

Examination of criminal background checks in behavioral health settings

Engrossed Substitute Senate Bill 5092; Section 215(40)(c); Chapter 334; Laws of 2021
December 1, 2021

Examination of criminal background checks in behavioral health employment settings

Acknowledgements

Department of Health

Department of Social and Health Services

Office of the Governor

Office of the Attorney General



Division of Behavioral Health
and Recovery

P.O. Box 45502

Olympia, WA 98504

www.hca.wa.gov/

Table of contents

Executive summary.....	4
Background.....	5
Examination of recommendations.....	6
5.1 Evidence-based review of Secretary’s disqualifying list of crimes.....	6
Findings.....	7
Data Limitations.....	8
Recommendations.....	8
5.2 Anticipate a possible increase in behavioral health workers in emergency services and first responder roles.....	9
Findings.....	9
Recommendations.....	9
5.3 Expand awareness of CROP.....	10
Findings.....	10
Recommendations.....	11
Conclusion.....	13

Executive summary

Engrossed Substitute Senate Bill 5092; Section 215(40) appropriated funds for the Washington State Health Care Authority (HCA) to:

Convene a taskforce to examine impacts and changes proposed to the use of criminal background checks in employment in behavioral health setting, with the goal of reducing barriers to developing and retaining a robust behavioral health workforce, while maintaining patient safety measures.” The taskforce membership must include representatives from the office of the Attorney General, the Department of Health, the Department of Social and Health Services, the office of the Governor and others appointed by the Authority. The proviso also asked the taskforce to, “consider any relevant information and recommendations made available by the work group created under Substitute House Bill No. 1411 (health care workforce).

Note: the Proviso 40 taskforce was asked to consider findings from House Bill (HB) 1411. At the time of this report, the HB 1411 workgroup had not been convened. Further, the HB 1411 report is not due to the Legislature until December 2022.

Proviso 40 references an examination of “proposed changes” but did not identify which changes it was referring to. The Health Care Authority contacted the Behavioral Health Workforce Advisory Council staff, who clarified that the proposed changes in the proviso were referring to the recommendations related to criminal background checks in the 2020 Behavioral Health Workforce Advisory Committee report:

[Washington’s Behavioral Health Workforce: Barriers and Solutions.](#)¹

To complete this work, HCA convened a taskforce comprised of the Departments of Health (DOH) and Social and Health Services (DSHS), and the offices of the Governor and Attorney General. The taskforce met every other week between August and October of 2021. Key findings as reported by these agencies:

- Of the 2,724 background checks processed by DSHS, Background Check Central Unit (BCCU), 43 individuals were automatically disqualified because of a criminal record.
- Of the thousands of applications for DOH licensure and certification every year, fewer than 100 are disqualified because of a criminal record.

Although this is a final report on this proviso, the taskforce acknowledges more work is needed to fully understand the true impact of criminal background checks on employment and hiring decisions, particularly among private and nonprofit industry. This should include a review of patient safety and risk to vulnerable individuals, as well as statutory implications.

¹ <https://www.wtb.wa.gov/wp-content/uploads/2020/11/Behavioral-Health-Workforce-Assessment-2020.pdf>

Background

Washington State is a leader in providing innovative behavioral health treatment and investing millions of dollars annually at all levels of care. This includes but is not limited to:

- Inpatient psychiatric care
- Hospital diversion programs
- Peer services
- Crisis stabilization
- Housing supports
- Substance Use Disorder (SUD)
- Outpatient services, and
- Residential care

Even with legislation that promotes these innovations and investments, workforce shortages continue to be an issue for behavioral health providers across Washington State. The combination of Washington's efforts to integrate physical and behavioral health care amidst the COVID-19 pandemic, and opioid and stimulant epidemics, have exacerbated workforce shortages.

Although significant state and federal investments over the past two years have made it possible to increase services, those investments have also increased the demand for workers and intensified competition between providers for the limited supply of qualified workers. These conditions have contributed to limited access to services, long appointment wait times, and agency downsizing and closures. With an insufficient number of new recruits coming into the field, workforce shortages are expected to continue into the foreseeable future.

Examination of recommendations

HCA convened subject matter experts from DOH, DSHS, and the offices of the Governor and Attorney General to examine the following recommendations from the [2020 Washington State Behavioral Health Workforce: Barriers and Solutions report](#):

5.1 Conduct an evidence-based review of the DSHS Secretary's Disqualifying List of Crimes and Negative Actions as applied to behavior health facilities and employers.

5.2 Anticipate a possible increase in behavioral health workers in emergency services and first responder roles.

5.3 Expand community awareness and engagement with Certificate of Restoration of Opportunity (CROP) and its potential benefits.

Following each section in this report are a set of recommendations that can help reduce barriers and increase behavioral health employment.

5.1 Evidence-based review of Secretary's disqualifying list of crimes

The taskforce examined the impact of automatic disqualifications resulting from the Secretary's list of disqualifying crimes using data provided by DSHS' BCCU. Proviso 40 required the following considerations:

- An individual's lived experience and whether the Secretary's list is unnecessarily limiting the pool of qualified workers.
- Whether DSHS should transition to an individualized assessment policy like that used by DOH.
- The role of stigma and racism in assessing an individual's readiness for work.

While the perception may be that many individuals with lived experience are automatically disqualified from employment based on the Secretary's list of disqualifying crimes and negative actions, the data reported by BCCU do not support this claim. BCCU processed 2,800 criminal background checks in fiscal year (FY) 2021. Forty-three individuals were automatically disqualified. This is a disqualification rate of .015.

Individuals who are not automatically disqualified, but who may have a criminal history for non-disqualifying crimes may request a Character, Competence, and Suitability (CC&S) review. CC&S is like an individualized assessment, which considers the number of years from last conviction, relevant circumstances at the time of the crime and after, a self-attestation of relevant information, and a comprehensive review of criminal history.

Additional analysis would need to determine which crimes are eligible for an individualized assessment, and whether any crimes should be excluded from review. Certain crimes may carry more perceived risk than others, and further analysis of published studies should be completed to distinguish between perceived risk and actual risk, and what circumstances contribute to actual risk. The taskforce concluded that impacts from the CC&S evaluation could have resulted in additional denials.

Although adding time-limits to additional crimes on the Secretary's list was not a recommendation proposed in the Washington State Behavioral Health Workforce: Barriers and Solutions report, it is a

solution that was proposed and implemented in other settings. In HB 1411, six crimes that were automatically and permanently disqualifying for long-term care workers and service providers were amended to add time limits. When those time limits are met, an individual may become eligible for a CC&R review, rather than being automatically disqualified. The change in time limits became effective July 25, 2021, so data is not yet available to determine the degree of impact.

Consider whether some automatic crimes on the Secretary's list should be replaced with an individualized assessment process like a CC&R review. While this is unlikely to produce a significant impact on the behavioral health workforce, it may have a meaningful impact for individuals with lived experience. Although individualized assessments will increase the workload for the agencies and employers using them, the number of individualized assessments is expected to be low.

Like automatically disqualifying lists, the individualized assessment process may be susceptible to bias, stigma, or institutional racism. It is important to consider a consistent process that includes a diverse panel of individuals on the review team, and diversity, equity, and social justice training to further limit stigma and personal bias. These types of changes should include a process to notify behavioral health agency applicants of the option to apply for an individualized assessment.

The taskforce also consulted DOH's Health Professions and Facilities Unit on disqualifications of licensing and certification applicants. DOH reported similar findings. According to DOH, they process thousands of applications for licensure and certification each year. Of these, less than 100 applications were denied based on criminal history alone.

Note: the taskforce did not have the expertise to do an evidence-based analysis of the Secretary's list of disqualifying crimes, but did investigate the following:

- The impact of automatic disqualifications
- Individualized assessments
- Adding time-limits to crimes
- Supporting individualized decision-making when not prohibited by rule or law

An example of Alaska State rules related to individualized assessments, also referred to as variances, is [available online](#), which includes rules on how to [request a variance](#).

Findings

- In April of 2016, Governor Inslee signed [Executive Order 16-05](#),² which directed the Financial Services Administration (FSA) and BCCU to complete a thorough review of its criminal history disqualifications and provide recommendations to the Secretary on potential adjustments. The goal was to create a more robust and evidence-based set of risk assessment procedures. This could be done by minimizing current disqualifications through expanded use of time limitations and more reliance on individualized CC&S assessments.
- In May of 2019, the Department of Commerce [submitted a report](#)³ to the Governor that stated they would obtain data related to the utilization of CROP. Though this report did not provide a timeline for this data, a report by the Faculty Scholarship at Santa Clara Law Digital Commons⁴

² https://www.governor.wa.gov/sites/default/files/exe_order/eo_16-05.pdf

³ <https://www.doc.wa.gov/corrections/community/docs/eo-16-05-corporate-outreach-plan.pdf>

⁴ Colleen Chien, Zuyan Huang, Jacob Kuykendall, and Katie Rabago, The Washington State Second Chance Expungement Gap (2020), Available at: <https://digitalcommons.law.scu.edu/facpubs/971>

noted the challenges in obtaining this data and estimate that only 3% of individuals eligible to vacate a criminal history have successfully vacated their record.

- Based on data provided by BCCU, .015 percent of individuals are automatically disqualified based on the Secretary's list of disqualifying crimes and negative actions.
- Although DOH reported that very few individuals are denied licensure or certification based on criminal history alone, the taskforce was unable to determine if or to what extent recent regulatory or statutory changes may be contributing to low number of denials.
- Because of the low proportion of disqualifications in this examinations, individualized assessments may not contribute substantially to the behavioral health workforce. However, individualized assessments could provide significant value to affected patients, families, and individuals with lived experience.

Data Limitations

- Data presented in this report are limited to DSHS BCCU data and anecdotal information on DOH applications for licensure and certification.
- DSHS BCCU does not gather information about an individual's race, ethnicity or any information related to protected classes during the application for employment. The 1964 Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex or national origin. Further, collecting protected data during a hiring process could be perceived as a discriminatory employment practice. Only when a fingerprint background check is run by DSHS are data on race and ethnicity optional. However, the fingerprint applications offer few options on race and ethnicity. As a result, DSHS reports that many individuals select the "other" option. No data related to fingerprint checks were available at the time of this report.
- Data on stigma and racism related to the application of the Secretary's list are not collected and would be difficult to prove or quantify.
- The taskforce considered, but was unable to confirm, the extent to which recent regulatory and statutory changes, such as the [2018 Fair Chance Act](#)⁵ and the [2016 Certificates of Restoration of Opportunity Act](#)⁶ contribute to the low prevalence of automatic disqualifications.
- Private and nonprofit employment practices were not considered in this examination.

Recommendations

- With appropriations for this purpose, DSHS, Research and Data Analysis, or another qualified entity, should conduct a review of the crimes on the Secretary's list of disqualifying crimes to determine if additional crimes should be time-limited, if the time limits on crimes that currently have them could be reduced without increasing risk to vulnerable individuals, if the circumstances surrounding a crime should automatically be considered during the determination of suitability for employment, and whether there are certain crimes that are more impactful on individuals with lived experiences or disproportionately affect black, indigenous, people of color or individuals who use a language other than English. This analysis should include data from other divisions within the DSHS that conduct background checks for behavioral health setting, and a review of character, competence, and suitability evaluations determinations. This review should lead to the

⁵ <https://app.leg.wa.gov/RCW/default.aspx?cite=49.94>

⁶ <https://app.leg.wa.gov/RCW/default.aspx?cite=9.97>

development of a recidivism risk model that acknowledges the level of risk at the time of the criminal background check rather than at the time of the criminal history event⁷.

- Examine the use, or potential use, of a variance process for crimes that are not prohibited by law. As determinations by a variance committee or group can be susceptible to bias, stigma and institutional racism, the examination should include recommendations for the diversity of the variance committee members and require training on diversity, equity, and institutional racism.
- Support individualized decision-making when not prohibited by statute or regulation.
- Display information on how to apply for a variance or exception to automatic disqualification prominently on DSHS website with other information on criminal background checks. Information on Certificate of Restoration of Opportunity should also be located on these webpages.

5.2 Anticipate a possible increase in behavioral health workers in emergency services and first responder roles.

Expanding the role of peers into emergency services and first-responder roles required an examination of the following:

- Expansion of the peer role
- A state-endorsed certification for peer crisis responders
- Continual professionalization of the peer counselor role

Expanding the peer role: HCA recently completed a curriculum project on crisis training. it is expected to launch in early 2022. The training will be available on the public Learning Management System (LMS). Additionally, as directed by SB 2092, HCA is developing a new 40-hour peer crisis training that focuses on preparing behavioral health peer specialists to work with individuals in crisis, including providing services in emergency departments, as co-responders with law enforcement, and as part of mobile crisis teams. The new training will become available to the public by June 30, 2022. HCA covers the cost of peer trainings and certifications, so no costs are passed on to Certified Peers. Because these trainings are new, there are no current data to measure the potential impact to the workforce.

State-endorsed certification for peer crisis responders: successful completion of the 40-hour peer crisis training will result in a state-endorsed certificate of completion. To ensure emergency and crisis peer services are eligible for Medicaid reimbursement, HCA will add this certification to the State Plan Amendment for the Centers for Medicare & Medicaid Services' approval.

Findings

- Increasing employment and career pathways for peer workers is a cost-effective method to expand the behavioral health workforce. Peer workers are in high demand in Washington State. Certification requires just 40 hours of training compared to more traditional training pathways that require two, four, or six years of education, thousands of hours of supervised experience, and thousands of dollars in tuition costs.

Recommendations

- Convene a diverse workgroup of peers, peer-run/led organizations, higher education partners, University of Washington Behavioral Health Institute, HCA, and DOH to design a framework to

⁷ https://www.rand.org/pubs/research_reports/RRA1360-1.html

expand peer career and education pathways, roles, settings, and billable services. Further professionalization of the peer role should be a thoughtful and inclusive process.

5.3 Expand awareness of CROP

Develop an educational program for CROP and its potential benefits for incarcerated individuals approaching release.

According to the 2020 Behavioral Health Workforce: Barriers and Solutions report, applications for CROP have been extremely low when compared to the number of individuals who may be eligible for the program. Stakeholders speculated this may be due to a lack of awareness.

The report goes on to recommend an awareness program for soon-to-be released individuals to support their transition back into the community. The report suggested that an awareness program that provides information about CROP could focus on incarcerated individuals who have non-violent offenses or SUD-related offenses who are interested in entering the behavioral health workforce.

CROP eligibility: an individual may be eligible for a CROP after a predetermined amount of time has passed from sentencing or release. The amount of time depends on a variety of factors, including the type of crime, whether or not the individual was incarcerated, and whether the individual has satisfied or is in compliance with all sentencing requirements imposed by a court ([Chapter 9.97 RCW](#)⁸).

Typically, a person is not eligible to apply for CROP for two years for crimes that are Class B or C felonies, depending on the specific circumstances. The shortest period for which an individual may be eligible for CROP is one year from the time of sentencing. However, crimes in this one-year category are not automatically disqualifying, as crimes are generally misdemeanors or gross misdemeanors. Only about 15 percent of the crimes listed on the Secretary's list are misdemeanors or gross misdemeanors. However, some of these misdemeanors or gross misdemeanor crimes may have a high degree of disqualification. For example, simple assault in the 4th degree, prostitution, harassment, or 3rd degree theft.

Court ordered Legal and financial obligations are the fines, fees, costs, and restitution imposed by the court on top of a criminal sentence. These legal and financial obligations may delay CROP eligibility, and in some cases, extend the wait period by several years. CROP eligibility requires individuals to have satisfied, or follow court-ordered legal and financial obligations, which accrue at 12 percent interest from the time of sentencing, including while an individual is incarcerated. [RCW 36.18.190](#)⁹ allows court clerks to use collection agencies to collect legal and financial obligations in exchange for the interest. Prior to 2018, all legal and financial obligations accrued this interest rate. After July 2018, interest can only accrue on court-ordered restitution.

According to the 2014 report by American Civil Liberties Union (ACLU) of Washington and Columbia Legal Services, *Modern-Day Debtors' Prisons in Washington*¹⁰, legal and financial obligations make a CROP more difficult to obtain and have a disparate impact on minorities and low-income individuals.

Findings

- In April of 2016, Governor Inslee signed Executive Order 16-05, which directed the Department of Corrections and juvenile rehabilitation to build a reentry-focused orientation for every individual

⁸ <https://app.leg.wa.gov/RCW/default.aspx?cite=9.97>

⁹ <https://app.leg.wa.gov/rcw/default.aspx?cite=36.18.190>

¹⁰ <https://www.aclu-wa.org/docs/modern-day-debtors-prisons-washington>

as she or he enters and exits a correctional facility. These orientations include information about CROP. Orientations began in March of 2017 (see the 2021 [Graduated Reentry brochure](#)¹¹).

- There is a wait time between sentencing and the time an individual is eligible for CROP. So, an educational pilot program at the time of release may be less impactful than one closer to the time an individual is eligible for CROP.
- In 2019, there were 19,000 individuals incarcerated in Washington prison facilities. More than 96 percent of these individuals will return to their communities.
- Executive Order 16-05 directed the Department of Commerce to develop a corporate outreach plan to build commitment within the business community to remove barriers for qualified applicants with criminal records. This plan includes obtaining data on CROP utilization.
- CROP requires a legal process that may vary by court of conviction. An individual with multiple findings on a Report of Arrests and Prosecutions (RAP) sheet may have to navigate several court systems to apply for a CROP.
- An individual's ability to satisfy, or comply with, court-ordered legal and financial obligations increase with employment and earnings.
- Interest on legal and financial obligations may delay eligibility for CROP by several years. However, after June of 2018, non-restitution legal and financial obligations no longer accumulate interest. Interest on restitution legal and financial obligations begin at the time of sentencing and continues to accumulate, including during incarceration, until the debt is paid in full. Simple interest accrues at 12 percent annually.

Recommendations

- Invest state resources to conduct a study on streamlining the vacation of criminal convictions such as that proposed in [2SHB 2793](#). According to Governor Inslee's Veto Letter¹² on the bill, the reason for the veto was the loss of revenue resulting from the COVID-19 pandemic. This single policy action would increase access to employment and housing opportunities, and close the gap between CROP eligibility and utilization.
- Make information about CROP available at the time individuals become eligible to vacate their record. Crop utilization would likely increase if the information, forms, and resources were made available closer to the time an individual is eligible. This could include notifications from courts, and state and county correctional facilities. This should also include information and forms on state and county public assistance sites including divisions across DSHS and DOH, county health jurisdictions, the Employment Security Department and American Job Centers (WorkSource).
- Replicate Options Addiction Counselor Training Model in Washington State Prisons. This training model was developed as a pilot in 2004 in a partnership between the San Quentin prison and Option Recovery Services, a large SUD treatment agency in Berkeley, California. The model is a 16-week training program that satisfies the education requirements in addiction studies and includes a 4,000-hour internship component. Graduates test for the state exam while in custody. The primary goals of the program are to reduce the incidence of SUDs among incarcerated populations and improve employment opportunities post-release. The program has been replicated in other California correctional facilities. In November of 2021, HCA convened a meeting with the National Association for Addiction Professionals, Department of Corrections, DOH, the State Board for Community and Technical Colleges (SBCTC), and the director of Options

¹¹ <https://www.doc.wa.gov/docs/publications/400-BR015.pdf>

¹² https://www.governor.wa.gov/sites/default/files/documents/2020_veto/2793.pdf

Recovery Services in Berkely, California. Although no commitment has been made to replicate the program in Washington correctional facilities, discussions are underway to develop a Certified Peer Counseling training program inside Washington Correctional facilities.

Conclusion

Senate Bill (SB) 5092; Section 215(40) required an examination of three strategies to increase the behavioral health workforce: a review of the Secretary's Disqualifying List of Crimes, an expansion of the peer role into crisis services, and an awareness program for CROP. Although a lack of data presented challenges to a more thorough examination, the taskforce discovered several innovative policy strategies, programs, trainings, and more recent regulatory changes designed to reduce employment barriers, increase equitable access to the behavioral health workforce.

HB 1411 will build on Washington's commitment to reduce employment barriers and provide equitable access to living wage jobs in long term care settings for individuals with previous involvement in the justice system. Changes that result from this work should be extended to private and non-profit businesses.

HCA recently completed a certification program for crisis peer workers and is developing an additional 40-hour training. Certifications such as these increase the ways in which individuals with lived experience can contribute to behavioral health services, meet industry workforce needs, and provide career pathways that can lead to more fulfilling work and higher income. These trainings are good additions to peer pathway development but should not be viewed as the end of the journey. There are numerous settings in physical and behavioral health care that could benefit from peer services. To meet the needs of the behavioral health workforce, more investments in peer pathways, as well as other paraprofessional pathways, will be necessary.

The Department of Corrections and Juvenile Rehabilitation implemented a reentry orientation for every individual that enters and releases from a correctional facility. These orientations began in March of 2017 and include information on CROP. However, these orientations may have limited ability to increase its utilization in Washington, because of delayed eligibility resulting from timeline requirements, with and without restitution, which may have a disproportionate effect on individuals with behavioral health conditions, people of color, and other low-income populations. Resources and assistance closer to the time an individual is eligible may be more effective at increasing CROP utilization and reduce disparity impacts of justice involvement.

Washington's innovative policies, programs, and training pathways have increased opportunities for underprivileged individuals. However, to meet the workforce needs, we not only need additional investments, but we also need better data to inform policies and programs and measure their impact.