STATE OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS

BUSINESS, CONSUMER SERVICES, AND HOUSING AGENCY • GOVERNOR EDMUND G. BROWN JR.

BOARD OF PSYCHOLOGY – Administration
1625 N. Market Blvd., N-215, Sacramento, CA 95834
P (916) 574-7720 F (916) 574-8671 www.psychology.ca.gov

MEMORANDUM

DATE	July 30, 2015
TO	Board of Psychology Members
FROM	Jonathan Burke Administrative Services Coordinator
SUBJECT	**AB 832 (Garcia) – Child Abuse: Reportable Conduct**

Background:

The Board adopted a "support if amended" position on AB 832 (Garcia) at the May Board Meeting. The language approved by the Board was adopted by the author on May 26, 2015. However, the author has decided to not pursue the legislation this session and will try with substantially similar language in 2017. The Board adopted a "support" position at the June meeting.

Please see attached analysis for detail on the legislation.

Action Requested:

The Staff recommendation is for the Board to continue to "support" on AB 832 (Garcia).

Attachment A is the staff analysis of AB 832.
Attachment B is the language of the bill.

CALIFORNIA STATE BOARD OF PSYCHOLOGY

BILL ANALYSIS

BILL NUMBER: AB 832 **VERSION:** AMENDED MAY 26, 2015

AUTHOR: GARCIA **SPONSOR:** AUTHOR

BOARD POSITION: SUPPORT

SUBJECT: CHILD ABUSE: REPORTABLE CONDUCT

Overview:

This bill would specify that voluntary acts of sodomy, oral copulation, and sexual penetration, where there are no indicators of abuse, are not considered acts of sexual assault that must be reported by a mandated reporter, unless it is between a person age 21 or older and a minor under age 16.

Existing Law:

1) Establishes the Child Abuse and Neglect Reporting Act (CANRA) which requires a mandated reporter to make a report in instances in which he or she knows or reasonably suspects that a child has been the victim of child abuse or neglect. (Penal Code (PC) 11164 et seq)

2) Defines "sexual abuse" for the purposes of CANRA as sexual assault or exploitation consisting of any of the following: rape, statutory rape, rape in concert, incest, sodomy, oral copulation, and certain lewd or lascivious acts upon a child, sexual penetration, or child molestation. (PC §11165.1(a))

3) Except under certain specified circumstances, declares any person who participates in an act of sodomy or oral copulation with a person under age 18 shall be punished by up to one year in state prison or county jail. (PC §§ 286(b)(1), 288a(b)(1))

4) Except under certain specified circumstances, declares any person over age 21 who participates in an act of sodomy or oral copulation with someone under age 16 is guilty of a felony. (PC §§ 286(b)(2), 288a(b)(2))

5) States that a person who engages in unlawful sexual intercourse with a minor, who is not more than three years older or three years younger, is guilty of a misdemeanor. (PC §261.5(b))

6) States that a person who engages in unlawful sexual intercourse with a minor who is not more than three years older or three years younger is guilty of a misdemeanor. (PC §261.5(b))

7) States that a person who engages in unlawful sexual intercourse with a minor who is more than three years younger is guilty of either a misdemeanor or a felony. (PC §261.5(c))

8) States that any person age 21 or older who engages in unlawful sexual intercourse with a minor under age 16 is guilty of either a misdemeanor or a felony. (PC §261.5(d))

This Bill:

1) Specifies that voluntary acts of sodomy, oral copulation, or sexual penetration, where there are no indicators of abuse, are not considered mandated reports of sexual assault under CANRA, unless the conduct is between a person age 21 or older and a minor under age 16. (PC §11165.1(a))

Comment:

1) **Author's Intent.** The author's office states that the reporting requirements for mandated reporters of child abuse are confusing, inconsistent, and discriminatory.

   They note that current law states that voluntary sodomy and oral copulation is illegal with anyone under age 18, and that it requires a mandated report as sexual assault under CANRA. However, the same reporting standards do not apply to voluntary heterosexual intercourse.

   The author is attempting to make the law consistent by ensuring that all types of voluntary activities are treated equally for purposes of mandated reporting under CANRA.

2) **Background.** The Board of Behavioral Sciences (BBS) examined this issue in 2013 when stakeholders expressed concern that consensual oral copulation and sodomy among minors were mandated reports under CANRA, while other types of consensual sexual activity were not.

   However, at the same time, staff members employed by the State Legislature contacted BBS staff to caution that there had been past legal opinions stating that this interpretation of CANRA was incorrect, and that amendments could potentially have ramifications for abortion providers.

   BBS was concerned about a potential legal misinterpretation of CANRA, but at the same time saw this as a valid effort. Therefore, BBS directed staff to obtain a legal opinion from the DCA legal office.

3) **Board's AG Opinion.** The Board of Psychology is seeking clarification from the Attorney General's Office on the laws regarding mandated reporting, specifically whether consensual sexual conduct between minors of a like age differs depending upon the type of sexual conduct described by the minor.

   On April 11, 2013 the Board of Behavioral Sciences (BBS) received a legal opinion from Dianne R. Dobbs, Senior Counsel, Legal Affairs which argued that the Child Abuse and Neglect Reporting Act ("CANRA") and California Penal Code 11165.1 do not mandate reporting as minors under and over the age of 14 can lawfully engage in consensual activities with minors of a like age. However, the question has been raised because of years' worth of distinctions made by professionals subject to the reporting act. In many Educational Materials on the subject there is a distinction made between acts of sodomy and oral copulation and these acts, even if engaged in consensually, must be reported.

This discrepancy has caused anxiety and confusion for Board of Psychology's licensees and the Board has thus sought an opinion from the Attorney General's Office before notifying licensees, who are mandated reporters, that their reporting requirements are not based upon certain sexual acts when reporting consensual sexual conduct between minors. The Board asked the AG to resolve the following legal questions:

1. The Child Abuse and Neglect Reporting Act (CANRA; Pen. Code, sec. 11164 et seq.) requires "mandated reporters" to report instances of child sexual abuse, assault, and exploitation to specified law enforcement and/or child protection agencies. Does this requirement include the mandatory reporting of voluntary acts of sexual intercourse, oral copulation, or sodomy between minors of a like age?

2. Under CANRA is the activity of mobile device "sexting," between minors of a like age, a form of reportable sexual exploitation?

3. Does CANRA require a mandated reporter to relay third-party reports of downloading, streaming, or otherwise accessing child pornography through electronic or digital media?

The Board attached several CE documents and sources along with its request for an opinion. The opinion was sent to the AG by Assemblywoman Garcia. We expect to hear back this summer.

4) **DCA Legal Opinion.** In its legal opinion, DCA found that CANRA does not require a mandated reporter to report incidents of consensual sex between minors of a similar age for any actions described in PC Section 11165.1, unless there is reasonable suspicion of force, exploitation, or other abuse. DCA also found the following, based on past court cases:

- Courts have found that the legislative intent of the reporting law is to leave the distinction between abusive and non-abusive sexual relations to the judgment of professionals who deal with children.

- Review of other legal cases has found that the law does not require reporting of consensual sexual activities between similarly aged minors for any sexual acts unless there is evidence of abuse.

5) **Board Recommended Amendment.** The Board voted to adopt a "support if amended" position at the Board Meeting in May. Below is the language the Board recommended that will bring the statute more in line with the Planned Parenthood decision.

"Penal Code §11165.1 (a) "Sexual assault" for the purposes of this article does not include voluntary conduct in violation of Section 286, 288a, or 289, where 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."

This language was adopted by the author and is currently in the bill. Staff therefore recommend a "support" position on this language.

6) **Previous Legislation.** AB 1505 (Garcia, 2014) would have specified that consensual acts of sodomy and oral copulation are not acts of sexual assault that must be reported by a mandated reporter, unless it involved either a person over age 21 or a minor under age 16.

At its May 2014 meeting, the Board adopted a "oppose unless amended" position on this bill. The Board's letter to the author stated;

"The Board is concerned that the most recent version of the bill does not resolve the lack of clarity in current law as effectively as the previous version did. The previous version of the bill would have clarified for mandated reporters that consensual sodomy or oral copulation among two minors, including those under age 16, is not reportable as sexual assault under the Child Abuse and Neglect Reporting Act (CANRA).

The current version of the bill still clarifies that consensual sodomy or oral copulation among two 16 or 17 year olds, is not reportable as sexual assault under CANRA. However, the current version of the bill actually codifies that consensual sodomy or oral copulation among two minors under 16, (for example, two 14 or 15-year olds, or a 16 and 15 year old) is a mandated report of sexual assault under CANRA. This is in conflict with existing case law and a recent DCA legal opinion.

The Board's desire is that a psychologist be allowed to determine if sodomy or oral copulation among two 15 or 14 year olds is abusive and reportable or non-abusive and non-reportable. The current version of the bill goes against the desired outcome of the Board. The initial version of the Bill was clearer in fulfilling the intent of the Board in clearing up the mandated reporting requirements of CANRA

7) **BreEZe Impact.** N/A.

8) **History**

2015

05/26/15 Ordered to inactive file at the request of Assembly Member Cristina Garcia.
05/26/15 Read third time and amended.
05/26/15 Ordered to third reading.
05/26/15 Reconsideration granted.
05/14/15 Motion to reconsider made by Assembly Member Cristina Garcia.
05/14/15 Read third time. Refused passage. (Ayes 27. Noes 32.).
04/30/15 Read second time. Ordered to third reading.
04/29/15 From committee: Do pass. (Ayes 10. Noes 5.) (April 29).
04/20/15 Re-referred to Com. on APPR.
04/16/15 Read second time and amended.
04/15/15 From committee: Amend, and do pass as amended and re-refer to Com. on APPR. (Ayes 5. Noes 2.) (April 7).03/12/15 Referred to Com. on PUB. S.
02/27/15 From printer. May be heard in committee March 29.
02/26/15 Read first time. To print.

California LEGISLATIVE INFORMATION

AB-832 Child abuse: reportable conduct. (2015-2016)

AMENDED IN ASSEMBLY MAY 26, 2015

AMENDED IN ASSEMBLY APRIL 16, 2015

CALIFORNIA LEGISLATURE— 2015–2016 REGULAR SESSION

ASSEMBLY BILL **No. 832**

Introduced by Assembly Member Cristina Garcia
(Coauthor: Assembly Member Eggman)

February 26, 2015

An act to amend Section 11165.1 of the Penal Code, relating to child abuse.

LEGISLATIVE COUNSEL'S DIGEST

AB 832, as amended, Cristina Garcia. Child abuse: reportable conduct.

The Child Abuse and Neglect Reporting Act requires a mandated reporter, as defined, to make a report to a specified agency whenever the 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. Existing law provides that "child abuse or neglect" for these purposes includes "sexual assault," that includes, among other things, the crimes of sodomy, oral copulation, and sexual penetration.

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

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 11165.1 of the Penal Code is amended to read:

11165.1. As used in this article, "sexual abuse" means sexual assault or sexual exploitation as defined by the following:

(a) "Sexual assault" means conduct in violation of one or more of the following sections: Section 261 (rape), subdivision (d) of Section 261.5 (statutory rape), 264.1 (rape in concert), 285 (incest), 286 (sodomy), subdivision (a) or (b) of, or paragraph (1) of subdivision (c) of, Section 288 (lewd or lascivious acts upon a child), 288a (oral copulation), 289 (sexual penetration), or 647.6 (child molestation). "Sexual assault" for the

purposes of this article does not include voluntary conduct in violation of Section 286, 288a, or 289, *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.

(b) Conduct described as "sexual assault" includes, but is not limited to, all of the following:

(1) Penetration, however slight, of the vagina or anal opening of one person by the penis of another person, whether or not there is the emission of semen.

(2) Sexual contact between the genitals or anal opening of one person and the mouth or tongue of another person.

(3) Intrusion by one person into the genitals or anal opening of another person, including the use of an object for this purpose, except that, it does not include acts performed for a valid medical purpose.

(4) The intentional touching of the genitals or intimate parts, including the breasts, genital area, groin, inner thighs, and buttocks, or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose.

(5) The intentional masturbation of the perpetrator's genitals in the presence of a child.

(c) "Sexual exploitation" refers to any of the following:

(1) Conduct involving matter depicting a minor engaged in obscene acts in violation of Section 311.2 (preparing, selling, or distributing obscene matter) or subdivision (a) of Section 311.4 (employment of a minor to perform obscene acts).

(2) A person who knowingly promotes, aids, or assists, employs, uses, persuades, induces, or coerces a child, or a person responsible for a child's welfare, who knowingly permits or encourages a child to engage in, or assist others to engage in, prostitution or a live performance involving obscene sexual conduct, or to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct. For the purpose of this section, "person responsible for a child's welfare" means a parent, guardian, foster parent, or a licensed administrator or employee of a public or private residential home, residential school, or other residential institution.

(3) A person who depicts a child in, or who knowingly develops, duplicates, prints, downloads, streams, accesses through any electronic or digital media, or exchanges, a film, photograph, videotape, video recording, negative, or slide in which a child is engaged in an act of obscene sexual conduct, except for those activities by law enforcement and prosecution agencies and other persons described in subdivisions (c) and (e) of Section 311.3.