Human Services Background Study Eligibility Task Force

Final Report to the Minnesota Legislature

December 2022

Executive Summary

The Human Services Background Study Eligibility Task Force is charged by the Legislature to identify problems with and recommend solutions for Minnesota's background study system under Minnesota Statutes, Chapter 245C. Chapter 245C requires prospective employees and volunteers for organizations working with vulnerable adults and minors, as well as caregivers of foster children, to obtain a license to do so from the relevant government agency. Applicants for such licenses are subject to a background study by the Department of Human Services (DHS) and shall be disqualified if a background study finds they have committed a crime enumerated in section 245C.15. The Task Force has identified a number of weaknesses and inefficiencies in this system and, therefore, has developed seven (7) major recommendations to rectify these issues. These recommendations are:

1) Reform Chapter 245C's use of juvenile evidence in disqualification determinations;
2) Simplify Chapter 245C's structure of "lookback periods" for making disqualification determinations;[1]
3) Remove disqualifying crimes under Chapter 245C that do not indicate an unacceptable risk to the health and safety of vulnerable individuals;
4) Standardize when disqualification lookback periods begin;
5) Remove Chapter 245C's bar to reconsideration requests from permanently disqualified individuals (when not necessary to comply with relevant federal statutes);
6) Remove the use of the preponderance of the evidence standard to make disqualification determinations; and
7) Undertake additional reforms to increase the efficiency and user-friendliness of the reconsideration process.

[1] This report uses the term "lookback period" to refer to enumerated crimes or conduct that disqualify an individual for a specified period of time pursuant to section 245C.15. For example, section 245C.15, subd. 2 lists several felony-level crimes with lookback periods of 15 years, meaning that an applicant found to have been discharged from a sentence of conviction for these crimes within 15 years of applying for a license must be disqualified.

Table of Contents

Membership

Minnesota Special Session Laws 2021, Chapter 7, Article 2, Section 74, Subd. 2:

(a) The task force shall consist of 26 members, appointed as follows:

(1) two members representing licensing boards whose licensed providers are subject to the provisions in Minnesota Statutes, section 245C.03, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(2) the commissioner of human services or a designee;

(3) the commissioner of health or a designee;

(4) two members representing county attorneys and law enforcement, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(5) two members representing licensed service providers who are subject to the provisions in Minnesota Statutes, section 245C.15, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(6) four members of the public, including two who have been subject to disqualification based on the provisions of Minnesota Statutes, section 245C.15, and two who have been subject to a set-aside based on the provisions of Minnesota Statutes, section 245C.15, with one from each category appointed by the speaker of the house of representatives, and one from each category appointed by the senate majority leader;

(7) one member appointed by the governor's Workforce Development Board;

(8) one member appointed by the One Minnesota Council on Diversity, Inclusion, and Equity;

(9) two members representing the Minnesota courts, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(10) one member appointed jointly by Mid-Minnesota Legal Aid, Southern Minnesota Legal Services, and the Legal Rights Center;

(11) one member representing Tribal organizations, appointed by the Minnesota Indian Affairs Council;

(12) two members from the house of representatives, including one appointed by the speaker of the house of representatives and one appointed by the minority leader in the house of representatives;

(13) two members from the senate, including one appointed by the senate majority leader and one appointed by the senate minority leader;

(14) two members representing county human services agencies appointed by the Minnesota Association of County Social Service Administrators, including one appointed to represent the metropolitan area as defined in Minnesota Statutes, section 473.121, subdivision 2, and one appointed to represent the area outside of the metropolitan area; and

(15) two attorneys who have represented individuals that appealed a background study disqualification determination based on Minnesota Statutes, sections 245C.14 and 245C.15, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader.

Michelle Basham (appointed 5/10/2022)
Appointee
Appointed by: Governor's Workforce Development Board

Senator Bobby Joe Champion
Senate
Appointed by: Senate Minority Leader

Lucas Dawson
Attorney representing individuals appealing a background study disqualification
Appointed by: Speaker of the House

Joshua Esmay
Mid-MN Legal Aid/Southern MN Legal Services/Legal Rights Center
Appointed by: Mid-MN Legal Aid/Southern MN Legal Services/Legal Rights Center

Gina Evans, Co-chair
Subject to a "set aside"
Appointed by: Senate Majority Leader

Jon Geffen, Chair
Attorney representing individuals appealing a background study disqualification
Appointed by: Senate Majority Leader

Dean Gilbertson (resigned 11/23/2021)
Licensing Board
Appointed by: Senate Majority Leader

Benjamin Hanson
Commissioner of Health Designee
Appointed by: Commissioner of Health

Elizabeth Huntley (appointed 1/31/2022)
Licensing Boards
Appointed by: Speaker of the House

Dave Irvin
Licensed service provider
Appointed by: Senate Majority Leader

Tiffany Kacir
Representing area outside of the Metro
Appointed by: MN Association of County Social Service Administrators

Roy Kammer (appointed 12/13/2021)
Licensing Board
Appointed by: Senate Majority Leader

Lieutenant Andy Knotz
Law enforcement
Appointed by: Senate Majority Leader

Honorable Gail Kulick
Minnesota Courts
Appointed by: Speaker of the House

Senator Andrew Mathews
Senate
Appointed by: Senate Majority Leader

Nicole Mattson
Licensed service provider
Appointed by: Speaker of the House

Kimberly Miller (resigned 11/2/2021)
Licensing Boards
Appointed by: Speaker of the House

Representative Kelly Moller
House of Representatives
Appointed by: Speaker of the House

Inspector General Kulani Moti
Commissioner of Human Services Designee
Appointed by: Commissioner of Human Services

Max Page
County Attorney
Appointed by: Speaker of the House

Jolene Rebertus
Appointee
Appointed by: One MN Council on Diversity, Inclusion, and Equity

Representative Kristin Robbins
House of Representatives
Appointed by: House Minority Leader

Leo Sandoval
Subject to disqualification
Appointed by: Speaker of the House

Honorable Melissa Saterbak
Minnesota Courts
Appointed by: Senate Majority Leader

Melissa Sherlock
Representing the metro area
Appointed by: MN Association of County Social Service Administrators

Dywon Tatum
Subject to disqualification
Appointed by: Senate Majority Leader

TaShonda Williamson
Subject to a "set aside"
Appointed by: Speaker of the House

Vacant
Representing Tribal Organizations
Appointed by: MN Indian Affairs Council

Background Information

Overview of the Task Force

The Human Services Background Study Eligibility Task Force is charged by the Legislature to

> (1) evaluate the existing statutes' effectiveness in protecting the individuals served by programs for which background studies are conducted under Minnesota Statutes, chapter 245C, including by gathering and reviewing available background study disqualification data; (2) identify the existing statutes' weaknesses and inefficiencies, ways in which the existing statutes may unnecessarily or unintentionally prevent qualified individuals from providing services or securing employment, and any additional areas for improvement or modernization; and (3) develop legislative proposals that improve or modernize the human services background study eligibility and disqualification statutes, or otherwise address the issues identified in clauses (1) and (2).[2]

The Task Force divided its work between 4 subcommittees: (1) Disqualifications (focused on the lists of disqualifying crimes found in Chapter 245C.15); (2) Remedies (focused on the remedies a disqualified study subject may pursue, for example, requesting a set-aside under Chapter 245C.24); (3) Data (responsible for gathering the data); and (4) Data Analysis (responsible for supporting the work of the other subcommittees by analyzing data as requested).

After more than a year of hearing expert testimony, analyzing data, researching background study statutes, and listening to the stories of people who have experienced the background study process, the Task Force has identified issues and developed recommendations in line with its mandate.

Summary of Recommendations

Juvenile offenses

Continue to permit disqualification of juveniles certified and prosecuted as adults in the same manner as adult convictions. For those who are adjudicated delinquent under the juvenile court system, and not certified as an adult, the disqualified period is 5 years, beginning from: 1) the date of adjudication, if the study subject was adjudicated delinquent of the violation but not committed to the custody of the commissioner of corrections; or 2) the date of release from juvenile detention, if the study subject was adjudicated delinquent of the violation and committed to the custody of the commissioner of corrections. If Chapter 245C continues to have a bar to setting aside a permanent disqualification, there should be an exception if this disqualification was based on a juvenile record.

Length of Disqualification

Eliminate the current structure of 7/10/15-year and permanent disqualifications, which includes disqualifications that are far too long and not commensurate with statutory need/purpose of protecting the vulnerable. This structure should be replaced with a two-tier system of 5-year and permanent disqualifications (which has the added advantage of mirroring federal statutes like the Adam Walsh Act).

[2] Minnesota Laws, 2021 1st Special Session, Chapter 7, Article 2, Section 74. See Appendix A below for full text of this legislation.

This change also addresses the need to simplify the law, reduce unnecessarily long disqualifications in myriad cases that do not affect public safety.

List of Disqualifying Offenses

Eliminate any misdemeanor/gross misdemeanor offense that does not involve health and safety of vulnerable individuals.

Date disqualification period begins

Begin the disqualification date on date of the incident for most cases. For more serious matters, begin the disqualification period after release from prison. Specifically, implement the following language: 1) the date of incident, if the study subject was convicted of the violation but not committed to the custody of the commissioner of corrections; or 2) the date of release from prison, if the study subject study subject was convicted of the violation and committed to the custody of the commissioner of corrections. This suggestion is based on idea that the time a person is crime free while on court supervision is less meaningful than when not supervised.

Permanent Bars

Permanent Crimes

- For background studies that do not need federal law compliance, adopt the 2008 Collateral Sanctions Committee recommendation that permanent disqualifications be limited to Murder, Manslaughter and Felony Criminal Sexual Conduct.[3] Remove the bar to set-aside for any permanent disqualifications that do not require federal law compliance. This would allow study subjects to show proof of rehabilitation and give DHS discretion to grant a set-aside, if DHS determines there is no risk of harm.
- Remove any permanent disqualifications altogether for Substance Use Disorder-related positions and facilities, Family Caretaker positions, and any disqualification based on conduct engaged in by a juvenile.
- Remove permanent disqualifications for positions that do not have direct unsupervised access to vulnerable people.

Background Study Use

- Federal Law Compliance- Background studies that need to comply with Federal statutes such as Adam Walsh Act or Child Care Development Block Grant should be limited to a list of disqualifications necessary to comply with those Federal Statutes.
- We anticipate that this would require DHS to have a list to help identify when a background study triggers some sort of Federal statute compliance.

Juveniles

- There should be no permanent bar for juveniles.

Preponderance of the Evidence (POE)

Disqualifications will no longer be made on a POE standard. Disqualifications will only be made based upon convictions, admissions, Alford pleas, and stays of adjudication.

[3] "DHS Background Studies, Disqualifications, and Set-Asides, Report and Recommendations of the 2007 Collateral Sanctions Committee," February 2008.

Disqualification determinations under Chapter 245C based on serious or recurring maltreatment will be made using a clear and convincing standard, rather than the current POE standard. Family assessments will not be used to calculate whether maltreatment is recurring. A study subject that receives a disqualification may utilize the request for reconsideration process and fair hearing process to challenge the disqualification for correctness. Hearings are always available for disqualifications based on serious or recurring maltreatment, even if the study subject did not appeal the maltreatment at the local level. The study subject regardless can still challenge the disqualification for a risk of harm as currently outlined.

Process

Task force members made numerous recommendations to background study process which are detailed in the report.

Overview of Chapter 245C[4]

Minnesota Statutes Chapter 245C (also known as the Human Services Background Studies Act) seeks to protect children and vulnerable adults by requiring that those working with such individuals obtain a background study permitting them to provide services from programs and agencies, such as the Department of Human Services (DHS) or Minnesota Department of Health (MDH).[5] DHS conducts background studies for more than 60 provider types, including more than 35,000 entities, with many having unique study requirements.

Chapter 245C is broad in scope, requiring background studies of prospective employees of organizations working with vulnerable adults (for example, long-term care and substance use disorder treatment facilities), as well as prospective volunteers at these organizations and providers of care for foster children. When an applicant applies for such a position, DHS conducts a study of their background and is required to disqualify them if they are found to have committed an enumerated offense on a list and within a period specified by the statute. For example, the statute has a list of misdemeanor-level crimes with a 7-year lookback period; a list of gross misdemeanor-level crimes with a lookback period of 10 years; a list of felony-level crimes with a 15-year lookback period; and a list of (typically felony-level) crimes that permanently disqualify an applicant. The lookback period is lengthened if the individual was on probation, entered an admission, or a judicial determination was made. It is illegal for an employer to hire a disqualified applicant (or for a household with a disqualified applicant in it to provide foster care). The DHS background study required by the statute is in addition to any background checks the prospective employer or relevant licensing boards might conduct.

Chapter 245C specifies several evidentiary standards that DHS may use to determine if an applicant committed a disqualifying crime. These include a conviction of, admission to, or Alford plea to an enumerated crime (in Minnesota, another state, country, or jurisdiction). In the case of a conviction, etc., in another jurisdiction, DHS legal staff may make a determination of equivalency with Minnesota law. Chapter 245C also allows DHS to review juvenile court records, and the agency must disqualify an applicant for having been adjudicated delinquent for commission of an enumerated crime as a juvenile.

[4] Parts of the procedures discussed here implicate Minnesota Statutes Chapter 245A (the Human Services Licensing Act) as well. This statute is outside of the purview of the Task Force.

[5] A number of other state agencies also license applicants under Chapter 245C.

DHS staff uses a preponderance of the evidence standard to determine whether an applicant is more likely than not to have committed a disqualifying act, even if the applicant was not convicted or even charged with a crime. The preponderance of the evidence standard, which is typically a standard used in civil law, is a much lower evidentiary standard than the clear-and-convincing standard used in other types of quasi-criminal determinations or the beyond a reasonable doubt standard used in criminal convictions (roughly speaking, a preponderance is finding a 50.1 percent chance that the accused committed the crime). Chapter 245C also specifies that applicants must be disqualified if one of several administrative determinations (for example, involuntary termination of parental rights, or a determination of maltreatment of a vulnerable adult) was made within a specified lookback period. These determinations are not criminal convictions and are based on lower evidentiary standards.

The beginning of the lookback period for a particular crime depends on the evidentiary standard used. For example, a conviction for a misdemeanor on the 7-year list will disqualify the applicant for 7 years beginning from the date of discharge from the sentence, while a preponderance of the evidence determination that the applicant committed the misdemeanor will begin the 7-year disqualification period from one of several dates specified by Chapter 245C:[6] "from the date of the dismissal, the date of discharge of the sentence imposed for a conviction for a disqualifying crime of similar elements, or the date of the incident, whichever occurs last." As a practical matter, disqualification lookback periods beginning from the date of a judicial determination like a conviction mean that these periods are in addition to the time it took for an applicant's case to be processed by the judicial system. For example, if it took 2 years from the date of a disqualifying misdemeanor for an applicant to be convicted, the 7-year lookback period means that the applicant was effectively disqualified for 9 years from their crime. Additional time would be added if a sentence is imposed. The Task Force finds this particularly concerning in light of reports of substantial delays in judicial proceedings for many cases in the wake of the COVID-19 pandemic (and subsequent on-going workforce challenges).

If an applicant is disqualified, they may pursue a reconsideration request under Chapter 245C. They are provided with written instructions from DHS on how to request reconsideration. For all disqualifications that are not permanent bars, the provided reconsideration form allows them to request reconsideration on the basis of correctness, risk of harm, or both. For permanent bars, the study subject can only request reconsideration on the basis of correctness as the legislature has prohibited the State from granting set-asides on permanent bars. Correctness challenges the underlying disqualifying event, while a risk of harm analysis determines whether a "set-aside" may be granted.

If it is determined on reconsideration that a disqualification is incorrect, the State is required to rescind the disqualification. Under a "set-aside," the applicant is determined to no longer pose an unacceptable risk of harm to vulnerable individuals they desire to serve. Chapter 245C allows the State to set aside non-permanent disqualification. Lastly, the prospective employer may also request a "variance," under which a system of supervision of the applicant is agreed upon. Chapter 245C specifies factors that DHS shall consider in determining whether an individual poses an acceptable risk of harm when making a set-aside or variance determination. These factors are applied by DHS staff as they review each reconsideration request. Applicants may also challenge the factual basis of their

[6] Specifically, the lookback period for a preponderance of the evidence-based disqualification begins "from the date of the dismissal, the date of discharge of the sentence imposed for a conviction for a disqualifying crime of similar elements, or the date of the incident, whichever occurs last." Minn. Stat. §245C.15, subd. 4(e).

disqualification, and may appeal disqualification, set-aside, and variance decisions before an administrative law or appeals court judge.

With minor exceptions (such as preponderance of the evidence determinations), the request for reconsideration review represents the first opportunity the applicant has for human discretion to be applied to their case (the initial disqualification is effectively determined by whether an applicant's name is found in a court records database). Only applicants who submit a reconsideration request are afforded this opportunity. The Task Force has found that this reconsideration process can be onerous and lengthy, which may serve to discourage some applicants from pursuing this right in the first place. Applications must be submitted in writing and by mail, with supporting evidence (such as police reports) gathered by the applicants themselves, on a tight time frame. Accommodations for applicants who are not good at expressing themselves in writing, who speak English as a second language, etc., are not provided. Anecdotally, it can take months or even years to receive a final decision, during which time the applicant is either disallowed from working in their prospective position or faces the prospect of being removed at any time if they receive a denial.[7] In either case, prospective employers must decide whether to hold the position open, risk losing an employee or volunteer just as they are settling in to their role, or to look for another candidate (this last option can be a challenge in the current job market). Applicants must likewise choose whether to risk their livelihoods by pursuing a caregiving position they desire, or to seek work less desired but not subject to background study requirements in Chapter 245C.

The reconsideration process is also not available to all disqualified applicants. With a few exceptions specified in the statute, DHS is barred from considering set-aside or variance requests for crimes with a permanently disqualifying lookback period.[8] This bar to the remedy of a set-aside or variance effectively means that a disqualification for one of these crimes is permanent with no recourse for the applicant. Permanent disqualifications for some of the crimes on the Chapter 245C list are necessary to remain in compliance with several federal statutes that tie funding to this compliance.[9] However, the Chapter 245C list of permanently disqualifying crimes is more expansive than is needed to maintain compliance with the federal statutes.

Overview of the Data

The Task Force worked closely with DHS staff to develop a quantitative picture of the background study process under Chapter 245C, using data from 2018 and 2019.[10] These data show a large and growing system that processes hundreds of thousands of background studies per year (184,700 in 2018 and 210,625 in 2019). Thousands of these lead to disqualifications (7,622 in 2018; 12,928 in 2019), and about a third of these disqualifications led to a request for reconsideration (set-aside, etc.). A large percentage of these requests were granted (2,150, or 75 percent, in 2018, and 2,731,

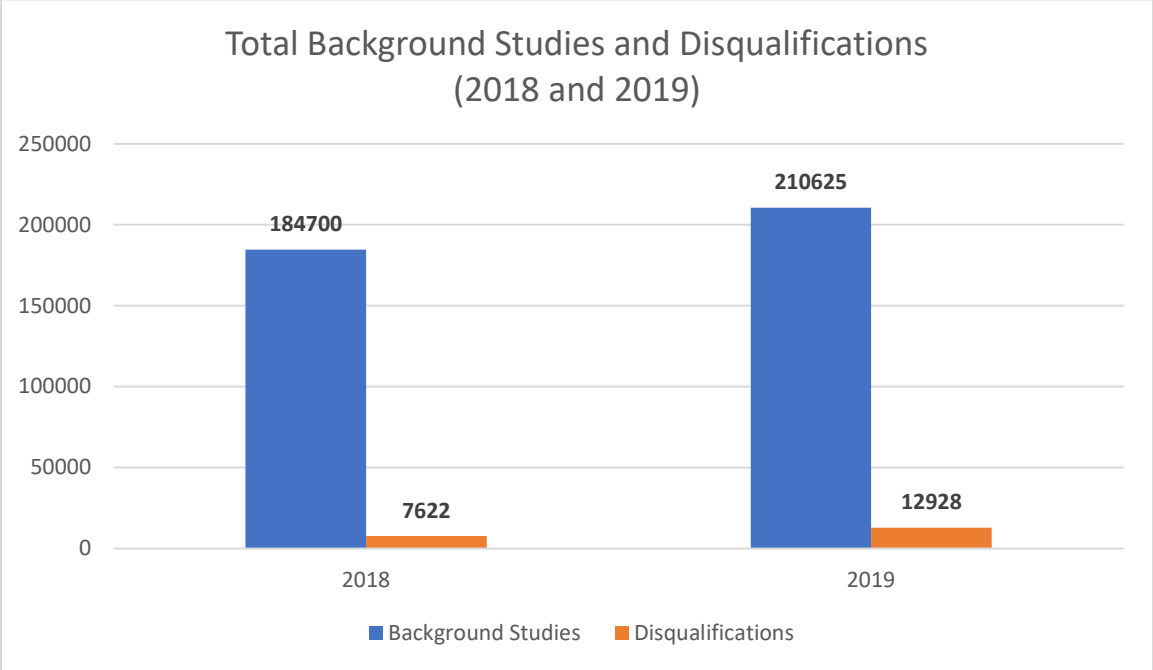
[7] The Task Force requested quantitative data from DHS on the timeliness of the reconsideration process. No data was provided. The Task Force is thus forced to rely on anecdotal information provided by both employers and people with lived experiences of going through the background study process, both of which consistently emphasized long and frustrating delays in receiving a response to reconsideration requests.

[8] These exceptions can be found in Minn. Stat. §245C.24 Subd. 2 (b)-(f).

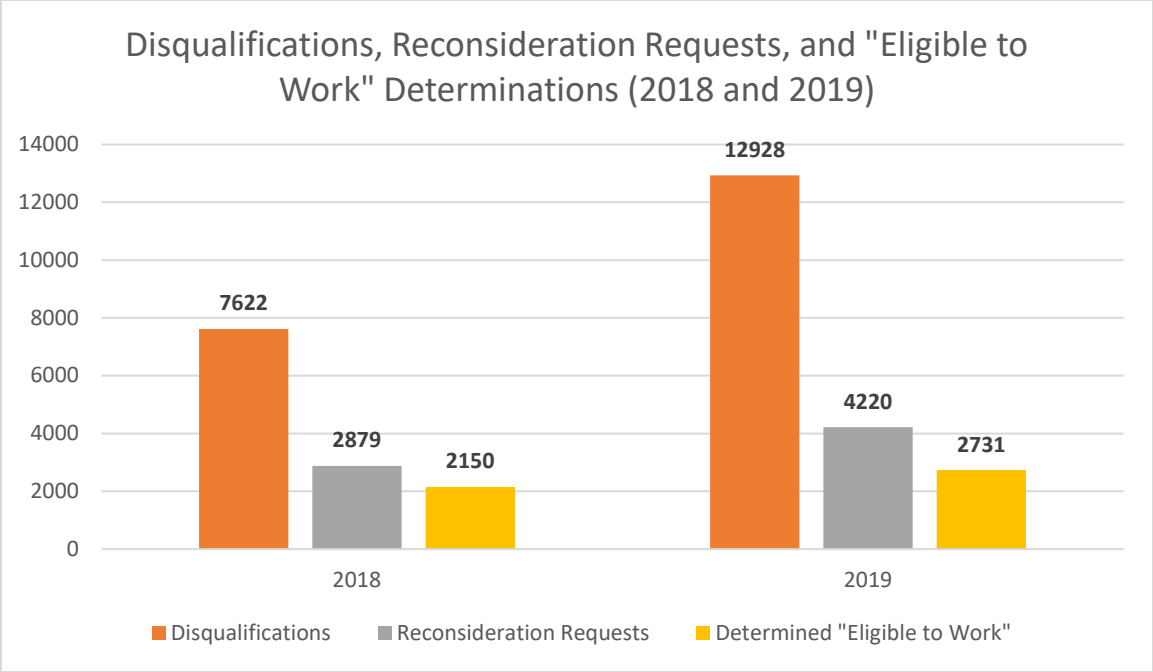
[9] For example, Title IV-E of the Social Security Act (42 U.S.C. §671).

[10] The datasets used by the Task Force are listed in Appendix B, below, and are publicly available on the Task Force website here: https://www.lcc.mn.gov/hsbtf/

or 65 percent, in 2019). This high rate of set-asides, variances, and other outcomes determining the applicant "eligible to work"[11] despite their disqualification is particularly noteworthy with regard to disqualifying crimes like issuance of dishonored checks (90 percent of reconsideration requests were successful in 2018; 94 percent in 2019) and receiving stolen property (91 percent successful requests in 2018; 90 percent in 2019). The fact that so many applicants did not exercise their right to request reconsideration (4,743 determinations were not appealed in 2018; 8,708 in 2019) stands in stark contrast to such high rates of successful requests. This disparity is likely due, at least in part, to the difficulty of submitting an effective request (such as the need to quickly write an eloquent application and gather evidence, followed by the prospect of a long wait for an answer). If these applicants had all made reconsideration requests and received favorable outcomes at similar rates, thousands of much-needed workers would have been available to join the caregiving workforce.



[11] "Eligible to work" is a category used by the Task Force in its analysis of DHS-provided data on the outcome of reconsideration requests. It combines the following categories reported in the DHS data: Previous Set Aside, Remains Set Aside, Rescind in Total, Set Aside, Limited Set Aside, and Not Set Aside – Variance Granted.

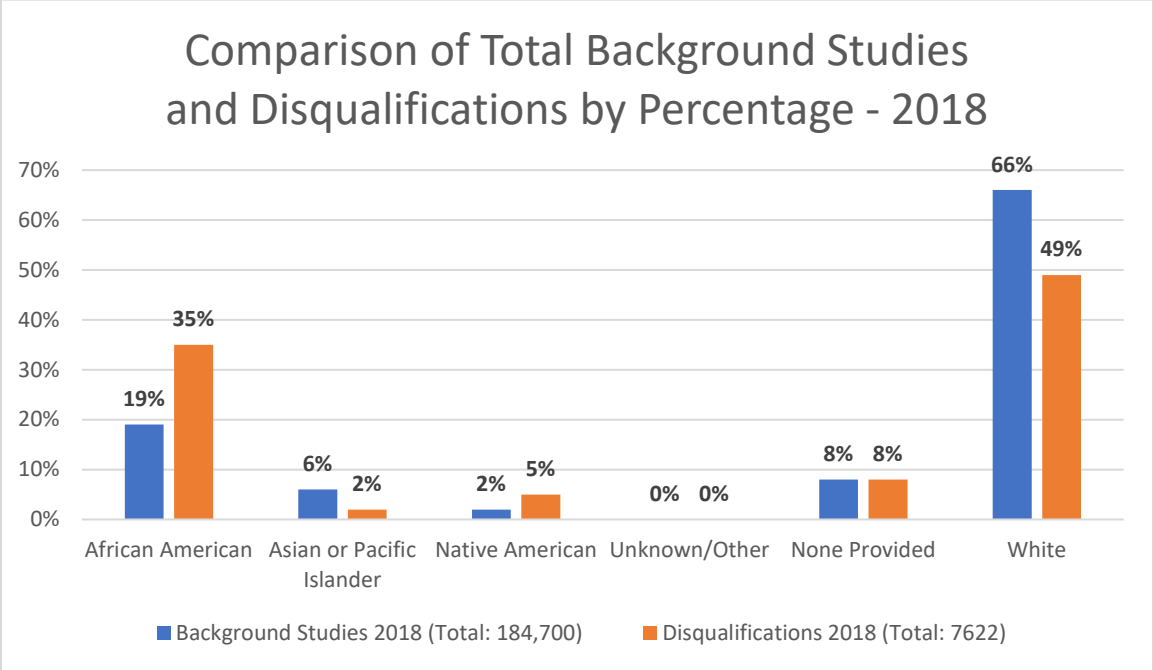


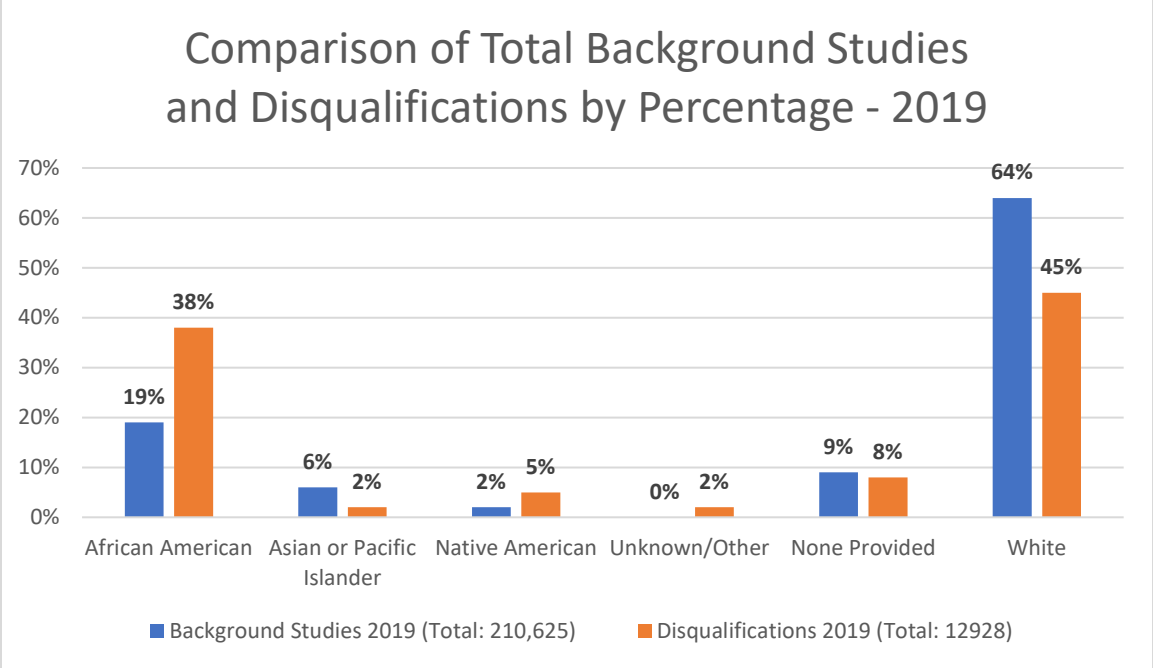
These data also highlight troubling racial disparities in the background study system, with applicants of color, particularly applicants identified as African-American and Native American, being disqualified at rates starkly disproportionate to the Minnesota population as a whole.[12] Seven percent of Minnesota's population was reported as "Black/African American" in the 2020 Census. Individuals who identified as African American comprised a higher percentage of background study applicants (19 percent) in 2018/2019, but African American individuals were also disqualified at an even higher rate (35 percent of disqualified applicants in 2018 and 38 percent in 2019). In other words, a third of people disqualified by the background study system are African American, in a state where "Black/African American" individuals make up 7 percent of the population. Likewise, over 5 percent of disqualified applicants in both years were identified as Native American. This is a disqualification rate five times higher than the 1.2 percent of Minnesota's population reported as "American Indian/Alaska Native" in the 2020 Census.[13]

By comparison, the 2020 Census identified 77 percent of Minnesotans as "White," and 64-66 percent of applicants in 2018-2019 were identified as White, but only 49 percent of disqualified individuals in 2018 and 45 percent in 2019 were identified with this category. The Task Force believes that this troubling disparity of outcome reflects the "downstream" effects of racial disparities in Minnesota's criminal justice system, due to Chapter 245C's rigid disqualification requirements and long lookback periods. It is important to emphasize, however, that Chapter 245C is intended to protect the health and safety of vulnerable adults and minors, not to further punish individuals who have already paid their debt to society. These data show that an unintended consequence of Chapter 245C as it exists

[12] The datasets provided to the Task Force use the race/ethnicity categories in the FBI's Criminal Justice Information Services (CJIS) system, which are used verbatim in this report.
[13] In 2018/2019, 1.5 percent of applicants were identified as Native American; a higher percentage than Minnesota's general population, but still far fewer than the 5 percent of disqualified individuals identified as Native American in those years.

today is to extend the disproportionate impact the criminal justice system has on many of Minnesota's communities of color.





Overview of Other Information Reviewed

The Task Force also drew on the knowledge of expert witnesses, research on similar statutes in other states, qualitative information from employers who have interacted with the background study system, and the lived experiences of individuals who have gone through the background study process. This information depicted an overly rigid system that is unresponsive to Minnesota's pressing workforce

needs and out of line with other states' practices, as well as scientific knowledge on juvenile brain development, rehabilitation, and recidivism.

The Task Force heard testimony from Brandon Jones (from the Minnesota Association for Children's Mental Health) and Dr. Corrie Vilsaint (from Massachusetts General Hospital and Harvard Medical School). Mr. Jones, who is an expert on juvenile mental health and brain development, made clear that brain development science does not support Chapter 245C's use of juvenile behavior (such as adjudications for delinquency) as a basis for determining future risk of harm to vulnerable individuals. "The growth of your actual brain stops at 24-25 years old… [behavior as an adolescent] is not a predictor… [of behavior] as more mature adults after 25 years old."[14] This scientific insight comports with the commonsense knowledge that our imprudent behavior as teenagers does not necessarily reflect on who we are as adults, and formed the basis for the Task Force's recommendation that Chapter 245C's use of juvenile evidence be reformed (see below). Dr. Vilsaint is an expert on the science of addiction, relapse, and recovery. In her testimony, Dr. Vilsaint emphasized that if an individual who is suffering from addiction to a chemical substance can stay in recovery for several years, they are likely to succeed in doing so in the future. "When people with a substance use disorder enter the substance use disorder [treatment] workforce… thinking about some of the work environment stuff [in SUD treatment], about two years" seems to be an appropriate period for an applicant to have been in recovery.[15] She also mentioned how someone who has committed a crime but remains crime-free for several years after they leave the criminal justice system has demonstrated strong evidence of rehabilitation. This insight comports with other criminological research, which finds that statistically, someone who has been convicted of a crime and who maintains several years of non-criminal behavior afterwards is no more likely to commit another offence than any other member of the general public.[16] Because, as this research shows, past behavior fails to remain a good predictor of negative future behavior after a few years of an individual remaining in recovery or otherwise demonstrating rehabilitation, the Task Force believes that Chapter 245C's current lookback structure is longer than needed to protect the health and safety of vulnerable adults and minors. This insight underlies the Task Force's recommendation that this lookback structure be reformed (see below).

The Task Force also conducted research comparing Chapter 245C to similar laws in other states.[17] One of the most notable conclusions is that Minnesota is an outlier for its use of the preponderance of the evidence standard in making disqualification determinations. (Under this standard, an applicant may be disqualified for a crime even if they are not convicted of it or are charged but have the charges dismissed. An applicant who was arrested but not charged with a crime may even

[14] Quote from April 8, 2022 Task Force meeting.
[15] Quote from September 23, 2022 Task Force meeting.
[16] See e.g. Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, "Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?," *Criminology and Public Policy* 5 no 3 (2006), 483-504; Alfred Blumstein and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," *Criminology* 47 no 2 (2009), 327-359; J. J. Prescott and Sonja B. Starr, "Expungement of Criminal Convictions: An Empirical Study," *Harvard Law Review* 133 no 8 (2020), 2460-2555.
[17] This research entailed identifying other states' laws that overlap with (but are not necessarily equivalent in scope to) Chapter 245C. For example, this research identified a North Carolina statute regulating home health aides, but not other employee, volunteer, or foster care provider categories covered by Chapter 245C. N.C. Gen. Stat. Ann. §131E-265. (This statute, like most identified by this research, used conviction for a crime as the disqualification standard). See Appendix C, below, for a list of state statutes identified by this research.

be disqualified under this standard.) The vast majority of other states studied use conviction for a crime as their standard for disqualifying an applicant from a job working with vulnerable individuals, and do not appear to compromise the health and safety of vulnerable adults and minors in doing so.[18] The Task Force believes that bringing Chapter 245C more in line with other states' practices by eliminating the use of the preponderance of the evidence standard would likewise not have a negative impact on the health and safety of vulnerable adults and minors. The Task Force is aware that current DHS practice is to avoid the use of the preponderance of the evidence standard in making most disqualification determinations, with this standard being predominantly used to disqualify applicants for alleged domestic assault.[19] However, this practice is an administrative decision, which may be reversed in the future under the current statute, and the Task Force recommends that instead Chapter 245C be reformed to enshrine this predominant current practice in statute by eliminating the use of the preponderance of the evidence standard.

The Task Force also received information from employers. It heard testimony from Joyce Norals of Lutheran Social Services (a major provider of services to vulnerable adults), as well as Amy Dellwo and Tom Meier of NuWay (a major provider of treatment services for individuals suffering from substance use disorder). Both Ms. Norals and Ms. Dellwo and Mr. Meier emphasized their frustrating experiences as employers trying to hire applicants with a criminal history under the current background study system. "Many times, that notice [that an applicant has been disqualified] comes after we have really invested in the person… working for us pending the results of the review," Ms. Norals noted. "When [applicants] are snatched out of the workforce when a disqualification is made, it really creates a lot of disruption, not only for the people they serve but their colleagues as well and of course the individual." The lengthy and difficult process of hiring these applicants, exacerbates their already dire staffing shortages. "It can take a couple of months, up to a year… when an individual is disqualified, and even if they pursue reconsideration, what happens is people have to move on… We might lose a very qualified individual," noted Ms. Norals.[20] Ms. Dellwo and Mr. Meier also emphasized how in the substance use disorder treatment field in particular, it is often applicants with histories of addiction (which could, in turn, lead to disqualifying criminal charges) who can most valuably serve their clients. It is "the people… who are doing the real heavy lifting with clients, and basically effecting the most change in the community with our clients because of their lived experience… who aren't able to get through the set-aside process in a timely fashion."[21] The practical impediments to hiring these individuals imposed by the inefficiencies of the current background study system may thus undermine the recovery of the very clients this system was intended to protect. This testimony was further echoed by employer comments submitted to the Task Force through its webpage and solicited by Task Force subcommittees, with one

[18] Kentucky and Maine statutes identified by this research allow a preponderance of the evidence standard to make disqualifying determinations. KY. Rev. Stat. Ann. §209.032; Me. Rev. Stat. Ann. Tit. 22 §1812-G. Several other states use more ambiguous language: for example, Kansas, Nevada, and South Dakota statutes regulating caregivers and certified nurse's aides allow applicants to be disqualified based on a "substantial finding" of a disqualifying crime having been committed. Kan. Stat. Ann. §39-970; Nev. Rev. Stat. Ann. §449.123; S.D. Admin. R. 44:74:01:01. See Appendix C, below.

[19] Furthermore, the quantitative data show that reconsideration requests by those disqualified for this conduct were very likely to succeed in 2018 (with 80% of requests being successful) and 2019 (73%). That is to say that when DHS was able to exercise human discretion in determining an applicant's real risk of harm by reviewing a request, an acceptable risk of harm was found a majority of the time.

[20] Quotes from February 25, 2022 Task Force meeting.

[21] Quote from March 11, 2022 Task Force meeting.

employer reporting having "multiple staff that have been waiting 4+ months on if they are gonna pass or fail a background check."[22] It is important to emphasize that the employers whose voices the Task Force heard were aware that the applicants they have wished to hire had a criminal past, and that they were prevented from exercising their discretion to hire these individuals by the rigid system mandated by Chapter 245C. The Task Force believes that many of the reforms recommended below would make this hiring process easier while protecting the health and safety of vulnerable adults and minors. It would also like to point out that at the time this report was written (late 2022), caregiving services in Minnesota are facing a staffing shortage that is approaching crisis levels. A lack of staff in these crucial services is itself a threat to the safety of vulnerable individuals. As an extreme (but illustrative) example, the *Star-Tribune* recently reported that one disabled individual suffered amputation of his legs because of staffing shortages among his caregivers.[23] Public testimony to the legislature by providers in this area has emphasized the crisis that they are facing. The Task Force believes that its recommendations for reform in Chapter 245C will continue to protect the health and safety of vulnerable adults and minors as the statute intends, and that by giving employers greater freedom to make hiring decisions, these reforms will help mitigate the risks posed to vulnerable individuals by this staffing crisis.

This belief is reinforced by the testimony and public comments the Task Force has received from individuals who have had lived experiences with the background study system. One testifier "was ecstatic" when he was offered a job "as a community health worker connecting justice-involved individuals upon release from prison who also have substance use disorder," but "when the DHS background study came back and I was ultimately disqualified and my job offer was rescinded, my devastation related to the knowledge that I have something to offer the world but feeling unable to contribute that gift because the current system cannot measure the changes I have gone through cognitively and emotionally."[24] Another recounted substantial delays in her background study, leading to the loss of a job for which she was critically needed. "I was employed in January of 2022, and still have not heard anything on the background study, not even the denial. HR and myself have contacted DHS background division, where there has been no progress on the study. I was offered a position inside of the company, went through both interviews and was ready to be hired into the new roll. Due to my background study not being completed and I would be working more independently I was not able to take the position. The last time that HR talked to the DHS background division it was said 'we are too backed up, it will not be looked at until August at the earliest'. While this was discouraging, I continue to work and serve clients with a positive attitude."[25] Hearing from these individuals, the Task Force is impressed with the determination they have shown to turn their lives around and serve their community, even in the discouraging face of the background study system as it stands today. The Task Force believes that the reforms it recommends below will continue to serve Chapter 245C's goal of protecting the health and safety of vulnerable adults and minors, while making it easier for applicants like those it has heard from to contribute to a stronger Minnesota.

---

[22] Comment submitted through Task Force website.

[23] Chris Serres, "Stranded Without Care, Minnesota Man Loses Limbs Because of Severe Staffing Shortage," *Star-Tribune*, November 5, 2022, www.startribune.com/stranded-without-care-minnesota-man-loses-limbs-because-of-severe-staffing-shortage/600222357

[24] Testimony from January 28, 2022 Task Force meeting.

[25] Comment submitted through Task Force website.

Recommendations

Juvenile Offenses:

Under Chapter 245C, the reviewing agency reviews records from the juvenile court system when conducting a background study, despite the fact that these records are commonly non-public information.[26] These include records from three ways that juvenile cases are handled by the court system. A case involving a child ordinarily remains a juvenile matter, and the juvenile court system has jurisdiction over the child until they reach the age of nineteen (19) years old. A child may be adjudicated delinquent of a crime, but by law, this is not the same thing as a conviction for that crime. Some (typically more serious) cases are routed through Extended Juvenile Jurisdiction ("EJJ"), and the case remains in the juvenile system until the individual reaches the age of twenty-one (21) years old. During EJJ, the juvenile is subject to a stayed adult sentence, and if the person violates the terms of their sentence, the court can revoke participation in EJJ and impose the adult sentence. Finally, in some particularly serious situations, a juvenile may be certified as an adult and their case is treated as if the juvenile were an adult. Chapter 245C requires the reviewing agency to use juvenile evidence including adjudications of delinquency when determining if a person is disqualified from direct care positions. Essentially, Chapter 245C treats juvenile adjudications the same as adult convictions, despite the distinction between the two in most other areas of Minnesota law. Accordingly, if a fourteen-year-old is adjudicated for a burglary, then they are disqualified for 15 years; the same as an adult committing the crime.

The Task Force believes that there are several problems with this practice. Both the common sense underlying the juvenile court system and the science of brain development suggest that using applicants' conduct as minors to disqualify them for such long periods of time is not warranted. Simply put, many adults did stupid things as juveniles which they may never do again once they reach maturity. This idea is reflected in the fact that Minnesota maintains a distinct separation between juvenile and adult courts, with the juvenile process being fundamentally different from adult criminal courts. For example, a juvenile has no right to a trial by jury, the proceedings are not public, oftentimes the record of the events are not public, and the underlying goal is support and rehabilitation. Advances in science, and recent decisions by the Supreme Court illustrate that as a matter of fact, children's brains are developing. Children fundamentally contrast with adults both physiologically and psychologically, such that, though they must be held accountable when they offend, it must be done in a developmentally appropriate manner. "Developmental changes that occur during childhood and [continuing through] adolescence ... are relevant to competence, culpability, and likely response to treatment." In light of this, the Task Force believes that it is generally dubious to regard applicants as posing an exceptional risk of harm to vulnerable individuals long after their conduct as juveniles. Some juvenile matters are severe and require exclusion from vulnerable individuals, but these severe cases are exactly what the process of EJJ and adult certification are intended to address. A distinction can be drawn between these cases and those where the applicant was adjudicated delinquent.

The Task Force is also concerned about racial disparities evident in this use of juvenile evidence. For example, in Hennepin County, from 2018 to 2022, 66.5 percent of juvenile prosecution are listed as "Black or African American." While 19.89 percent identify as "white." According to 2021 Census, 74.2

[26] See Minn. Stat. §§ 260B.171, Subd. 4 and 260B.163, Subd. 1(c).

percent of Hennepin County residents identify as "white alone" while 13.8 percent identified as "Black or African American alone." These disparities remain within the background study process. In 2018, 303 (42 percent) of 726 individuals disqualified based on a juvenile matter were identified as "African American." In 2019, 515 (46 percent) of the 1,135 individuals disqualified were identified as "African American." This number is significantly disproportionate with statewide data listing the state's population of African Americans at 7 percent . The Task Force is concerned that these outcomes are inconsistent with Minnesota's Policy on Disproportionate Minority Contact under section 260B.002, which commits the state "to identify and eliminate barriers to racial, ethnic, and gender fairness within the criminal justice, juvenile justice, corrections, and judicial systems, in support of the fundamental principle of fair and equitable treatment under law."[27]

RECOMMENDATION: Continue to permit disqualification of juveniles certified and prosecuted as adults in the same manner as adult convictions. This includes those who were on EJJ and violated the terms of the sentence and had an adult sentence imposed. For those who are adjudicated delinquent under the juvenile court system, and not certified as an adult, the disqualified period is 5 years, beginning from: 1) the date of conviction, if the individual was convicted of the violation but not committed to the custody of the commissioner of corrections; or 2) the date of completion of sentence, if the individual was convicted of the violation and committed to the custody of the commissioner of corrections. If Chapter 245C continues to bar the setting aside of a permanent disqualification, there should be an exception for disqualifications based on a juvenile record.

Length of Disqualification:

Minnesota law currently separates the length of a disqualification into four (4) categories of lookback periods:

1) Permanent disqualification. Disqualification period never expires. Reserved for serious offenses (regardless of the level of the offense) such as murder, kidnapping, criminal sexual conduct. *See* § 245C.15, Subd. 1 for a complete list.

2) 15-Year Disqualification. Disqualification period ends 15 years *after* the discharge of sentence. List includes felony level offenses of numerous crimes. *See* § 245C.15, subd. 2 for a complete list.

3) 10-Year Disqualification. Disqualification period ends 10 years after the discharge of sentence. List includes gross misdemeanor level offenses of numerous crimes. *See* § 245C.15, subd. 3 for a complete list.

4) 7-year Disqualification. Disqualification period ends 7 years since the discharge of sentence. List includes misdemeanor level offenses of numerous crimes and substantiated serious or recurring maltreatment of a minor (Minnesota Statutes Chapter 260E) or vulnerable adult (Minnesota Statutes section 626.557). *See* § 245C.15, subd. 4 for a complete list.

The Task Force has several concerns about this lookback period structure. In light of information it has received on the science of addiction, recovery, and recidivism (discussed above), the Task Force

[27] See Minn. Stat. §§ 260B.002.

believes that the 15-year disqualification for drug possession is longer than necessary to protect the health and safety of vulnerable adults and minors. A 2008 report to the Legislature by the Collateral Sanctions Committee raised similar concerns, and the logic of this document remains sound today.[28] Current law levies the exact same 15-year disqualification for a 5th Degree Controlled Substance possession offense and a 1St Degree Controlled Substance Offense. Essentially, Chapter 245C currently treats an individual who is addicted to a chemical the same as a person who sells even large amounts of a chemical.

The Task Force is also concerned that the current system under Chapter 245C is inconsistent with Minnesota's criminal expungement statute, also referred to as the Second Chance Act (See Minnesota Statutes Chapter 609A). In the expungement statute, a person may seek expungement as follows:

Diversion or Stay of Adjudication	One year after completion of Sentence
Misdemeanor Conviction	Two years after completion of Sentence
Goss Misdemeanor	Three years after completion of Sentence
Felony	Five years after completion of Sentence

As a result, individuals with financial means may seek expungement of these criminal records within the lookback period under Chapter 245C and sidestep disqualification. For example, a person who was convicted of a misdemeanor theft may seek an expungement two years after completing the terms of their sentence. However, if not expunged, that misdemeanor theft will remain a disqualification for 7 years after the completion of their sentence. This is incongruent, does not make sense, and results in inequitable treatment of those without the financial resources to pay for an attorney to expunge their case.

Chapter 245C's lookback period structure is also confusing/hard to implement. One of the biggest complaints identified from the community is the difficulty understanding Chapter 245C and disqualifications. The law requires one to understand the four tiers of disqualification period, when the disqualification period begins, what occurs when a case is reduced by a stay of imposition,[29] and in cases where a person is never convicted.[30] This complicated scheme leaves those impacted consistently confused whether they are disqualified.

RECOMMENDATION: Eliminate the current structure of 7/10/15/permanent disqualifications, which includes disqualifications that are far too long and not commensurate with statutory need/purpose of protecting the vulnerable. This structure should be replaced with a two-tier system of 5 year and permanent disqualifications (which has the added advantage of mirroring relevant federal statutes like

[28] "DHS Background Studies, Disqualifications, and Set-Asides, Report and Recommendations of the 2007 Collateral Sanctions Committee," February 2008.

[29] A stay of imposition is a very common tool used by attorneys and the court. Generally, a person who accepts a plea to a felony will have the severity of the conviction reduced if they successfully complete probation. See Minn. Stat. sec. 609.185.

[30] Minnesota law disqualifies individuals in situations without a conviction. This occurs when a person makes an admission, enters into an Alford Plea and even if the reviewing agency determines it is more likely than not the crime occurred.

the Adam Walsh Act). This change also addresses the need to simplify the law and reduce unnecessarily long disqualifications in myriad cases that do not affect public safety.

ALTERNATIVE SUGGESTION: Some members believe that the two-tier structure proposed above is overly inflexible, while agreeing that the current lookback period structure (particularly the 15-year disqualification category) is excessively long. They instead propose a three-tier lookback period structure: for example, of 5 year, 10 year, and permanent disqualifications.

List of Disqualifying Offenses:

The list of disqualifying offenses under section 245C.15 is overly extensive. It includes misdemeanor offenses that do not substantially endanger community safety, particularly "crimes of poverty" like Issuance of a Dishonored Check. It also removes employers from making informed decisions. Chapter 245C prohibits employers from hiring those they think are best suited for job. This is a unique facet of Chapter 245C. It removes the employer's decision making authority regarding who is best fit to work for the company, despite the fact that employers commonly vet their prospective employees and conduct their own background checks.

Additionally, many offenses listed in section 245C.15 are not identified as disqualifying offenses in related federal law (such as the Adam Walsh Act and Child Care Development Block Grants). This indicates these offenses are not so severe the government should preclude employers from making informed hiring decisions. The main body of section 245C.15 is also inconsistent with sections added by the new Child Foster Care law, which removed a number of offenses from the list of disqualifications while reducing the lookback period length of others.

RECOMMENDATION: Eliminate misdemeanor/gross misdemeanor offenses when doing so would not pose an excessive risk to the health and safety of vulnerable adults and minors. For example:

Wrongfully obtaining public assistance	Minn. Stat.§ 256.98
Unemployment Fraud	Minn. Stat.§ 268.182
Federal SNAP Fraud	Minn. Stat.§ 397.03
Medical Assistance Fraud	Minn. Stat.§ 609.466
Theft	Minn. Stat.§ 609.466
Bringing Stolen Goods into MN	Minn. Stat.§ 609.525
Issuance of Dishonored Check	Minn. Stat.§ 609.535
Financial Transaction Card Fraud	Minn. Stat.§ 609.821

Reduce the disqualification period of felony crimes that do not pose an excessive risk to the health and safety of vulnerable adults and minors. Under the recommendations above, the new disqualification period for the below listed crimes would be 5 years:

Wrongfully obtaining public assistance	Minn. Stat.§ 256.98
Unemployment Fraud	Minn. Stat.§ 268.182

Federal SNAP Fraud	Minn. Stat.§ 397.03
Medical Assistance Fraud	Minn. Stat.§ 609.466
Possession of Shoplifting gear	Minn. Stat.§ 609.521
Bringing Stolen Goods in MN	Minn. Stat.§ 609.525
Issuance of Dishonored Check	Minn. Stat.§ 609.535
Possession Burglary Tool	Minn. Stat.§ 609.59
Insurance Fraud	Minn. Stat.§ 609.11
Aggravated Forgery	Minn. Stat.§ 609.625
Forgery	Minn. Stat.§ 609.63
Check Forgery/Offering a Forged Check	Minn. Stat.§ 609.631
Fraud in Obtaining Credit	Minn. Stat.§ 609.82
Financial Transaction Card Fraud	Minn. Stat.§ 609.821
Drug cases under Chapter 152	Chapter 152 (see note below).

The judgment that disqualifications for these crimes may be safely eliminated/reduced is based on extensive examination by the Task Force's Disqualification subcommittee, which went crime-by-crime through section 245C.15 in its meetings. This work entailed placing section 245C.15 crimes into informal categories such as crimes against persons, against property, etc. The crimes identified above as being safely able to be eliminated/reduced generally fit into a category of "crimes of poverty" developed by the subcommittee. It is important to note that this list does not include all crimes of fraud or violated trust, and the Task Force does not suggest eliminating all such crimes from 245C.15. For example, the Task Force does not suggest eliminating the crime of Financial Exploitation of a Vulnerable Adult from the disqualifying crimes specified by Section 245C.15.

It is important to note that these proposed changes are not any kind of "free pass" for applicants. If someone has been subject to judicial sanction for any of these crimes, they have already been punished by that sanction. However, Chapter 245C is intended to protect the health and safety of people receiving services and program integrity, not to punish applicants. The Task Force believes that the reforms it proposes will continue to accomplish the former goal, and that the only real purpose for keeping the system as it stands today would be to (illegitimately) accomplish the latter. Moreover, prospective employers will still have access to all public records related to the applicant's criminal history. Employers can use such records to make their own decisions about who is the best fit for their organizations, even if the proposed reforms remove government control over their decisions. In the case of drug offenses in particular, the Task Force believes that reducing the length of a disqualification based on a drug conviction is a rational reflection of the fact that many individuals struggle with chemical use but recover. Indeed, these individuals often are in a unique position to help others successfully navigate their own recovery. When consistent with the health and safety of vulnerable adults and minors, we should remove their impediments to doing so.

Date disqualification period should begin:

Chapter 245C sets forth several different time periods when a disqualification begins based on how the case was resolved. Specifically, the law delineates between convictions, admissions, preponderance of the evidence, court orders and Alford Pleas. Minn. Stat. § 245C.15, subd. 1(d).

Conviction: For a conviction, the disqualification period begins at the conclusion of an individual's sentence. Minn. Stat. § 245C.15, subd. 1(d). For example, under the current law, a person who is cited for felony drug possession is disqualified for 15 years after completion of the terms of the sentence. Accordingly, if the person is sentence to five (5) years of probation beginning in 2015 and ending in 2020, the person's 15-year disqualification period will begin in 2020 and expire in 2035.

Admission: When a disqualification is based on an admission (but not a conviction), the disqualification begins from the date of the admission in Court. Minn. Stat. § 245C.15, subd. 1(d). This situation arises in cases where, for example, an individual is charged with crime, admits to engaging in the criminal activity, but the court does accept the plea in lieu of probation or other terms.

Preponderance of Evidence: Preponderance of the Evidence ("POE") disqualifications begins on the date of the dismissal of charges, the date of the sentence imposed, or date of the incidence, whichever occurs last. Minn. Stat. § 245C.15, subd. 1(d).

Alford Plea: Disqualification for an Alford Plea begins the date the Alford Plea is entered in court. Minn. Stat. § 245C.15, subd. 1(d). An Alford Plea is a plea in criminal court whereby a defendant does not admit to the criminal act and asserts innocence but admits that the evidence is likely to persuade a judge or jury of the person's guilt.

Non-Conviction Judicial Determination: Begins the date of the Court Order.

The Task Force is concerned that this current patchwork system leads to inequitable results. For example, some counties use longer probation periods than others. A person sentenced for similar crimes may receive vastly different probationary periods. Likewise, delays in court proceedings due to the COVID-19 pandemic have led to longer disqualification periods. The pandemic slowed prosecution of criminal cases because courts shut down and operated on a reduced capacity. Accordingly, many criminal matters were put "on hold." As the pandemic subsides, these criminal cases were processed years after the alleged incident. Furthermore, some counties do not regularly reduce the length of probation. In many jurisdictions, if a person is doing well, the court terminates probation before the original expiration date. However, some counties do not reduce probationary periods. Finally, the current system creates longer disqualification periods for those who exercise right to a criminal trial. An individual charged with a crime has a constitutional right to a trial. This process takes time. If that person exercises their right to a trial, and is found guilty, their disqualification period will last longer than a person who committed the same crime on the same day and took a plea deal. The Task Force questions whether it is legal, or wise, to punish a person for exercising a constitutional right.[31] All of these scenarios delay the end of one's sentence and under current law, result in a longer disqualification

[31] "While an individual may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *United States v. Goodwin*, 457 U.S. 36, 372 (1982).

period. Using the date of the release from one's sentence is not connected to the conduct. As noted above, there are numerous issues that are unrelated to the actions causing concern that impact the length of the disqualification. The Task Force believes that the period of disqualification must be tethered to the conduct. Finally, the Task Force questions whether Chapter 245C as currently written is consistent with recent modifications in child foster care law. Under these modifications, a disqualification period begins on the date of the incident, not the date of release of supervision. Minn. Stat. § 245C.15, subd. 4a(e) (6).

RECOMMENDATION: Begin the disqualification date on date of the incident for most cases. For more serious matters, begin the disqualification period after release from custody. Specifically, implement the following language: 1) the date of incident, if the individual was convicted of the violation but not committed to the custody of the commissioner of corrections; or 2) the date of completion of sentence, if the individual was convicted of the violation and committed to the custody of the commissioner of corrections. This suggestion is based on idea that the time a person is crime free while in confinement is less meaningful than when not confined.

ALTERNATIVE SUGGESTION: Some members suggest that rather than beginning the disqualification period at the time of the offense, the legislature should consider adopting the scheme that it recently endorsed when amending the child foster care statutes in 2020. Specifically, the legislature should consider the language, or some variation thereof, in Minn. Stat. § 245C.15, Subd. 4a(f):

> (f) For purposes of this subdivision, the disqualification begins from:
>
> (1) the date of the alleged violation, if the individual was not convicted;
>
> (2) the date of conviction, if the individual was convicted of the violation but not committed to the custody of the commissioner of corrections; or
>
> (3) the date of release from prison, if the individual was convicted of the violation and committed to the custody of the commissioner of corrections.
>
> Notwithstanding clause (3), if the individual is subsequently reincarcerated for a violation of the individual's supervised release, the disqualification begins from the date of release from the subsequent incarceration.

Many people change their behavior or circumstances upon arrest or when charged with a crime, and for those people, the Task Force's recommendation may make sense. Many other individuals, however, do not begin to change their behavior until after being convicted or until after they have begun participating in the recommendations of probation.

Permanent Disqualifications and Bars:

The statute, as constructed, prevents the reviewing agency from making a determination on a case-by-case basis whether an applicant poses an unacceptable risk to the health and safety of vulnerable adults and minors, regardless of how much time has passed and how much rehabilitation the person has accomplished. It is best for people to be evaluated individually using standards designed to focus on factors that clarify the relationship, if any, between the person's past behavior and the employment he or she now seeks. The current permanency list includes crimes where a permanent bar is not required by federal statute, applies to all background studies, regardless of the individuals being

served by the program, and applies equally to juveniles, when not required by federal law. Throughout the Task Force meetings, the Task Force heard from an expert in juvenile brain development, Brandon Jones, from the Minnesota Association of Children's Mental Health. Data shows that juvenile brains are not fully developed, and therefore, juvenile records are less predictive of future behavior.

1. Permanent Crimes

- For background studies that do not require federal law compliance, adopt the 2008 taskforce recommendation that permanent disqualifications be limited to Murder, Manslaughter and Felony Criminal Sexual Conduct. Remove the bar to set-aside for any permanent disqualifications that do not require federal law compliance. This would allow individuals to show proof of rehabilitation and give DHS discretion to grant a set-aside, if DHS determines there is no risk of harm.
- Further, altogether remove any permanent disqualifications for Substance Use Disorder-related positions and facilities, Family Caretaker positions, and any disqualification based on conduct engaged in by a juvenile.
- Also remove permanent disqualifications for positions that do not have direct, unsupervised access to vulnerable people.

2. Background Study Use

- Federal Law Compliance—Background studies that must comply with Federal statutes, such as Adam Walsh Act or Child Care Development Block Grant, should be limited to a list of disqualifications necessary to comply with those Federal Statutes.
- We anticipate that this would require DHS to have a list to help identify when a background study triggers some sort of Federal statute compliance.

3. Juveniles

- There should be no permanent bar for juveniles.

Preponderance of the Evidence (PoE):

Applying a preponderance of the evidence standard leads to disqualifying people for conduct that was either never proven or admitted, which creates a significant risk of innocent people being disqualified. In addition, the current framework brings in individuals who may receive a sentence without a plea which is designed to allow the individual the benefits of no criminal history and to move forward in life. The current framework takes away from the power of the criminal justice system to reach an outcome that balances someone's ability to work with protecting vulnerable individuals. The prosecutors, defense attorney, judges and probation have more information when reaching a resolution than DHS may have when making the preponderance of the evidence determination.

The subcommittee explored other states and federal guidelines which seem to rely more heavily on convictions, rather than the POE standard. Based on our research, Minnesota is one of only a few states that rely on a POE standard.

Currently, disqualifications based on a preponderance of the evidence can be litigated through the fair hearing process by the disqualified individual. This leads to additional expenses and time for both the individual and State resources. It is an inefficient use of State resources. The recommendation below will streamline the process and reduce the current workload for the Department of Human Services.

RECOMMENDATION: Disqualifications will no longer be made on a preponderance of the evidence standard.

Under the recommended framework, disqualifications are based on serious or recurring maltreatment. Maltreatment findings are the only disqualifying event which are proven by a preponderance of the evidence. The other enumerated crimes/events have to be proven by either clear and convincing evidence or proof beyond a reasonable doubt. Disqualifications for serious or recurring child or vulnerable adult maltreatment are made using family assessments, which are not appealable. The purpose of family assessments is to determine whether the family would benefit from services such as therapy, parenting education, etc., rather than making a determination of maltreatment. Therefore, family assessments should not be the threshold used when determining whether to disqualify someone for recurring maltreatment under Chapter 245C. Lastly, the maltreatment process itself uses a different set of statutes, individuals are not entitled to counsel, and the appeal process can be confusing and cumbersome.

RECOMMENDATION: Disqualification determinations under Chapter 245C based on serious or recurring maltreatment will be made using a clear and convincing standard, rather than the current preponderance of the evidence standard. Family assessments will not be used to calculate whether maltreatment is recurring. An individual that receives a disqualification may utilize the request for reconsideration process and fair hearing process to challenge the disqualification for correctness. Hearings are always available for disqualifications based on serious or recurring maltreatment, even if the individual did not appeal the maltreatment at the local level. The individual regardless can still challenge the disqualification for a risk of harm as currently outlined. It should be noted that the Task Force makes this recommendation only in regard to disqualifications under Chapter 245C, and does not intend to recommend any changes to how family assessments are handled under any other statute.

Process:

Current situation: the data is not accessible in an efficient manner

Throughout this task force, the group requested data from DHS. The group saw inefficiencies in the amount of data that is either not tracked, located across different sources, or not easily available. This led to significant delays in accessing data that was necessary for the task force to complete its work.

RECOMMENDATION: DHS should receive funding to update its IT infrastructure to improve data retrieval. Improving databases will facilitate the work of any future bodies like the Task Force as well as Department management.

RECOMMENDATION: DHS should create a dashboard and provide regular public reports on the background study process. These reports should include statistics such as the number of applicants, racial breakdown of applications and disqualifications, number of disqualifications, set-asides, average time to determination, etc.

Current situation: Timing for appeal: 15 days or 30 days (section 245C.21)

A significant barrier to obtaining a set aside is simply completing the request for reconsideration process. One factor is the very quick window in which a job applicant who has been disqualified must request reconsideration or forfeit the opportunity. This is sometimes as short as 15 days.

RECOMMENDATION: Standardize the timeline for requesting reconsideration at 30 days for all disqualifications. Create a statutory good cause exception wherein a deadline can be extended, or a request for reconsideration can be accepted after the deadline, if the applicant offers an explanation for why they were unable to meet the deadline. DHS should send out notification of disqualification letters via certified mail or when necessary personal service. DHS should modernize this process by creating a web portal so that the entire background study and reconsideration process can be done electronically.

Current situation: Applicant responsible for getting police reports: section 245C.21, subd. 3

As a part of the process for requesting reconsideration, applicants are currently required to obtain and provide to DHS a copy of any relevant police reports. Depending on the police department this can require traveling to pick up physical copies of the reports in person. This is an inefficient and unnecessary barrier to requesting reconsideration which reduces the number of people who obtain set asides. It is our understanding that DHS already has the ability to access the police reports.

RECOMMENDATION: DHS should request any necessary police reports and provide them to the applicant along with the notice of disqualification. If DHS is unable to obtain the police reports prior to issuing the disqualification notice, then the 30 day window for requesting reconsideration should not start until DHS has provided them to the applicant. If this recommendation is enacted, it should be accompanied by increased funding for DHS staff to carry out this directive, as well as statutory language necessarily to enact it (for example, requiring that police departments respond to records requests from DHS in a timely manner).

Current Situation: Waiver of appeal: (section 245C.29, subd. 2)

If an applicant fails to request reconsideration within the applicable timeline, the agency's decision becomes final. Currently this means that an applicant only has one opportunity to challenge a preponderance of the evidence determination and if they fail to do so the first time, they lose the opportunity to challenge the preponderance of the evidence determination at a contested hearing wherein they could raise defenses and prove their innocence.

RECOMMENDATION: If preponderance of the evidence remains the standard by which DHS determines whether there is a disqualification, then an applicant's right to challenge that determination shall not be waived by failure to request reconsideration on any particular background study. Instead, it shall only become final after the issue is decided at a contested hearing.

Current Situation: DHS response times (section 245C.22, subd. 1)

DHS is required by statute to respond to a request for reconsideration within a certain time period depending on the type of relief sought by the applicant. The time periods are as follows: 15 days for risk of harm determination, 30 days for correctness of the disqualification, and 45 days if the applicant seeks both types of relief. In an ideal world, these timelines would be just fine, however DHS is not always able to complete their review within these windows. At times it can take months for DHS to

make a determination, during which time, the applicant may be unable to work, or only able to work in a limited capacity.

RECOMMENDATION: When DHS is unable to complete their review of a request for reconsideration within the prescribed time frames, DHS shall notify the applicant and prospective employer of the delay and take steps to ensure that the applicant can continue to work while DHS completes the request for reconsideration process. Additionally, DHS should be required to have a final decision within 6 months. DHS should receive additional funding needed to hire staff to meet this goal.

ADDITIONAL SUGGESTION: Some members are concerned that 6 months is an excessively long time for applicants and prospective employers to wait for a final decision.

Current Situation: Difficulty with traveling set-asides

Job seekers are typically required to undergo a new and separate background study every time they apply for a new job under DHS's purview. This is the case regardless of whether or not the subsequent job applications are for positions that are substantially similar to jobs for which an applicant has already received a set-aside. In the past DHS has tried to implement a process for granting "traveling set-asides" that could follow the job applicant to subsequent applications thereby streamlining the process and granting certainty to the applicant that they will be allowed to work. However, DHS's past efforts appear to be unsuccessful.

RECOMMENDATION: DHS should review the process and propose statutory changes that would allow traveling set-asides to work as this would create a more efficient process and reduce the use of resources.

Current Situation: Issues with Accessibility/ESL/communicating in writing

The bulk of the request for reconsideration process is done in writing. This creates difficulties for job applicants who struggle to communicate by writing and for whom English is not their first language. Since the entire process is done in writing, this places applicants at a disadvantage who do not have the benefit of higher education, or with the means to hire an attorney, or engage with community resources. This may reduce their likelihood of requesting reconsideration in the first place and also negatively impact their ability to be successful if they do engage in the process.

RECOMMENDATION: DHS should create a process for the initial request for reconsideration to happen in an oral interview similar to how the judicial branch's violations bureau allows people to meet in person with a hearing officer. DHS should also allow requests for reconsideration and related correspondence to happen via email instead of solely via print mail. For applications that do proceed in written format, DHS should reduce opportunities for implicit bias to impact the results by utilizing a blind review process in which the name, gender, race, address and any other identifying information is removed. Prospective employers should be included in reconsideration and related correspondence.

Access to Community Resources

Along with their notice of disqualification, DHS currently provides a list of community resources through which an applicant can access legal advice related to their request for reconsideration. This is a great practice, but DHS has not always done so in the past and could cease the practice in the future.

RECOMMENDATION: It should be codified in statute that DHS is required to provide a list of community resources through which a disqualified person and prospective employer can obtain legal advice related to their background study and disqualification. Prospective employers should be included in the community resources correspondence.

Stay of Adjudication vs. Stay of Imposition DQ length: section 245C.15

There is currently an inconsistency related to how DHS treats two common types of criminal case dispositions and how those two dispositions are treated in the criminal legal system. A stay of adjudication is a disposition in which a defendant pleads guilty, but the court stays the adjudication of guilt based on that guilty plea. Instead, the court places the individual on probation without entering a conviction against them. If the individual successfully completes probation their case is dismissed. A stay of imposition is a separate disposition in which the court adjudicates the individual as guilty but stays the process of imposing a sentence. The benefit of a stay of imposition is that if the defendant successfully completes probation their conviction will be deemed a misdemeanor, regardless of whether the initial charge was a gross misdemeanor or felony. A stay of adjudication is universally considered a better disposition because it avoids a conviction altogether. However, Chapter 245C treats a stay of imposition as the better disposition because it reduces the length of a disqualification, for example a 15-year disqualification for a felony stay of imposition would result in a 7 year disqualification once the conviction is deemed a misdemeanor.

RECOMMENDATION: Any disqualification based on a stay of adjudication should be treated as a misdemeanor and receive the shortest applicable disqualification period.

Risk of Harm factors: section 245C.22

One factor that is extremely important to DHS's decision whether to grant a set-aside is the level and frequency of access to vulnerable people that the job seeker would have if allowed to work in the position sought. Related to this is the level of supervision that a worker would have while in contact with vulnerable people. It is DHS's current practice to consider these factors, but they are not required to do so by statute.

RECOMMENDATION: Ensure that licensing agencies continue to factor in the level of access to vulnerable people and level of supervision needed by adding those factors into the Risk of Harm factors in section 245C.22

Improve accountability by drawing on practices elsewhere in Minnesota law

Currently there are no statutorily created accountability measures for when DHS wrongly disqualifies an individual. Erroneous disqualifications can cause an individual to incur attorney fees and suffer lost wages.

RECOMMENDATION: Allow an applicant who successfully challenges a disqualification through the contested hearing process or civil appeal to recoup attorney's fees from the licensing agency in a manner similar to how individuals who are wrongly denied a conceal and carry permit are able to do so if they successfully challenge that disqualification. Also allow individuals who successfully challenge a disqualification through the contested hearing process or civil appeal to recoup lost employment income from the licensing agency.

Conflict with the expungement statute

There is currently a conflict between the DHS background study act and Minnesota's expungement statute. The expungement statute allows for an expungement to be granted without requiring the individual seeking expungement to undergo the full expungement petition process if they meet the statutory requirement for expungement and the prosecutor in their case agrees to the expungement. However, the DHS background study act allows DHS to obtain expunged records from the BCA regardless of an expungement unless DHS is served a copy of the expungement petition and is included in an expungement order. This creates confusion as to how DHS should respond to an expungement order that includes DHS records but did not result from a full expungement petition process.

RECOMMENDATION: Update the language in the DHS background study act to require that DHS be given notice of the expungement petition or pending expungement by party agreement and an opportunity to request to be heard prior to the court issuing any order.

NOTE: The Task Force recognizes that implementing many of these recommendations will require additional resources on the part of relevant state agencies like DHS. It strongly recommends that any legislative actions based on these recommendations be accompanied by additional funding commensurate with this need.

Appendix A: Statutory Authority

Minnesota Special Session Laws 2021, Chapter 7, Article 2, Section 74, Subd. 2:

Sec. 74. LEGISLATIVE TASK FORCE; HUMAN SERVICES BACKGROUND STUDY ELIGIBILITY.

Subdivision 1. Creation; duties.
A legislative task force is created to review the statutes relating to
human services background study eligibility and disqualifications, including but not limited to Minnesota Statutes, sections 245C.14 and 245C.15, in order to:

(1) evaluate the existing statutes' effectiveness in protecting the individuals served by programs for which background studies are conducted under Minnesota Statutes, chapter 245C, including by gathering and reviewing available background study disqualification data;

(2) identify the existing statutes' weaknesses and inefficiencies, ways in which the existing statutes may unnecessarily or unintentionally prevent qualified individuals from providing services or securing employment, and any additional areas for improvement or modernization; and

(3) develop legislative proposals that improve or modernize the human services background study eligibility and disqualification statutes, or otherwise address the issues identified in clauses (1) and (2).

Subd. 2. Membership.
(a) The task force shall consist of 26 members, appointed as follows:

(1) two members representing licensing boards whose licensed providers are subject to the provisions in Minnesota Statutes, section 245C.03, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(2) the commissioner of human services or a designee;

(3) the commissioner of health or a designee;

(4) two members representing county attorneys and law enforcement, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(5) two members representing licensed service providers who are subject to the provisions in Minnesota Statutes, section 245C.15, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(6) four members of the public, including two who have been subject to disqualification based on the provisions of Minnesota Statutes, section 245C.15, and two who have been subject to a set-aside based on the provisions of Minnesota Statutes, section 245C.15, with one from each category appointed by the speaker of the house of representatives, and one from each category appointed by the senate majority leader;

(7) one member appointed by the governor's Workforce Development Board;

(8) one member appointed by the One Minnesota Council on Diversity, Inclusion, and Equity;

(9) two members representing the Minnesota courts, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader;

(10) one member appointed jointly by Mid-Minnesota Legal Aid, Southern Minnesota Legal Services, and the Legal Rights Center;

(11) one member representing Tribal organizations, appointed by the Minnesota Indian Affairs Council;

(12) two members from the house of representatives, including one appointed by the speaker of the house of representatives and one appointed by the minority leader in the house of representatives;

(13) two members from the senate, including one appointed by the senate majority leader and one appointed by the senate minority leader;

(14) two members representing county human services agencies appointed by the Minnesota Association of County Social Service Administrators, including one appointed to represent the metropolitan area as defined in Minnesota Statutes, section 473.121,subdivision 2, and one appointed to represent the area outside of the metropolitan area; and

(15) two attorneys who have represented individuals that appealed a background study disqualification determination based on Minnesota Statutes, sections 245C.14 and 245C.15, one appointed by the speaker of the house of representatives, and one appointed by the senate majority leader.

(b) Appointments to the task force must be made by August 18, 2021.

Subd. 3. Compensation.
Public members of the task force may be compensated as provided by Minnesota Statutes, section 15.059, subdivision 3.

Subd. 4. Officers; meetings.
(a) The first meeting of the task force shall be cochaired by the task force member from the majority party of the house of representatives and the task force member from the majority party of the senate. The task force shall elect a chair and vice chair at the first meeting who shall preside at the remainder of the task force meetings. The task force may elect other officers as necessary.

(b) The task force shall meet at least monthly. The Legislative Coordinating Commission shall convene the first meeting by September 1, 2021.

(c) Meetings of the task force are subject to the Minnesota Open Meeting Law under Minnesota Statutes, chapter 13D.

Subd. 5. Reports required.
The task force shall submit an interim written report by March 1, 2022,
and a final report by December 16, 2022, to the chairs and ranking minority members of the committees in the house of representatives and the senate with jurisdiction over human services licensing. The reports shall explain the task force's findings and recommendations relating to each of the duties under subdivision 1, and include any draft legislation necessary to implement the recommendations.

Subd. 6. Expiration.
The task force expires upon submission of the final report in subdivision 5 or December 20, 2022, whichever is later.

EFFECTIVE DATE. This section is effective the day following final enactment and expires December 31, 2022.

Appendix B: Task Force Organization and Subcommittees

The Task Force divided its work between 4 subcommittees: Disqualifications (focused on the lists of disqualifying crimes found in Section 245C.15), Remedies (focused on the remedies a disqualified individual may pursue, for example, requesting a set-aside under Chapter 245C.24), Data (responsible for gathering the data discussed above), and Data Analysis (responsible for supporting the work of the other subcommittees by analyzing data as requested). The Disqualifications and Remedies subcommittees discussed and delivered recommendations to the Task Force membership as a whole. The Data subcommittee has also provided a summary of its activities and concurrence with these recommendations. Because the Data Analysis subcommittee was in a supporting role, it has not made any recommendations. After receiving them from the subcommittees, the Task Force has discussed and voted to adopt the recommendations above.

Disqualification Subcommittee

The Disqualification Subcommittee of the Task Force was organized to review the list of criminal matters enumerated in section 245C.15 to determine if there are areas that need improvement. The Subcommittee reviewed the law with the paramount concern for the health and safety of vulnerable adults and children. The DQ Subcommittee is also aware of the shortage of employees to work with vulnerable individuals. This shortage has a detrimental impact on vulnerable individuals who do have adequate care for their needs, and businesses that seek to provide these services. Accordingly, the DQ Subcommittee sought ways to simplify the law, and eliminate disqualifications for those who do not pose a risk of harm to vulnerable populations.

The DQ Subcommittee reviewed the following topics:

- List of Disqualifying Offenses
- Length of Disqualification for Offenses
- Date disqualification period should begin
- How Juvenile cases should be analyzed
- Recent changes to the Child Foster Care disqualification law

Recommendations for the first four categories may be found above. Regarding family foster care:

Licensed Family Foster Setting Disqualifications:

i. Law:

Section 245C.15, subd. 4a, outlines the licensing process for those seeking a family faster care license in Minnesota. Please note that this subdivision is separate from the other parts of Minnesota's background study act. Accordingly, those seeking a child foster care license under this section are considered apart from other direct care positions such as nursing assistant, childcare worker, personal

home attendant, etc. Subdivision 4a applies only to licensed family foster care settings. This is a recent change in the law that was implemented in July 2022.

ii. Concern:

- The law is new and not enough time has transpired to determine the benefits, if any, of the changes.

- Members of the Disqualifications subcommittee who work within child foster care indicate positive responses to most of the new changes. Members noted it will make it possible for some deserving individuals to obtain foster care licenses to care for their relatives who previously were excluded from providing such caregiving.

- Some members express concern that the new law includes twenty (20) year disqualification for a voluntary or involuntary termination of their parental rights. Concerns involve whether this lengthy disqualification period is necessary to protect health and safety of children.

iii. Recommendation:

We recommend not changing the child foster care laws set forth in subdivision 4a at this time. Rather, we recommend that the Department of Human Services ("DHS") collect data to track the impact of the legislative changes. We recommend that DHS collect and monitor the following data points:

- How many child foster applicants were denied foster care licensure based on a disqualification after implementation of new law?

- What are the bases for disqualification?

- How many applicants requested reconsideration?

- Of those requesting reconsideration, how many were granted a set-aside.

- How many disqualifications were due to a prior Termination of Parental Rights (with breakdown if due to voluntary vs involuntary) of the applicant?

- How many were still denied a license after County risk of assessments occurred?

- How many of those ended up licensed but had a facility investigation or disrupted placement?

- With all these measures there also still needs to be an eye to the racial demographics.

Subcommittee Members:

Lucas Dawson

Gina Evans

Jon Geffen (chair)

Dave Irvin

Tiffany Kacir

Judge Gail Kulick

Max Page

Representative Kristin Robbins

Leo Sandoval (resigned)

Melissa Sherlock

Remedies Subcommittee

The Remedies subcommittee was responsible for reviewing the processes that an applicant might pursue after they are initially disqualified (for example, requesting a set-aside), both as provided for in Chapter 245C and as practically enacted. The Subcommittee identified a number of flaws with the statute that it recommends be changed. It has also identified inefficiencies with the reconsideration request process, and has provided recommendations for this process to be improved.

Subcommittee Members:

Lucas Dawson (chair)

Joshua Esmay

Gina Evans

Dywon Tatum (resigned)

TaShonda Williamson

Data Subcommittee

The Data Subcommittee was responsible for gathering data (quantitative and qualitative) to support the work of the Task Force and its other subcommittees. This principally entailed, but was not limited to, working with the Department of Human Services (DHS) to produce a quantitative picture of the background study process in Minnesota. Other sources of data collected by the Subcommittee included qualitative information on employers' perspectives of the background study system. The Subcommittee coordinated requests for data from other subcommittees with its own data requests and received and disseminated data from DHS and other entities. The Subcommittee also handled the analysis of these data before the Data Analysis Subcommittee was founded to shoulder this task.

A summary of the Data Subcommittee's work is below, with a particular focus on its interactions with DHS. The Subcommittee principally served in a supporting role to other Task Force subcommittees (which were more directly focused on crafting recommendations). However, based on its experiences, the Subcommittee strongly agrees with the recommendation of the Remedies group that DHS should receive funding to improve its database infrastructure. While the Subcommittee consistently found its

interactions with DHS staff to be collegial, professional, and helpful, the limitations of DHS databases (about which DHS staff were transparent) proved an impediment to the Subcommittee's work, and by extension the work of the whole Task Force.

The Subcommittee convened in late December 2021, met weekly throughout January 2022 (in the interest of gathering data as expeditiously as possible), followed by biweekly meetings until the summer. In early meetings, the Subcommittee focused on composing and delivering data requests for DHS. As the group began to receive data in spring 2022, it shifted to fielding analysis requests from other subcommittees as well as continuing to coordinate with DHS staff on as-yet-unfulfilled data requests. As these analysis duties were taken on by the Data Analysis group, the Subcommittee shifted to coordinating with other subcommittees as new data needs became apparent.

Selected examples of data requests to DHS included:

- 12/20/21:
    - Specific numbers of cases:
        - Under preponderance of evidence standard (PoE)
        - Where PoE was found
        - Reversed on reconsideration
        - Taken to fair hearing appeal
        - Overturned at fair hearing
        - Number of people at fair hearings represented by attorneys/advocates
    - Disaggregated data
        - Race
        - Gender
        - Provider/program type
        - Disqualification crime or conduct) number of disqualifications
- 1/10/22:
    - Quantitative data on timeliness of background study/reconsideration process:
        - Average time a case is open [days from initial background study request to final resolution]
        - Average time to complete initial qualification/disqualification decision, disaggregated by program/provider type [days from submission to subject receiving decision]
        - Average time to complete reconsideration decision, disaggregated by program/provider type [days from submission to subject receiving decision]
        - Total average time to reach set-aside decision, disaggregated by program/provider type [days from initial background study request to successful set-aside delivered to subject]
        - Total average time to reach variance decision, disaggregated by program/provider type [days from initial background study request to successful variance agreement reached with subject]
- 1/18/22:
    - Quantitative data on disqualified cases where subject/employer does not request reconsideration/set-aside/variance:
        - Disaggregated by:

- Race
- Gender
- Provider/program type
- Disqualification crime or conduct
- Number of previous disqualifications

- Quantitative data on disqualified cases where subject/employer does request reconsideration/set-aside/variance:
  - Disaggregated by:
    - Race
    - Gender
    - Provider/program type
    - Disqualification crime or conduct
    - Number of previous disqualifications
- Average time (days from disqualification determination to final set-aside/variance) disaggregated by factors above.

The Subcommittee received the following responses to these requests. All data reported was from the years 2018 and 2019.

- 1/6/22: Overview 1. Statistics on distinct background studies by outcome (eligible vs disqualifying determination), disaggregated by race/ethnicity, regulatory agency, and provider type.
- 1/26/22: Overview 2. Statistics on distinct disqualifications disaggregated by race, risk of harm determination, and provider type. Also, statistics on number of disqualifications per applicant.
- 2/24/22: Overview 3. Statistics on disqualifications by disqualification period, evidentiary standard, and disqualifying crime/conduct, disaggregated by race and gender.
- 3/14/22: Supplements to Overview 1 and 2, with previous data disaggregated by gender.
- 4/5/22: Overview 4. Statistics on reconsideration requests by outcome and provider type, disaggregated by race and gender.
- 5/6/22: 1st Supplement to Overview 4. Statistics on reconsideration requests, by outcome and disqualifying crime/conduct.
- 6/6/22: 2nd Supplement to Overview 4. Statistics on reconsideration requests, by outcome and disqualifying crime/conduct, disaggregated by race and gender. Reported outcomes use simplified categories requested by the Data Analysis group.
- 7/8/22: Response to miscellaneous questions from the Data Analysis group.
- 8/8/22: Response to miscellaneous questions from the Data Analysis group.

The Subcommittee is appreciative of the hard work and professionalism of DHS staff in compiling these data. Nonetheless, it would also like to note the long delays in receiving some requested data. For example, data on the use of the Preponderance of the Evidence (PoE) standard were received two months after they were requested, data on set-aside requests three months after they were requested, and no quantitative data on the timeliness of the background study process has been received nearly a year after they were requested. The Subcommittee is aware that many of these data requests were made near the beginning of the 2022 legislative session, which entailed considerable demands on DHS staff time. More concerningly, however, the Subcommittee has been made aware of serious

inefficiencies in DHS information technology infrastructure. Compiling the data above apparently drew upon three separate databases, which required the manual input of several full-time employees to be processed into the form delivered to the Task Force. The Subcommittee does not have a clear picture of whether this database infrastructure even allowed the analysis of data requested and not received (for example, quantitative data on background study timelines) in the first place.

These delays in receiving data prosed a considerable challenge to Task Force work (for example, the Remedies subcommittee was unable to draw on data related to the PoE standard in discussions of the topic before the completion of the March 1, 2022 Interim Report). Additionally, the Subcommittee is troubled by the implications of these challenges for good governance more generally. The fact that DHS' current database architecture required so much time and effort to compile these statistics calls into question the ability of the Legislature, through task forces like this, to effectively use statistical evidence in its oversight of the Department. This difficulty in forming a quantitative picture of the background study system also calls into question the ability of Department leadership to manage this system effectively. The Subcommittee would like to reiterate its high regard for the professionalism and dedication of individual DHS staff members in working through these limitations to deliver these data, but in light of the evident technical failings of the system they were working with, it heartily agrees with the Remedies subcommittee's recommendation that the Department receive funding to modernize its database infrastructure.

Subcommittee members:

Gina Evans

Roy Kammer

Nicole Mattson

Rep. Kelly Moller

Jolene Rebertus

TaShonda Williamson (chair)

Data Analysis Subcommittee

The Data Analysis subcommittee provided support to the other subcommittees by analyzing data received as needed for their work. Many of the data-based findings discussed above were based on this subcommittee's work. See below for copies of meeting minutes. Because it served in a supporting role, this subcommittee has not discussed or delivered recommendations.

Subcommittee members:

Michelle Basham

Gina Evans

Jon Geffen

Roy Kammer (chair)

Jolene Rebertus

Appendix C: Other States' Background Study Statutes

State	Statute Number	Regulates	Minimum Standard for Disqualification
Alabama	Ark. Code Ann. §20.38.105	Caregivers	Conviction
Alaska	Alaska Admin. Code tit. 7 §10.905	Home Health Aides	Conviction
Arizona	Ariz. Rev. Stat. Ann. §41-1758.03	Direct Care Workers	Conviction
Arkansas	Ark. Code Ann. §20-38-105	Caregivers	Conviction
California	Cal. Health and Safety Code §1522	Home Health Aides	Conviction
Colorado	Colo. Rev. Stat. Ann. §12-255-210	Certified Nursing Assistants	Reasonable Belief
Connecticut	Conn. Gen. Stat. § 17b-749k	Child Care	Conviction
Delaware	Del. Code Ann. §1145	Home Health Aides	Conviction
Florida	Fla. Stat. Ann. §400.512	Home Health Aides & Certified Nursing Assistants	Conviction
Georgia	?	?	?
Hawaii	HRS §§321-15.2	Child Care	Conviction
Idaho	Idaho Code Ann. §39-5604	Personal Caregivers	Conditional Denial/ POE
Illinois	225 Ill. Comp. Stat. Ann. §46/25	Direct Care Workers	Conviction
Indiana	Ind. Code Ann. §16-27-2-5	Home Health Aides, Certified Nursing Assistants, and unlicensed providers	Conviction
Iowa	Iowa Code Ann. §135C.33	Home Health Aides	Conviction
Kansas	Kan. Stat. Ann. §39-970	Certified Nursing Assistants	Substantiated Finding
Kentucky	Ky. Rev. Stat. Ann. §209.032	Caregivers	POE
Louisiana	La. Stat. Ann. §40:1203.2	Caregivers	Conviction

Maine	**Me. Rev. Stat. Ann. Tit. 22 §1812-G**	**Certified Nursing Assistants and Direct Care Workers**	**POE**
Maryland	**MD. Code Ann., Md. Health Gen. §19-1901**	**Home Health Aides**	**Conviction**
Massachusetts	**606 CMR 14**	**Child Care**	**Conviction**
Michigan	**Mich. Comp. Laws Ann. §333.20173**	**Home Health Aides**	**Conviction**
Minnesota	**Minn. Stat. §245C.14**	**Direct Care Workers**	**POE**
Mississippi	**Miss. Code Ann. §43-11-13**	**Direct Care Workers**	**Conviction**
Missouri	**Mo. Ann. Stat. §192.2495**	**Home Health Aides**	**Conviction**
Montana	**?**	**?**	**?**
Nebraska	**Neb. Rev. Stat. Ann. §71-6603**	**Home Health Aides**	**Conviction**
Nevada	**Nev. Rev. Stat. Ann. §449.123**	**Caregivers**	**Substantiated Finding**
New Hampshire	**N.H. Rev. Stat. Ann. §106-B:14**	**Caregivers and Home Health Aides**	**Conviction**
New Jersey	**N.J. Rev. S. 30:5B-25.7**	**Day Care Providers**	**Conviction**
New Mexico	**N.M. Stat. Ann. §29-17-5**	**Caregivers**	**Conviction**
New York	**N.Y. Public Health Law §2899-a**	**Certified Nursing Assistants and Home Health Aides**	**Conviction**
North Carolina	**N.C. Gen. Stat. Ann. §131E-265**	**Home Health Aides**	**Conviction**
North Dakota	**N.D. Cent. Code Ann. §43-12.1-14**	**Certified Nursing Assistants**	**Charge or Conviction**
Ohio	**Ohio Admin. Code §173-9-06**	**Direct Care Workers**	**Conviction**
Oklahoma	**Okla. Stat. Ann. tit. 63 §1-1950.1**	**CNA's and Home Health Aides**	**Conviction**
Oregon	**Or. Admin. R. 333-027-0064**	**Home Health Aides**	**Conviction or Disqualifying Condition**
Pennsylvania	**35 PA. Stat. and Cons. Stat. §10225.503**	**Direct Care Workers**	**Conviction**

Rhode Island	**R.I. Gen. Laws § 23-17-34**	**Nursing Facilities**	**Conviction**
South Carolina	**S.C. Code Ann. Regs. §44-7-2910**	**Certified Nursing Assistants**	**Totality of factors**
South Dakota	**S.D. Admin. R. 44:74:01:01**	**Certified Nursing Assistants**	**Substantial Evidence**
Tennessee	**Tenn. Code Ann. §71-2-403**	**Caregivers**	**Conviction**
Texas	**THSC § 250**	**Certified Nursing Assistants**	**Conviction**
Utah	**Utah Code Ann. §62A-2-120**	**Direct Care Workers**	**Conviction**
Vermont	**?**	**?**	**?**
Virginia	**Va. Code Ann. § 32.1-162.9:1**	**Home Health Aides**	**Conviction**
Washington	**Wash. Admin. Code §388-113-0020**	**Caregivers**	**Pending Charge or Conviction**
West Virginia	**W. VA. Code Ann. §16-49-1**	**Home Health Aides**	**Conviction**
Wisconsin	**Wis. Stat. Ann. §50.065**	**Caregivers**	**Conviction**
Wyoming	**Wyo. Stat. Ann. §33-21-146**	**Certified Nursing Assistants**	**Conviction**