

Double discrimination?

Executive summary of a report into the impact of criminal records on people from black, Asian and minority ethnic backgrounds

This 4-page executive summary is taken from a report based on the survey responses from 221 individuals.¹ It provides new data on the impact of criminal records as perceived by people from Black, Asian and Minority Ethnic (BAME) backgrounds, and it draws on what is known about the over-criminalisation of certain groups. Key findings from the survey include:

1. **Over three-quarters of people (78%) felt that their ethnic background had made the problems they face as a result of their criminal record harder.** Around 1 in 5 (22%) felt that it had made no difference. Nobody from a BAME background felt that their ethnicity made things easier.
2. **The overwhelming majority (79%) cited employment as one of the problems they faced.** The other most common problems were relationships (34%), volunteering (30%), insurance (26%), travel/immigration (23%) and college/university/education (23%).
3. **The problems persisted for long periods of time.** Although the majority were last cautioned/convicted between 1 and 10 years ago (32% between 1 and 5 years ago, with 30.8% between 5 and 10 years ago), 15% had problems between 10 and 20 years later and 7% had problems over 20 years later.
4. **It affects all age groups.** The problems people faced because of their ethnicity spanned the full age range, the full range of sentences and a wide range of offences types.
5. **African and Caribbean individuals were most affected.** Problems were faced by a range of ethnic groups, but the largest proportions were African (17.8%) and Caribbean (13.4%)

It is not possible to obtain quantitative data that looks at the number of BAME individuals affected by the disclosure of their criminal record on checks issued by the Disclosure and Barring Service (DBS). **The first recommendation is the Home Office, through the DBS, should collect data on ethnicity from those undergoing criminal record checks.** Grouping BAME people as one can mask inequalities rather than help challenge them. **The second recommendation is that government should better distinguish between ethnic groups when measuring disproportionality throughout the criminal justice system.**

It is clear from wider evidence² that people from some BAME backgrounds are disproportionately represented at all stages of the criminal justice system, and this affects both their experience and perception of how ethnicity compounds the difficulties created by a criminal record.

1. **More likely to be arrested** - Black and ethnic minority children account for more than a quarter of all child arrests across England and Wales - more than double the proportion of the BAME population as a whole.
2. **More likely to get a caution** - Although the use of cautions is decreasing overall, the proportion given to BAME groups has grown. **The third recommendation is the police should:**
 - a. **Understand the circumstances where a caution is necessary, or whether an informal disposal can be issued instead, and**
 - b. **Ensure that information, specifically tailored to the circumstances, is provided to individuals before they accept the specific caution they have been offered.**
3. **More likely to be prosecuted** - Black defendants have a much higher rate of prosecution, and therefore are at an increased likelihood of receiving a conviction.

¹ The full report is available to download at www.unlock.org.uk/doublediscrimination

² References for evidence cited in the executive summary are contained in the full report.

4. **More likely to plead not guilty** - BAME defendants are consistently more likely to plead not guilty than white defendants. This means that, if found guilty, they are likely to face more punitive sentences than if they had admitted guilt. The result of this is a criminal record that will invariably end up having to be disclosed for longer under the Rehabilitation of Offenders Act 1974 (ROA) because the time it takes for the conviction to become spent will be longer.
5. **More likely to get a longer sentence** – Black teenage boys are more likely to be charged with murder than manslaughter and more likely to receive a higher or maximum sentence than white boys. One in four black teenage boys guilty of manslaughter were given maximum jail terms, while white children found guilty of the same crime were sentenced to no more than 10 years, with the majority getting less than four. This particular statistic is striking within the context of the criminal records regime, where any sentence of more than 4 years in prison can never become spent. More generally, longer sentences take longer to become spent (if they ever do), meaning a criminal record will cause more difficulties for longer. This is an additional penalty – what David Lammy refers to as the double penalty is in fact a triple penalty.

This means that the damage from the post-conviction disclosure rules also impacts disproportionately – especially where sentences cross the four-year threshold, after which a sentence can never become spent. A sentence that can never become spent can effectively feel like a life sentence in the community

In September 2017, David Lammy MP published his review into the treatment of BAME groups in the criminal justice system. In addition to the inequalities found at each stage of the justice system, the review highlighted the ongoing difficulties caused by criminal records: *“One of the most significant barriers to any ex-offender’s prospects of employment is created by public policy: the criminal records regime.”* The Lammy Review made two recommendations about criminal records, both of which the government recognised the need to address. Neither of them has been implemented.

The fourth recommendation is, now litigation has concluded, the Ministry of Justice should respond to recommendation 34 of the Lammy Review (on sealing criminal records). If the Ministry of Justice is not going to pursue this recommendation, then it should clearly articulate why not and explain what other changes it will make instead. The fifth recommendation is the Ministry of Justice should fully implement recommendation 35 of the Lammy Review (on commissioning and publishing a study indicating the costs of unemployment among ex-offenders).

The overwhelming majority of survey respondents cited employment as one of the problems they faced. There are significant differences in employment rates between different ethnic groups. For example, in the UK there are over 20.6 million women of working age population, 2.9 million (14%) of whom are from BAME backgrounds. 72.6% of white women and 55.8% of BAME women are in employment.

However, whereas ethnicity can be a visible characteristic to employers, a criminal record is not. When looking specifically at those with a criminal record, combining the attitudes of employers towards criminal records with the differences in employment rates between different ethnic groups, it is likely that BAME groups would be better served by widespread improvements in employer practices towards criminal records, such as Ban the Box. If employers did not find out about the criminal record of an applicant until after they had offered a conditional job offer, it would become much clearer whether an employer’s decision not to hire was based on the applicant’s criminal record. It would also avoid many of the connections and stereotypes that were referred to by survey respondents:

- *“I think that having a fraud conviction and being of an African background feeds into the stereotype held about Nigerians. I have dreadlocks and I’ve had to change my name to afford me a foot in the door, so to speak.”*
- *“The conviction(s) should not have to be disclosed unless employers are going to offer you the new position, and only if it is relevant to the post applied for.”*

The sixth recommendation is the government should extend the Ban the Box commitment beyond the civil service to all public bodies. The seventh recommendation is 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 any questions about criminal records until the pre-employment stage.

On a very practical level, the way the process of getting standard or enhanced DBS checks as part of certain jobs presents people with problems. As a middle-aged Bangladeshi man in our survey said, *"I am not confident of applying for jobs, I can't get an enhanced DBS to check what is on it."* Understandably, he wants to make sure that his caution has come off before he starts applying for jobs and not disclosing. **The eighth recommendation is the Home Office, through the DBS, should provide a mechanism by which individuals can check which cautions and convictions will appear on their standard or enhanced DBS check.**

Over a quarter of survey respondents (26.7%) reported having faced problems with travel/immigration. As part of the UK's exit of the European Union, the UK government's 'EU settlement scheme' enables EU citizens to continue to live in the UK. Around 3.3 million EU nationals live in the UK, and all applying for 'settled status' will be asked a broad question about criminal records - "Have you ever been convicted of a criminal offence?". Unlock has concerns that many people who are worried about the impact of their criminal record will simply not apply for settled status, leaving them in a precarious position in terms of immigration status. **The ninth recommendation is the Home Office should provide clarity, in the form of clear guidance to individuals, as to what types of criminal record may affect a person's settled status application.**

There may not be specific solutions within the criminal records disclosure regime for BAME groups. As David Lammy highlighted in his report: *"BAME communities face specific challenges, including discrimination in many walks of life. But some of the most marginalised BAME communities have much in common with the White working-class. A justice system that works better for those who are BAME and poor will work better for those who are White British and poor too."* Taking this approach to criminal records, **a criminal records disclosure regime that works better for those who are BAME will work better for those who are White British too.**

In January 2019, the Supreme Court ruled that two aspects of the filtering scheme are disproportionate and in breach of Article 8 of the European Convention on Human Rights. It is important that there is proper consideration of the wider issues. However, Unlock does not consider it an appropriate position for the government to expect those affected by the Supreme Court judgment to have to wait for such broader consideration. **The tenth recommendation is the government should pass a remedial order as soon as practical to deal with the Supreme Court judgment to ensure that all youth cautions, reprimands and warnings are now filtered out, and that the multiple conviction rule is removed.**

There have been a number of criticisms of both the filtering rules and the wider criminal records disclosure regime, which the government had postponed dealing with until the outcome of the Supreme Court case. In its response to the Justice Select Committee inquiry, the government committed to considering criminal record disclosure for children and young adults following the conclusion of this litigation. A wider review would provide an important opportunity to consider other important aspects, such as amendments to the list of filterable offences. The Taylor Review into the youth justice system, and the Law Commission, has criticised the current regime. As one survey respondent said: *"At some stage, the question of a criminal records would be posed and the application in 99% of cases has been ended. A conviction, especially one that will remain unspent throughout my whole life, means that I will be paying more for insurance and struggle to find employment throughout my whole life."* **The eleventh recommendation is the Ministry of Justice should implement reforms to the Rehabilitation of Offenders Act 1974, including reducing the time before convictions become spent and expanding the scope of the legislation so that all convictions can become spent. The twelfth recommendation is the government should conduct a fundamental review of the wider criminal records disclosure regime, including looking at reforms to ensure effective protection from discrimination for people with spent and/or filtered criminal records.**

Conclusion

It is clear that, for the majority of people surveyed, they feel that their ethnicity has made it harder to overcome the problems they have faced because of their criminal record. The discrimination faced by people from BAME individuals who have a criminal record may not be 'double', but the difficulties they face are certainly cumulative.

The perceptions of many of those surveyed were that the way the criminal record disclosure rules operate means that, had they been white, their past offences would have not caused them as many problems. This may be because, for example, they may not have been prosecuted, or the sentence they received would have been lower and therefore spent earlier.

There is a wealth of evidence, some of which is highlighted in this report, that shows how the criminal justice system disproportionately impacts on people from some BAME groups. These groups are more affected than others because of over-criminalisation and harsher treatment by the criminal justice system, and are also disadvantaged by discrimination based on ethnicity.

Put simply, ethnicity impacts on the type of criminal record someone gets.

This does not necessarily mean that this report demonstrates that there is additional discrimination because of the way the criminal record disclosure system works. For this, there would need to be evidence of outcomes for BAME and white individuals, not just evidence of how people feel about the process. However, the experiences of those who responded show that **people feel the criminal records disclosure regime disproportionately impacts BAME groups**. And this report shows that, proportionately, more people from a BAME background suffer from that experience of their criminal record. The extent of that experience is not yet possible to quantify. The disclosure regime exacerbates problems faced by people already treated more harshly at all stages in the criminal justice system.

Whereas ethnicity can be a visible characteristic to employers, a criminal record is not. This means that, while tackling ethnicity-based discrimination requires a certain set of responses, tackling conviction-based discrimination might include a different set of responses. For example, ways to minimise, or delay, the use of criminal records, may benefit BAME groups in particular but would result in a much fairer system for everyone.

A criminal records disclosure regime that works better for those who are BAME will work better for those who are White British too.

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