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BACKGROUND CHECKS: How federal and state law is failing to protect children

Presented by:
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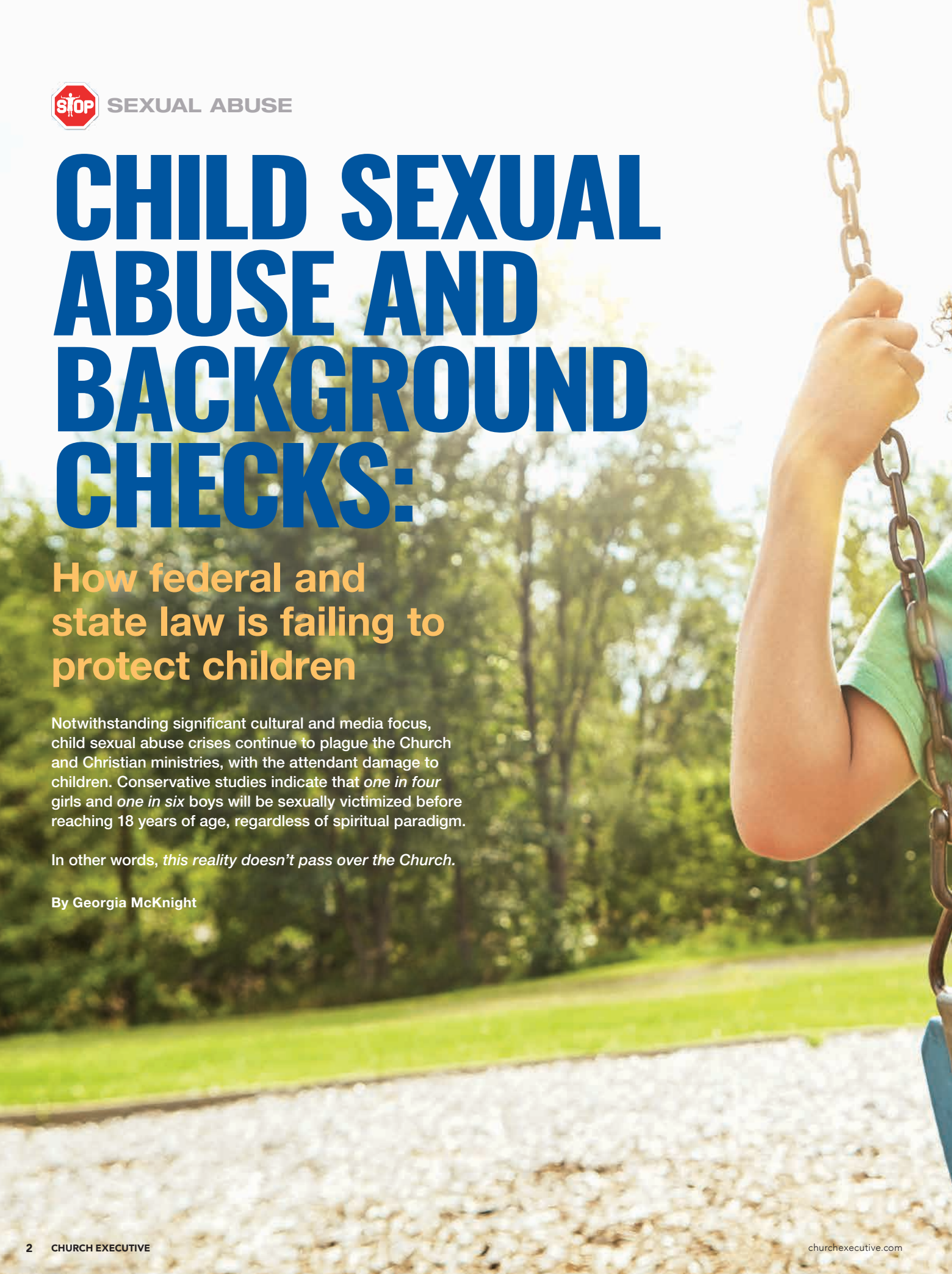
CHILD SEXUAL ABUSE AND BACKGROUND CHECKS:

How federal and state law is failing to protect children

Notwithstanding significant cultural and media focus, child sexual abuse crises continue to plague the Church and Christian ministries, with the attendant damage to children. Conservative studies indicate that *one in four* girls and *one in six* boys will be sexually victimized before reaching 18 years of age, regardless of spiritual paradigm.

In other words, *this reality doesn't pass over the Church.*

By Georgia McKnight



CULTURAL RESPONSE

In the past 10 years, headlines critical of the Church and other child-serving organizations have been inescapable. The American public has become angry and intolerant about this issue — as it should be. Litigation is skyrocketing, and the cost to resolve sexual abuse claims continues to climb; currently: $2.5 million per victim if settled, $10.3 million per victim if damages are determined by a jury. Out of necessity, insurance carriers are responding by requiring specific child protection protocols for reinsurance.

Initially slow to respond, churches, camps, Christian schools and youth sport organizations now understand the need for an effective safety system to *prevent* child sexual abuse. A fundamental element of *any* safety system is the background check of any applicant for paid or volunteer positions. When a ministry considers someone applying to work with children or vulnerable populations, it is critically important to determine whether the applicant has a past history suggesting that he or she has engaged in sexual abuse or violent crime.

BACKGROUND CHECK LIMITATIONS

Background checks provide a first line of defense for child-serving ministries; the proverbial 'low-hanging fruit'. While it's no 'silver bullet' or stand-alone safety system, the background check has become a standard of care for ministries and secular organizations offering services to children. Clearly, the background check has limitations where child sexual abuse risk is concerned, because two out of three children don't report abuse until they reach adulthood, if ever. As a result, 90% of sexual abusers have *never* encountered the criminal justice system and have no past criminal record to unearth.

As awareness of the risk grows, however, and ministry leaders and parents better understand the *abuser's grooming process* and legal reporting requirements mandated *by law*, abusers will encounter a higher likelihood of prosecution.

When a ministry applicant has a criminal record (arrest or conviction) related to violent crime or injury to a member of a vulnerable population (children, adults with intellectual or developmental disabilities, adults or children with *special needs* that limit or negate competency), the ministry should have access to *all* such information for staffing purposes, whether the applicant is applying to serve as an employee or volunteer. Unfortunately, this is not *currently* the case.

FEDERAL AND STATE LAW

Federal legislation governing reportability of criminal histories is the Fair Credit Reporting Act (FCRA). The FCRA is designed to balance an employer's need for adverse criminal information with the need for previously convicted individuals to find employment and housing. Under the current FCRA framework, background check providers are allowed to report (1) *convictions* indefinitely and (2) *non-convictions* within seven years *only*. As a result, arrests not leading to conviction cannot be reported after seven years. Clearly, this opens up opportunities for employment, especially when most employers assume a "no records found" background check means that *no records exist*. At the same time, withholding this information creates enormous risk when the employment position involves access to children. In fact, this practice disables the first line of defense in child safety: pre-employment screening.

Many states further restrict background information that may be reported. California, for example, limits reportable information to *convictions only — and within seven years*. Effectively, this means a convicted molester with an *older* conviction could apply to work or serve in child-serving contexts, and the ministry *would never know* of the conviction, unless told of it by the applicant himself. Washington, New York, and several other states operate under the same framework.

"[A] sexual abuser with multiple arrests but no conviction (i.e., deferred adjudication, dismissal, plea-downs) must simply *wait seven years* and the criminal history cannot be reported by background check providers, under federal law. There is wisdom in allowing a bankruptcy, foreclosure or bad payment history to 'fall off' a credit report, thereby allowing a 'do-over'; the same is *not true* for sexual abusers."

Recidivism in sexual offenders is extremely high. According to a 2003 study by the Bureau of Justice Statistics, "sex offenders were about four times more likely than non-sex offenders to be arrested for another sex crime after their discharge from prison." What's more, though a statistical outlier, serial perpetrators might have as many as *400 victims* over the course of their lives. Currently, sex offenders are able to take advantage of protections created by state and federal law to *fly under the radar.* For example, a sexual abuser with multiple arrests but no conviction (i.e., deferred adjudication, dismissal, plea-downs) must simply *wait seven years* and the criminal history cannot be reported by background check providers, under federal law. There is wisdom in allowing a bankruptcy, foreclosure or bad payment history to 'fall off' a credit report, thereby allowing a 'do-over'; the same is *not true* for sexual abusers.

When it comes to protecting children from sexual abuse, the best predictor of *future* behavior is *past* behavior. This is especially clear given the incredibly high rates of recidivism documented among child sexual abusers. For this reason, when screening candidates for child-serving roles, it is crucial that employers have access to all possible information relating to past abusive behavior in order to determine the likelihood of such behavior in the future.

To understand past behavior, employers need access to *all* criminal records involving abuse or other violent crime, more information than is currently permitted by the FCRA. Criminal records, regardless of how old or whether an arrest led to conviction, are extremely pertinent in evaluating whether a candidate poses a risk of child sexual abuse. This is due in part to the unique challenges of criminal prosecution in child sexual abuse contexts: children might not fully disclose, victims are often young and cannot clearly communicate, and parents commonly refuse to prosecute (particularly if the abuser is a family member). These realities, coupled with the delay common in reporting sexual abuse, frequently impede prosecution. As a result, there are generally greater numbers of arrests as compared to convictions in cases involving sexual abuse.

In addition, abusers are often allowed to plea down to offenses that do not clearly identify the underlying crime as having involved sexual behavior or children. Alternatively, crimes against children are often dismissed or deferred. As a result, child sexual abusers are not easily identified through records of convictions alone. Because of this reality, employers must have access to all available information about *past* behavior in order to make informed decisions about potential *future* risk to children — including criminal information not resulting in conviction.

SO, WHAT'S THE ANSWER?

This challenge to child protection must be addressed by the federal government. Where any clash of interests exists, *the compelling state interest of child safety should win.* Child sexual abuse is a pervasive problem that inflicts severe and long-lasting consequences on its victims. Protecting children from child sexual abuse has motivated sweeping legislation in the past, including mandatory reporting laws, sex offender registries, and extended or abolished statutes of limitation. These legislative initiatives illustrate that protecting children justifies the restriction or removal of longstanding rights and privileges.

One straight-forward solution is to simply carve-out organizations providing services to children, youth or vulnerable populations — where limitations on reporting are concerned — perhaps limiting the carve-out to criminal behavior resulting in *injury to a person.* By doing so, ministries serving children and vulnerable populations could access *all information necessary* to make safer staffing decisions. Applicants with a past criminal history related to sexual abuse or injury to a person are still employable, but not in programs serving children or vulnerable populations. The existing limitations with respect to *all other forms of employment* remain in place. This suggested modification of federal law would override all currently existing state law, providing an important step in safeguarding children.

In collaboration with child-serving ministries and denominations, the attorneys at MinistrySafe are actively working to *amend* federal law related to background checks provided to ministries serving children and vulnerable populations.

Want to help? Contact us at 833-737-SAFE (7233). CE

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