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# Effective use of criminal record checking in recruitment – best practice guidance

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## Introduction

A recent survey of HR professionals<sup>1</sup> reveals that 80% of recruiters consider criminal record checks to be critical or very important to their recruitment process, yet a third are not confident that they have an adequate and appropriate criminal record checking policy in place.

There has been remarkable growth in the number of criminal record checks (CRCs) being conducted in the UK, and indeed around the world. When the routine checks were first introduced in Britain in 1986, the Home Office anticipated processing 100,000 a year but by 1993 some 1 million checks were done and today this has risen to 2 million checks a year, a process which costs upward of £83 million in England and Wales each year.

This rise reflects a culture of caution, how risk is assessed and how and why some people are excluded. Highly publicised cases of ex-criminals offending again in their workplace have contributed to a heightened sense of fear among employers who respond to an increasingly risk-averse society with a 'you can't be too careful' mentality. Legislation and governing bodies responsible for carrying out CRCs have also developed the way checks are done and how accessible they are to employers.

Inextricably linked to issues of freedom of information and privacy, CRCs are fraught with problems and complexities of who should have access to a person's criminal record, the extent and breadth of the information given and for how long.

Gainful employment has become a measure of good health and self-esteem in today's society. Research has shown that for ex-offenders, re-entering the workforce notably lessens their risk of re-offending. But while substantial empirical evidence backs this up, less than half of ex-criminals are given employment, due to their criminal record.

This white paper investigates the growing trend of employers using criminal record checks and how this affects the recruitment process, looking at both the implications for the employer and the candidate.

## The evolution of criminal record checks

Britain has been keeping criminal records since 1869 but back then, the records were accessed only by police and the courts as a reference for previous offenders. It was not until the 1940s and 1950s that CRCs emerged as a way of screening candidates for employment, mainly for reasons of national security.

In the 1980s, CRCs started to be used as a way of identifying people unsuitable to work with children and by 1986 widespread screenings of childcare workers were conducted in the UK. At the time, police were also able to disclose more than just convictions. 'Non-conviction' information, which is considered relevant to police and government bodies, such as arrests, could also be made known to employers if it was deemed relevant to recruitment in a particular role.

As the amount of requests mounted, the Home Office reviewed the process and decided to create a new, central authority to deal with CRC requests. The Police Act 1997 paved the way for The Criminal Record Bureau (CRB), created in 2002. "The problem in the first place was that checks were free because the local police provided them to local employers," says Terry Thomas, a professor of criminal

<sup>1</sup> HireRight survey December 2013. Findings based on participation from over 200 HR professionals.

justice studies at Leeds Metropolitan University. "Police got tired of the job which was taking up officers' time when they could have been doing other things."

CRCs were then recognised as information that was to be 'sold' to employers. The Home Office has continued to try to reduce the number of checks, reviewing the systems in place in 2010.

The CRB and the Independent Safeguarding Authority (ISA) was replaced by the Disclosure and Barring Service (DBS) in late 2012 while Disclosure Scotland conducts CRCs for Scotland, England and Wales.

## **The varying levels of criminal record checks**

Criminal record checks have been categorised into three different levels of checks: basic, standard or enhanced.

A basic disclosure is the most commonly requested check and is accessible for any job role and provided by Disclosure Scotland for checks in Scotland, England and Wales. The check will return information exclusively on 'unspent' convictions, charges which are yet to have passed the appropriate rehabilitation period. Time frames vary depending on the sentence issued by the court.

A standard disclosure is only available for certain jobs, mainly in the legal and accountancy professions. Information will include 'spent' and 'unspent' convictions, cautions, reprimands and final warnings. Standard disclosures for Scotland, England and Wales are delivered by the DBS and the information requested can include exempted questions under the Rehabilitation of Offenders Act 1974.

Enhanced disclosures can be requested for applications to jobs involving contact with children or vulnerable adults, with particular licensing requirements and judicial roles. As well as information revealed from a standard disclosure, the check will also include other information from local police considered relevant for the applied job, for example checks on the children's and adults' barring lists if the applicant is to work in a regulated activity with children or vulnerable adults. The DBS is responsible for these disclosures in Scotland, England and Wales. Disclosure Scotland can only issue standard and enhanced disclosure for individuals applying to work in Scotland.

## **Checks on the increase**

HireRight has seen a staggering 73% rise in the amount of criminal record checks undertaken in 2012-2013, compared with the same period in 2011-2012<sup>2</sup>. Much of the increase is due to a greater number of international criminal record checks being undertaken. The rise in criminal record checks far outpaces the increase seen in other types of verifications. Criminal record checks now make up almost 10% of all the candidate due diligence checks that HireRight undertakes for its EMEA and APAC clients.

This trend, however, is not exclusive to Britain. In Australia CRCs have increased six-fold in the last decade while in the Netherlands, 'conduct certificates' requests have almost doubled, from 255,000 in 2005 to 460,000 in 2009. According to Thomas, one contributing factor is employers' "fear of litigation if you do not do [CRCs] and then something happens – what the Americans call 'the negligent hiring doctrine'," especially in the wake of high profile cases of ex-offenders re-committing crimes at work.

<sup>2</sup> HireRight data 2013, based on analysis of over 810,500 EMEA candidate due diligence checks between October and August 2011/12 and 2012/13.

Changes in legislation have also led to an increase in checks. In Scotland, the list of professions from which CRCs are exempt has decreased. "Professions like taxi drivers, social workers, animal veterinarians and dentists are no longer protected by the Rehabilitation of Offenders Act's exempt professions," says Dr Sarah Armstrong from the Scottish Centre for Crime & Justice Research. "Amendments have been made to the act which governs what convictions are expunged from the record."

Increased access to CRCs has also influenced the record numbers of checks. With advancements in information technology, the ability to store and disseminate information such as criminal records has risen. Technology allowed government bodies such as the police and child protection agencies to store and access information about criminal records and with it came the 'because we can' argument toward CRCs. Centralised offices disseminated CRCs have also made it easier for employers to gather this information. "It's also technologically easier for candidates because there is now one central office where these requests go," says Armstrong.

In contrast, the number of standard and enhanced checks has declined. Armstrong attributes the decline to 'portable' CRCs which enable a check to be updated, rather than repeated for multiple requests. The DBS introduced this change in June this year.

## **Employer attitudes toward what they find in CRCs**

Little research has been done in Britain to shed light on how employers process the information disclosed in CRCs. "The real issue is that no one knows how employers make their decisions on receipt of a disclosed criminal record, some are liberal, some are more hard-line," says Thomas.

Information that one employer may consider irrelevant to hiring a candidate may be what stops a different employer recruiting them. Employer attitude is often considered to be more of a barrier to employment of ex-offenders than legislation or their lack of skills. An employer's reliance on CRCs to judge a candidate's character can often be misleading. "The organisation to which an ex-offender applies to for employment could determine the success of their application due to the decision-maker involved in the recruitment," Dr Nageen Mustafa from Staffordshire University suggests in her doctorate about individual recruitment decision-making after CRCs.

Thomas cites an example of a man applying for a volunteer role working with children. The recruiters thought he seemed like a risky choice and so requested a CRC. When the check came back all clear, they offered him the work but within weeks he had to be removed for the children's safety. "The point is that the CRC over-rode the evidence of the interviewing panel's own eyes - such is the weight people give to a criminal record check," he says. "CRCs have taken on a credibility and a form of symbolic life of their own."

The timing of when an applicant is asked about their criminal history and/or a CRC is requested can also alter the final decision. "If someone is asked about their criminal record at the job application stage, they are more likely to be screened out," says Armstrong. "When employers ask for a criminal record check once the job has been offered, the outcomes can be very different."

It is important for employers to carefully consider how a candidate's criminal history may affect their job application. Questions such as how long ago the conviction was and the nature of the conviction need to be weighed against the nature of the job and what risk they could possibly pose. "What employers actually do is often make an off-the-cuff decision based on their own beliefs and prejudices," says Thomas.

These prejudices may be reflected in a company's policy surrounding employing candidates with a criminal record. "There is lots of research which suggests that there is a great bias against recruiting people with criminal records," says Armstrong. "Two-thirds of companies have a policy around criminal records which has a tendency to hire against those with criminal records and this is a pretty consistent finding over the last 20 years."

"Just how do employers make their decisions? No one is really looking at this," says Thomas.

## **A lack of employer awareness surrounding CRC legislation**

Research suggests there is currently a significant lack of awareness among employers about legal, social and ethical implications of CRCs. "Research consistently shows that employers have no idea of the specific law governing it or are extremely hazy on how it applies," says Armstrong. "Only 10-15 per cent of recruiters demonstrated any reasonable understanding of the law. The key problem is that there is little clear information and education for employers to realise how CRCs are supposed to work."

Some employers are unsure of what they can and cannot ask an applicant to disclose, some asking for information that would not be disclosed in a basic CRC. "Some employers even ask in job applications about stuff that they are not entitled to ask about like whether they have been arrested," Armstrong explains. "Inquiring about arrests scares off the candidate if they know that arrests are going to show up."

While there has been an increase in CRCs in the UK, this does not necessarily correlate with a growing number of ex-offenders being re-integrated into the workforce. Approximately 60 per cent of ex-offenders were refused employment based on the criminal record, according to the Home Office.

While employers are allowed to ask a candidate about their criminal record, there are limits to what extent the inquiry goes. Asking for information which is not relevant or seen as excessive can be considered a breach of data protection laws. Applicants also have the right to refuse to answer questions about 'spent' convictions (charges laid after a number of years).

Dr Mustafa suggests that a glossary of offence names and sentencing guidelines could assist with recruitment decisions. "To ensure that recruitment decisions are being made fairly, all decision-makers should be given the correct training and information to do so to ensure a logical, justifiable process is utilised for all decisions made," she writes.

## **Running CRCs on foreign applicants**

"There are lots of people now from overseas looking for jobs in the UK with a need for a CRC, often jobs with elderly or otherwise vulnerable people, how do

we check them out?” asks Thomas. “Systems are being put in place but it is a slow and tortuous business.”

“A criminal record check, or similar verification of good standing, can be undertaken in almost every country in the world, however the means of accessing this information, the type of consent needed and the way the information can be used can vary. Because these checks can be very complex and problematic, some employers skip this stage when dealing with foreign applicants,” says Steve Girdler, managing director at HireRight. “In doing so, not only are these employers opening themselves up to the risk of hiring people that could severely harm their reputation or deliberately cause harm, but they could also face a costly legal challenge for discrimination if they do not carry out a lawful process by ensuring the same checks for all candidates. A criminal record checking policy needs to be fair and consistently applied.”

## **Employment lessens the risk of re-offending**

A 2013 Ministry of Justice report found that there is a direct link between an ex-offender gaining employment and a reduced risk of breaking the law again. Research has found that with employment, ex-offenders are 30-50 per cent less likely to re-offend. Just over two-thirds of these people also attributed having a job as the single most important reason why they did not re-offend.

The report state that “for custodial sentences of less than one year, offenders with a P45 employment spell had a proven re-offending rate 9.4 percentage points lower than the matched comparison group. For custodial sentences of one year or more, offenders entering P45 employment after release had a proven re-offending rate 5.6 percentage points lower than the matched comparison group.”

Hiring ex-offenders has also been a positive experience for employers. “In the abstract there is a general bias against working with so-called criminals but those who have recruited ex-offenders knowingly are more likely to be motivated to recruit again,” says Armstrong.

Hiring these applicants has many benefits. “Regarding ex-convicts, there are massive advantages in hiring people that you’d think wouldn’t necessarily fit into a narrow band of employability,” says Steve Girdler, managing director at HireRight. “Companies might look at it as giving people an opportunity to get back into the workforce and getting a second chance. Some people are desperate to prove themselves.”

## **The effectiveness of CRCs in recruitment today**

While there are no unequivocal ways to measure whether CRCs in recruitment are effective or not, their use in recruitment is continuing to grow, putting increased pressure on organisations of all kinds to adopt them.

The laws surrounding CRCs are in place to encourage the employment, rehabilitation and re-integration but Armstrong argues that they do more to create barriers. “It is effective for very serious offences, but that applies to very few people,” she says. “These laws are penalising people at the less serious end especially considering there’s a pretty low rate of re-offending. A two-and-a-half-year sentence creates a permanent, lifetime barrier. That person will never be able to expunge it and this goes against the grain over every other European country.”

Coined an ‘invisible punishment’ for its destructive effect on ex-offenders, some commentators argue that the Rehabilitation of Offenders Act needs to be improved.

“It’s impossible to measure how effective the current CRC process is in the UK,” says Thomas. “What employers should do is make a careful assessment of the criminal record and then measure it against the nature of the job vacancy they have to demonstrate what risk is posed and how their decision has been made.”

## **Criminal record checks – best practice guidance for employers**

- » Use criminal record checks proportionately for the job roles being recruited for.
- » Make criminal record checks part of a wider background screen to give a full picture of an individual’s background.
- » Ensure you always have the subject’s signed consent.
- » Be fully transparent about why and how you conduct checks, and how the findings will be used. Document this in written policies.
- » Ensure you understand the type of questions you can ask, the different types of checks available and the roles they can be used for.
- » Don’t overlook international criminal record checks for candidates that have spent time outside of the UK.
- » Conduct all criminal record checks in line with local legislation and partner with an expert to ensure your program is compliant.
- » Use partnerships to benefit from technological advances. Providers that offer integrated e-DBS or e-DS checks can return results in as little as three days.
- » Handle criminal record data securely, keep the process confidential and auditable.
- » Do not make recruitment decisions on criminal record results alone.
- » Remember that criminal record status can change. Do annual rechecks on all or a sample of your workforce.

### **About HireRight**

HireRight is a leading global provider of candidate due diligence services, providing background screening of employees and job applicants in order to help over 1,800 EMEA organisations mitigate employee risk, make informed hiring decisions and meet compliance obligations.

The company works in more than 200 countries and has offices across the globe, including the UK, USA, and Hong Kong. More than one-third of the Fortune 500 uses the organisation’s services.

[www.hireright.co.uk](http://www.hireright.co.uk)

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For more information about HireRight background screening solutions, call us at **+44 (0) 1273 320160**, email us at **EMESales@hireright.com**, or visit **www.hireright.co.uk**.

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