U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

March 31, 2009

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

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 327, the "Improving Assistance to Domestic Violence and Sexual Violence Victims Act of 2009". We note with particular approval the legislation's proposal to improve the HIV testing certification that the Violence Against Women Act of 2005 (VAWA) added to the Department's Grants to Encourage Arrest Policies and Enforcement of Protection Orders (Arrest Program). We also welcome the provision that would prevent grantee jurisdictions from imposing filing and other fees on victims of dating violence who seek protection from the civil or criminal justice system.

Although we generally support the legislation, the Department recommends certain changes to correct sections that are problematic as drafted. In addition, at the end of this document, we propose additional, largely technical amendments to the Department's grant programs that would improve greatly our ability to administer these programs. We look forward to working with the Committee to address these recommendations.

General Effective Date Provision

As currently drafted, the bill contains numerous specific effective date provisions but does not provide an effective date for all its amendments. Because the Department cannot immediately implement statutory changes regarding grant awards that already have been made, the Department recommends adding a new section 2 that provides that, unless explicitly specified otherwise, changes will go into effect with Fiscal Year (FY) 2010 funding:

"SEC. 2. EFFECTIVE DATE.

"Except as otherwise provided in this Act, the provisions of this Act shall not take effect until the beginning of Fiscal Year 2010."

Other bill sections would need to be re-numbered accordingly.

Treatment of Confidential Information: Paragraph 2(d)(4)

In proposed 42 U.S.C. § 13925(b)(2)(G), the Department recommends striking the last sentence (beginning "In no case may consent. . .") because it duplicates text currently at 42 U.S.C. § 13925(b)(2)(B)(ii) that prohibits consent to release of information by an abuser.

In addition, we note that proposed amendments to 42 U.S.C. § 13925(b)(a)(B)(i) would prohibit grantees and subgrantees from releasing individual victim information even if it is "encoded, encrypted, hashed or otherwise protected." Although we understand and support the safety concerns underlying this amendment, which would prevent victim service providers from disclosing encrypted victim information to statewide databases, we note that this provision may not have uniform application. Because the statute also creates an exception for statutorily mandated releases, victim services providers still might be required to release information to a state funder if there is a state statute mandating the collection of such data.

Further, this section states, "In no case may consent or authorization for release of information be given by the abuser of the minor, or person with a court appointed guardian, or the abuser of the other parent of the minor." The Department recommends changing "the abuser" to "alleged abuser" or "accused abuser" so that it does not take a conviction to put an abuser in this category.

Exemption from Matching Funds: Subsection 3(b)

In proposed 42 U.S.C. § 3796gg-1(f)(2), we recommend changing "victims services" to "victim services" for consistency with terms used throughout VAWA.

Limits on Internet Publication of Protection Order Information: Subsection 3(d)

Subsection 3(d) would add a new certification requirement to the STOP Violence Against Women Formula Grant Program, by moving the internet publication prohibition currently found at 18 U.S.C. § 2265(d)(3) into Part T of the Omnibus Crime Control and Safe Streets Act. As drafted, however, there is some ambiguity regarding when a "State, Indian tribe, or territory may share" information about protection orders. In order to make clear that there are limits on such information sharing, we suggest moving the phrase "for purposes of enforcing orders and injunctions described in subsection (a)." As revised, the new exception would read: "A State, Indian tribe, or territory may share court-generated and law enforcement-generated information about an order or injunction described in subsection (a) for purposes of enforcing such orders and injunctions, if such information is contained in secure, governmental registries."

Trained Sexual Assault Examiners: Subsection 3(e)

The Department opposes subsection 3(e) of the bill, which would remove a requirement that, if states choose to use STOP Violence Against Women Formula Grant Program (STOP) funds for sexual assault forensic examinations, the examinations must be performed by "trained examiners for victims of sexual assault". The Department has heard advocates in the field express concern that, in rural areas, there are few sexual assault examiner (SANE) programs and therefore the current requirement presents a hardship for states. If there is such a hardship, however, we believe it is outweighed by the benefits of using trained examiners and the fact that states may opt to use other funding for forensic examinations.

In 2005, the Department urged Congress to amend VAWA to permit states to use STOP funds for forensic examinations by trained examiners. Prior to this change, states had to certify, as a condition precedent for receiving STOP formula awards, that victims did not bear the out-of-pocket costs of forensic examinations. As a result, states could not use the actual STOP funds to pay for the examinations. The Department supported the amendment as a means of encouraging states to use trained examiners. It may be that there is confusion in the field whether use of trained examiners is itself now a certification requirement, but it is not. Rather, the use of trained examiners is one of two prongs that states must meet if they wish to use STOP Program funds to pay for exams. If they do not wish to use STOP Program funds for this purpose, they can disregard the requirement for trained examiners.

Furthermore, research has shown that use of trained examiners is a best practice that protects victims and facilitates prosecution. According to the National Institute of Justice (*see* http://www.ojp.usdoj.gov/nij/topics/crime/rape-sexual-violence/response.htm), SANE programs and Sexual Assault Response Teams enhance the quality of health care for victims, improve the quality of evidence collected and improve the criminal justice system's ability to hold the offender accountable. If states are permitted to use their formula STOP funds for forensic examinations, they should be mandated to support better examinations, such as those conducted by SANEs. If there is a lack of SANEs in rural areas, we would urge states to direct STOP funds to enhance the availability of SANEs.

Definition of Rural State: Subsection 3(f)

The Department opposes subsection 3(f) of the bill, which amends the definition of "rural state" to expand the population that a state can have and still be considered "rural" and lock the definition to the 2000 decennial census rather than updating with each decennial census. We object to tying the definition to the 2000 census because, as state populations change and shift, the Department will be statutorily bound to consider outdated census data.

The Department proposes instead to address a separate problem related to funding for rural states. The term "rural state" is used only in the Rural Domestic Violence, Dating Violence, Sexual Assault, and Stalking Enforcement Assistance Program (Rural Program) statute

(42 U.S.C. § 13971), which contains a 75 percent set-aside of funds for applicants from rural states. This set-aside has hindered our administration of the Rural Program because, after we take out other mandated set-asides (10 percent for the Tribal Governments Program under 42 U.S.C. § 13971(d)(1)(A), 5 percent for the Culturally and Linguistically Specific Services Program under 42 U.S.C. § 14045a(a), and up to 8 percent for technical assistance under 42 U.S.C. § 13971(d)(3)), there is less than 10 percent left for applicants from the states that are not classified as "rural" – even though many of these states have vast rural areas. For example, in Fiscal Year 2008, the Department received 128 applications from entities in non-rural states that sought to serve rural communities, but was only able to fund 14 of them. Even with the revised definition, states such as Virginia, Texas, and California, each of which has large rural areas, would not qualify.

We therefore recommend amending the language in the Rural Program statute, so that we would give priority to applicants from rural states, but would not be held to a specific percentage. This would give us flexibility so that if we receive a large number of worthy applications from applicants in non-rural states, we would be able to fund more of them. Specifically, we propose the following language: "Section 40295(d)(5) of the Violence Against Women Act of 1994 (42 U.S.C. §13971(d)(5)) is amended by striking 'Not less than 75 percent of the total amount available for each fiscal year to carry out this section shall be allocated' and inserting 'In awarding grants under this section, the Director shall give priority'."

Filing Fees for Dating Violence Victims: Subsections 3(g) and (h)

These subsections make a welcome change to one of the certification requirements for both the STOP Formula Program and the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (Arrest Program). The statute currently requires applicants to certify that they will not charge filing and other fees to victims of domestic violence, sexual assault, and stalking seeking court process. Although we wholeheartedly support this amendment, we recognize that states, tribes, and units of local government may need time to come into compliance with the requirement as amended. To provide them with that time, we recommend adding a new subsection (i) to read as follows:

"(i) Amendments made by subsections (g) and (h) of this section shall take effect two years from the date of enactment of the Improving Assistance to Domestic and Sexual Violence Victims Act of 2009."

Tribal Issues: Section 7

In proposed section 903(c) of VAWA 2005, we would like to change "3" to "6" because three months will not be sufficient time to gather the information contained in this report.

These provisions would require the Department to submit reports to Congress that cover a number of topic areas including reports about joint consultations with the Department of Health and Human Services (HHS), investigative efforts of the Federal Bureau of Investigation (FBI), and prosecutorial efforts of United States Attorneys' Offices (USAO) regarding domestic violence and sexual assault against Indian women. The first report would contain data from the last three years and would include numbers regarding investigations, declinations, indictments, convictions, etc. This requirement would require full-time employee resources from HHS, FBI, USAOs, the Department's Office of Justice Programs, and the Department's Office of Tribal Justice, among others. We are concerned that this legislation does not provide funding for such a project.

The Department recommends that the definition of "qualified tribal organization" be rewritten to better reflect the drafter's intent.

Tribal Governments Program: Paragraph 7(b)(1)

We note that the proposed addition of subsection(c) to 42 U.S.C. § 3796gg-10, which would provide that Tribal Governments Program funds remain available until expended, is unnecessary because the same thing is currently provided for all of the Department's VAWA programs at 42 U.S.C. § 13925(b)(5). If this proposed subsection is retained, we recommend changing "appropriated" to "available" because the Tribal Governments Program is funded through the appropriations for other VAWA programs and does not have its own appropriation.

In proposed 42 U.S.C. § 3796gg-10(e)(1), which would require that the Department's Office on Violence Against Women (OVW) make certain technical assistance awards to support the Tribal Governments Program, we suggest changing "6 months" to "one year". OVW needs time to evaluate the technical assistance needs of the grantees, solicit and evaluate applications, and process cooperative agreements before technical assistance funds are dispersed. Six months from receipt of funding is not adequate time for OVW to complete this process.

Polygraph Certification: Section 8

Section 8 of the bill amends the polygraph certification that applies to the STOP Formula and Arrest Programs. The new requirement would prohibit the polygraph of sexual assault victims under any circumstances; the current language permits law enforcement to ask a victim to take a polygraph exam as long as it is voluntary and the victim's refusal to take the polygraph exam is not a reason to stop the investigation of the assault. While the practice of polygraphing victims should be rare and unlikely, it is unwise to restrict law enforcement investigative options in this way. This change could be interpreted to ban polygraphing a sex crime suspect if he had been the victim of a sex crime himself, which is frequently the case in Tribal cases. We object to this amendment as greatly premature and burdensome to the states: this polygraphing certification was only added to VAWA by VAWA 2005, and states, local governments, and tribal governments were given until January 5, 2009 to change their laws, policies, or practices.

In order to comply, a large number of states recently have enacted new polygraph testing prohibitions. It would be overly burdensome to the states to require them to amend their laws, policies, or practices to meet the new requirement, when they have only just changed them to comply with VAWA 2005. Moreover, we believe it is premature to determine whether the existing requirement contains a loophole that is too large or that law enforcement officials are abusing. We also note that this new requirement would be more restrictive than the Attorney General Guidelines for Victim and Witness Assistance, which specifically provide that "Department employees should not request that sexual assault victims take a polygraph *except in extraordinary circumstances*." (emphasis added).

HIV Testing Certification: Subsection 10(2)

Subsection (2) of section 10 revises a provision that VAWA 2005 added to the Arrest Program. That provision amended the Arrest Program statute to impose a 5 percent funding penalty on grantee states and local governments that do not provide victim-requested HIV testing of sexual assault offenders within 48 hours of the date that an information or indictment is presented. In the Department's view, VAWA 2005's HIV certification suffers from two significant flaws. First, it makes no allowance for jurisdictions that must exceed the 48-hour limit when offenders are not in custody or otherwise easily accessible. (For example, the defendant might have been charged even though his whereabouts are unknown, or the defendant may be in a location at great distance from a testing site.) Second, testing of a defendant within 48 hours of *indictment* or *information*, rather than the assault itself, does too little to help a victim who has been infected or fears she has been infected with HIV. Guidelines issued by the Centers for Disease Control and Prevention recommend that antiretroviral post-exposure prophylaxis be administered within 72 hours of exposure to prevent infection. Therefore, rapid victim testing, counseling, and prophylaxis are more effective ways to address victim health issues than offender testing.

We support the amendment proposed in this subsection, which would permit grantees to satisfy the certification requirement by providing victim testing and treatment rather than offender testing. We are concerned, however, that it does not go far enough to correct problems with the current language: it does not address the practical problems of requiring testing within 48 hours of indictment, and it does not mandate that victim testing and treatment occur with sufficient speed after exposure. To address these issues, we propose the following statutory language instead of the current subsection (2):

> "(2) Subsection 2101(d) of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3796hh(d)) is amended by striking subsection (d) and inserting a new subsection (d) as follows:
>
> > '(d) HIV TESTING AND PROPHYLAXIS.—A State or unit of local government shall not be entitled to five percent of the funds allocated under this part unless the State or unit of local government—

(1) certifies that it has a law or regulation that requires—

(A) the State or unit of local government to provide immediately and without charge, at the request of a victim of a sexual assault that carries the risk of transmission of the immunodeficiency virus (HIV), an HIV test, counseling regarding the risk of transmission and available treatments, and HIV prophylaxis as described in guidance set forth by the Centers for Disease Control and Prevention;

(B) as soon as practicable notification of the testing results to the victim or parent and guardian of the victim, if the victim is a minor or has a court-appointed guardian; and

(C) follow-up tests for HIV as may be medically appropriate and that, as soon as practicable after each such test, the results be made available in accordance with subparagraph (B); or

(2) certifies that it has a law or regulation that requires—

(A) the State or unit of local government to administer, at the request of a victim of a sexual assault that carries the risk of transmission of HIV, to an offender, against whom there has been a finding of probable cause that the offender committed the sexual assault, HIV testing not later than 48 hours after the victim's request, if the offender is in custody or otherwise available for testing;

(B) as soon as practicable notification of the testing results to the victim or parent and guardian of the victim, if the victim is a minor or has a court-appointed guardian, and offender; and

(C) follow-up tests for HIV as may be medically appropriate and that, as soon as practicable after each such test, the results be made available in accordance with subparagraph (B); or

(3) gives the Attorney General assurances that its laws and regulations will be in compliance with the requirements of paragraph (1) or (2) within the later of--

(A) the period ending on the date on which the next session of the State legislature ends; or

(B) two years.'"

If the current language is retained, we suggest amending proposed 42 U.S.C. 3796hh(d)(3) by striking "by a date that is not later than the latter" and inserting "by the later" for clarity.

Clarification of the Term Culturally and Linguistically Specific: Section 11

In section 11, paragraph (a)(2), in proposed 42 U.S.C. § 13925(a)(6), the bill defines "racial and ethnic minority groups" by reference to the Public Health Service Act (42 U.S.C. § 300u-6(g)), which provides "[t]he term 'racial and ethnic minority group' means American Indians (including Alaska Natives, Eskimos, and Aleuts); Asian Americans; Native Hawaiians

and other Pacific Islanders; Blacks; and Hispanics." This definition appears to require an overly narrow definition of minority groups that might exclude certain ethic groups from OVW-funded services. For example, under this definition, a grantee could focus on "Asian Americans" but not Asian immigrants who are not American citizens; it could focus on immigrants from sub-Saharan Africa but not North Africa.

In subsection 11(b), the United States Code citation is incorrect. Rather than "42 U.S.C. 13701 et seq." it should be "42 U.S.C. 14043e-3".

In subsection 11(c), the United States Code citation is incorrect. Rather than "42 U.S.C. 13701 et seq." it should be "42 U.S.C. 14043e-4".

Analysis and Research on Violence Against Indian Women: Section 13

Section 13 would change the jurisdictional territory to be covered in the National Baseline Study from "Indian country" to "land owned or held in trust" for a tribe. The purpose of the study is to examine the Department's response to domestic violence and sexual assaults against Indian women. The proposed language change, however, would spoil the study because the new definition is both over- and under-inclusive. The change appears to include fee land owned by tribes – which are not automatically "Indian country" over which the United States would have jurisdiction. The change would exclude non-trust land located within reservation boundaries – which are "Indian country" over which the United States would have jurisdiction. If the study is to do what it is designed to do, the definition should not be changed. This proposed amendment should be deleted.

The Department proposes striking "on land owned or held in trust for the benefit of an Indian tribe included on the list published under section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a–1)" and inserting "." to address concerns about underrepresentation of the population of Indian women intended to be covered under the mandated National Baseline Study to be executed by the National Institute of Justice. The recommended language is in keeping with the purposes of Title IX of P.L. 109-162, which appears to refer in a number of places to addressing violence against "Indian women" without additional stated limitations based on residence or tribal jurisdiction. The National Baseline Study has been planned and outlined to include women with tribal affiliations, as well as women "off-reservation" who self-identify as "Indian". As a technical revision, the "(a)(1)" in the parenthetical code reference at line 13 should be removed to clarify the reference as it appears as codified. The phrase in parentheses currently reads "(42 U.S.C. 3796gg-10(a)(1) note)".

Motions to Reopen: Section 14

Section 14 of the bill would amend the Immigration and Nationality Act (INA) to exempt aliens from the time and number limitations for motions to reopen if the basis of the motion is to apply for T or U nonimmigrant visa status or adjustment of status. This amendment risks delay in

seeking relief under subparagraphs (T) or (U) of section 101(a)(15) of the INA or adjustment of status under section 245(l) or (m) of the INA, because the regulations do not currently require victims of trafficking or criminal activity to file a motion to reopen with the Immigration Courts or the Board of Immigration Appeals (BIA). Their applications should be directed to the U.S. Citizenship and Immigration Services at the Department of Homeland Security (DHS). The proposed amendment is unnecessary even in cases where an alien is already subject to a final order of removal. The regulations currently provide for the automatic cancellation of a final order of removal against an alien with an approved application for T nonimmigrant status as of the date of the grant of such status. In addition, counsel for Immigration and Customs Enforcement, DHS already has regulatory authority to agree as a matter of discretion to join in a motion to reopen by an alien who has successfully applied for U nonimmigrant status in order to overcome applicable time and number limitations.

Section 14(b) provides that the amendments in section 14(a) become effective on the date of enactment for "applications filed before, on, or after such date." This subsection should be modified to exclude aliens already removed from the United States because such aliens cannot obtain reopening of their removal proceedings. *See Matter of Andres Armendarez-Mendez*, 24 I. & N. Dec. 646 (BIA Oct. 6, 2008). Additionally, in order to conform with 8 U.S.C. § 1229a(c)(7)(C)(i), this provision should provide that, for applications adjudicated before the effective date of the Act, aliens seeking to reopen their removal orders under 8 U.S.C. § 1229a(c)(7)(C)(iv)(I) must do so within ninety days of enactment of the Act.

Section 19

The Department recommends removing this section. The Department of Homeland Security advises us that it should be able to retain the ability to determine what office leads policy and program development. If this section is enacted, DHS's flexibility to manage these programs would be hampered, and changes that may be deemed necessary to more effectively manage the programs would necessitate a statutory amendment.

STOP Program Allocations: Section __

Your staff also has provided the Department with an additional amendment that would require that state grantees under the STOP Violence Against Women Formula Program reprogram funds under the allocations for law enforcement, prosecution, and courts to victim services if they have not obligated the funds within 18 months of the award. Under the STOP Program, states must certify that at least 25 percent of their STOP awards will be allocated for law enforcement, 25 percent for prosecution, 30 percent for victim services, and 5 percent for courts. The Department views this allocation formula as the backbone of the STOP Program because it ensures that states take a multi-disciplinary, coordinated approach with their VAWA funding. Neither a state nor the Department, however, has the discretion to deviate from the formula. This can delay expenditure of State STOP funds when a state has difficulty meeting the allocations, particularly (in our experience) when law enforcement or courts in the state do not

apply for subawards. Therefore, we support the idea of importing greater flexibility into the allocation process. We have problems, however, with the provision as drafted.

First, and most problematic, the amendment would provide for an automatic reprogramming after 18 months when STOP Formula Grant awards are for two years. Many states do not finish within the allotted two years - indeed, OVW still has awards open as far back as 2003. Requiring states to reprogram the funds after 18 months will not result in a shorter award time. Instead, after 18 months, the states would be obliged to issue a new request for proposals regarding unspent law enforcement, prosecution, and courts money and to issue new awards. This would only cause further delay in those states that already do not expeditiously make STOP subawards.

Second, we object to the fact that funds may only be reprogrammed for victim services. Although we acknowledge there is tremendous need in this area, victim services already receive the largest share of the funds. States may have worthy projects in the law enforcement, prosecution, courts, or discretionary categories that they have been unable to fund and they may prefer reprogramming the funds for those projects.

To address these two problems, the Department proposes inserting language that would give it discretion to approve deviations from the formula when a state has made a reasonable effort both to adhere to formula and to expend its funds within a reasonable time. If such efforts have not been made, we could deny the request: before we approve such a request, we would want to be sure that a state has tried to fund all aspects of its criminal justice system and that they had made a credible effort to do so during the first 18 months of their award.

Therefore, we propose changing the current language amending 42 U.S.C. § 3796gg-1(c)(3) to read: "except that in the event that funds allocated under subparagraphs (A) and (C) are not obligated within 18 months of receipt of funds, then the Attorney General may permit the State to allocate those funds for any other purpose set forth in section 2001(b) of this part (42 U.S.C. § 3796gg(b))."

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member