THE BUCHANAN INSTITUTE

Criminal Record Data: Ensuring Employment & Upholding Data Subject Rights (CRED)

Image credit: The Nation (2015)

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Executive Summary

Too frequently, employers in the United Kingdom undermine the qualifications, skills, and experiences of applicants with an old or minor criminal or arrest record, imposing systems at the initial stage of the application process to filter these individuals out. This makes it impossible for applicants to explain or contextualise themselves and to move forward in the employment cycle. This only leads to further prejudice against those with criminal records and perpetuates discrimination against BAME candidates, who are disproportionately affected by criminal records.

The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA18) came into force on May 25th, 2018 and apply to the processing of all personal data within the EU. Personal data pertaining to information processed in connection with the criminal justice system is protected under the DPA18. Most jobs fall under the Rehabilitation of Offenders Act 1974 (ROA1974), which gives individuals with spent convictions and cautions the right not to disclose them when applying for jobs. Most employers must carry out a criminal records check only at the last stage of employment to ensure 'data minimisation'. Legal regulations assert that personal data must be processed transparently and this information should be collected for legitimate and necessary purposes only. If an employer fails to comply with this, they could be fined up to €20 million or 4% of their company's annual turnover (Unlock, 2018a).

Despite the introduction of this data protection regime, numerous issues remain during the collection, recording and dissemination of one's criminal or arrest records. Many employers are either unaware or ignorant of their legal obligations, resulting in many job applicants being unnecessarily questioned about their convictions. Consequently, one's ability to obtain employment can be severely affected by the mishandling or misuse of criminal records. In the UK, half of the respondents in a YouGov survey stated they would not consider hiring an offender or an ex-offender (Halliday, 2019). This is compounded by the fact that a record states only that an arrest was made - the lack of detail and further information leads to seriously mistaken assumptions about the nature of the arrest and works particularly to the disadvantage of BAME candidates.

The policies in this proposal tackle issues at the public level, the company level, and the individual level. First, MPs should amend the ROA 1974 by making it more compliant with the key principles of the DPA 2018, primarily data storage limitation. Secondly, companies and employers within the UK should review their hiring process and 'Ban the Box,' thereby removing the disclosure of personal criminal record data at the application stage. Finally, for increased transparency, job centres and unions should increase data subjects' awareness of the privacy policy and data rights under the DPA 2018 for those with criminal records.

Introduction

This proposal is grounded in research regarding the existing and potential threats to personal data protection, particularly for marginalised groups. At the start of our research, we identified a gap in the protection of personal data in the criminal justice context. We narrowed the problem down further and learned of the issues surrounding protection of criminal record data in the employment context in the United Kingdom (UK). Accordingly, our proposal centres around a need for more effective and robust measures to protect the personal data of individuals with criminal record data when applying for employment. Often, these individuals will face discrimination in the employment context as a result of disclosing this information despite not legally being obliged to do so. In fact, 75% of UK employers admitted to using criminal convictions as a means of discriminating against and deselecting applicants. Additionally, 16% of employers said they would automatically reject the candidate (Royal Mail MarketReach, 2015).

However, the Rehabilitation of Offenders Act 1974 promises a second chance for those with criminal or arrest records through protection from discrimination of this kind - the ROA establishes legislation indicating when individuals are exempt from revealing their prior arrests or convictions as well as which employers can request the disclosure of spent or unspent convictions from job applicants. Generally, spent convictions are protected under the ROA except for specific job roles, meaning that it is unlawful for employers to request or obtain this information. It is also unlawful under the General Data Protection Regulation ('GDPR') of 2018, which sets out stringent conditions for collecting this data. These are discussed further in the coming sections. Further, the Equality Act 2010 ('EA') calls for equality in the employment context, yet

employers still use criminal record data to prejudice and filter out candidates. Furthermore, despite that criminal record data is protected, employers still require applicants to reveal this information at the earliest stage of the employment process. To us, this indicates a significant barrier to employment which we hope to tackle through three levels of targeted recommendations – public, company, and individual. It is important to note at this stage that we are referring specifically to individuals with old or minor offences - this does not include individuals who have served custodial sentences or committed any form of serious crimes. Rather, we are focusing on those who have committed minor offences, which, for clarity's sake, can include the following: possession of liquor by a minor, obstructing traffic, offensive conduct or language, custody of a knife in public, using a laser pointer, and low level shop-lifting. We believe that those who have committed offenses within this sphere of severity do not deserve to be discriminated against where they have turned their lives around and possess relevant qualifications.

Indeed, the lack of protection over conviction and arrest record data can lead to inequalities in the employment cycle and even further discrimination of BAME candidates. This is known as double discrimination, as BAME individuals are disproportionately impacted by the criminal justice system (for a multitude of reasons beyond the scope of this work) (Unlock, 2019). Moreover, there are inconsistencies under the ROA which are in breach of data protection laws under the UK Data Protection Act 2018, which implemented the GDPR. In the UK, of the 11 million people with criminal records, only 8% have been given a prison sentence for a serious crime (Unlock, 2020b). Furthermore, England, Wales and Scotland have the highest rates of imprisonment within western Europe with the majority of the crimes being petty and non-violent. Of the 59,000 individuals that were sentenced in 2018, almost half were given a custodial sentence of 6 months or less (Halliday, 2019). Thus, it is excessive that all recordable offences, including minor, historic and spent convictions remain in the UK-wide Police National Computer until the individual reaches 100 years of age. This prejudiced system is reinforced by the findings of YouGov's survey in 2016, where half of the respondents stated they would not consider hiring an offender or an ex-offender (Halliday, 2019).

Our team is committed to providing recommendations capable of reforming this discriminatory system. Therefore, through our policy recommendations that focus on the public,

employer, and individual level, we make suggestions that aim to rectify injustices and increase lawfulness and transparency in the UK criminal justice system. The collection of personal data is evolving in a manner that renders data an asset for all those able to access it. However, the vast number of stakeholders benefiting from this rapid technological shift creates unease within the public in relation to both terms of privacy and possible misuse or abuse of this information (World Economic Forum, 2011). As data continues to evolve into a modern raw material, it is essential that robust and effective measures are in force that protect individuals from breaches to their personal data and human rights.

Research Methods

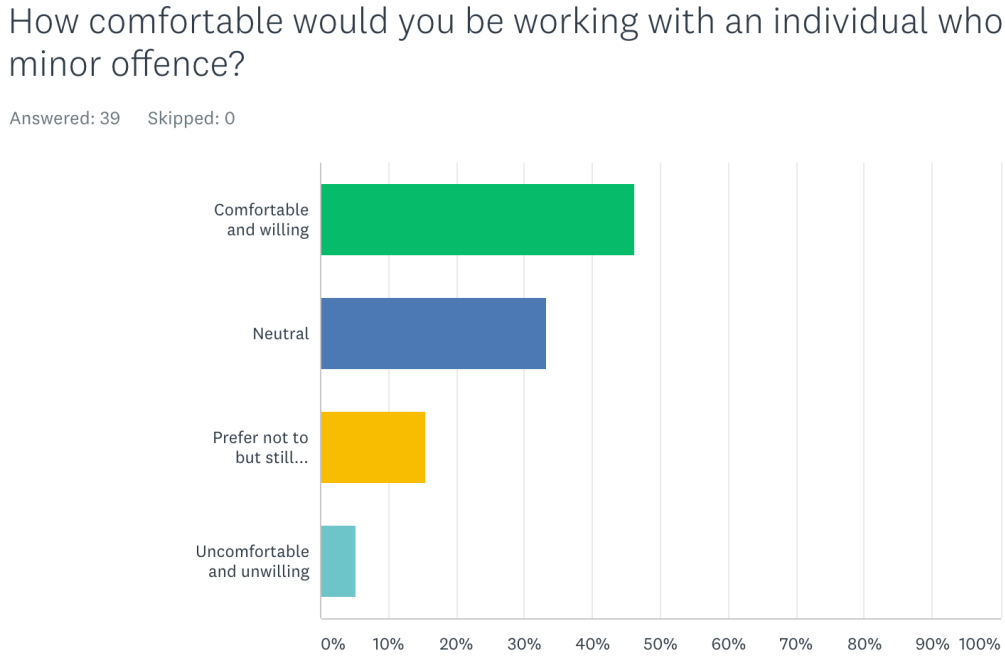
We conducted a bifold approach to our research: first, we explored the academic literature surrounding criminal data rights to gain a greater understanding of the topic. This aided us in evaluating the current landscape of information, identifying gaps and lead us to explore the topic of employment. It also helped us devise questions for the survey we conducted. We focused this survey towards hiring professionals but sought information from any employer or employee in the UK to explore public opinion on hiring and working with individuals with old or minor convictions.

Primary Research

We have conducted a survey targeted towards people in employment, specifically for members of senior management and hiring managers. The aim of the survey was to explore the perceptions of both working with and hiring people with criminal records in a UK employment setting. The survey consisted of seven questions. It was anonymous and the subject was limited to reveal the city and industry they work in, in the hope that the answers are as truthful as possible. The subject was also given the option to express their thoughts, positive or negative, about working with people with convictions or with a minor offence on their record. The results from the survey have enabled us to understand the views of different social groups – employers, employees, and students – in relation to working with and hiring individuals with old or minor offences.

The survey was completed by 39 participants from the UK. The demographics were varied, showing results of individuals working in finance, law, hospitality,

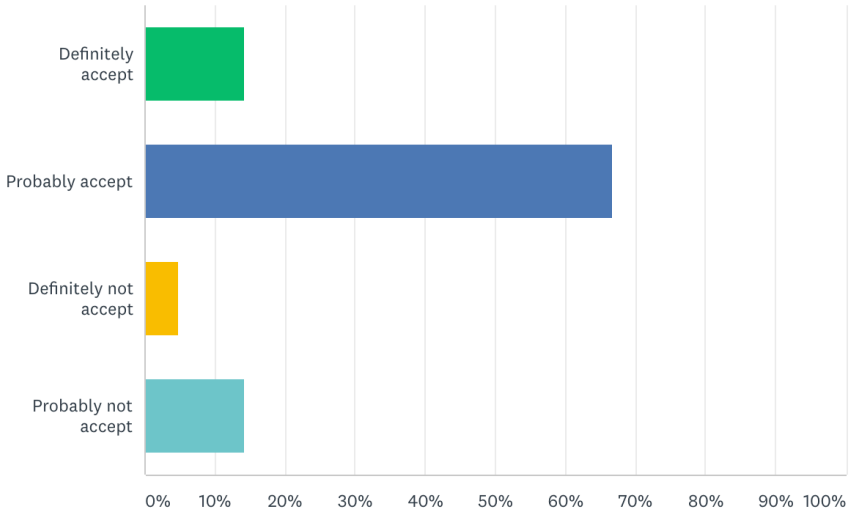
marketing, film, pensions, car manufacturing, road safety, childcare and the third sector. When participants were asked how comfortable they would be working with an individual who had an old or minor offence, 46.15% said they would be 'comfortable and willing', compared to 33.33% who were neutral, 15.38% who would prefer not to but still would be willing, and 5.13%would be uncomfortable and unwilling. These results serve as evidence against the myth that working with someone with an old and often irrelevant offence would be uncomfortable for most people and accordingly hinder a business or endanger its people. It provides optimism for our research and the evidence strengthens our case for employers which could persuade them to hire individuals with minor or old convictions.



To explore the likelihood of employment, we asked how willing senior or hiring managers would be to hire someone with a criminal record for a minor or old offence. Results showed that 3 participants would 'definitely accept' and a significant 66.67% of managers (14 participants) would 'probably accept' them, whilst only 1 answered that they would 'definitely not accept' and 2 said they would 'probably not accept'. Similarly, 64% of participants said they would consider an applicant if they disclose a criminal arrest or conviction on the application form, compared to 14.29% who said they probably would not accept.

How willing are you to hire someone with a criminal record for a minor or old offence? (Hiring managers/senior management only)

Answered: 21 Skipped: 18



Considering the possibility that some participants in the survey may work in sectors not covered by the Rehabilitation of Offenders Act 1974, these results are particularly encouraging for our research. Many managers seem to be forgiving of peoples past mistakes, and the results may indicate a willingness to consider the Ban the Box ideology.

When participants were asked to elaborate, many people said that 'A minor and old offence should not limit what opportunities people have in the future', but that it depends upon the crimes committed. One participant mentioned that they would be 'more willing to work with someone that had a non-violent conviction than a violent one', with many other participants stating that everyone should be allowed a second chance 'unless they pose threats to other colleagues'. Many people have recognised the societal repercussions of crimes, and that crimes committed when people are young are often due to the unfortunate circumstances they are in. One participant said old convictions 'shouldn't determine their future - everyone should be allowed a second chance unless they pose threats/dangers to other colleagues,' echoing the general sentiment in our survey results that so long as the ex-offender has reformed and moved forward with their lives, then they would be comfortable working with an ex-offender. Overall, it seems that employers are more likely to employ someone with a minor or old conviction or arrest, rather than someone with a minor but recent and violent conviction or arrest. Participants expressed that they are open to changing their perception of the person if they

have taken positive steps to change their life since their conviction and can be proven to be trustworthy, with many participants noting that 'business is built on trust'. Only one response was negative as they said it 'could show a lack of

trustworthiness and poor judgement skills', yet on the whole, the responses expressed understanding of the socioeconomic factors that can lead to offences, in addition to forgiveness and ease in relation to working with or hiring individuals with old or minor offences.

Lastly, one third of participants stated that they were unaware of their company's legal obligations when processing personal data relating to criminal records information. This significant result shows that there is a clear lack of knowledge regarding data subject rights within positions of senior management. We believe it is vital to tackle the issue of prejudice against employing people with convictions from the position of the employers as they are often unaware of the laws in place. This has inspired us to create the information pamphlet for hiring managers to better educate and inform them on their company's legal obligations in a way that is accessible and easy to spread.

The link to the aforementioned survey can be found at the following address: https://www.surveymonkey.com/r/GSRQM5X.

Secondary Research

To support our primary data, we conducted an analysis of the existing literature on the topic of criminal record data and employment. Goffman (1963) states that a criminal record is a 'deeply discrediting' mark that is socially constructed and reinforced. Likewise, a journal article by Hoskins (2018) reveals the collateral consequences of convicted offenders, highlighting that the stigma of a criminal record often hinders access to employment in the long-term. A criminal record can affect not only employment but also access to housing, public benefits and accordingly an individual's financial and social security. These findings motivated our research towards dissecting the negative stigma of criminal records (particularly for those with old or minor offences) and fuelled our research regarding alleviation of barriers to employment. We also discovered that public perceptions impact prisoner re-entry success in wider society, which is also likely to affect recidivism. Thus, this guided our recommendations towards exploring public opinion and detangling myths affecting people with old, minor convictions or arrests.

Furthermore, Fitzgerald O-Reilly (2018) emphasises that legal instruments such as the Rehabilitation of Offenders Act 1974 fail to protect individuals

from being discriminated against because of their criminal record. The article notes the scheme undermines individuals' rights to privacy and often misrepresents the public record. This is unjust and undermines the principles of storage limitation and the data subject's right to their own information, which are principles enshrined in Article 5 of the GDPR. Moreover, DeWitt and Denver (2020) highlight the relevance of the digital age and the hindrance it causes towards people with criminal records. The difficulty of erasure coupled with the high public accessibility of criminal records has motivated us to tackle these issues in a way that ensures data subject rights are upheld in accordance with, or above and beyond, existing data protection regulations. Another source of secondary research was past documents published on the UK government website. Papers published by the Ministry of Justice helped us place the ROA in a modern context and guided our conclusions on the shortcomings of the ROA in upholding the Data Protection Act 2018. Therefore, we focused our public-level recommendations on the reform of the ROA 1974 to ensure spent convictions are erased from the Police National Computer, and that data is stored for a time that is more proportionate to the conviction.

Our aim is to ensure that employers maintain their legal obligations to protect individuals, and that individuals are aware of their data subject rights. One of the main contributors to our research is Unlock, a charity that aids people seeking employment with a criminal conviction. Unlock published a guide for employers on their responsibilities when processing criminal record data, which narrowed our focus towards the principles of data minimisation, transparency and accountability, which are principles enshrined in the GDPR. This provided a framework for our recommendations at the company level; a major campaign advocated by Unlock, called 'Ban the Box', laid the foundations for our company-level recommendations. It is a simple and effective means of mitigating the negative stigma associated with criminal records and accordingly potentially improving employment prospects for individuals with criminal records. However, Doleac (2016) and Semuels (2016) were doubtful of Ban the Box, suggesting that it has the adverse effect of 'statistical discrimination'. They argue that due to the lack of information, employers often assume if the applicant has a criminal record or not, thus polarising individuals in the United States because of their race. With this in mind, we decided to develop a more holistic approach for our proposal to employers, suggesting that they review their recruitment process as a whole to promote inclusivity and diversity across the board. Unlock's recent report, 'A question of fairness,' informed us of the ways employers unlawfully obtain criminal offence data through asking misleading or unlawful questions, which are elaborated upon in the coming sections.

The GDPR also formed a significant part of our research, informing our recommendations from a legal perspective. Article 5 of Chapter 2 lays out the principles relating to personal data processing: lawfulness, fairness and

transparency; purpose limitation; data minimisation; accuracy; storage limitation; integrity and confidentiality (security); and accountability. Under the GDPR, criminal offence data is treated as a separate category of personal data. The processing of such data must abide by the lawfulness of processing guidelines set out in Article 6, which require the employers to only collect criminal offence data if they can illustrate that doing so is necessary. Article 6 also sets out the lawful bases for collecting data and Article 10 lays out conditions for processing. We have attached these relevant articles in Schedule 1. In order to comply with these regulations, employers must set out a clear purpose for collecting such data, identify a lawful basis for such processing, and ensure a privacy policy is in effect and that applicants are aware of their rights over the data collected. Quite straightforwardly, if there is no necessity in processing the data, then the processing is unlawful; this means that if there is no rational and clear nexus between the purpose of the processing and the processing itself, then the data controller is in breach. Despite that many employers host their application portals through third parties, the employer is still considered the data controller and is responsible for ensuring compliance with these regulations. Unlock's data protection guidance affirms that collecting criminal offence data at the first stage of the employment cycle, the application, is unlikely to comply with the requirement of necessity and accordingly breach both the GDPR and DPA. Regardless, any collection of this data 'must be justified by a link between purpose and processing'.

Discussion

Background

UK Criminal Justice System in the Employment Context

A criminal record refers to a record of having been convicted of a crime in a Magistrate's Court or the Crown Court. Other disposals and cautions can also be found within a criminal record. In the UK, criminal record data is stored in the Police National Computer (PNC). People with convictions remain marginalised in their attempt to lead a productive life after prison (Recruit!, 2020a). Reforming criminal record expungement policies to aid those with

outdated or minor convictions would create a more level playing field. Vetting rules and criminal background checks in employment recruitment processes have increased (McIntyre & O'Donnell, 2017). Over half of people with a criminal record have stated that if a job asks them to disclose their past convictions, they are unlikely to complete the application.

Police National Computer

The Police National Computer (PNC) is used across UK criminal justice and law enforcement organizations as a means to share information (College of Policing, 2020). Spent convictions remain on the Police National Computer for 100 years from the birth of the person convicted and can still be requested by employers recruiting individuals for a specified number of jobs. To avoid disproportionate punishment, the UK law enforcement organizations should take into account the burden faced by those with old or minor convictions that effectively hinder their chances at employment.

UK Rehabilitation of Offenders Act

The Rehabilitation of Offenders Act 1974 sets out the treatment of offenders that have not been reconvicted of serious offences and focuses on regulating the disclosure of their previous convictions. In 2013 it was ruled that the disclosure of all convictions by the DBS was in violation of Article 8 protecting the right to respect for private and family life found in the European Conventions on Human Rights. The ROA, after being amended in 2014, now includes specified periods of time when certain convictions will become spent (Nacro, 2020). Within the act is the length of time required for a convicted individual to be fully rehabilitated in the sense that they no longer have to disclose their conviction to a potential employer. The period of rehabilitation is determined by the severity of the sentence. For a 4 year custodial sentence, for example, there is no rehabilitation period but a 6 month custodial sentence requires a 2 year rehabilitation for individuals over 18. Moreover, cautions become spent immediately. An adult conviction, depending on its nature, will be removed from a DBS certificate if 11 years have passed since they were convicted, it is the person's only offence, and it did not result in a custodial sentence. For those under 18 at the time of the offence, the same rules apply but will be removed after 5.5 years instead (FairChecks, 2020). Nevertheless, even though convictions can become spent after the rehabilitation time stated in the ROA, they remain on the PNC for 100 years since the person was convicted. Some jobs such as those in health professions and teaching require the DBS to send them the previous spent convictions of applicants.

Data Protection Act 2018

The Data Protection Act 2018 is the most recent national law relating to the European Union's General Data Protection Regulation and an updated version of the Data Protection Act 1998. Article 4 of the GDPR states that the 'processing of data should be designed to serve mankind.' The scope of the GDPR does not apply to the processing of personal data to do with security policy. This means that a lot is left to the national state's discretion on how to implement data protection of individuals within the criminal justice system, in particular those with criminal records. Furthermore, Article 5 of the Data Protection Act sets out 7 key principles which were mentioned previously in this paper.

Key findings

This proposal is predicated on data illustrating that individuals with criminal records in the United Kingdom are discriminated against when searching for employment. 11 million individuals in the UK have a criminal record, accounting for roughly 17% of the population. Only 8% of these individuals have committed serious offences and been to prison (Unlock, 2018a). In reality, 76% of convictions are summary offences, meaning that the situations were not serious in nature and were concluded in the Magistrate's Court. This would mean that just one old, minor offence can prevent a candidate from gaining employment, despite having moved forward positively in their lives following the conviction. As aforementioned, 75% of UK employers admitted to using criminal convictions as a means of discriminating against and deselecting applicants. 16% of employers said they would automatically reject the candidate (Royal Mail MarketReach, 2015).

Research has proven that employment is one of the primary factors associated with reducing recidivism by up to 50%, which has social costs of up to £15 billion a year (Herman, 2019; CBScreening, 2020). Still, of 78 online application forms surveyed by Unlock, 75% required the applicant to declare a criminal record, and 76% of these employers provided no guidance to the applicant about why this information was required, how the data would be stored or used, or informed them of their rights under the Rehabilitation of Offenders Act (Unlock, 2018b). Furthermore, from 2019-2020, DBS carried out almost 4 million checks at enhanced levels, which disclose cautions and spent convictions which applicants are legally entitled to withhold. These checks are prohibited and deemed ineligible except for specific jobs like teaching, accountancy, law, or social work. In fact, carrying out a check at a higher level than legally permitted can constitute a criminal offence and lead

to a breach of data protection regulations (Unlock, 2020b). This unnecessarily exposes employers to risk but also constitutes a barrier to employment for those with spent, old, and minor convictions.

It is notable that 32% of employers were concerned about the skills and capabilities of individuals with criminal records, 45% were concerned that they would not be reliable, and 40% were concerned for the reputation and public image of their organization. However, data from 2019 indicates that 81% of employers who had hired individuals with records believed this has a positive impact on their business. Furthermore, 75% of customers would go to businesses who hired employees with past convictions (Tynan, 2020). This illustrates that many of the reasons employers invoke to exclude those with convictions are not well-founded, posing an unnecessary hindrance for individuals to move forward with their lives.

Areas of Focus

Public Level

Before 2006 the police were able to delete records from the UK Police National Computer after convictions were spent. However, the 'Exceptional Case Procedure' policy was introduced in 2006 which led to a significant decrease in expungement of records. Currently, recordable offences remain on the Police National Computer (PNC) until they reach the age of 100. As there is no formal process for individuals to request their data to be deleted, where the police do receive a request, it is likely that they will refuse its complete erasure from the database (FairChecks, 2020). This means that minor and historic convictions that have been spent under the ROA remain on the PNC for a disproportionate amount of time.

Arguably, the withholding of spent convictions on the Police National Computer for 100 years is in breach of several of the key principles under the Data Protection Act 2018. The lack of fairness and accountability between stakeholders such as the law enforcement organizations, employers and those with criminal records is also relevant in this context.

Company Level

Recruitment process

Many employers request candidates check a box on an application form regarding whether or not they have any convictions or arrests. This means the

information is requested at the initial stage of the employment cycle. However, this is problematic as a crucial tenet of the GDPR is data minimisation. This

principle requires data processing to be adequate, relevant, and limited only to what is necessary. Simply put, this means that personal data processing must only be collected for specific purposes; that the data controller has sufficient personal data to achieve this purpose; and that the data controller does not hold more data than is needed for that purpose. According to the Information Commissioner's Office, in the criminal offence context, data minimisation is especially vital (ICO, 2020a). As aforementioned, any processing of criminal offence data must fall within a lawful basis under Article 6 with authority to do so under Article 10. The principle of lawfulness, fairness, and transparency describe the requirement to identify a lawful basis for collecting personal data, and, importantly, to not use the data in a manner which is unfair or detrimental. This includes an obligation to be clear about how the data will be used and to justify any adverse impact caused by the processing.

Unlock & 'Ban the Box' campaign

Unlock is an organization advocating to end discrimination faced by those with criminal records in job recruitment. They employ volunteers and staff members who have previously been convicted. Unlock has been working to 'Ban the Box' across the UK, reminding employers that they should ask for 'sensitive data' - such as criminal offense data - only when necessary. To this end, Unlock has produced several reports outlining the data protection obligations of employers, the data subject rights of potential candidates, and the undue prejudice faced by individuals with criminal offence data. A main goal of Unlock is to place 'ban the box' on legislative footing in the UK. So far, around 130 companies have joined this campaign. However, our policy recommendation will reiterate Unlock's push for the UK government to include ban the box as a statutory requirement.

Disclosure and Barring Service (DBS)

The DBS is the authority responsible for criminal record checks. Employers can request to view unspent criminal record check as part of the recruitment process. The legally permissible extent of these checks is codified in legislation. If a role falls within the ROA, then an employer may request a basic criminal record check which will only reveal data for unspent conviction. If a role is exempt from the ROA, then an employer may request a standard or enhanced criminal record check. A standard check would divulge spent and unspent convictions and cautions, but not those which are now protected through DBS filtering. Employers are legally obligated not to take DBS filtered convictions into account when assessing a candidate for employment and, even if the candidate shares this information, the employer must disregard it. An enhanced check will

reveal the same data. However, enhanced checks may also include information such as arrests or allegations that the police deem relevant for the role.

In 2019, the Supreme Court held that two of these aspects are in breach of Article 8 of the European Convention on Human Rights. Article 8 surrounds the 'right to respect for private and family life'. Before 2013, all convictions and cautions were disclosed through DBS checks which the Court of Appeal ruled as unlawful stating that the aim to protect employers was legitimate however the means were disproportionately evasive into the lives of vulnerable individuals. This led to the implementation of filtering rules. Nevertheless, the 2019 ruling argued that there remain certain rules on the disclosure of criminal records that are still in breach of Article 8. Firstly, individuals with more than one conviction automatically must have all of their past convictions disclosed regardless of how historic or minor they are. Secondly, individuals with childhood cautions may also have these records disclosed (FairChecks, 2020). Currently, UK legislation on disclosure of criminal records remains flawed when checked against the European Convention on Human Rights. Thus, removing the box that requests criminal records to be disclosed early in recruitment processes is one of the first steps to a proportionate system where individuals can disclose their past convictions if they deem it necessary.

Individual Level

Disproportionate impact on BAME applicants

Double discrimination is a term used to describe the compounded impact faced by BAME candidates across two systems: the criminal justice and employment system. The marginalisation faced by individuals with criminal offence data is disproportionately faced by BAME applicants as these individuals are especially affected by the criminal justice system. According to Unlock, BAME communities remain over-represented in the criminal justice system. This includes being more likely to be targeted, arrested and imprisoned compared to white British people (Unlock, 2020b). Furthermore, of a sample size of 221 BAME individuals who had criminal offence data, 79% cited obtaining employment as the biggest challenge they face as a result of having an arrest or conviction (Unlock, 2019). The Ministry of Justice's *Statistics on Race and the Criminal Justice System*, a report from 2016, illustrated that Black individuals were cautioned more than two times more than white individuals. This same report indicated that the prosecution rates for black males were three times higher than white males, with the rate for black females being two times higher than white females (Ministry of Justice, 2017). The 2018 version of this report indicated that across various stages of the criminal justice system, minority ethnic groups were over-represented. Stop and searches, for example, increased for all minority ethnic groups from 2014 until 2018, from 13% to 22% for black

suspects. Minority ethnic children accounted for 67% of children arrested in London, with minority ethnic adults accounting for 52% (Ministry of Justice,

2019). Evidently, arrest and conviction rates are generally higher across ethnic groups, rendering criminal record data an additional barrier to employment for BAME candidates when seeking employment after completing their sentence (Ministry of Justice, 2016; Ministry of Justice, 2019).

Job centres as well as trade unions are key organizations that help support and protect its members. A focus on this level would ensure that applicants with past criminal convictions are educated and aware of their rights under the ROA. Implementing an education scheme would help in this regard as it would allow individuals wanting to join the workforce to seek out advice and have a point of contact throughout the employment process. In a prejudiced system, this scheme would tackle discrimination of marginalised groups by eradicating inequalities at the first stage of employment.

Stakeholders

At the public level, we are contacting local MPs and MSPs to push for legal reform. We are also reaching out to individuals who consider a fair criminal records system important and are willing to send an email to their local MP about the necessity of a reform. By lobbying with people in Government, there is potential for current legislation to be changed, which would directly impact people with a criminal record. We believe this would be the most effective path for change at the UK-wide level.

At the company level, employers must have a policy that outlines the purpose of collecting criminal record data, provides a lawful basis for processing, and sets out how they will uphold applicants' data subjects rights. Unlock Charity's campaign 'Ban the Box' provided us with a list of employers who have already committed to removing the tick box from application forms and asking about criminal convictions later in the recruitment process, which helped identify the outliers. We devised a list of employers in the food and drink, retail, finance and legal industries and collated their correlating email addresses. We chose to target the food and drink and retail industries because they fall under the ROA 1974 and are known to have fewer barriers to entry for people with convictions. On the other hand, *Prospect Magazine* notes that employers in regulated professions can request a standard criminal record check (Abrahams, 2013). This includes the finance and legal sectors, which are regulated by the Financial Conduct Authority (FCA) and the Solicitors Regulation Authority (SRA) and Council for Licenced Conveyancers (CLC) respectively. The barriers to employment in these sector are significantly higher in these industries, which is

why we have decided to focus on alleviating this barrier. Barclays Bank, Lloyds Bank and Freshfields Bruckhaus Deringer have already banned the box, which encourages us to urge other firms to do the same.

At the individual level, we aim to educate people with a criminal record about their data subject rights. A key stakeholder is the government-funded employment agency Jobcentre Plus. They provide resources for unemployed people to find work, and provide training for those who are chronically unemployed. They are situated in most cities and their resources are easily accessible online, which can maximise the spread of information. Our strategy is to provide Jobcentre Plus with an information pack that will contain information about data protection rights of people with criminal records under the GDPR and DPA18, which could serve as a foundation for an educational scheme about data rights that could be created by the Unions. We have also encouraged them to delegate a representative within each branch who would be responsible for ensuring members are educated as to their rights as data subjects when it comes to criminal record data. In addition to Jobcentre Plus, we have carried out a similar approach to job unions to amplify the information and to reach as many people as possible.

Policy Reform and Recommendations

Public Level

This recommendation calls for MPs and MSPs to amend the ROA 1974. Firstly, we urge MPs and MSPs to establish a more proportionate storage time of criminal record data on the PNC. Secondly, we request MPs formalise the process for the full erasure of minor spent convictions from the PNC. We argue that under the Data Protection Act 2018, historic and minor convictions that have already passed their rehabilitation period assigned have no necessity to remain stored in the PNC until that individual turns 100 years of age.

Breach of Data Protection Laws

The Data Protection Act 2018 assigns the role of data controller to the police meaning it is left up to the police officers' discretion to approve the deletion of data. ACRO Criminal Records Office recorded that only 9% of the requests to delete cautions, warnings and reprimands between 2017-2018 were approved (Unlock, 2020b). There have been no cases of deletion of minor convictions from the PNC, even those that have been spent. Currently, records are kept for 100 years in a database and spent convictions still appear in standard and enhanced checks often used by employers. These will remain in the PNC for 100 years from the birth of the person that was convicted.

In Chapter 3 of the Act, section 47 states that the 'data subject may request the controller to erase personal data or to restrict its processing'. It also states that the controller must erase personal data if there is an infringement of section 35, 36 (1), 37, 38(1), 39(1), 40, 41, 42 which correspond to the 7 key principles of the Act. These include:

- Lawfulness, fairness, and transparency
- Purpose limitation
- Data minimisation
- Accuracy
- Storage limitation
- Integrity and confidentiality
- Accountability

The withholding of this sensitive data infringes the requirement of Section 35 (1) 'the first data protection principles is that the processing of personal data for any of the law enforcement purposes must be lawful and fair'. It is also in breach of Section 39 (1) which aims to prevent personal data from being kept for longer than necessary.

Article 17 of the GDPR grants individuals the right to erasure, also known as the 'right to be forgotten'. Although this right is not absolute and applies in certain circumstances, there is a formal process whereby individuals can request their personal data to be completely erased. One valid reason for carrying out this process is if an individual argues that the storage of their personal data is no longer necessary for the purpose for which it was originally collected or processed for. Individuals can therefore request, either verbally or through a written statement, for their personal data to be erased (ICO, 2020b).

Inconsistencies in the Rehabilitation of Offenders Act 1974

Under the ROA 1974, the rehabilitation time period depends on the length of the sentence that was imposed or the disposal that was administered. It also sets out the limits on what convictions an employer can request to be disclosed. In a standard or enhanced disclosure certificate, employers listed on the Exceptions Order can request the disclosure of the applicant's previous spent and unspent convictions. Current police policy retains all caution and conviction information until the subject reaches 100 years of age, for 'police operational reasons and in the interest of prevention and detection of crime'. As we have previously mentioned, it is only when there are compelling reasons that an individual can raise a claim for their record to be erased yet it is unlikely to result in the deletion of sensitive data. This means that under the ROA, there is still no formal process for minor or historic spent convictions to be erased from the PNC (Ministry of

Justice, 2014). For example, youth cautions, reprimands and warnings remain on the PNC to be revealed to potential employers which the Supreme Court ruled as unlawful in 2019 (Unlock, 2020b).

Amendments to the ROA

This recommendation urges MPs and MSPs to draft a bill that amends the Rehabilitation of Offenders Act. This already established Act deals with rehabilitation periods for those with criminal convictions.

The bill would make amendments to the ROA in the following ways:

Once rehabilitation time has passed, the storage of spent convictions no longer serves the purpose they did when they were recorded. Thus we urge MPs and MSPs to establish a reduced storage time in the PNC that is more proportionate to already spent, historic and minor convictions. In particular, those that would be checked by employers in a Standard disclosure for jobs. Historic and minor convictions remaining on the PNC until the subject is 100 years of age is in breach of the Data Protection Act as it is a disproportionate and unfair attempt to further marginalise citizens with criminal records.

Secondly, a formalised procedure that follows a similar process as under the 'right to be forgotten' found in the GDPR should be created. It would consist of a formalized process by which, under the ROA, individuals with previous convictions that have become spent have the option to have their case heard for the erasure of their criminal record from the PNC. This would aid individuals that feel discouraged in the job application processes whereby their recently spent conviction keeps them at an unfair disadvantage. This would be in line with 7 key principles of the DPA 2018 as it would help prevent disproportionate impact on law-abiding citizens with spent convictions.

Finally, to move towards a more inclusive employment environment, we urge MPs and MSPs to advocate for legislation that will extend the Ban the Box campaign into a legal instrument for all employers both in private and public bodies. Indeed, the UK should follow the United States' model in which 35 states have codified Ban the Box by placing it on statutory footing. This would render it unlawful for employers to request or collect criminal offence data in the first stage of a job application (Unlock, 2020a). Placing Ban the Box on statutory footing in the UK would be a welcomed legislative move capable of reducing barriers to employment and discrimination for individuals with old or minor offences. Further, a statutory requirement obligating employers to not collect this data at the application stage would enable employers as data controllers to not only comply with their existing obligations under the GDPR, DBS Code,

and ROA, but also stop prejudicial practices. As long as the box remains part of job applications, UK hiring practices remain discriminatory as perfectly law-abiding, reformed individuals may be filtered out due to minor and old crimes despite being otherwise qualified for the role.

The Employment Rights Act 1996 (ERA)

The ERA lays out the rights of employees in the course of their work or dismissal. It specifically lists the situations in which unfair dismissal can be held to occur. A major inconsistency in legislation lies in the fact that Section 4(3) of the ROA holds that a spent conviction, or failure to disclosure a spent conviction, "shall not be proper ground for dismissing or excluding a person from any office, profession, occupation or employment," yet there is no equivalent provision in the law of employment (Unlock, 2020a). Accordingly, one of our proposals for legal reform calls for an amendment of the ERA to include unfair dismissal on the grounds laid out in Section 4(3) of the ROA. This would, in effect, protect workers and employees from being refused work due to a spent conviction through bringing Section 4(3) of the ROA into the ERA. The important role of the law in preventing any form of discrimination brought about the Equality Act of 2010 which made it unlawful to refuse work due discrimination of any nature; similarly, discrimination on the grounds of criminal history should be protected under the law through the legislative means discussed herein.

Company Level

This recommendation argues that employers should reform their hiring policies and adopt more inclusive, fair approaches to recruitment. A major aspect of this reform should include not requesting conviction information at the initial stage of the application cycle as a means of discriminating against and deselecting qualified and loyal candidates. For this reason, our primary recommendation at the company level in the UK is to 'Ban the Box.' As aforementioned, Ban the Box is a global campaign aiming to increase opportunities for individuals with criminal records. The main aspect of this campaign is for companies to literally ban the box in the initial application which inquiries about convictions or arrests. This is important to ensure minor and old offences do not hinder individuals who have seriously turned their lives around from gaining employment they are qualified for. It is also important to note that every employer who commits to Ban the Box is undertaking a general commitment to assess an applicant's skills and experience on their merit - there is no one size-fits-all approach to

implementing Ban the Box. In the coming paragraphs, key reasons for employers to adopt this campaign will be outlined.

Breach of Data Protection Laws

Collecting data relating to criminal records at the application stage is likely a breach of data protection laws. The General Data Protection Regulation ('GDPR') Article 5 sets out seven key principles for data collection as have been reiterated throughout this proposal:

a. Lawfulness, fairness, and transparency
b. Purpose limitation
c. Data minimisation
d. Accuracy
e. Storage limitation
f. Integrity and confidentiality
g. Accountability

Data principle (c) particularly obligates all organizations to abide by three pillars of data minimisation: ensuring the data collection is adequate, relevant, and limited to what is necessary. It is easy to violate this principle where a job falls within the Rehabilitation of Offenders Act, especially considering that there is no legal obligation to collect conviction data except in specific scenarios as mentioned previously (Unlock, 2018b).

Furthermore, requesting criminal record data at the first stage of the application can breach individual data subjects' rights. If an ineligible check occurs, Articles 79 and 82 of the GDPR enables the individual to claim damages where they believe their personal data rights have been breached (Unlock, 2020b). Upholding principles (a), (b), and (c) would render it illegal to obtain 'basic' checks through the DBS for jobs covered by the ROA because they are not only unnecessary, but protected under the Act.

Data protection principle (a), specifically with regards to transparency, would require employers to clarify which information applicants should disclose when answering any questions related to criminal records, and ensure the question is not phrased in a way which is 'misleading' or 'unlawful'. A misleading question is one which is unclear or underhanded, to the effect of requiring an applicant to disclose information that the employer is not legally entitled to obtain. An example of an underhand question can be exemplified through Costa's application form, identified during a survey conducted by Unlock of 80 UK employers, which asks candidates: 'Under the Rehabilitation of Offenders Act 1974 you are required to share with us information related to any unspent

criminal convictions. Do you have any unspent criminal convictions?' This question is underhanded because it implies that the candidate must disclose the information to the employer, which is factually inaccurate as the majority of employers have no legal obligation to request criminal record information. Furthermore, the ROA does not *require* individuals to share information about their criminal record unless they are asked. Accordingly, the question is capable of misleading applicants into revealing personal data relating to criminal records which are not a prerequisite for the role or a legal requirement (Unlock, 2018a).

Additionally, an unlawful question would be one which results in employers accounting for spent convictions or cautions when hiring for jobs protected under the ROA. For those roles excluded from the ROA, employers may be in breach of the DBS code for processing information outwith the DBS filtering rules. An example of this is seen with Superdrug: Superdrug's application form asks applicants if they have 'any live civil criminal or military convictions or been formally cautioned/warning (sic) by the police.' This is potentially unlawful for two main reasons. Firstly, it is unclear what is meant by 'live' convictions as this term has no legal definition, so applicants may not know what information they have a right to keep private. Secondly, cautions and warnings are immediately spent and are not subject to disclosure in the majority of roles. In this way, the question is 'potentially unlawful' because it would require the applicant to provide personal data which the company does not have a legal entitlement to (Unlock, 2018a).

Indeed, the GDPR makes it clear that 'criminal offence data' should only be collected by employers if they can prove that it is necessary. Compliance with this obligation would require employers to clarify the purpose of collecting the information, specify a lawful basis and condition for obtaining it, and ensure employees and applicants are aware of the privacy and data rights. An example of a lawful basis is a contract (for example, an agency that provides staff for nursing or teaching), vital interests, public tasks (such as sworn officers and some government jobs), or through consent. Unfortunately, when it comes to vital interests very few roles would qualify as this would require the collection of data to save or protect one's life. With regards to consent as a lawful basis, it is unlikely that an applicant would be able to give genuine consent if they know they will not be considered if they do not answer questions about criminal offence data (Unlock, 2018b).

With regards to necessity, Article 10 of the GDPR requires not only that a condition for processing the data is determined, but also that the necessity of the processing is established. Demonstrating necessity would require illustration that the purpose of collecting the data is directly and rationally

linked to the collection of the criminal record data. Indeed, Unlock's analysis illustrates that compliance with the GDPR would be unlikely as asking applicants to disclose criminal offence data at the application stage would seldom satisfy the lawful bases and meet the threshold of necessity required.

Breach of the Rehabilitation of Offenders Act 1974 and Police Act 1997

Employers can incur legal liability if they carry out a higher level DBS check than is permitted under the law. Specifically, the Rehabilitation of Offenders Act is breached where employers obtain information about cautions or spent convictions for roles protected within the Act. Under the Police Act 1997, where employers knowingly carry out a check at a higher level than what is allowed under the law, they may be charged with a criminal offence. Section 123(3) of this Act makes it clear that it is a criminal offence to knowingly for an individual to make a false statement for the purpose of obtaining a certificate under the Act, with the maximum penalty set at six months imprisonment or a fine (Unlock, 2020b).

Breach of the DBS code

As aforementioned, the DBS processes requests for criminal record checks in England and Wales. In Scotland, the equivalent service is called Disclosure Scotland and requests are processed in accordance with the Scottish Rules under the ROA, which falls under Section 5. The DBS Code includes employers' obligations in relation to personal data garnered using standard and enhanced checks. Failing to comply with the provisions governing these higher levels checks, and carrying out ineligible checks, could lead to repercussions including the de-registration of registered bodies (Unlock, 2020b).

Business benefits of recruiting individuals with convictions

As discussed above, 81% of employers found hiring people with criminal records had a positive impact on their business, while 75% of consumers were confident buying from businesses who hired individuals with criminal records. Furthermore, Ricoh UK estimates that each person hired through Ban the Box actually saves the business £390.10 through reducing overheads. Additionally, employers can benefit from access to a wider, more diverse talent pool. This is a significant benefit given that, (1) 11 million individuals in the UK have a criminal record, and (2) over 50% of employers find it difficult to fill vacancies due to skills shortages which can easily be filled by people with criminal records. Finally, adopting Ban the Box is a positive influence on an organisation's business credentials and reputation as it illustrates their contribution to society and local communities. Indeed, adopting fair

recruitment practices allows organisations to make a tangible difference through providing opportunities to those who are often marginalised in society (National Criminal Justice Art Alliance, 2019; Unlock, 2018a).

Considering fair chance recruitment principles

When adopting the Ban the Box campaign, employers should familiarise themselves with fair chance recruitment principles. At the core of the Ban the Box campaign is providing opportunities to individuals who have been hindered by old or minor offences which do not reflect their current capacities or values. This principle is deeply rooted in the need for non-discrimination in employment. Unlock, in collaboration with employers, recruitment professionals, and experts in data protection, have devised the following ten core principles:

1. Consider whether your organisations *needs* or *wants* to ask
2. Have a clear and accessible policy
3. Ban the Box and defer any questions, if necessary, under after a conditional job offer
4. Be clear about any questions asked, including their purpose and the applicant's rights
5. Follow rehabilitation and data protection legislation, as criminal records is sensitive personal data and obtaining it requires necessity
6. Ensure actions are proportionate
7. Ensure actions are fair and consider criminal records in context
8. Be confident in your organisation's process
9. Understand discrepancies
10. Document decision-making (Recruit!, 2020b)

These ten principles are intended to broadly guide employers towards fair practice when hiring individuals with convictions, and can be used by recruitment professional and human resources departments to mould new policies that are more consistent with the legal obligations aforementioned. As part of this proposal's company level recommendation, our team will be producing an online pamphlet detailing these principles and their application in company policy and emailing this information to UK employers who have not yet banned the box. This should allow recruiters to better educate themselves with fair recruitment principles, the incentives for hiring individuals with criminal records, and ways to do their part.

<u>Individual Level</u>

This recommendation calls for the promotion of knowledge about employment

and data protection rights. One in six individuals in the UK have criminal offence data, but many of them are unaware of data protection rights under GDPR (Unlock, 2020b). Therefore, the aim of this 'individual level' recommendation is to reach one of our key stakeholders - individuals with minor and old offences – who are unable to access the legal information they need to protect their rights. As such, we have identified two locations where people with minor and old convictions, who are interested in employment, may be looking for information: Job Centres Plus (JCP) and trade unions.

Trade unions are crucial to the representation of employee interests in various sectors and organisations. One of the functions of trade unions is to support, protect and further the interest of its members, through providing advice and information on work-related problems, and ensuring access to legal advice. Some organisations, such as Education International, a global union federation of teachers' trade unions representing the education sector worldwide, include the right to be educated about one's rights in their policy:

'All education workers have the right to be educated about their rights, and to have a right to full representation through their union or association at every step of any disciplinary, performance, or grievance process.

We believe educating people about their rights should be one of the main responsibilities of all trade unions. People with criminal records who found employment and are members of trade unions may want to switch careers or get promoted, which is why they should be aware of their data rights under GDPR. Those who struggle to find employment and visit job centres would also benefit from knowing their data protection rights under GDPR'. (Education International, 2020).

In line with this rationale, we believe that trade unions in the UK should make it a priority to educate their members about their data protection rights. As part of this recommendation, we hope to facilitate this goal through providing an information pamphlet for unions containing information about data protection rights of individuals provided by the GDPR, highlighted below:

1. The right to be informed about the collection and the use of their personal data.
2. The right to access personal data and supplementary information.
3. The right to have inaccurate personal data rectified, or completed if it is incomplete.

4. The right to erasure (to be forgotten) in certain circumstances.
5. The right to restrict processing in certain circumstances.

6. The right to data probability, which allows the data subject to obtain and reuse their personal data for their own purposes across different services.
7. The right to object to processing in certain circumstances.
8. The rights in relation to automated decision making and profiling.
9. The right to withdraw consent at any time (where relevant).
10. The right to complain to the Information Commissioner. (gov.uk, 2020).

This pamphlet will be distributed via e-mail to not only trade unions, but also Job Centre Plus in the UK, making it simpler for these entities to distribute this information to their members or clients. In the future, this information could serve as a foundation for an educational scheme about data rights that could be created by unions and Job Centre Plus to further education about these rights. Such an education scheme could include publicly held presentations or seminars detailing applicants' rights and the ways that these rights might be abused; for example, through educating affected candidates about the misleading or unlawful questions mentioned in the previous recommendation, and about their rights under the ROA to disclose a spent conviction.

As a part of this scheme, we suggest every trade union should have a delegated data protection officer, specialising in data protection rights. The purpose of the data protection officer is to ensure that individuals are aware of their rights as data subjects and to have a designated expert to seek legal advice from. This is crucial considering the confusion and lack of awareness about one's rights in relation to the processing of criminal offence data. Not only are the legal resources detailing these rights and obligations often complex for the average layman, but they are also often obscure and difficult to identify. Therefore, a data protection officer can mitigate these deficiencies and ensure data subjects are aware of their rights through serving as a point of contact for any relevant issues.

Furthermore, we advise all JCPs to enlist designated advisors specialising in data rights and employment facilitation for ex-offenders who are capable of serving as a point of contact for relevant inquiries or concerns. This individual should make it a priority to reach out to the community who use JCP as a resource for moving forward with their lives, including ex-offenders, through organising public seminars aimed at educating individuals about their data rights in employment. According to a recent *House of Commons Work and Pensions Committee* report, a growing number of people with past convictions rely on Job Centre Plus for assistance when looking for work. However, they are often deemed 'hard cases' and therefore are not provided the sufficient, specialised help they require. The study also illustrated that the quality of JCP support is inconsistent and insufficient in some areas, and that the majority of

representatives lack the requisite training and expertise needed to support ex-offenders. This was especially true in relation to the disclosure of convictions during the application process and interviews. Numerous individuals surveyed by The Work and Pensions Committee described inefficiency in JCP's current practices, including testimony that JCP representatives were either reluctant to engage with them or even encouraged them to lie about having a conviction. Others shared that they felt the JCP did not offer any specialised assistance for people with past convictions. In fact, some ex-offenders seeking advice at the JCP felt a 'distinct reluctance' to provide assistance to them. Some mentioned that they were advised to apply for jobs at companies which were known for having a selection processes designed to filter ex-offenders early on (House of Commons Work and Pensions Committee, 2016). This is clearly problematic and indicates significant deficiencies in the JCP regime as its primary purpose is to support individuals across the UK, regardless of their background, to find employment. Accordingly, a designated JCP officer, specialising in supporting ex-offenders, would significantly improve the quality of expertise and support offered by the JCP when advising ex-offenders who are qualified and determined to work. This officer could provide annual training to JCP employees and serve as an expert within the JCP organisation for complex queries. Not only that, but this officer could, as aforementioned, host public educational seminars and work as an direct advisor. Overall, it is inexcusable for ex-offenders who are ready to work, qualified, and law-abiding to be dismissed by the JCP. We hope that this individual level recommendation will be adopted by trade unions and JCPs in order to properly support and advise ex-offenders.

Next Steps

Goals upon publication

Having discussed an array of recommendations across the public, company, and individual level, there are certain solutions worth prioritising at this stage. For one, it would be prudent for Ban the Box to achieve legislative footing so that criminal and arrest records are not accessible to employers during the initial stages of the employment cycle. This will ensure this data does not serve as a filter to separate candidates with arrest or criminal records from the rest of the pool. In the United States, 'fair chance hiring' practices have been implemented, including a statutory requirement for employers to reserve inquiries relating to criminal record data until pre-employment. As such, a crucial solution to prioritise is for the UK government to reform policies

relating to the disclosure of criminal records, so that minor and old crimes do not appear on DBS searches. Another key solution is to add Section 4(3) of the ROA is added to the Employment Rights Act 1996's list of unfair dismissals, so that spent convictions are not considered "proper grounds for dismissing or excluding a person from any office, profession, occupation or employment." This would be a significant change as there is no equivalent protection in employment law legislation currently. It seems contrary to anti-discrimination employment principles to not include discrimination against individuals with arrest or criminal records. It is evident the ROA intends to prevent potential employers from excluding a candidate due to spent convictions. Accordingly, protections should be afforded to employees or applicants at risk of being refused work due to a spent conviction in the same way that the Equality Acts protects individuals from multiple other forms of discrimination. This will also give effect to the envisioned societal impact of the ROA. This solution can be accomplished through enacting petitions on change.org and through the UK government portal, and identifying and communicating with MPs/MSPs committed to reform in this area.

It is also important to focus on employer level change as Ban the Box is a crucial component of meeting our policy objectives of fair recruitment and equal opportunities. Additionally, companies have control over their own HR policies and can always opt not to request criminal/arrest record disclosure (except for exempted roles) - regardless of government policy on this matter. Accordingly, one of our goals upon publication is the education of employers through targeted training about banning the box and asking misleading or unlawful questions, the direct and indirect discrimination that occurs as a result of unnecessarily soliciting this information, and the benefits (legal and business) of hiring individuals with criminal or arrest records. A feasible means of achieving this is to encourage employers to join the Ban the Box campaign and implement new HR and hiring policies that do comply with the GDPR and fair recruitment principles outlined above. We hope that the information packet we produce will be a factor contributing to this education and reform.

Potential problems

Primary Data

As with all primary data collection, there are various ethical considerations. A primary concern includes ensuring that the information we obtain is considered within the sample and not taken as necessarily representative of the entire UK population. Rather, we hoped to gauge the views of the average layperson about working with individuals with old or minor offences.

However, survey responses were limited despite our efforts to collect information through a range of platforms. This brings up problems of generalisability. On the same note, we are concerned that the survey results may or may not be true to people's opinions. We have tried to achieve this by ensuring anonymity and that the individual only reveals their city and industry, however it is impossible to ensure the sincerity of responses beyond that.

Public Level

Pushing for legal change at the public level is, by nature, a particularly difficult task and often requires great momentum. Being able to lobby with MPs and MSPs, particularly in this current climate, may be an obstacle if it is limited to online interactions. Moreover, the Police National Computer (PNC) is available to all law enforcement organizations yet the UK law is composed of different criminal justice legal systems in England, Wales, Scotland and Northern Ireland. Therefore, a consensus agreement between all four legal systems may be difficult to obtain. Similarly, the Disclosure and Barring Service (DBS) issues checks to England, Wales, the Channel Islands and the Isle of Man. The Scottish equivalent is Disclosure Scotland, yet unlike DBS, they allow 'basic' checks to be used by any prospective employers provided the applicant consents. To ensure effective change and that all nations are equally attended to, our campaigns must tackle each nation accordingly.

Company Level

As aforementioned, articles by Doleac (2016) and Semuels (2016) reveal that 'Ban the Box' in the United States may have the adverse effect of 'statistical discrimination' because the lack of knowledge about any criminal record will lead employers to assume, and thus discriminate on the basis of race and gender. A recent paper explored the effect of the implementation of 'Ban the Box' policies on employment for young, low-skilled, black and Hispanic men. They found that the policy lowered their chance of being employed by 5.1% for young, low-skilled black men, and 2.9% for young, low-skilled Hispanic men (Doleac & Hansen, 2016). However, much of the research on the effect of 'Ban the Box' policies on racial discrimination are US-based and at the time of writing - this has not yet been explored at the UK level. Despite this, we will take these findings into consideration and provide a more holistic approach to companies by encouraging a three-step process. We will ask them to Ban the Box, take positive actions by providing apprenticeships and work opportunities for people with small spent criminal records and from difficult socioeconomic backgrounds, and review their recruitment approach as a whole. Other case-studies at the UK-level provide positive outcomes and effects on businesses, which we will convey through our leaflet.

Individual level

At the individual level, our main concern is that companies may not appoint a data protection officer. The appointment of this officer is essential to ensure consistent protection of data subject rights, and to ensure that people are informed of their rights which they may not otherwise know. The absence of such an officer may lead to further discrimination of people with a criminal record, and in particular BAME people. Another concern at the individual level will be providing this information to affected individuals who are not able to access or join a trade union or Job Centre Plus.

Conclusion

This report has focused on the disadvantages faced by individuals with minor and old convictions in the employment context in the UK. Our proposal tackled this issue from three levels: the public level, the company level, and the individual level which focused on change through Job Centre Plus and Unions. At the public level, we recommend that MPs and MSPs amend the Rehabilitation of Offenders Act 1974 in a way that complies with the data protection principle of storage limitation, put Ban the Box on statutory footing, and formalise a process to allow individuals to erase their past convictions from the Police National Computer (PNC). At the company level, we recommend that employers review their recruitment process and adopt 'Ban the Box' as an organisation. We also suggest that employers take positive steps towards including candidates who are otherwise marginalised due to their past, when, in practice, they have radically changed their lives and are capable of contributing to the workforce. At the individual level, we recommend that Job Centres and Unions actively educate their members about their data subject rights under the GDPR and DPA18 in order to ensure data subjects are educated about their personal data rights. This can prevent discrimination caused by illegal access to personal data. We have proposed that Job Centres and Unions delegate a data protection officer to ensure that rights are consistently upheld.

Overall, our research has hoped to shed light on the barriers to employment faced by those with criminal record data, specifically for old and minor offences. We want to reiterate again that our research has been aimed at addressing the discrimination faced by those who have not committed serious

sentences of any kind, rather those smaller, minor, and older offences that do not bear upon one's current ability to be a safe, functioning, and law-abiding member of society. We hope that this research will incite change at all levels we have discussed and promote a workplace that is truly inclusive.

The Equality Act of 2010 sought to increase diversity and inclusion at the workplace through prohibiting discrimination of any kind: we believe that discrimination on the basis of one's past should be included in this ideology. As we have discussed, the personal data rights of those affected by this issue are a fundamental human right and should not pose a hindrance to one's ability to move on and improve their lives.

If you would like any more information regarding our proposal, please contact us. For more information and to sign petitions related to this topic, head to https://www.unlock.org.uk/.

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Schedule 1

Art. 5 GDPR - Principles relating to processing of personal data

1. Personal data shall be:
    1. processed lawfully, fairly and in a transparent manner in relation to the data subject ('lawfulness, fairness and transparency');
    2. collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes ('purpose limitation');
    3. adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation');
    4. accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay ('accuracy');
    5. kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject ('storage limitation');
    6. processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate

technical or organisational measures ('integrity and confidentiality').

2. The controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Art. 6 GDPR - Lawfulness of processing

1. Processing shall be lawful only if and to the extent that at least one of the following applies:
    1. the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
    2. processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
    3. processing is necessary for compliance with a legal obligation to which the controller is subject;
    4. processing is necessary in order to protect the vital interests of the data subject or of another natural person;
    5. processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
    6. processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.
2. Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.
3. Member States may maintain or introduce more specific provisions to adapt the application of the rules of this Regulation with regard to processing for compliance with points (c) and (e) of paragraph 1 by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing including for other specific processing situations as provided for in Chapter IX.

4. The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:
    1. Union law; or
    2. Member State law to which the controller is subject.
5. The purpose of the processing shall be determined in that legal basis or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. 3That legal basis may contain specific provisions to adapt the application of rules of this Regulation, inter alia: the general conditions governing the lawfulness of processing by the controller; the types of data which are subject to the processing; the data subjects concerned; the entities to, and the purposes for which, the personal data may be disclosed; the purpose limitation; storage periods; and processing operations and processing procedures, including measures to ensure lawful and fair processing such as those for other specific processing situations as provided for in Chapter IX. 4The Union or the Member State law shall meet an objective of public interest and be proportionate to the legitimate aim pursued.
6. Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia:
    1. any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;
    2. the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;
    3. the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;
    4. the possible consequences of the intended further processing for data subjects;
    5. the existence of appropriate safeguards, which may include encryption or pseudonymisation

Art. 10 GDPR - Processing of personal data relating to criminal convictions and offences

1. Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. 2Any comprehensive register of criminal convictions shall be kept only under the control of official authority.