

Summary – A question of fairness

Research into employers asking about criminal records at application stage

Unlock carried out a survey of 80 well-known, national employers' online application systems. We selected companies based on an in-house poll of large, well known employers. The employers covered eight sectors: supermarkets; retail; construction; utilities and services; car manufacturers; food and drink, communications and hotels. We analysed application forms and recruitment policies to assess employers' attitudes and approach to recruiting people with criminal records. The full report is available on our [website](#)¹, and the full list of employers we surveyed, along with the questions they ask, can be found in the [Annex](#).²

1. Key findings

1. 77 out of 80 employers had online application forms.
2. Of those 77, 54 employers (70%) asked about criminal records on their application form.
3. 80% of employers who asked about criminal records provided no guidance to applicants on when a conviction becomes spent.
4. 22% of employers had phrased the question about criminal records in a way that was either *potentially unlawful or misleading*.
5. Collecting criminal records data at application stage is unlikely to be compliant with data protection legislation.
6. None of the employers surveyed provided information to applicants on why they collect criminal records data, or for how long it will be retained. Under the GDPR, employers who fail to provide this information are likely to be in breach of the law.
7. None of the construction companies and only half of the car manufacturers in our survey asked about criminal records at application stage.

2. Recommendations

The findings of this report show that there is still a long way to go in encouraging employers to stop asking about criminal records on application forms. In the conclusion we explore the broader implications of this report, but to achieve a fundamental shift in recruitment practice and seeing Ban the Box as business-as-usual, we believe there are steps that both government and employers should take.

Government should:

1. **Lead from the front by:**
 - a. Expanding and sharing evidence of its civil service scheme to encourage other blue-chip companies to employ people with criminal records.
 - b. Working with business and charities, to establish a clear and achievable plan to accelerate the growth of employers banning the box.
 - c. Promoting and sharing evidence that people with convictions – not just those leaving prison - represent a pool of hard-working, talented and reliable employees. The Ministry of Justice and the New Futures Network have a particularly important role in this, but it should involve other government departments too.
2. **Require its contractors to sign up to Ban the Box**
 - a. Government procurement terms should require that contractors must, as a minimum, sign up to Ban the Box and preferably go further – actively recruiting people with convictions into their business.

¹ Available to download from <http://www.unlock.org.uk/report-a-question-of-fairness/>

² Available to download from <http://www.unlock.org.uk/wp-content/uploads/Annex-A-question-of-fairness.pdf>

3. Implement financial incentives for employers

- a. Working with employers and the third sector, government needs to deliver on the 2017 Conservative manifesto pledge to incentivise the recruitment of marginalised groups including people with convictions.

4. Review legislation

- a. Support the private members bill that proposes a reduction in the time it takes for criminal records to become 'spent'. This will enable more applicants to benefit from the protections of the Rehabilitation of Offenders Act 1974.
- b. Support calls for wider reforms to the criminal record disclosure regime, including reviewing the DBS filtering rules so that old, minor and irrelevant cautions and convictions are no longer disclosed.
- c. Consider changes to the Police Act 1997 and related legislation to ensure that the conditions under which criminal record checks can be carried out are compatible with the GDPR. This could include prohibiting self-disclosure, at least at application stage, and explicitly limiting the rights of employers to request basic checks for non-exempt roles unless they can demonstrate that it is necessary to do so.
- d. In the absence of a clear and achievable plan to accelerate the growth of employers banning the box, 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.

Employers should:

1. Sign up to Ban the Box

- a. Removing the tick-box about criminal records is an important step towards an inclusive recruitment policy. There is no employer that cannot do this, and there are over 110 employers that can show why this is important.

2. Consider whether they need to ask about criminal records at all

- a. Most employers have no legal obligation to ask about criminal records, and most criminal records are not relevant to most jobs.
- b. Unlock's [fair recruitment principles](#) can help employers decide if, when and what to ask.

3. Review their approach in light of new data protection legislation

- a. Asking about criminal records at job application stage is unlikely to comply the GDPR and the Data Protection Act 2018.
- b. Asking about criminal records at any stage must be necessary and proportionate.
- c. Employers should be aware that a non-compliant approach is open to legal challenge.

4. Ensure that if they need to ask, they ask only for information to which they are legally entitled

- a. For most jobs, spent convictions cannot be considered, so employers should be clear about what applicants should disclose when answering questions.
- b. Given official criminal record checks can be done at the pre-employment stage, employers should question the value of asking applicants to complete 'self-disclosure forms' earlier in the recruitment process. Instead, if official checks reveal information, this can begin a conversation with the individual about the content and relevance.

5. Recognise the business benefits of recruiting people with convictions

- a. [Ricoh UK](#) estimates each person they recruit directly through Ban the Box and their work in prisons saves the company £390.10.
- b. A [national brand](#) reports an 83% retention rate, much higher than for the rest of their workforce.
- c. 65% of organisations that [promote their efforts](#) in the media report a positive impact on their corporate reputation.

Conclusion

We surveyed 80 large national employers, and found that 77 provided online application forms. Of the 77 employers with online application forms, 54 (70%) asked about criminal records. Very few – if any – of the jobs offered by these employers will be exempt from the Rehabilitation of Offenders Act 1974 – meaning employers are not legally obliged to ask about criminal records at any stage of the recruitment process.

These findings are unsurprising – employers are asking about criminal records at application stage as a way of deselecting applicants, and this knowledge itself has a chilling effect on talented applicants with a criminal record, many of whom deselect themselves and never apply. Both employers and applicants lose out. Evidence from employers who do recruit people with criminal records shows that they make reliable, hardworking and loyal employees. Employers who are open about their inclusive recruitment practices report a positive reputational impact.

Yet this report shows that, despite 5 years since the Ban the Box campaign was launched, it remains the case that asking about criminal records at application stage is the default approach for around three-quarters of national, big name employers. Despite the huge progress that Ban the Box has made, the number of employers signing up to the campaign is not increasing fast enough; for example, only four retailers in our survey – Boots, Primark, Poundland and Home Bargains do not ask about criminal records on their application form. Of these, only Boots is an official Ban the Box employer.

It doesn't have to be this way; none of the construction companies we surveyed asked about criminal records at application stage. This reflects the collaboration between the sector, government and other organisations to support inclusive recruitment and shows what can be achieved. The construction industry is in the midst of a skills shortage and is successfully tapping into the skills and talent of applicants with criminal records. Other sectors facing skills shortages include tradespeople such as electricians, plumbers, technical and manufacturing occupations, mechanics and vehicle technicians. There is a need for coding and advanced digital skills. A [City and Guilds](#) survey of 1000 employers found that more than two-thirds expect the skills gap in their sector to worsen over the next 3-5 years, as the UK leaves the European Union and faces a period of uncertainty. Business needs to respond creatively, and applicants with criminal records can provide part of the solution. City and Guilds is a Ban the Box employer and does not ask about criminal convictions at any stage in their recruitment process.

We know that much more can be and should be done by government to encourage and support employers to implement Ban the Box and broader fair inclusive practices. However, this report highlights that there remains a long way to go, and therefore other ways must be considered.

Employers no longer ask other discriminatory questions during recruitment and selection and we believe the same principle should be applied to questions about criminal records. In the absence of a clear and achievable plan to accelerate the growth of employers banning the box, we 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 doing this, it would be important that policymakers learn from the experience in the US to avoid any unintended negative impact from legislation on the employment outcomes for people with criminal convictions - any legislation must ensure that moving the criminal records question does not simply move discrimination to a different part of the recruitment process. As part of our support for this, we will be doing some work to look at how other countries have approached this. We also call on government to make good on the 2017 Conservative manifesto pledge to incentivise the recruitment of marginalised groups including people with convictions.

The removal of self-disclosure forms – either on application forms or later in the recruitment process – would mean applicants would not be under pressure to remember complex information, often from long ago and during a difficult time in their lives. Employers can request DBS checks to the appropriate level at the pre-employment stage, and if the official criminal check reveals information, this can begin a conversation with the

individual about the content and relevance, giving the employer the chance to ask questions and understand the bigger picture before making an assessment based on factual information.

It is difficult to see how asking about criminal records, or conducting blanket basic criminal record checks, is necessary for the majority of roles offered by the 80 employers surveyed. Although it may be authorised by the Police Act, it is unclear how it is necessary under the GDPR. The Police Act should be amended to ensure that the conditions under which checks can be carried out are compatible with the GDPR. This could include explicitly limiting the rights of employers to request basic checks for non-exempt roles unless they can demonstrate that it is necessary to do so.

Collecting criminal records data at any stage must be justified by a link between purpose and processing and must identify a lawful basis for processing AND meet a condition of processing. 22% of employers surveyed ask a potentially unlawful or misleading question, for which there could be no lawful basis, and 80% provided no guidance at the point of application on how to answer the question and none provided any detail on the purpose or lawful basis or condition of processing. In addition, no application form mentioned an applicant's data subject rights - explaining how applicants' rights will be upheld is key to meeting the condition of processing. This information may be available elsewhere but, as accountability is a key principle of the GDPR, we advise employers that this information should be clear and accessible at the point of application.

Reviewing recruitment practice is not only good for business, it is also essential for legal compliance. Unlock has worked closely with the ICO to produce practical guidance for employers on [GDPR and data protection compliance](#), and we advise that collecting criminal records at application stage is unlikely to be necessary and therefore in breach of the GDPR and the DPA18.

Unlock works to support 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. Part of this work involves identifying and sectors facing skills shortages and engaging employers in developing recruitment policies and practices that benefit both them and applicants with a criminal record. Ultimately, hiring people with a criminal record is good for business.

This report shines a spotlight on the need for more radical thinking about how to accelerate the changes in employer behavior needed. So far, we have relied on the voluntary goodwill of businesses that buy-in to the positive impact on both their organisations and on the individuals that they end up employing as a result. Yet this has so far only scratched the surface of influencing mainstream recruitment practice.

The findings of this report show that there is still a long way to go to move away from businesses using criminal records as a core part of their initial application forms, and the recommendations we have made on page 4 would, if implemented, help to achieve a fundamental shift in the recruitment practices of employers towards applicants with criminal records.

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Written by Rachel Tynan and Christopher Stacey.

Unlock is a registered charity no. 1079046 and a company limited by guarantee, registered in England and Wales no. 3791535.

Registered office: Maidstone Community Support Centre, 39-48 Marsham Street, Maidstone, Kent, ME14 1HH
Telephone: 01622 230705
Email: admin@unlock.org.uk
Twitter: [@unlockcharity](https://twitter.com/unlockcharity)
Website: www.unlock.org.uk