

A question of fairness

Research into employers asking about
criminal records at application stage

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1. Introduction

Unlock is an independent award-winning national charity that provides a voice and support for people with convictions who are facing stigma and obstacles because of their criminal record, often long after they have served their sentence.

Firstly, we help people. We provide information, advice and support to people with convictions, including running an information site and confidential peer-run helpline. We help practitioners support people with convictions by providing criminal record disclosure training. And we support employers and universities in treating people with criminal records fairly.

Secondly, we advocate for change, working at policy level to address systemic and structural issues. We listen to and consult with people with criminal records, undertake research and produce evidence-based reports to inform policy makers and the public. We challenge bad practice, influence attitudes and speak truth to power. We co-founded and support the Ban the Box campaign and we are pushing to wipe DBS checks clean of old/minor criminal records.

Unlock is being supported by the Esmée Fairbairn Foundation to run a project, Fair Access to Employment, which includes supporting employers to develop and implement fair and inclusive policies and procedures that enable the recruitment of people with convictions and that deal fairly with criminal records. Our objectives include:

1. Supporting larger employers in implementing significantly fairer and more inclusive policies and procedures, working with a range of existing employer networks such as 'Ban the Box' and the 'Employers' Forum for Reducing Reoffending' (EFFRR).
2. Developing and maintaining a resource centre for employers and recruitment professionals.
3. Challenging employers who act unfairly and/or unlawfully, improving their practices as a result.

This report sets out the findings of our research into the online application systems of 80 large, well-known national employers.

Having co-founded the Ban the Box campaign in 2013, we were keen to find out how, 5 years since the campaign launched, what the current practices of some of the most recognisable businesses on the high-street were.

We looked at online application systems to see whether employers asked about criminal records, the guidance provided and whether the question was clearly and accurately worded. In addition, we considered whether asking all applicants about criminal records at application stage contravenes with the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA18).

2. Key findings and recommendations

2.1 Key findings

We surveyed 80 large, national employers across eight sectors – supermarkets, retail, hotels, food and drink, construction, car manufacturing, utilities and communications and found that:

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

2.2 Recommendations

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

Government should:

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

3. Implement financial incentives for employers

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

4. Review legislation

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

Employers should:

1. Sign up to Ban the Box

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

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

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

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

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

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

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

5. Recognise the business benefits of recruiting people with convictions

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

3. Background

11 million people in England and Wales have a [criminal record](#). The majority have never been to prison and will only ever be cautioned or convicted once, yet analysis of Unlock's data over the last decade shows that old and minor criminal records cause the most difficulty for people.

While most criminal records become 'spent' eventually, applicants with a criminal record may struggle to find employment until then, leaving a big gap in their work history. In addition, the introduction of [basic DBS checks](#) earlier this year is expected to lead to an increase in checks at this level, even where a conviction has no bearing on an applicant's ability to do the job.

3.1 Criminal record disclosure rules

The legislation surrounding criminal records and disclosure is complex and confusing. Major (and separate) changes to legislation have come into force in 2013, 2014, 2015 and 2018. The rules relate to applicants when answering questions during recruitment ('self-disclosure') and to official criminal record checks (provided in England and Wales by the Disclosure and Barring Service).

Asking applicants to self-disclose

1. There is no law that requires employers to ask applicants about their criminal record at application stage.
2. The [Rehabilitation of Offenders Act 1974](#) (ROA) supports the reintegration of people with convictions by giving them legal protection from having to disclose their record after a legally determined period of living crime free. After this rehabilitation period criminal records can be [considered 'spent'](#).
3. Once spent, the person is treated as if they haven't got a criminal record – meaning they don't need to disclose it when applying for most paid or voluntary jobs. Most convictions will become spent.
4. Most jobs are covered by the ROA and, where it applies, it is illegal for an employer to discriminate against somebody with a spent criminal record. Employers should not ask applicants about spent convictions and, if they self-disclose, you should ignore that information.
5. Where the criminal record is unspent, it is generally up to the discretion of the employer whether to employ the person.
6. For roles [exempt from the ROA](#), an employer is entitled to consider both unspent and spent convictions and cautions, but is not allowed to consider protected convictions and cautions – these are [filtered](#).

Requesting official criminal record checks

The Disclosure and Barring Service (DBS) is responsible for issuing official [criminal record checks](#) in England and Wales. The level of check that can be carried out is set out in legislation.

1. **For roles covered by the ROA**, an employer can carry out a basic criminal record check. This contains details of unspent convictions only. An individual can apply for their own basic check, or an organisation registered with the DBS as a 'responsible organisation' can also apply, subject to the individual's consent. There is no specific legislation that entitles employers to ask about criminal records for non-exempt roles - but nor is there legislation that prohibits it. Part V of the Police Act 1997 enabled the provision of official criminal record checks. Employers are only entitled to carry enhanced or standard checks for roles exempt from the ROA. Basic checks appear to be authorised by the Police Act but the GDPR requires employers to demonstrate the necessity of collecting criminal records data. This means they must demonstrate the purpose of checking, as well as identifying a lawful basis and condition of processing (these are specified in the GDPR, which is explained in more detail below).
2. **For roles exempt from the ROA**, an employer can carry out a standard or enhanced criminal record check, depending on the role. A standard check contains unspent and spent convictions and cautions, but not those convictions or cautions that are now [protected](#) (i.e. filtered by the DBS). An enhanced check contains the same information but can include additional information the police deem relevant - e.g. arrests or allegations that didn't result in a formal outcome. If the role involves working in 'regulated activity' with adults or children, the enhanced check can involve a check against the adults' and/or children's barred list.

3.2 Ban the Box

Unlock was a founding member, along with Business in the Community (BITC), of the [Ban the Box](#) campaign. Now in its 5th year, Ban the Box calls on employers to create a fair opportunity for people with criminal records removing the tick box from application forms and asking about criminal records later in the recruitment process.

No employer has a legal obligation to ask about criminal records at application stage but, as our findings show, the majority still do. More than 110 employers so far are signed up to the campaign. Ban the Box employers include: Accenture; Barclays; Boots; Bristol City Council, the Civil Service, Eversheds; Interserve; Land Securities; Linklaters; Ricoh, Sodexo; Veolia. The full list is maintained by [BITC](#).

What's wrong with the box?

1. **It screens out talented and qualified applicants**
 - a. Prejudice and misinformation mean applicants who declare a criminal record are discriminated against regardless of their skills or experience.
 - b. Some automated systems prevent applicants who tick the declaration box from completing the application form.
2. **There is no opportunity to contextualise or to explain**
 - a. Application forms rarely include enough space for an applicant to explain the circumstances or how they've made changes since. How would your worst mistakes look in black and white?
3. **People de-select themselves from applying - so employers miss out**
 - a. The shame, embarrassment and stigma of disclosing a past criminal record puts a significant number of people off from even applying for roles where their criminal record will come up.
4. **It can lead to discrimination; some groups are disproportionately affected**
 - a. Young people, BAME people and those who have experienced the care system are disproportionately criminalised and as a result these groups are disproportionately excluded from the workplace and economically disadvantaged.

3.3 The GDPR and data protection

The General Data Protection Regulation (GDPR) forms part of the data protection regime in the UK, together with the Data Protection Act 2018 (DPA18). The main provisions of this have applied, like the GDPR, from 25th May 2018. The GDPR and the DPA18 applies to the processing of all personal data.

Criminal records data (including convictions, cautions and allegations) are a separate category of data – “criminal offence data” – and employers should only collect this information if they can demonstrate that it is **necessary** as part of the recruitment process. To demonstrate compliance, employers need to:

1. Define the purpose of collecting criminal records data,
2. Identify a lawful basis and a condition for processing, and
3. Set out a privacy policy and ensure applicants and employees are made aware of their rights over the information collected.

Unlock has produced a detailed guide on complying with [data protection legislation](#), which explains these three stages of ensuring compliance in more detail.

The survey in this report looked at online application systems, many of which are hosted by third parties on behalf of the employer or bought off the shelf. The employer is the data controller and is legally responsible for demonstrating compliance, so where an employer contracts a third party or uses software to host application portals the employer is responsible for ensuring only necessary information is collected.

A key element of the GDPR and data protection that relates to the findings of this report is asking all applicants to disclose at application stage is **unlikely to meet the necessity test** as it is neither a specific nor targeted means of collecting criminal records data:

- there are usually many more applications than there are positions – unsuccessful applicants will have unnecessarily had to disclose their criminal record.
- most legitimate interests in collecting this data could be met by collecting less data – for example, by only asking the applicant offered the role.

4. Survey of employers

4.1 Approach to findings

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

Asking about criminal records at an early stage might not accurately indicate an employer's attitude to recruiting people with criminal records – indeed many applications advise that a criminal record will 'not necessarily' disqualify an applicant. However, the variable quality of the questions and any guidance or support offered to applicants do provide an indication of how much thought an employer has put into recruiting this group. Applicants with criminal records often deselect themselves rather than face the humiliation of yet another rejection.

Most roles at each of the employers we surveyed would be covered by the Rehabilitation of Offenders Act 1974. Few, if any, jobs in these sectors include job roles that are exempt from the ROA, meaning employers are usually only legally entitled to ask about unspent convictions and/or carry out a basic check. Employers would be under no legal obligation to ask about criminal records at any stage in the process and in most cases a criminal record would not affect an applicant's ability to carry out the job. In this section, we include screenshots of online application forms, already in the public domain, that ask what we describe as misleading and/or potentially unlawful questions. The aim of highlighting these is not to 'name and shame' employers, but to illustrate areas of bad practice and offer guidance on how to improve. We want to engage with employers so that they can increase their talent pool by offering opportunities to skilled applicants with convictions.

4.2 Overall findings

1. 77 out of 80 employers had online application forms.
2. Of the 77 employers with online application forms, **70% (54 employers) asked about criminal records on their online application form.**
3. **80% of employers who asked the question provided no guidance** to applicants on when a conviction becomes spent.
4. **22% of employers had phrased the question about criminal records in a way that was either potentially unlawful or misleading.** Lack of guidance and misleading questions expose an employer to the risk of *asking for information they are not entitled to*, and of *putting off qualified applicants who believe they are being asked to disclose something they should not have to*.
5. None of the employers surveyed provided information to applicants on why they collect criminal records data, or for how long it will be retained. Under the GDPR, employers who fail to provide this information are likely to be in breach of the law.
6. None of the construction companies, and around half the car manufacturers, surveyed asked about criminal records at application stage.

¹ Available to download from <http://www.unlock.org.uk/wp-content/uploads/Annex-A-question-of-fairness.pdf>

4.3 Questions asked

Of the 54 employers that asked about criminal records on their online application form, there was a wide variety of questions – it is clear that there is no standard approach.

The questions are listed in full in the [Annex](#), but examples include:

- **Aldi:** “Please select to indicate ‘I do not have any unspent convictions, cautions, reprimands or final warnings’. Or, if this does not apply to you, enter details of any unspent convictions, cautions, reprimands or warnings below.”
- **BMW:** “Do you have any unspent criminal convictions? (excluding driving convictions that do not result in a custodial sentence)”
- **Ford:** “Please give details of any court-martial, conviction, outstanding summons or prosecution (except spent convictions under the Rehabilitation of Offenders Act 1974). Any false statements will disqualify you from employment, or if discovered after employment has commenced, will render you liable to summary dismissal. Are there any prosecutions pending against you? If Yes please give details of pending prosecutions”
- **Sainsburys:** “Do you have any ‘unspent’ criminal convictions?”

4.4 Guidance to applicants

80% of employers that asked about criminal records provided no guidance to applicants on how to do so. As can be seen in the Annex, questions about criminal records are phrased in all sorts of different ways and it is not always clear what information is being requested. If applicants are unsure what to disclose, they may not disclose the information an employer is looking for.

Conversely, they may disclose more than is necessary. If an applicant discloses more than necessary which is then considered, the employer risks:

- Breaching the Rehabilitation of Offenders Act 1974 and other disclosure legislation
- Breaching the GDPR and the Data Protection Act and facing action by the Information Commissioners Office (ICO)
- Breaching the DBS code of practice
- Facing a civil claim by an applicant

For most jobs, employers can only ask about unspent convictions. The time it takes for a conviction to become [spent](#) is set out in law and depends on the punishment, not the crime. The law has changed significantly in recent years and applicants may not be aware of when their conviction becomes spent. To avoid confusion, employers should ensure any questions about criminal records are clearly worded, and provide applicants with information on how to find out if a conviction is spent – for example, by using Unlock’s [disclosure calculator](#).

Even with guidance, applicants can sometimes disclose incorrectly – for example, they may get the wording of a conviction wrong, or believe that two counts of an offence count as one conviction. For jobs involving standard or enhanced DBS checks, they may misunderstand the filtering process. This is often the case with minor crimes – shoplifting or benefit fraud can see multiple counts for the same offence and – especially with old convictions – applicants have often put the past a long way behind them. An applicant may disclose inaccurately but in good faith, yet discrepancies are likely to be viewed as

dishonesty, because they have a criminal record. Indeed, Ford explicitly state the following: *“Any false statements will disqualify you from employment, or if discovered after employment has commenced, will render you liable to summary dismissal.”*

Employers should consider removing self-disclosure forms from the recruitment process and, if they consider it necessary, instead undertaking a DBS check (at the appropriate level) at the pre-employment stage. If official checks reveal information, this can begin a conversation with the individual about the content and relevance. This means employers avoid breaching the GDPR by collecting excessive data via self-disclosure forms, and any assessments are made based on factual information.

4.5 Potentially unlawful questions

It is unlawful for employers to take spent convictions or cautions into account when making decisions about recruitment for most jobs. For roles exempt from the Rehabilitation of Offenders Act 1974, it is unlawful for employers to take into account cautions or convictions that are now protected under the DBS filtering rules.

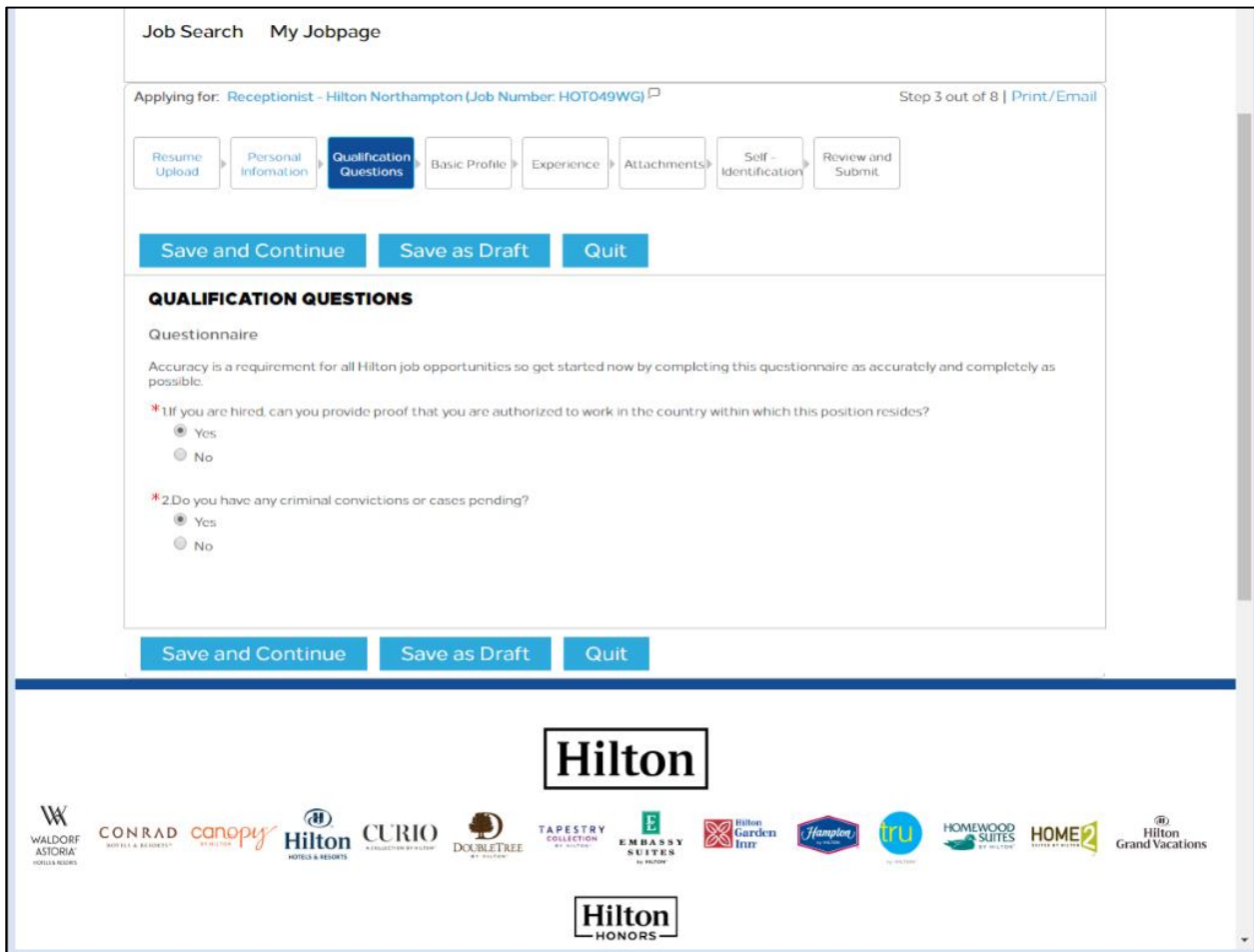
As a result, asking about spent (or, for roles exempt from the ROA, protected) convictions therefore exposes an employer to the risk of collecting information that they are legally obliged to ignore.

In addition, asking for information that employers are legally obliged to ignore would be considered excessive data collection and in breach of the GDPR and Data Protection Act 2018.

The following are examples of employers in our survey that asked potentially unlawful questions.

Example 1 - Hilton

In this example, Hilton ask 'Do you have any criminal convictions or cases pending?'



The screenshot shows the Hilton job application interface. At the top, there are links for 'Job Search' and 'My Jobpage'. Below this, the user is applying for a 'Receptionist - Hilton Northampton (Job Number: HOTO49WG)' and is on 'Step 3 out of 8 | Print/Email'. A progress bar shows the following steps: Resume Upload, Personal Information, **Qualification Questions** (current step), Basic Profile, Experience, Attachments, Self-Identification, and Review and Submit. Below the progress bar are three buttons: 'Save and Continue', 'Save as Draft', and 'Quit'.

The 'QUALIFICATION QUESTIONS' section is titled 'Questionnaire' and states: 'Accuracy is a requirement for all Hilton job opportunities so get started now by completing this questionnaire as accurately and completely as possible.' It contains two questions:

- *1 If you are hired, can you provide proof that you are authorized to work in the country within which this position resides?
 - ☒ Yes
 - ☐ No
- *2 Do you have any criminal convictions or cases pending?
 - ☒ Yes
 - ☐ No

Below the questions are three buttons: 'Save and Continue', 'Save as Draft', and 'Quit'.

At the bottom of the form, there is a large Hilton logo and a row of logos for various Hilton brands: Waldorf Astoria, Conrad, Canopy, Hilton, Curio, DoubleTree, Tapestry Collection, Embassy Suites, Hilton Garden Inn, Hampton, Tru, Homewood Suites, Home2 Suites, and Hilton Grand Vacations. Below this row is the Hilton Honors logo.

- Asking about 'any criminal convictions' could lead to applicants disclosing convictions that are spent under the ROA which, if they were taken into account by Hilton, would breach the ROA. Unless the job role is exempt from the ROA, Hilton should only be asking about unspent convictions.
- In addition, the section in which the question appears as 'Qualification Questions', which implies that applicants will be disqualified if they answer yes. It is not clear why the question is asked here, or how Hilton will use the information – in short, it does not meet the necessity test under the GDPR.

Example 2 – Marks and Spencer

Marks and Spencer ask applicants to declare unspent convictions. However, they also ask 'have you received a police caution in the last five years?'

Please confirm whether you agree to be contacted by M&S by SMS message? ☐ Yes ☐ No

Have you received a police caution in the last five years? ☐ Yes ☐ No*

Have you ever been dismissed from a previous employment for theft, dishonesty or conduct, or resigned whilst under disciplinary investigation for the same, in the last 5 years? ☐ Yes ☐ No*

Have you been convicted of any criminal offences, which are not yet "spent" under the Rehabilitation of Offenders Act 1974? ☐ Yes ☐ No*

(Ex offenders will be considered on an individual basis and the nature of their offence will be taken into account in the recruitment decision).

N.B. Once employed by Marks & Spencer, an employee must inform the company of any criminal prosecutions, convictions or cautions. Failure to do so will result in disciplinary action.

- The question Marks and Spencer asks about cautions is potentially unlawful – cautions become spent immediately and so should not be considered unless the job is exempt from the ROA. It is unlikely that any jobs at Marks and Spencer are exempt (with perhaps a very few exceptions).

Example 3 - Superdrug

Superdrug ask applicants if they have ‘...any live civil criminal or military convictions or been formally cautioned/warning (sic) by the police’.

that **Superdrug** feeling

Home

Login
Contact us

Do you have a clean and current drivers license?:*

☐ Yes

☐ No

Have you previously worked for us?:*

☐ Yes

☐ No

Do you intend to work for another employer besides us?:*

☐ Yes

☐ No

Do you have any relatives working for us?:*

☒ Yes

☐ No

If 'Yes' to the previous question, please give name, role and location of the relative(s):

Have you any live civil, criminal or military convictions or been formally cautioned/warning by the police?:*

☒ Yes

☐ No

- It is not clear what Superdrug mean by ‘live’ convictions – the term has no legislative meaning. It is also not clear that there is any legal basis for Superdrug to ask about civil or military convictions.
- In addition, the question asks about cautions and warnings – these are immediately spent and are not disclosable for most jobs.
- This question is potentially unlawful as it is asking an applicant to reveal information that Superdrug are not legally entitled to.

Example 4 – DHL Express

DHL Express ask applicants ‘Do you have any convictions, cautions, reprimands or final warnings that are not ‘protected’ as defined by the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (as amended in 2013)?’

MOTHER'S MAIDEN NAME: **This is required for your criminal record check request.**

Please answer the below questions in full to allow us to carry out Basic criminal record checks and international checks if applicable. Failure to do so may result in the termination of any Contract of Employment arising from this application. The amendments to the Exceptions Order 1975 (2013) provide that certain spent convictions and cautions are ‘protected’ and are not subject to disclosure to employers, and cannot be taken into account.

DO YOU HAVE ANY CONVICTIONS, CAUTIONS, REPRIMANDS OR FINAL WARNINGS THAT ARE NOT ‘PROTECTED’ AS DEFINED BY THE REHABILITATION OF OFFENDERS ACT 1974 (EXCEPTIONS) ORDER 1975 (AS AMENDED IN 2013)? IF YES, PLEASE PROVIDE DETAILS BELOW. YES ☐ NO ☐

CONVICTIONS:

DATE OF APPEARANCE: <input type="text"/> / <input type="text"/> / <input type="text"/>	DATE OF APPEARANCE: <input type="text"/> / <input type="text"/> / <input type="text"/>
DATE OF OFFENCE: <input type="text"/> / <input type="text"/> / <input type="text"/>	DATE OF OFFENCE: <input type="text"/> / <input type="text"/> / <input type="text"/>
NAME OF COURT: <input type="text"/>	NAME OF COURT: <input type="text"/>
SENTENCE / DISPOSAL: <input type="text"/>	SENTENCE / DISPOSAL: <input type="text"/>

CAUTIONS, REPRIMANDS OR FINAL WARNINGS:

DATE OF APPEARANCE: <input type="text"/> / <input type="text"/> / <input type="text"/>	DATE OF APPEARANCE: <input type="text"/> / <input type="text"/> / <input type="text"/>
DATE OF OFFENCE: <input type="text"/> / <input type="text"/> / <input type="text"/>	DATE OF OFFENCE: <input type="text"/> / <input type="text"/> / <input type="text"/>
NAME OF COURT: <input type="text"/>	NAME OF COURT: <input type="text"/>
SENTENCE / DISPOSAL: <input type="text"/>	SENTENCE / DISPOSAL: <input type="text"/>

- The form indicates that DHL Express will carry out a basic DBS check and ‘international checks if applicable’. It is not clear what international checks are, but if the job is only eligible for a basic DBS check, DHL Express is not legally entitled to ask about anything other than unspent convictions. Asking about ‘any convictions, cautions, reprimands or final warnings’ means an applicant may disclose more information than they need to. The question is therefore potentially unlawful.
- In addition, the form asks the applicant to provide their mother’s maiden name so that DHL Express can carry out a basic DBS check. A parent’s maiden name is not required for a basic DBS check – the question is therefore misleading.
- Finally, if an applicant has more than two convictions or two cautions/reprimands (even for the same offence at the same time, which is far from uncommon) it is not possible for them to honestly answer on the form – the question is therefore unclear.

4.6 Misleading questions

Misleading questions are those that are unclear or underhand – they may also be unlawful because they tend to mislead an applicant into disclosing information that an employer is not entitled to.

Unclear questions

If questions are unclear, applicants are uncertain whether and what to disclose and may reveal more information than necessary, running the risk that employers consider something they should legally ignore. Information which you wanted to be disclosed might not be because you didn't make it clear that the applicant needed to disclose it.

People with offences that don't need to be disclosed might be put off from applying because they believe they are being asked to disclose them – meaning employers miss out on talented applicants.

Example 1 - Asda

Asda ask applicants 'Have you ever been convicted of a criminal offence? (Including any driving convictions but excluding any spent convictions)'

Asda Colleague-Produce Colleague

Fields marked with an asterisk (*) are required.

Tell us about any convictions

*Have you ever been convicted of a criminal offence?
(Including any driving convictions but excluding any spent convictions)

☐ Yes

☐ No

*Do you have any prosecutions pending?

☐ Yes

☐ No

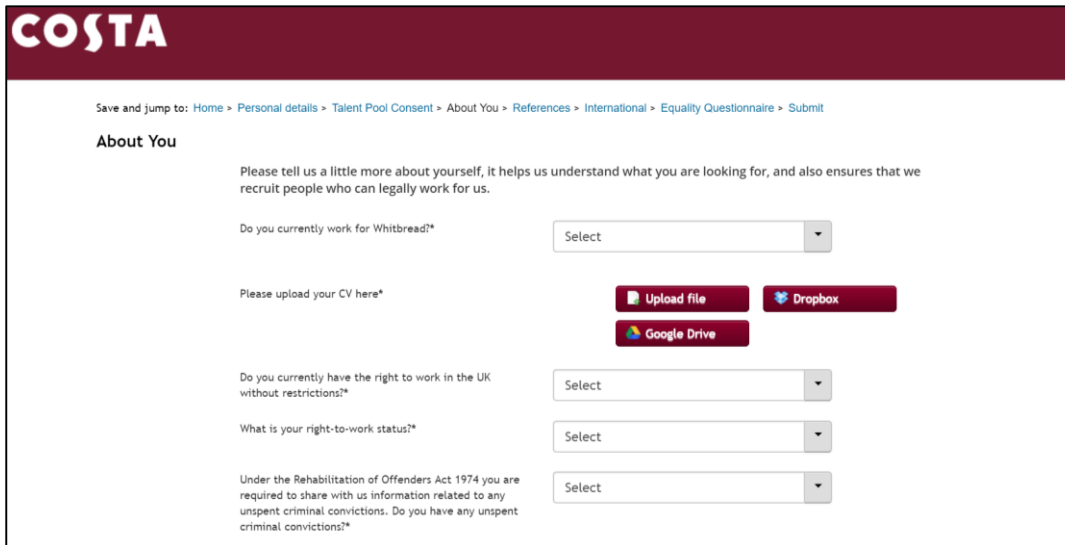
- The question is requesting potentially conflicting information – is it asking for driving convictions regardless of whether they are spent? Or is it only excluding spent driving convictions (but still wanting disclosure on spent non-driving convictions)?
- The use of the phrase "Have you ever..." is very powerful to a reader and potentially unclear – it suggests spent convictions need to be disclosed (particularly given the approach the text in brackets).

Underhand questions

Underhand questions are those that imply – intentionally or otherwise – that an applicant must disclose to an employer. It suggests employers have no choice but to ask. In fact, no employer is legally obliged to ask.

Example 1 - Costa

Costa advises applicants '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?'



The screenshot shows the 'About You' section of the Costa application form. At the top, there is a breadcrumb trail: 'Save and jump to: Home > Personal details > Talent Pool Consent > About You > References > International > Equality Questionnaire > Submit'. Below this, the section is titled 'About You'. A message states: 'Please tell us a little more about yourself, it helps us understand what you are looking for, and also ensures that we recruit people who can legally work for us.' The form contains several questions with dropdown menus and a file upload section. The questions are: 'Do you currently work for Whitbread?' (dropdown), 'Do you currently have the right to work in the UK without restrictions?' (dropdown), 'What is your right-to-work status?' (dropdown), and '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?' (dropdown). The file upload section is titled 'Please upload your CV here*' and includes buttons for 'Upload file', 'Dropbox', and 'Google Drive'.

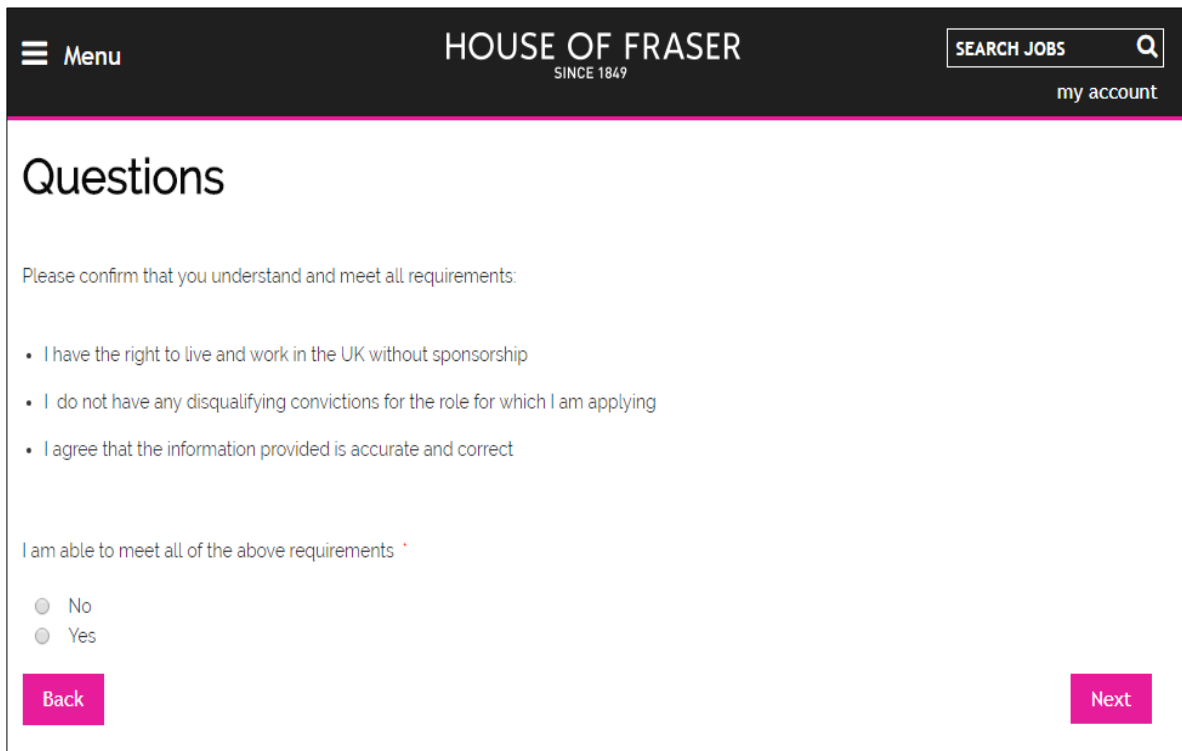
- The ROA does not require a person to share information about their criminal record, although it does mean that a person must disclose if asked.
- The phrasing of the question implies that the decision to ask is out of Costa's hands – which is simply untrue. Most employers are not legally obliged to ask about criminal records, they make a conscious decision to do so.

Unusual questions

Unusual questions are not necessarily unlawful or misleading – although they could be. These are questions that are outside of the standard wording.

Example 1 – House of Fraser

House of Fraser ask applicants to confirm that they ‘...do not have any disqualifying convictions for the role...’



The screenshot shows the 'Questions' section of the House of Fraser application form. The header includes a 'Menu' icon, the 'HOUSE OF FRASER' logo with 'SINCE 1849', a 'SEARCH JOBS' button, and a 'my account' link. The main content area is titled 'Questions' and contains the following text: 'Please confirm that you understand and meet all requirements:'. Below this are three bullet points: 'I have the right to live and work in the UK without sponsorship', 'I do not have any disqualifying convictions for the role for which I am applying', and 'I agree that the information provided is accurate and correct'. At the bottom, there is a statement 'I am able to meet all of the above requirements' followed by two radio button options: 'No' and 'Yes'. At the very bottom, there are 'Back' and 'Next' buttons.

- The application form does not provide any guidance on ‘disqualifying criminal records’ – applicants cannot be expected to know what would disqualify them from a retail position.
- Applicants may indicate that they do not have a disqualifying criminal record in good faith, only to find out later that the employer disagrees and decides to terminate their employment.

Example 2 – Kingfisher

Kingfisher (parent company of B&Q and Screwfix) ask applicants whether they have an unspent conviction for a list of specified offences – murder, manslaughter, theft, fraud, sex offences including paedophilia, grievous bodily harm and actual bodily harm. This question appears on the application forms for both B&Q and Screwfix.

tps://kingfisher.taleo.net/careersection/application.js?type=1&lang=en&portal=22105021063&reqNo=779256

Criteria Check
Upload Your CV
Your Personal Information
About You Questionnaire
Talent Q Assessment
Diversity Monitoring
Review and Submit

Save and Continue
Save as Draft
Quit

Criteria Check

Mandatory fields are marked with an *

To help us better know you and further assess you for this position, please answer the following questions as accurately as possible.

*1. Do you have an unspent criminal conviction for any of the following offences?

No Selection
No Selection
No
Murder
Manslaughter
Theft
Fraud
Sex offence including Paedophilia
Grievous Bodily Harm
Actual Bodily Harm

*2. In the country for which you are applying? For example, valid UK passport.

*3. Sex offence including Paedophilia
for: Grievous Bodily Harm
Actual Bodily Harm

*4. Please select your reason for leaving (if you have worked for more than one Kingfisher Group Company, please select the most recent reason for leaving).

No Selection

- It is not clear why these particular offence types (compared to others) are of particular concern to Kingfisher. A person with an unspent conviction for any other offence need not declare it – but if Kingfisher have a blanket ban on manslaughter convictions, are they really unbothered about, say, death by dangerous driving?
- In addition, this is the very first question on the application form which indicates that this is more important than an applicant's ability to carry out the job in question.
- Collecting very specific information from all applicants is likely to be considered excessive data collection under the GDPR.

4.7 Online application systems and automated decision-making

Dry run applications showed that many employers rely on software that will not allow progression through the application if an applicant ticks the box to say they have an unspent criminal record. Ticking the box takes the applicant to a message such as this:

Thank You

Thank you for sending us your online job submission. Unfortunately, the information you provided does not satisfy the minimum requirements for this position and we are unable to consider you for employment at this time. We invite you to view the job openings available in our Career section and to further explore the functionalities of your account.

[View My Submissions](#) | [View the General Profile](#) | [View All Jobs](#)

Where recruitment decisions are automated, applicants are not given the opportunity to explain the circumstances of their criminal record; instead they are automatically rejected. Under GDPR, applicants have the right not to be subject to a decision based solely on automated decision-making. The right applies where the decision would significantly affect the individual, which would cover a decision on whether to shortlist someone for employment.

The GDPR provides applicants with specific rights related to [automated decision making including profiling](#). This means employers are accountable for safeguarding against the risk of a potentially damaging decision being taken without any human intervention.

The GDPR applies to all automated individual decision-making and profiling. Article 22 of the GDPR has additional rules to protect individuals if you are carrying out solely automated decision-making that has legal or similarly significant effects on them. Application systems that rely on automated decision making without providing applicants with a route to appeal are in breach of data protection law.

4.8 Recent case work

Unlock's helpline and online forum are an ear to ground on the problems that people face as a result of their criminal record. Most issues relate to employment difficulties – discrimination by employers, misleading or unclear questions on application forms, requests to disclose spent criminal records and cautions and higher-level checks than the post requires.

We provide advice and guidance to individuals to empower them to challenge unfair practices. We also challenge employers directly in cases of bad practice and discrimination. This section highlights some recent examples of our engaging with employers to provide advice on how to make their recruitment practices fairer and more inclusive. These examples show that some employers are willing to make changes to the policies and practices when provided with information and advice, but that often it requires regulatory or compliance advice before changes are implemented.

Misleading questions

National Express

National Express were asking a misleading question on their application form and were not providing guidance on the level of check that would be undertaken. This exposed National Express to the risk of collecting excessive personal data – in breach of Data Protection principles and the ROA – and putting potential applicants off applying because they believed they were being asked to disclose information they should not have to.

Unlock wrote to National Express with our concerns. We received no response so raised the concerns with the ICO, who contacted National Express with compliance advice. National Express amended their application form to ask about unspent criminal records only and to make clear they conduct a basic DBS check prior to employment.

Selco

Selco advertised a Facilities Manager role at one of their warehouses. The application asked a misleading question about criminal records, asking applicants if they would be prepared to undergo a 'police check' and if they had ever been convicted of a criminal offence or been subject to a court martial.

Although the application went on to explain an applicant would be asked to complete a basic DBS check, the misleading question could potentially lead to applicants disclosing information that they were not obliged to. This exposed Selco to the risk of gathering excessive information and to putting off potential applicants.

Unlock wrote to Selco on three occasions but unfortunately received no response. We referred our concerns to the ICO, who issued compliance advice. Selco then amended the application form to make clear that applicants would be expected to disclose unspent criminal records only. In light of the GDPR, Selco have further amended their policy and now no longer ask about criminal records at any stage of the recruitment process.

Ineligible checks

Ineligible checks are those that are requesting more information than an employer is legally entitled to for the post – for example requesting a standard or enhanced DBS check for a post that is not exempt under the ROA.

Guide Dogs

Guide Dogs were advertising a vacancy for an office administrator which inaccurately described the role as exempt from the ROA, meaning applicants would be required to undergo an enhanced DBS check. Following correspondence from Unlock, Guide Dogs agreed that the role was not exempt, and amended their application form to reflect that the role should only be subject to a basic check.

Unofficial checks

We often receive calls to our helpline from people who have been offered employment, or even started work, only to have their offer withdrawn or employment terminated following unofficial checks. This can include internet searches by the employer or other employees, or disclosure by a previous employer via a reference. Here are two recent examples:

Lee was offered a job after interview, and at no stage during the recruitment process was he asked about criminal records. He had started work and thought he was getting on well until one day he was called in to see HR. They told him that one of his references had disclosed his criminal record, and he was let go as he hadn't disclosed the information himself.

Emma disclosed her conviction on her application form and advised that she would give details at interview. She was not asked about her conviction and was offered the job the same day. Three weeks later the offer was withdrawn after the employer carried out internet searches. They said the conviction called her judgement into question and created a reputational risk for the organisation.

Neither Emma nor Lee were given the chance to explain their criminal record, despite both employers having written policies that assured applicants they would be given the opportunity to explain in person.

These two examples show how important it is for employers to have a clear policy on asking about criminal records that goes beyond banning the box and considers not only if, when and how to ask about criminal records but also how to manage unofficial sources of information. Under the GDPR, employers must only use applicants' data in ways that they might 'reasonably expect'. Searches of material in the public domain – news sites, social media – must have a defined purpose and lawful basis.

5. Fair recruitment principles

The findings of our survey demonstrate that most employers do not apply inclusive recruitment practice when it comes to applicants with criminal records.

In consultation with employers, recruitment professionals and data protection experts, and people with a criminal record, Unlock has developed 10 [fair recruitment principles](#). They are designed to be used as a benchmark for employers in ensuring the fair treatment of people with criminal records.

Principle 1 – Consider whether you need or want to ask

Principle 2 – Have a clear, accessible policy that you review

Principle 3 – Ban the box: Defer questions until after a conditional job offer

Principle 4 – Be clear in any questions you ask

Principle 5 – Follow rehabilitation & data protection legislation

Principle 6 – Be proportionate

Principle 7 – Be fair and consider criminal records in context and face-to-face

Principle 8 – Be confident in your process and practice

Principle 9 – Be understanding of discrepancies

Principle 10 – Document your decision-making

Employers committed to fair recruitment can use these principles to amend their policies and practices, and Unlock welcome the opportunity to work with any employer who wishes to make their recruitment practice fairer and more inclusive.

6. Conclusion

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

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

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

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

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

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

The removal of self-disclosure forms – either on application forms or later in the recruitment process – would mean applicants would not be under pressure to remember complex information, often from long ago and during a difficult time in their lives. Employers can request DBS checks to the appropriate level at the pre-employment stage, and if the official criminal check reveals information, this can begin a conversation with the individual about the content and relevance, giving the employer the chance to ask questions and understand the bigger picture before making an assessment based on factual information.

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

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

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

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

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

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

7. More information

This report was produced by Unlock as part of our Fair Access to Employment project, supported by the Esmée Fairbairn Foundation. Our objectives include:

1. Supporting larger employers in implementing significantly fairer and more inclusive policies and procedures, working with a range of existing employer networks such as 'Ban the Box' and 'EFFRR'.
2. Developing and maintaining a resource centre for employers and recruitment professionals.
3. Challenging employers who act unfairly and/or unlawfully, improving their practices as a result.

We provide practical guidance and free resources via [Recruit!](#) – our website providing advice and support for employers on recruiting people with convictions and dealing with criminal records fairly.

For further advice about fair and more inclusive recruitment policies, please contact us: recruit@unlock.org.uk.

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