



## DEPARTMENT OF JUSTICE

Justice Building  
1162 Court Street NE  
Salem, OR 97301-4096  
Telephone: (503) 378-4400

September 11, 2018

**No. 8294**

This opinion responds to a question from the Department of Human Services (DHS) about the mandatory child abuse reporting statutes.<sup>1</sup> The question stems from reports that at least one school district in Oregon requires teachers (and other mandatory reporters of abuse) to report all sexual conduct they become aware of involving students—even if the person with knowledge of the conduct does not consider the conduct harmful and it involves adolescents close in age. Our answer should be understood in that context. As explained below, we conclude that the law does not require every instance of sexual conduct involving an adolescent to be reported as child abuse.

### QUESTION PRESENTED

Is a mandatory child abuse report required for sexual conduct involving a minor, even when Oregon law provides a defense against criminal charges based on the conduct because the participants are close in age (referred to throughout this opinion as the “age-gap defense”)?

### SHORT ANSWER

No. Oregon law provides that minors are legally unable to consent to sexual contact, and criminalizes nonconsensual sexual contact. But where sexual conduct is a crime *only* because a participant is too young to consent, Oregon law generally provides a defense if the participants are less than three years apart by age.<sup>2</sup> A review of the relevant statutory text and context indicates that the legislature did not intend to require every instance of conduct covered by the

---

<sup>1</sup> Oregon’s mandatory child abuse reporting statutes are codified at ORS 419B.005 to 419B.055.

<sup>2</sup> In all cases, the age-gap defense applies only if the participants are less than three years apart, and only to conduct that would be consensual but for the fact that minors cannot legally consent to sexual contact. ORS 163.345.



age-gap defense to be reported as abuse.<sup>3</sup> The child abuse reporting statutes are intended to protect children from harm, and the age-gap defense reflects a legislative decision that conduct that falls within the scope of the defense is not inherently harmful to the child. However, each instance of sexual conduct involving a minor must be considered by the potential reporter. If the conduct was likely harmful to the minor, it must be reported, regardless of the possibility of the age-gap defense.

## BACKGROUND

### I. Mandatory Child Abuse Reporting Law

Some professionals, such as physicians, dentists, and school employees, are required to make a report to DHS or to law enforcement whenever they have reasonable cause to believe child abuse has occurred and have come in contact with the victim or perpetrator.<sup>4</sup> A report of abuse triggers an investigation by DHS or law enforcement,<sup>5</sup> as well as protective social services “if necessary to prevent further abuses to the child or to safeguard the child’s welfare.”<sup>6</sup>

### II. Statutory Definitions

Within the mandatory reporting statutes, the definition of “abuse” covers a number of sex crimes codified in ORS chapter 163, including the following:

- (C) Rape of a child, which includes but is not limited to rape, sodomy, unlawful sexual penetration and incest, as those acts are described in ORS chapter 163.
- (D) Sexual abuse, as described in ORS chapter 163.
- (E) Sexual exploitation, including but not limited to:
  - (i) Contributing to the sexual delinquency of a minor, as defined in ORS chapter 163 \* \* \*.<sup>7</sup>

These crimes generally prohibit nonconsensual sexual conduct. And as a matter of law, a person under the age of 18 is “incapable of consenting to a sexual act.”<sup>8</sup> As a result, most sexual conduct involving a minor will implicate these statutes regardless of whether the minor participates willingly.

---

<sup>3</sup> This opinion will not go into detail about sexual conduct that is subject to a mandatory report; ORS 419B.005(1)(a) defines “abuse” specifically. We address only whether reporting is required in all circumstances where the age-gap defense applies.

<sup>4</sup> ORS 419B.010(1); ORS 419B.015(1)(a).

<sup>5</sup> ORS 419B.020(1).

<sup>6</sup> ORS 419B.020(3).

<sup>7</sup> ORS 419B.005(1)(a)(C)–(E).

<sup>8</sup> ORS 163.315(1)(a).

### III. Age-Gap Defense

Although Oregon law provides that individuals under 18 are legally incapable of consent, the law also provides a defense in cases where the participants are close in age. The age-gap defense requires that “the victim’s lack of consent was due solely to incapacity to consent by reason of being less than a specified age” and that “the actor was less than three years older than the victim.”<sup>9</sup>

## DISCUSSION

The definition of “abuse” in the mandatory reporting statutes does not expressly say whether sexual conduct that would otherwise be criminal must be reported as “abuse” even if the age-gap defense applies. In interpreting the relevant statutes, our task is to give effect to the likely intent of the legislature. To determine legislative intent, we consider the statute’s text in context, with reference to pertinent legislative history.<sup>10</sup> Context includes “other provisions of the same statute and other related statutes,”<sup>11</sup> “statements of statutory policy,”<sup>12</sup> and the legislative history of related statutes.<sup>13</sup>

### I. Text

Even though the statute does not directly address the relationship between the age-gap defense and mandatory reporting requirements, we have identified two relevant textual indications. Each suggests that the legislature did not intend to require all adolescent sex to be reported as abuse.

The first is the word “abuse” itself, which connotes harm in its ordinary usage. The relevant dictionary definitions of the term are “physically harmful treatment” and “the act of violating sexually.”<sup>14</sup> The age-gap defense reflects a legislative decision that not all sexual conduct involving adolescents is inherently harmful, provided that the participants are close in age.

---

<sup>9</sup> ORS 163.345. Although the age-gap defense applies somewhat differently to a number of different crimes, these features are consistent. If a defendant properly raises the age-gap defense, the prosecution must prove that it does not apply. *See* ORS 161.055(1), (3). This is distinct from affirmative defenses, which require the defendant to prove the defense by a preponderance of the evidence. *See* ORS 161.055(2).

<sup>10</sup> *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009).

<sup>11</sup> *PGE v. Bureau of Labor & Industries*, 317 Or 606, 611, 859 P2d 1143 (1993).

<sup>12</sup> *Havi Group LP v. Fyock*, 204 Or App 558, 564, 131 P3d 793 (2006).

<sup>13</sup> *State v. Stamper*, 197 Or App 413, 420, 106 P3d 172 (2005).

<sup>14</sup> *Webster’s Third New Int’l Dictionary* 8 (unabridged ed 2002). “To violate,” as relevant here, means “to do harm to the person.” *Id.* at 2554.

Second, the statutory definition of “abuse” repeatedly refers to chapter 163 as a whole.<sup>15</sup> And chapter 163 contains the age-gap defense as well as the statutes defining the elements of the relevant crimes and the statute establishing that minors are legally incapable of consent. The legislative choice to invoke the entire chapter, rather than simply the parts of it that describe the elements of various crimes, suggests that the age-gap defense is relevant to determining what conduct must be reported.

## II. Context

The statutory context likewise suggests that the mandatory reporting statutes are designed to protect children from harmful conduct. References to sexual abuse, rape, and contributing to the delinquency of a minor were added to the statute in 1985. At that time, the other types of conduct that qualified as “abuse” were those that would cause injury to the child: for example, “any physical injury” in certain circumstances, “any mental injury,” “threatened harm to a child,” and “negligent treatment or maltreatment.”<sup>16</sup> Similarly, mandatory reporting was expressly intended to “safeguard and enhance the welfare of abused children.”<sup>17</sup> If a law enforcement investigation revealed reasonable cause to believe that abuse had occurred, the Children’s Services Division was required to provide protective social services “if necessary to prevent further abuses to the child or to safeguard the child’s welfare.”<sup>18</sup> This context is consistent with our understanding that the legislature intended to require harmful conduct to be reported.

Context also supports our view that the age-gap defense reflects a legislative determination that sexual conduct involving adolescents and partners close in age is not always harmful. The drafters of the criminal code stated that the defense’s purpose was “to avoid punishing minor sexual experimentation.”<sup>19</sup> They further explained that the age-gap defense would “exclude from criminal sanction certain activity by minors.”<sup>20</sup>

---

<sup>15</sup> *E.g.*, ORS 419B.005(1)(a)(D) (“Sexual abuse, as described in ORS chapter 163”).

<sup>16</sup> *Former* ORS 418.740(1) (1985). Because the statutory references to sexual abuse, rape, and contributing to the sexual delinquency of a minor were enacted in 1985, Or Laws 1985, ch 723, § 1a, and remain in substantially similar form today, we focus on the statutory scheme as it existed in 1985. *See Gaines*, 346 Or at 177 n 16. The current statutes have different numbering due to legislative action in 1993. *See* Or Laws 1993, ch 546, §§ 12–22, 141.

<sup>17</sup> *Former* ORS 418.745 (1985) (policy statement).

<sup>18</sup> *Former* ORS 418.760(2) (1985); *see also former* ORS 419.569(1)(b) (1985) (allowing the division to take a child into temporary custody “[w]here the child’s condition or surroundings reasonably appear to be such as to jeopardize the child’s welfare”).

<sup>19</sup> *Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report* § 108 (July 1970). The drafters chose to treat this age gap as a complete defense, rather than listing age-related factors as elements of the various criminal offenses, largely because doing so “permits a simpler format” to effectively accomplish the same end. *Id.* § 108. We do not believe this drafting decision changes the analysis of whether the legislature intended to require conduct protected by the age-gap defense to be reported.

<sup>20</sup> *Id.* § 115–16. This statement was made in the context of an affirmative defense against the charge of sexual abuse in the second degree. That specific affirmative defense no longer applies. The age-gap defense discussed throughout this opinion now applies to the crime.

### III. Legislative History

Our review of the pertinent legislative history reveals no reason to conclude that the legislative assembly intended to require all intimacy involving adolescents to be reported as child abuse. Although we can find no instances in which the legislature discussed the specific question we are addressing, the overall legislative history is consistent with the idea that the legislature was concerned about harms inflicted on children. For example, the history of the 1985 legislation that first introduced references to ORS chapter 163 indicates that the legislature was acting to ensure that the state would receive federal funds under the Child Abuse Prevention and Treatment Act (CAPTA).<sup>21</sup> Federal law at the time defined “sexual abuse” as “the rape, molestation, prostitution, or other such form of exploitation of children, or incest with children, under circumstances which indicate that the child’s health or welfare is harmed or threatened thereby.”<sup>22</sup> In other words, the federal statutes and regulations that formed the basis for the amendments focused on acts that harm a minor.<sup>23</sup> This is entirely consistent with our understanding based on the text and context of the statute.

### CONCLUSION

We conclude that mandatory reporters are not obligated to report every instance of sexual conduct involving minors when the age-gap defense applies. Sexual conduct between participants less than three years apart by age does not need to be reported if the lack of consent is due to the age of the minors, and no other factors make the conduct a crime or otherwise qualify as “abuse.” However, each instance of sexual conduct involving a minor must be considered by the potential reporter. If the conduct was likely harmful to the minor, it must be reported, regardless of the possibility of the age-gap defense.



ELLEN F. ROSENBLUM  
Attorney General

ER1:nog/DM8907845

---

<sup>21</sup> Tape Recording, House Committee on the Judiciary, Subcommittee 1, HB 2160, Apr 1, 1985, Tape 330, Side A (statement of Karen Green).

<sup>22</sup> 42 USC § 5102(1) (Supp II 1984).

<sup>23</sup> In addition, the federal law was clearly not focused on the type of voluntary sexual conduct at issue here, because the phrase “child abuse and neglect” encompassed only harm caused by someone responsible for the child’s welfare. *See* 45 CFR § 1340.2(d)(1) (1984).