

SENATE BILL REPORT

SHB 1411

As Reported by Senate Committee On:
Health & Long Term Care, March 26, 2021

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

Committee Activity: Health & Long Term Care: 3/22/21, 3/26/21 [DPA, DNP, w/oRec].

Brief Summary of Amended Bill

- Prohibits the Department of Social and Health Services (DSHS) from automatically disqualifying a person convicted of certain crimes from having unsupervised access to, working with, or providing care to vulnerable adults or children.
- Directs DSHS to facilitate a work group to identify an informed choice 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 DSHS 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.

SENATE COMMITTEE ON HEALTH & LONG TERM CARE

Majority Report: Do pass as amended.

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.

Signed by Senators Cleveland, Chair; Frockt, Vice Chair; Conway, Keiser, Randall, Robinson and Van De Wege.

Minority Report: Do not pass.

Signed by Senators Muzzall, Ranking Member; Padden, Rivers and Wilson, J.

Minority Report: That it be referred without recommendation.

Signed by Senator Holy.

Staff: LeighBeth Merrick (786-7445)

Background: Disqualifying Crimes. The Department of Social and Health Services (DSHS) 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 DSHS 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—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 they have 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.

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. Criminal justice agencies and the Washington State Bar Association may disqualify a person who holds a CROP based solely on criminal history. DSHS, the Department of Children, Youth, and Families, and the Department of Health 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.

Summary of Amended Bill: Disqualifying Crimes. DSHS 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 — after at least three years have passed;
- theft in the first degree— after at least ten 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 DSHS may not automatically disqualify a long-term care worker, contracted provider, or licensee, DSHS or an employer under contract with DSHS 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. DSHS and the employer are immune from law suits based upon their exercise of discretion or refusal to exercise discretion and their exercise of discretion or refusal to exercise discretion does not constitute negligence. The exemption from automatic disqualification does not apply to background checks performed by DSHS on behalf of the Department of Children, Youth, and Families. The exemption from automatic disqualification does not apply to DSHS employees or applicants, except for positions in the state-operated community residential program. 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 Choice Work Group. DSHS must facilitate a work group to identify an informed choice 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. DSHS must appoint the members of the work group, which include:

- two representatives from DSHS;
- 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;
- one representative from the Washington State Attorney General's Office;
- four representatives from organizations representing seniors and individuals with physical or developmental disabilities;
- two representatives who are current or previous 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.

At least one of the work group's meetings must be devoted to reviewing and analyzing racial disparities, including disparities in charges and disqualifications in providing paid home care services. The work group must submit its recommendations to the legislature by December 1, 2022.

Certificate of Restoration of Opportunity. The exclusions that apply to certain applicants with a CROP are eliminated with respect to assisted living facility employees, long-term care workers, and vulnerable adult care providers who are home care aides. A contracted provider or licensee is excluded from the CROP. 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, DSHS may use its discretion to:

- 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, DSHS must review relevant factors, including the nature and seriousness of the offense, the time passed since conviction, changed circumstances since the offense occurred, and the nature of the employment or the license being sought.

DSHS and the employer are immune from law suits based upon their exercise of discretion or refusal to exercise discretion and their exercise of discretion or refusal to exercise discretion does not constitute negligence.

EFFECT OF HEALTH & LONG TERM CARE COMMITTEE AMENDMENT(S):

- Changes one of the crimes, for which DSHS must no longer automatically disqualify, from selling marijuana to a person under the age of 21 to selling marijuana to a person.
- Increases the time that must have passed for theft in the first degree from five years to ten years.
- Changes references to “department contracted provider” and “contracted employee” to “contracted provider.”
- Adds Area Agencies on Aging and their subcontractors who provide case management to the contracted provider definition.
- Expands the lawsuit immunity to also state that DSHS’, a contracted provider’s or licensee’s consideration or lack of consideration of a criminal conviction and its resulting decision does not constitute negligence.
- Modifies the goals and the list of items the informed consent work group must address.
- Adds the following members to the work group: one representative from the Attorney General’s Office, two consumers of personal care services that represent the diversity of the disability community, and two individuals who receive unpaid care from individuals who were disqualified due to their criminal records.
- Removes the requirement for DSHS to revise and implement the work group’s recommendations by January 1, 2023 and instead requires the work group submit their recommendations to the legislature by December 1, 2022.
- Adds vulnerable adult care providers who are not certified Home Care Aides, DSHS contracted providers and licensees to the list of professions that are not required to accept a certificate of restoration of opportunity.

Appropriation: None.

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

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: This bill is the product of a collaborative process with DSHS, worker, employers, families, researchers and formerly incarcerated individuals. There is a very long list of crimes that automatically disqualify an individual from becoming an in-home care provider. This bill takes a modest approach by removing few of those crimes that are vacatable offenses and permitted through CROP from the list. DSHS can still do a review and determine if the applicant is eligible. This bill help address the workforce shortage, further racial equality and reduce recidivism by giving individuals an opportunity to be employed. Research shows this will

not compromise public safety. This bill honors the individual's decision about who they want to be their caregiver. This bill addresses structural inequities. There are inequalities in the criminal justice system and no pathway for people with certain criminal histories to enter the long-term care work force. Many individuals are already doing this work but without the benefits of pay, training or access to personal protection equipment. Criminal background does not show an accurate portrayal of a person's character or ability to provide care. People with criminal records can provide high quality of care. There will be amendments to the composition of the work group to include more people with disabilities.

CON: This bill is too rushed and was not done in plain language so that the people who it will impact the most can understand. The bill should be amended to include people that will be served by the caregivers on the work group. Additionally, people that will be served by caregivers should be given plain language to learn about the issue and provided with the background checks so informed consent is actually informed.

OTHER: The bill should be amended to focus on family providers and the work group should include service recipients. We are concerned about theft, extortion and assault being included in the list of crimes that are not subject to automatic disqualification due to the intimate nature of this type of work. We appreciate the pathway for employment. The liability language does not provide necessary safeguards. It gives DSHS the sole discretion to make decisions about who is able to become a caregiver and immunity from civil suits. We propose alternative language of rebuttable presumption which could provide DSHS the benefit of the doubt encouraging decision-makers to make careful choices. However, DSHS does not agree with our interpretation of the liability language and has rejected our suggestion as a feasible alternative. We support the bill's policy but are still working through some amendments. The existing liability language is an important of the bill and we believe it provides limited liability only pertaining to sections 1 and 3 of the bill.

Persons Testifying: PRO: Representative Tarra Simmons, Prime Sponsor; Demas Nesterenko, SEIU775; LaQuesha Rose Turner, former HomeCare provider; Dr. Noel Vest, Stanford University; Adrienne Stuart, Washington State Developmental Disabilities Council.

CON: Ivanova Smith, Self Advocates in Leadership.

OTHER: Shawn Latham, Allies in Advocacy; Darya Farivar, Disability Rights Washington; Bea Rector, DSHS, Aging and Long-Term Support Administration; Noah Seidel, Office of Developmental Disabilities Ombuds.

Persons Signed In To Testify But Not Testifying: No one.