



U.S. Department of Justice

Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Patrick Leahy  
Chairman  
Committee on the Judiciary  
United States Senate  
Washington, D.C. 20510

May 15, 2008

Dear Chairman Leahy:

This presents the views of the Department of Justice on S. 2756, the “Child Protection Improvements Act of 2008” (the Act). This legislation would amend the National Child Protection Act (NCPA), Pub. L. 103-209, as amended, to require the Attorney General to establish a system under which any business or organization, whether public, private, for-profit, nonprofit, or voluntary, that provides services to children (covered entity) can obtain a fingerprint-based background check on a volunteer or employee (covered individual) of criminal history information maintained by the states and the Federal Bureau of Investigation (FBI). To create such a system, the Act would require the Attorney General to (1) to establish within the federal government or through an agreement with a nonprofit entity an “applicant processing center” that would provide covered entities the means for requesting a fingerprint-based criminal background check that checks both FBI and state-held criminal history data (national criminal background check) and (2) to enter into an agreement with the National Center for Missing and Exploited Children (NCMEC), under which NCMEC would establish a “fitness determination program” to review criminal background check reports created by the applicant processing center and advise the covered entity whether the report indicates that the covered individual has “a criminal history record that may render the covered individual unfit to provide care to children.” The fitness determination would be based on criteria established by the Attorney General and NCMEC, in coordination with other national organizations representing covered entities.

We support the Act’s goal of broadening access to national criminal background checks by the entities covered under the NCPA. *The Attorney General’s Report on Criminal History Background Checks* (the Attorney General’s Report), submitted to Congress in June 2006, made detailed recommendations on how the law can be changed to achieve broader access to such checks for noncriminal justice purposes generally. The Attorney General’s Report was carefully developed with input from a broad range of stakeholders on the issues addressed, including the state repositories, the National Crime Prevention and Privacy Compact Council, the private sector, labor, privacy groups, groups who advocate on behalf of ex-offenders seeking employment, and others who responded to the Department’s request for public comment.

While we support the overall goal of the Act, we have serious concerns, described below, with the Act's specific requirements for establishing a national criminal background check system for child-serving organizations.

First, the Act would allow any covered entity to request national criminal background checks under this federally-established system, even where such a check is available through state procedures, thereby undermining the existing state systems that have been established since the NCPA's enactment in 1993 to perform national criminal history background checks on providers of care for children. This approach will likely result in the creation of a *de facto* national clearinghouse to which most covered entities would turn for such checks, even when the checks are available through state procedures, a result which is directly counter to the recommendations in the Attorney General's Report. The Report recommends that, where possible, access to criminal history checks for noncriminal justice purposes be through states that meet certain standards for the scope of access and the methods and time frames for providing access and responses to these checks. Only when such state access is unavailable should an authorized user have recourse to an Attorney General-established procedure. This approach takes advantage of existing state background check procedures and ensures a check of more complete state records, while allowing for access through a national system when the state does not opt to provide such access. An Attorney General determination of the unavailability of state procedures should be part of the criteria for the eligibility of a qualified entity to participate in any Attorney General-established program providing access to checks under the NCPA.

Second, the Act specifies that the background checks are to be accomplished exclusively through a "fitness determination program." The Act does not authorize, as recommended in the Attorney General's Report, the dissemination of the information, with appropriate privacy safeguards, to the covered entity for its individualized assessment of the relevance of the record to the placement decision. Nor does the Act entitle the individual to explain to the qualified entity the criminal record that is the basis of an adverse fitness determination which, by its nature, provides almost no details about the record, including the age and nature of the offense. As stated in the Attorney General's report, we recommend that qualified entities have the flexibility to determine what they want for risk assessment purposes. Specifically, we recommend that authority be created for the states and the Attorney General to disseminate the criminal background check report, with appropriate privacy safeguards, to qualified entities interested in such information for their use in making the risk assessment and placement decision. Such authority would likely have the effect of more states establishing procedures for these background checks,<sup>1</sup> thereby increasing the availability of more complete state records and lessening the number of checks that would have to be processed through a system established by the Attorney General.

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<sup>1</sup> The input we received for the Attorney General's Report from the Compact Council and the state identification bureaus indicated that the primary obstacle to the states establishing procedures for background checks under the NCPA is the requirement under Pub. L. 92-544 (under which most state procedures for employment and licensing checks have been established) that a state agency conduct a fitness determination. They also indicated that establishing state procedures providing access to NCPA checks would be much more feasible if the authority to disseminate the record was an available option.

Third, while NCMEC has provided a valuable service in making suitability determinations for many of the approximately 55,000 checks performed over the last five years under the PROTECT Act's Child Safety Pilot Program, (42 U.S.C. § 5119a note), the Act's provision that NCMEC is to be the exclusive entity for making fitness determinations unreasonably restricts the Attorney General's flexibility in using agents to perform such a task. The system contemplated under the Act has the potential of receiving substantially more criminal background check requests than the number of request received under the Child Safety Pilot Program. Yet, under the Pilot, both the National Mentoring Partnership and NCMEC experienced capacity issues as the volume of fingerprint submissions increased. The FBI has already designated other entities that can perform such noncriminal justice administrative services under the Outsourcing Rule and Standards established by the National Crime Prevention and Privacy Compact Council. While additional entities, such as NCMEC, can be designated to perform these functions for purposes of expanding access to checks under the NCPA, the Attorney General should have the flexibility to select other authorized outsourcing agents instead of or in addition to NCMEC.

Fourth, while we agree that when the Attorney General establishes a means for doing background checks unavailable through the state level, the checks should check the records of as many state repositories as possible, the Act is overly prescriptive on how the Attorney General should do this. Such a requirement should be stated in general terms, leaving the details for implementation to the Attorney General.

Fifth, the Act does not address the needs of entities that serve other vulnerable populations covered by the NCPA, including the elderly and persons with disabilities. As indicated in the Attorney General's Report, the Department favors the development of solutions that would increase access to national criminal history checks for the placement of persons in positions of trust working with vulnerable populations generally.

Finally, we are concerned about the timeline, funding, and fee provisions of the Act. The Act's 90-day deadline for the creation of a national criminal background check system for achieving these goals is unrealistic. Any timeline for development of such a system must take into consideration the lead time necessary for obtaining, through the budget and appropriation process, the funds necessary for carrying out the new requirements, as well as a reasonable amount of time for program development. We would support an extension of the Child Safety Pilot Program until such a system is established under a more realistic timeframe. In addition, we do not know, at this point, whether the funding level authorized in the Act would cover the costs of establishing the system and therefore believe the authorization should be for "such funds as are necessary" to carry out the new requirements. Regarding the fee, we note that the FBI's current fees for conducting NCPA checks in which the Record of Arrest and Prosecution (RAP) sheets are returned to the requesting state governmental agency (without any review of the RAP sheet by the FBI) are \$19.25 for employees and \$15.25 for volunteers. We do not know, at this point, whether the fee caps proposed in the Act will cover the actual cost of establishing a fitness

determination program. Any deficiencies in covering the costs of the program created by such a cap would have to be paid by appropriations. For that reason, we believe that the fee for the fitness determination portion of a check should be only limited to the actual cost of performing the service.

As noted above and as stated in the Attorney General's Report, the Department supports the Act's goal of broadening the access to national criminal background checks by child serving organizations. For that reason, the Department is committed to reach that goal in a way that addresses the concerns identified above and is consistent with the recommendations in the Attorney General's Report.

Thank you for your attention to this matter. The Office of Management and Budget has advised that there is no objection from the standpoint of the Administration's program to the presentation of this letter.

Sincerely



Brian A. Benczkowski  
Principal Deputy Assistant Attorney General

cc: The Honorable Arlen Specter  
Ranking Minority Member