UNLOCKING POTENTIAL
Fair admissions for people with previous convictions

Criminal Records Data and the GDPR in Ireland

Background

The General Data Protection Regulation (GDPR) came into force on 25 May 2018, with the Irish Data Protection Act (IDPA) of 2018 being signed into law on 24 May 2018. The Act introduced a Data Protection Commission, and gives further effect to the GDPR alongside earlier data protection legislation in Ireland, with this legislation being known as the 'Data Protection Act 2018'.

The purpose of the GDPR and Irish Data Protection Act is to strengthen individuals' data rights, giving them increased control and power over how their personal data is processed and used. This legislation enhances individuals' rights to have companies reveal and delete any personal data, and if there is a breach of data protection there are enforcement actions available to a maximum fine of €20 million or 4% of a company's annual global turnover, whichever is greater.

The GDPR and the IDPA mandate standards for all personal data, while the Law Enforcement Directive (LED) of 2018 establishes data protection standards for criminal offence data. Together, these acts outline the appropriate use of personal data in relation to the collection and processing of criminal record data for recruitment purposes.

Requesting Criminal Offence Data

The legislation relating to the collection of criminal offence data in Ireland is linked to employment and hiring practices. In Ireland there is no requirement to conduct criminal background checks unless the employee will be working with children or vulnerable adults. While it is necessary for employers to ask an individual for a lot of personal data (your name, address, contact details, qualifications, work experience, etc.) to enable them to contact a candidate and assess their suitability for a role, an employer must carefully consider what information it is necessary for them to have and, at what stage of the recruitment process they need it. This has become especially true with the introduction of the GDPR and related legislation, where employers need to be able to fully justify the processing of criminal record data especially where there is no actual legal requirement to do so. That is, an employer would need to reasonably justify the need for a background check in cases where an individual is not expected to be working with children or vulnerable adults. [1]

Legal Basis for Processing Criminal Record Data

The processing of personal data must meet data protection principles, including purpose limitation and data minimisation as listed in *Article 5, Chapter 2* of the GDPR. These principles apply to data

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[1] https://hub.unlock.org.uk/knowledgebase/gdpr-and-data-protection-guidance-for-individuals/#Recruitment

protection more broadly but are especially important in relation to asking individuals to disclose criminal record data. Purpose limitation requires clarity about what the purposes for processing data are from the start, and you can only ask for data if the collection is compatible with the original purpose, there is consent, or there is a clear obligation or function set out in law. Data minimisation means that organisations only collect an amount of data sufficient to properly fulfil their stated purpose, that has a rational link to that purpose, and that it is limited to what is necessary.

If an employer wants to process data relating to criminal convictions, they must have a lawful basis for doing so under *Article 6* of the GDPR. Any personal data held by an organisation must be justified according to one of six lawful bases. These are: contract, legal obligation, vital interest, public task, consent, and legitimate interest.

Unlock UK have stated that most employers, who are adhering to GDPR guidelines as per *Article 6*, are likely to rely on consent, legal obligation and legitimate interest as their lawful basis for collecting criminal records data.[2] Consent is where there is a clear reason why an employee's contract would need an employer to collect criminal record data. For example, an employee working in an elder care home or as a teacher. Legal obligation is where the processing is necessary for the employer to comply with the law. For example, any employee who was going to work with vulnerable adults or children must be vetted by the Garda Síochána under the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012-2016. And lastly, legitimate interest applies where the processing is necessary for the legitimate interests of the employer and an employer can protect the rights of the individual. Any employer can use this basis but their purpose must be clearly defined.

Practice of Requesting Criminal Record Data under the GDPR

As mentioned in above section, if an employer wants to know whether an individual has a criminal record, they cannot ask about cautions or spent convictions unless an individual is going to be employed in a role that is listed in the National Vetting Bureau (Children and Vulnerable Persons) Acts 2012-2016 (this would include doctors, solicitors, anybody working with children or vulnerable adults). These employers have a legal obligation to carry out a standard or enhanced vetting process. As part of the Garda Vetting process an applicant must disclose any and all convictions. This disclosure must include such offences as driving offences, non-payment of a TV licence and public order offences, and includes the application of probation or community service. This covers offences in the Republic of Ireland and Northern Ireland.

For all other roles, an employer can only ask individuals to voluntarily disclose whether they have any unspent convictions or agree to a basic criminal record check through the Garda Vetting process. If an individual is being asked to disclose any unspent convictions, then an employer will need to provide them with details of their lawful basis for asking and also a copy of their privacy policy which should set out the data retention periods and who the data will be shared with.

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[2] https://hub.unlock.org.uk/knowledgebase/gdpr-and-data-protection-guidance-for-individuals/#Recruitment

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The University Context

Although the GDPR and the IDPA do not specify conditions for asking applicants to disclose their criminal records data in the context of third level institutions, it is similar in many ways to the employment context. The GDPR gives individuals rights with regard to their data, and outlines strict protocols about when and why other groups or organisations can rightfully request information from individuals. *Article 6(1)(f)* of the GDPR provides a lawful basis for processing where:

"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."

The Data Protection Act 2018 is also applicable, specifically 'CHAPTER 2: Processing of special categories of personal data and processing of personal data relating to criminal convictions and offences', *Article 46*. It states that:

"Subject to suitable and specific measures being taken to safeguard the fundamental rights and freedoms of data subjects, the processing of special categories of personal data shall be lawful where the processing is necessary for the purposes of exercising or performing any right or obligation which is conferred or imposed by law on the controller or the data subject in connection with employment or social welfare law."

This means that there must be an appropriate reason why you are asking for such data, it must be necessary to collect and process information for the purpose, and the purpose and necessity must not inhibit the rights of the data subject.

Based on the above discussed principles of purpose limitation and data minimisation, asking all applicants to disclose at application stage does not meet the GDPR lawful basis for processing as it is neither a specific nor targeted means of collecting criminal records data and could potentially be a breach of the GDPR/IDPA.[3] It could also be a breach of the GDPR/IDPA if criminal records data is being requested of individuals when the course to which they are applying will not see them engaging with vulnerable populations. This view is confirmed by the advice from the UK Information Commissioner (the UK's independent body set up to uphold information rights) to UCAS (the UK equivalent of the CAO) to the effect that their policy of asking all applicants for information on convictions is not compliant with Art. 6 of the GDPR. This advice has resulted in UCAS removing a question about convictions from their form and has also been relied on by HEIs in the UK in taking the decision to change their admissions policy. In particular, the following paragraph is instructive:

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[3] http://recruit.unlock.org.uk/wp-content/uploads/Employer-GDPR-guidance.pdf

"It is unclear why asking all applicants, no matter what course they are applying to, to declare their unspent convictions is necessary for assessing those applicants' suitability for their chosen course. For many degree courses – perhaps the majority – possession of a criminal conviction, even for quite serious offences, will not be relevant to the matter of their suitability to study that particular subject."[4]

Therefore, based on the legal provisions in both the GDPR and the IDPA outlined above, only in cases where a degree programme would possibly involve work with children or vulnerable adults should Irish HEIs ask an individual to disclose their criminal records data. To be GDPR and IDPA compliant, Irish HEIs should remove questions about criminal records from application forms and should not request applicants to non-Garda vetted courses to disclose criminal records information. Not only would this adhere to privacy legislation protocols (thus avoiding the risk of large fines) but it would also remove an unnecessary barrier for individuals with convictions who are thinking of applying to university.

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[4] UCAS 'Criminal convictions – advice from the Information Commissioner's Office' available at: https://www.ucas.com/file/160216/download?token=Mh2Hcwmi (accessed 16th November 2020)