

HOUSE BILL REPORT

SHB 1411

As Amended by the Senate

Title: An act relating to health care workforce eligibility for persons with prior involvement with the criminal justice system.

Brief Description: Expanding health care workforce eligibility.

Sponsors: House Committee on Health Care & Wellness (originally sponsored by Representatives Simmons, Davis, Santos, Valdez, Berry and Fitzgibbon).

Brief History:

Committee Activity:

Health Care & Wellness: 2/8/21, 2/11/21 [DPS].

Floor Activity:

Passed House: 3/1/21, 58-39.

Senate Amended.

Passed Senate: 4/10/21, 29-18.

Brief Summary of Substitute Bill

- Prohibits the Department of Social and Health Services (Department) from automatically disqualifying a person who has a criminal record containing certain crimes from having unsupervised access to, working with, or providing care to vulnerable adults or children.
- Establishes a work group to identify an informed consent process to allow older adults and people with disabilities to hire an individual with a criminal record that would otherwise disqualify the person from providing paid home care services.
- Authorizes the Department to exercise its discretion regarding whether to permit or prohibit a person with a certificate of restoration of opportunity to have unsupervised access to children, vulnerable adults, or individuals with mental illness or developmental disabilities.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

HOUSE COMMITTEE ON HEALTH CARE & WELLNESS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Cody, Chair; Bateman, Vice Chair; Bronoske, Davis, Harris, Macri, Riccelli, Simmons, Stonier, Tharinger and Ybarra.

Minority Report: Do not pass. Signed by 1 member: Representative Schmick, Ranking Minority Member.

Minority Report: Without recommendation. Signed by 2 members: Representatives Caldier, Assistant Ranking Minority Member; Rude.

Staff: Christopher Blake (786-7392).

Background:

Disqualifying Crimes.

The Department of Social and Health Services (Department) is responsible for investigating the conviction records and pending charges of specified people who may have unsupervised access to children, vulnerable adults, or individuals with mental illness or developmental disabilities, including Department employees or applicants, in-home service providers, and long-term care facilities. Agencies, facilities, and individuals who provide care to vulnerable adults may not allow persons to work in a position that may involve unsupervised access to minors or vulnerable adults if the person has been convicted of or has a pending charge for certain disqualifying crimes. In some cases a person will not be automatically disqualified from employment if a designated number of years have passed since the date of conviction for the disqualifying crime. In those instances, the person may be allowed to work in a position with access to minors and vulnerable adults depending on the results of a character, competence, and suitability review.

Certificate of Restoration of Opportunity.

A certificate of restoration of opportunity (CROP) may be granted to a person by a superior court if the person:

- has achieved the applicable waiting period following sentencing or release from confinement, as follows: one year for misdemeanors and gross misdemeanors when sentenced to probation or some other noncustodial sentence; 18 months for misdemeanors and gross misdemeanors when sentenced to a term of confinement; two years for a class B or C felony; or five years for any violent offense;
- is in compliance with or completed all sentencing requirements, including legal financial obligations;
- does not have any new arrests, convictions, or pending criminal charges or known imminent charges; and
- is not required to register as a sex offender.

A person is not eligible for a CROP if he or she has ever been convicted of any of the following offenses: a class A felony, an attempt to commit a class A felony, or criminal solicitation of or criminal conspiracy to commit a class A felony; a sex offense; a crime that includes sexual motivation; Extortion in the first degree; drive-by shooting; vehicular assault; or luring.

In general, a public entity may not disqualify a person who holds a CROP for a license, certificate, or qualification to engage in the practice of a profession or business solely based on criminal history if the person meets all other statutory or regulatory requirements. The following entities may disqualify a person who holds a CROP based solely on criminal history: criminal justice agencies and the Washington State Bar Association. The following entities may disqualify a person who holds a CROP based solely on criminal history if the profession or license would give the person unsupervised access to vulnerable persons: the Department of Social and Health Services, the Department of Children, Youth, and Families, and the Department of Health.

Summary of Substitute Bill:

Disqualifying Crimes.

The Department of Social and Health Services (Department) may not automatically disqualify a long-term care worker, contracted provider, or licensee who has a criminal record that contains certain crimes from having unsupervised access to, working with, or providing care to vulnerable adults or children. The long-term care worker, contracted provider, or licensee may engage in these activities once a specified amount of time has passed since the most recent conviction for each crime and the date of the background check. The crimes and the specified minimum times are:

- selling marijuana to a person under the age of 21 years old after at least three years have passed;
- Theft in the first degree after at least five years have passed;
- Robbery in the second degree after at least five years have passed;
- Extortion in the second degree after at least five years have passed;
- Assault in the second degree after at least five years have passed; and
- Assault in the third degree after at least five years have passed.

While the Department may not automatically disqualify a long-term care worker, contracted provider, or licensee, the Department or an employer under contract with the Department has the discretion to consider any of the convictions when conducting a character, competence, and suitability review regarding a long-term care worker, contracted provider, or licensee to be employed in a position caring for, or having unsupervised access to, vulnerable adults or children. The Department and the employer are immune from law suits based upon their exercise of discretion or refusal to exercise discretion.

The exemption from automatic disqualification does not apply to background checks performed by the Department on behalf of the Department of Children, Youth, and

Families. The exemption from automatic disqualification does not apply to Department employees or applicants, except for positions in the state-operated community residential program. In addition, the exemption does not allow for care to be provided or paid for if it would be prohibited under federal Medicare or Medicaid rules.

Informed Consent Work Group.

The Department must facilitate a work group to identify an informed consent process to allow older adults and people with disabilities to hire an individual with a criminal record that would otherwise disqualify the person from providing paid home care services.

The Department must appoint the members of the work group, which include:

- two representatives from the Department;
- two representatives from community-based organizations that represent people with criminal records;
- one representative from a community-based organization that represents Black communities;
- one representative from an organization or tribe to represent the interests of American Indians or Alaska Natives;
- one representative from a community-based organization that represents immigrant populations or persons of color;
- three representatives from the union representing the majority of long-term care workers in Washington;
- one representative of a consumer-directed employer;
- one representative of an association representing area agencies on aging in Washington;
- one representative from the Office of the Long-Term Care Ombuds;
- one representative from the Office of the State Developmental Disability Ombuds;
- one representative from an association representing Medicaid home care agencies; and
- four representatives from organizations representing seniors and individuals with physical or developmental disabilities.

At least one meeting of the work group must be devoted to reviewing and analyzing racial disparities, including disparities in charges and disqualifications in providing paid home care services. By December 1, 2021, the work group must submit its recommendations to the Secretary of the Department, including a proposed informed consent process for clients to hire a family member or friend with a criminal record. The Department may revise the informed consent process, but must implement it by January 1, 2023.

Certificate of Restoration of Opportunity.

The exclusions that apply to certain applicants with a certificate of restoration of opportunity (CROP) are eliminated with respect to assisted living facility employees, long-term care workers, and vulnerable adult care providers.

In cases regarding an applicant who has a CROP, as well as a criminal history that would disqualify the applicant from a license or employment, the Department may, in its discretion:

- allow the applicant to have unsupervised access to children, vulnerable adults, or individuals with mental illness or developmental disabilities, if the applicant is otherwise qualified and suitable; or
- disqualify the applicant solely based on the applicant's criminal history.

Prior to making the decision, the Department must review relevant factors, including the nature and seriousness of the offense, the time that has passed since conviction, changed circumstances since the offense occurred, and the nature of the employment or the license that is being sought.

The Department and the employer are immune from law suits based upon their exercise of discretion or refusal to exercise discretion.

EFFECT OF SENATE AMENDMENT(S):

The Senate amendment changes the crimes that are exempted from automatic disqualification by replacing selling marijuana to a person under the age of 21 with selling marijuana to a person. The waiting period for Theft in the first degree is extended from five years to 10 years.

The Senate amendment expands the definition of "contracted provider" to include area agencies on aging and their subcontractors who provide case management as well as providers contracted with area agencies on aging. The term "contracted provider" does not apply to applicants. References to "Department-contracted providers," and "contracted employees" are changed to "contracted providers."

The Senate amendment modifies the scope of the informed consent work group by changing references from informed "consent" to informed "choice" and adding goals related to the importance of protecting vulnerable adults and providing just compensation for unpaid care work while preserving the choice to be an informal caregiver without pay. The work group's recommendations are expanded to also include the economic consequences of unpaid caregiving on caregivers and people receiving care, categories of eligible workers, disqualifying crimes, and mechanisms for consideration, such as attestation or petition. The workgroup is expanded to include a representative from the Washington State Attorney General's Office, two representatives who are or have been consumers of personal care services and represent the diversity of the disability community, and two representatives who receive unpaid care from individuals who are unable to become Medicaid paid home care workers because of disqualifying convictions. The work group representative from an organization or tribe representing the interests of American Indians and Alaska Natives is replaced with two representatives of federally recognized tribes, one from Western Washington and one from Eastern Washington. The work group's recommendations must

be submitted to the Legislature, rather than the Secretary of the Department of Social and Health Services (Department), by December 1, 2022, rather than December 1, 2021. The authority of the Department to revise the work group's recommended process and its duty to implement the process by January 1, 2023, is removed.

The Senate amendment restores the exemption from the application of certificates of restoration of opportunity for vulnerable adult care providers to the extent that they are not home care aides, contracted providers, or licensees.

The Senate amendment removes the immunity from a lawsuit for the Department's, contracted providers', or licensees' consideration or lack of consideration of a criminal conviction, whether in the context of an automatic disqualifying crime exemption or a certificate of restoration of opportunity, and replaces it with a rebuttable presumption that the consideration or lack of consideration of a criminal conviction was appropriate. If the Department or a consumer directed employer determines that an individual with a conviction that is exempt as an automatic disqualifying crime or an individual with a certificate of restoration of opportunity is qualified to provide services as an individual provider, the results of the state background check must be provided to the client and any guardian of the client before the individual begins providing services.

Appropriation: None.

Fiscal Note: Available. New fiscal note requested on March 31, 2021.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 6, related to adult family homes, which takes effect July 1, 2022.

Staff Summary of Public Testimony:

(In support) Many people in Washington have a criminal record which makes it very difficult to enter the health care workforce. Many people with criminal involvement can change with treatment and recovery. The rigidity of background check requirements makes it difficult for people to care for family members. This bill is a great step to help many families in need of a caregiver to have a larger workforce eligible to meet demands. This bill will ensure that family members who would like to quit their jobs to care for a loved one can be paid for that. This bill will give individuals who have turned their lives around an opportunity for a meaningful career with purpose. This is an opportunity to bring caregivers into a place where there is accountability, rather than have a person with a conviction provide unsupervised care with no accountability or acknowledgement of rehabilitation. There are many entities that will serve to keep health care safe and productive and this bill will not impact safety or productivity. Paying a caregiver alleviates stress for both the caregiver and the person being cared for.

The research is clear that recidivism decreases with gainful employment and matriculation through school programs. Recidivism risk decreases across time as people stay offense-free in the community. States that have reformed their occupational license laws have seen a decrease in recidivism. Increasing the rate at which individuals are cleared to work can both increase employment and decrease crime.

This bill will help diversify the health workforce. This will help some communities that have been impacted by incarceration to enter into good health care careers. Persons of color are more likely to be unpaid caregivers because they have higher rates of criminal records due to systematic and institutional racism. This bill addresses many policies including equality of employment opportunities, equality of consumer choice, home care workforce shortages, and economic stimulus to the most impaired communities.

(Opposed) There is concern about who would hire persons with disabilities.

(Other) The laws needs to center both on caregivers and those who rely on them. There need to be as many safeguards in place as possible to protect the most vulnerable individuals. The bill should target the scope of provider types to the crimes that would become time-limited to make the application of the bill consistent across all employees in a long-term care setting to facilitate implementation of the policy. Vulnerable children should be added to the bill. The bill should have a severability clause in case there is any conflict in the bill related to federal requirements. The implementation time should be shortened and the bill should go into effect once the implementation has happened and there is an established informed consent process. The work group representatives from organizations representing seniors and persons with physical or developmental disabilities should either be people who use caregiver services or the work group should be expanded to include people who use caregiver services. This bill needs more safeguards to ensure that the most vulnerable individuals are free from abuse and neglect. Individuals should know who is working with them, including the details of any employee's past legal history. Individuals should always have the right to refuse employment to any candidate applying to work with them. There should be monitoring of these unique placements and they should be observed regularly for the duration of their employment.

Persons Testifying: (In support) Representative Simmons, prime sponsor; Adrienne Stuart, Washington State Developmental Disabilities Council; Noel Vest, Stanford University; Demas Nesterenko, Service Employees International Union 775; Susan Mason, What's Next Washington; and Ryan Davis, Seattle Jobs Initiative.

(Opposed) Robert Wardell.

(Other) Bea Rector, Department of Social and Health Services, Aging and Long-Term Support Administration; Darya Farivar, Disability Rights Washington; and Sandra Latham.

Persons Signed In To Testify But Not Testifying: None.