
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 1145 **Hearing Date:** July 31, 2020
Author: Cristina Garcia
Version: February 21, 2019
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Child Abuse: Reportable Conduct*

HISTORY

Source: Equality California

Prior Legislation: AB 832 (C. Garcia), 2015, failed passage on Assm. Floor
AB 1505 (C. Garcia), 2014, was never heard in Assm. Approps. Comm.

Support: American Civil Liberties Union of California; Board of Behavioral Sciences; Board of Psychology; California Association of Marriage and Family Therapists; California Psychological Association; California Public Defenders Association; Los Angeles County District Attorney's Office; National Association of Social Workers, California Chapter

Opposition: None known

Assembly Floor Vote: 47 - 19

PURPOSE

The purpose of this bill is to specify that "sexual assault" for purposes of reporting incidents of abuse under the Child Abuse and Neglect Reporting Act (CANRA) does not include voluntary sodomy, oral copulation, or sexual penetration, if there are no indicators of abuse, unless the conduct is between a person who is 21 years of age or older and a minor who is under 16 years of age.

Existing law establishes CANRA for the purpose of protecting children from abuse and neglect. (Pen. Code, § 11164.)

Existing law defines "child" under CANRA to mean a person under the age of 18 years. (Penal Code Section 11165.)

Existing law enumerates 46 different categories of persons, including but not limited to teachers, coaches, youth camp counselors, doctors, peace officers, and firefighters, that are deemed mandated reporters of child abuse. (Pen. Code, § 11165.7.)

Existing law requires that any specified mandated reporter who has knowledge of or observes a child, in his or her professional capacity or within the scope of his or her employment whom the

reporter knows, or reasonably suspects, has been the victim of child abuse, to report it immediately to a specified child protection agency. (Pen. Code, § 11166, subd. (a).)

Existing law defines "reasonable suspicion" to mean that it is objectively reasonable for a person to entertain a suspicion, based upon the facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect. (Pen. Code, § 11166, subd. (a)(1).)

Existing law requires mandated reporters to make reports of suspected child abuse or neglect to any police department or sheriff's department, not including a school district police or security department, county probation department, if designated by the county to receive mandated reports, or the county welfare department." (Pen. Code, § 11165.9.)

Existing law provides that any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jail or by a fine of \$1,000 or by both that imprisonment and fine. If a mandated reporter intentionally conceals his or her failure to report an incident known by the mandated reporter to be abuse or severe neglect under this section, the failure to report is a continuing offense until a specified agency discovers the offense. (Pen. Code, § 11166, subd. (c).)

Existing law defines "child abuse or neglect" under CANRA to include physical injury or death inflicted by other than accidental means upon a child by another person, sexual abuse as defined, neglect as defined, the willful harming or injuring of a child or the endangering of the person or health of a child as defined, and unlawful corporal punishment or injury as defined. (Pen. Code, § 11165.6.)

Existing law states that "sexual abuse" means sexual assault or sexual exploitation. (Pen. Code, § 11165.1.)

Existing law defines "sexual assault" as conduct in violation of one or more of the following crimes: rape, statutory rape involving a person who is 21 years of age or older with a minor who is under 16 years of age, rape in concert, incest, sodomy with a person who is under 18 years of age, lewd or lascivious acts upon a child who is under 14, or who is 14 or 15 years of age by a person who is at least 10 years older than the child, oral copulation, sexual penetration, or child molestation, as specified. (Pen. Code, § 11165.1, subd. (a).)

This bill specifies that "sexual assault" for purposes of CANRA, does not include voluntary acts of sodomy, oral copulation or sexual penetration, if there are no indicators of abuse, unless the conduct is between a person 21 years of age or older and a minor who is under 16 years of age.

COMMENTS

1. Need for This Bill

According to the author:

Adults who interact with minors as part of their job are considered mandated reporters. As a mandated reporter, they are required by law to report cases of abuse. While the law has a good and necessary intent, the current law includes a reliance on a legal distinction based on the type of sexual activity that is outdated and discriminatory.

Under current law, a mandated reporter does not have to report two people having vaginal intercourse unless the conduct is between someone over 21 years of age with someone under 16 years of age. The same law requires that a mandated reporter does have to report incidents of oral sex, anal sex, and sexual penetration in any instance where one person is under the age of 18 years. As a result, a therapist, healthcare worker, or teacher would have to report two teens engaging in activities that generally lead up to vaginal intercourse, but not vaginal intercourse itself. Crucially, it means that LGBT teens will always be reported. Even if the two minors were both 17 years of age, one teenager would have to be reported as a sex offender and one as a victim.

This puts teens at risk. Therapists and healthcare workers disclose the limits of confidentiality. This means teenagers who are engaging in oral or anal sex are less likely to get advice addressing their mental and health care concerns than two teens engaging in vaginal intercourse. It also puts the mandated reporters at risk of losing their licenses and their jobs if they help these teenagers as trusted adults.

AB 1145 does not change the criminality of the acts in any of the sections referenced for mandated reporters. It does not change the fact that a mandated report is required to report any case where abuse is suspected or there is coercive behavior.

A Department of Consumer Affairs legal opinion in 2013 only further confused the issue, appearing to offer some reporters leeway to use clinical judgment when determining what consensual acts to report. However, because this opinion lacks the power of law, reporters are advised that the safest course of action is to follow the existing statute.

AB 1145 simply makes sure that when it comes to reporting voluntary acts of sexual conduct that all types of sexual conduct get the same treatment. Clearing up the contradictions and inconsistencies will allow mandated reporters to better protect teens and better identify cases where there is non-voluntary behavior.

2. Mandatory Reporting of Sexual Assault under CANRA

CANRA was established in 1981 for the purpose of protecting children from abuse and neglect. The law imposes a mandatory reporting requirement on individuals whose professions bring them into contact with children. These professionals are called mandated reporters for purposes of CANRA. Whenever a mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect.

A mandated reporter must report an incident of child abuse by telephone to a police or sheriff's department or a county probation or welfare department immediately or as soon as practically possible, and then prepare and submit a written follow up report within 36 hours of receiving the information concerning the incident. A mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect is guilty of a misdemeanor.

Under CANRA, child abuse includes sexual abuse. Not all sexual conduct involving a minor constitutes sexual abuse requiring a mandated reporter to report the incident. (*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal. App. 3d 245.) In *Planned Parenthood Affiliates*, the petitioners sought to enjoin implementation of CANRA following an opinion of the Attorney General which held that the statute imposed on professionals and others a duty to report any sexual activity of minors under the age of 14 years as child abuse. Petitioners claimed the law violated the constitutional right to privacy of such minors and placed professionals in circumstances in which they would be forced to choose between compliance with the law and fidelity to their ethical duties to preserve patients' confidential medical histories. (*Id.* at pg. 257.)

In order to explore legislative intent behind CANRA, the court reviewed CANRA in light of other statutes that relate to sexual conduct by minors. Various statutes give minors the right to consent to the prevention or treatment of pregnancy (Fam. Code, § 6925, formerly Civ. Code, § 34.5); the right to consent to treatment of sexually transmitted diseases (Fam. Code, § 6926, formerly Civ. Code, § 34.8); and the right to consent to treatment for rape or sexual assault (Fam. Code, §§ 6927 and 6928, formerly Civ. Code, §§ 34.9 and 34.10). Existing statutes also provide minors a privilege of medical record confidentiality. (Civ. Code, §§ 56 et seq.) (*Planned Parenthood Affiliates, supra*, 181 Cal. App. 3d at p. 269.) The court found that an interpretation of the law that requires mandated reporters, which include physicians and counselors, to report all instances of sexual conduct by minors, regardless of suspected child abuse, would unjustifiably interfere with a minor's right to confidential reproductive health care. (*Id.* at pp. 270-271.)

A part of the court's analysis also involved discussion of a prior challenge to CANRA's inclusion of statutory rape as the statute was written at the time. At the time, Penal Code Section 261.5 prohibited any act of intercourse with an unmarried woman under 18, regardless of whether the act is voluntary. The California Supreme Court ordered the case transferred to the First District Court of Appeal with directions to issue the alternative writ of mandate, staying operation and enforcement of the reporting law insofar as it applied to conduct in violation of section 261.5. Shortly thereafter, the Legislature deleted section 261.5 from the CANRA statutes and concluded that "[the] existing provisions of law are causing the overreporting of various acts unrelated to child abuse . . . creating a detrimental impact upon the efforts of the Legislature to deal with the problem of child abuse." (*Planned Parenthood Affiliates, supra*, 181 Cal. App. 3d at p. 272, citing the analysis by the Assembly Committee on Criminal Justice (May 9, 1981).)

The court held that the legislative intent of CANRA was "to allow the trained professional to determine an abusive from a nonabusive situation. Instead of a blanket reporting requirement of all activity of those under a certain age, the professional can make a judgment whether a minor is having voluntary relations or is being sexually abused." (*Id.* at p. 272.) The court found that, although Penal Code Section 288 (lewd and lascivious conduct with a minor under the age of 14) is included in CANRA, the inclusion of this section did not render all sexual conduct of such minors child abuse per se, and that mature minors under 14 enjoyed the same presumptive constitutional right to sexual privacy as adults. The court reasoned that the CANRA "provisions contemplate criminal acts of child abuse causing trauma to the victim; they do not contemplate the voluntary sexual associations between young children under the age of 14 who are not victims of a child abuser and are not the subjects of sexual victimizations." (*Id.* at p. 267.)

Therefore, the court concluded that "[t]he de facto voluntary sexual conduct among minors under the age of 14 may be ill advised, but it is not encompassed by section 288. The inclusion of that statute in the reporting law does not mandate reporting of such activity. (*Id.* at p. 276.)

3. Department of Consumer Affairs' Memo Regarding CANRA

In 2013, the Department of Consumer Affairs (DCA) evaluated the issue of whether CANRA requires practitioners to report all conduct by minors that fall under the definition of sodomy and oral copulation. Relying on case law, including *Planned Parenthood Affiliates v. Van de Kamp*, supra, and the legislative intent behind CANRA, DCA concluded that mandated reporters are not required to report consensual sex between minors of like age for any of the conduct listed as sexual assault unless the practitioner reasonably suspects that the conduct resulted from force, undue influence, coercion, or other indicators of child abuse. Because sexual conduct of minors that meet the definition of sodomy and oral copulation must be treated the same as all other conduct listed in the section (i.e. Penal Code Section 288), only instances involving acts that are nonconsensual, abusive or involves minors of disparate ages, conduct between minors and adults, and situations where there are indicators of abuse. Accordingly, DCA stated that it was not necessary to amend the statute or remove sodomy or oral copulation from CANRA. (See DCA, Memorandum on the Evaluation of CANRA Reform Proposal Related to Reporting Consensual Sex Between Minors (Apr. 11, 2013).)

As stated in relevant case law and the DCA memo, mandated reporters are not required to report all sexual conduct by minors listed in the CANRA statutes under the definition of "sexual assault." Rather, mandated reporters must use their training and judgment in determining which situations may involve child abuse. However, the proponents of this bill have expressed that the statute is confusing as written and may lead to discrimination against minors who participate in sexual conduct that is not vaginal intercourse. Thus, this bill explicitly states that "sexual assault" for purposes of CANRA does not include voluntary sexual acts between minors (16 years of age and older) and other minors or young adults (20 years of age and younger) if there are no other indicators of abuse.

4. Effect of this Legislation

Under CANRA, a minor who engages in voluntary vaginal intercourse does not fall under the definition of "sexual assault" unless it involves a person 21 years of age or older and the minor is under 16 years of age. The statute's definition of "sexual assault" does include other situations where a minor engages in voluntary sexual acts including oral copulation, sodomy, or penetration by a foreign object, regardless of the age difference of the participants. (Pen. Code, § 11165.1, subd. (a).) The discrepancy in the types of sexual acts included within the statutory definition of "sexual assault" and the lack of consideration of whether the conduct is voluntary may be confusing to some mandated reporters or lead to discriminatory results on who is reported by a mandated reporter. This bill would clarify that these other types of sexual acts do not have to be reported unless it involves a significant age difference or some other indicators of abuse.

This bill does not make changes to any other existing laws that criminalize statutory rape, oral copulation, sodomy or penetration by a foreign object involving a minor. (See Pen. Code, §§ 286, 288a, 289.)

5. Argument in Support

According to the California Psychological Association:

Currently, CANRA requires a psychologist, among other mandated reporters, to report whenever they (in their professional capacity or within the scope of his or her employment) has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect, including sexual abuse. Further, under existing law, sexual abuse is reportable if it involves unlawful sexual intercourse between a person 21 years of age or older with a minor who is under 16 years of age. Existing law also makes sexual abuse reportable if any person participates in an act of sodomy or oral copulation with a person who is under 18 years of age.

This bill would instead make instances of sodomy or oral copulation reportable as sexual abuse only if any person over 21 years of age engages in a sexual act with a person who is under 16 years of age. For years, professionals in the field have felt that the current statute discriminated against LGBT youths, and could put practitioners at risk of professional and legal discipline for not reporting what they did not deem to be child abuse, but that a strict interpretation of the statute deemed to be child abuse. Several years ago, the Department of Consumer Affairs issued a legal opinion which clarifies that oral or anal copulation between two minors does not need to be report if the professional deems it is not abuse; much like non-abusive consensual intercourse is not reported as child abuse. However, the statute remains intact, and could be interpreted by practitioners, attorneys, and future department heads in a different manner.

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