer from the language used that they cannot expect to be treated fairly or with respect by that employer.

### **Serve limited purpose**

- The number of employers who are asking questions about criminal records suggests a misunderstanding about how relevant or useful criminal records data is.
- Most records will be for a minor offence and not relevant to the role at hand – in 2022, 80% of all sentences handed down were fines.

### **Disadvantages some people more than others**

- Disproportionality in the criminal justice system (whereby some people are more likely to receive a criminal record, or more negative outcomes at other stages in the system) means that employers who sift applicants on the basis of a criminal record may be creating a double disadvantage for those who already face discrimination in the UK.

### **Breaches legal obligations**

- All of the roles we surveyed are covered by the Rehabilitation of Offenders Act 1974 (ROA). This means employers are only legally entitled to ask about unspent convictions and/or carry out a basic Disclosure and Barring Service (DBS) check. Many of the questions we discovered were asked in a way that could lead to applicants disclosing spent criminal records when not legally obliged to do so. These employers may be in breach of the ROA.
- The General Data Protection Regulations and the Data Protection Act 2018 provide protection for personal data. Criminal records data is a distinct category of data and therefore requires specific criteria to be met for processing. Collection must be necessary in order to be legitimate; it is unlikely that collecting sensitive criminal record data from every applicant, many of whom will not proceed to the next stages of recruitment, is proportionate or necessary.

Focused effort is needed to ensure fair treatment of people with criminal records in the UK labour market. We recommend that employers adopt Unlock's Fair Chance Recruitment Principles – set out below. These principles have been designed in collaboration with business leaders to ensure they are useful, relevant and applicable to any organisation. The principles apply regardless of the sector in which the employer operates (including sectors that attract higher levels of criminal record check).

### 1. Consider the need to ask

Many employers ask questions about criminal records out of habit. Much of this information serves no purpose, and is not managed appropriately or in accordance with the law. Most of the employers surveyed could stop asking questions about criminal records with no negative effect on their business. Indeed, it would increase the number of available applicants.

### 2. Follow rehabilitation & data protection legislation

There are legal obligations relating to criminal records data, outlined in brief earlier in this report. Employers must ensure they understand what these are and how to comply. It is obvious from our survey that many do not. The Information Commissioner's Office provides comprehensive guidance on the management of criminal records data, available [here](#).

### 3. Consider the right time to ask

Where an employer determines that they can and will ask about criminal records, timing is important. This report outlines the problems with asking questions early in an application process. There are a small number of roles for which legal requirements mean that a question should be asked at the beginning of recruitment (e.g. roles for which it would be an offence to recruit a person on a barred list). This does not apply to any of the roles we researched.

Employers should wait until a conditional offer is made before asking questions about criminal records. They should ensure that applicants are informed of this process before applying, in the advertisement for the role. If the role does not involve asking about criminal records at any point, applicants should be informed that this is the case.

### 4. Ask clear questions and provide guidance

The examples in this report show that many questions about criminal records are unclear, and there is very little guidance available for applicants. Employers should review any questions they are currently asking and ensure that applicants are either directed to expert guidance or given advice on that specific employers' process. Find guidance [here](#) on how to word questions appropriately.

### 5. Have a clear and accessible policy

Employers should establish their approach to criminal records and set this out in a clear policy. This is protective for business and ensures consistent practice. If shared publicly, an accessible policy can also help applicants to know how they will be treated and therefore minimise the chilling effect. Only one employer that we surveyed had a publicly accessible policy of this kind. Unlock offers a step-by-step guide to developing a policy [here](#).

## 6. Consider context and relevance

The questions identified in this research offered no opportunity for applicants to explain the circumstances behind their criminal record. Offering applicants an opportunity to contextualise their criminal record supports recruiters to understand an individual better, rather than making presumptive judgements about what it means to have a criminal record.

Anyone making decisions on the basis of a criminal record must consider the relevance of that specific record to the role being recruited for. The checking of criminal records should not be performed as a general pass/fail exercise.

## 7. Document decision-making

Employers should keep a record of the process they go through when making recruitment decisions that involve consideration of criminal records. This enables employers to explain their decision-making, make confident recruitment decisions and demonstrate that they are complying with the law. Doing so can also help employers identify any improvements needed to their process or policy.

## 8. Be confident in process practice

Finally, it's important that employers are confident in the way that they handle criminal records. This report highlights that a lack of guidance and information for applicants can be a deterrent. Employers can only provide relevant and useful guidance for applicants if they have a comprehensive understanding of both the relevant law and their organisation's approach to people with a criminal record.

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## How we can help

Unlock's expert advice to employers is free and available by contacting [recruit@unlock.org.uk](mailto:recruit@unlock.org.uk). We support employers every day with specific advice regarding criminal records and employment. Unlock also offers more comprehensive consultancy for employers looking to make systemic change within their organisations.

We provide tailored, expert in-house training for organisations of all kinds, and also have publicly available training sessions available [here](#).

Our [Recruit!](#) website is full of useful templates and step-by-step guidance that employers can use to make their processes fairer.

Unlock's peer-led, confidential helpline offers expert support and advice for those with criminal records. The helpline can be contacted via telephone, email or whatsapp. Find further information [here](#).

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<sup>i</sup> CIPD (2023) [Labour Market Outlook 2023](#)

<sup>ii</sup> Working Chance (2023) [Progress and Prejudice](#)

<sup>iii</sup> Business in the Community (2015) *Finding work after prison*