CHILD ABUSE AND NEGLECT REPORTING ACT

TASK FORCE REPORT

2004

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I.

INTRODUCTION

Children by the tens of thousands are injured physically, emotionally or mentally in California every year. That is common knowledge.

For forty years California has been committed through its Child Abuse and Neglect Reporting Act ("CANRA"or "Act") to identifying children who have been injured other than by accidental incidents or disease and who are at continuing risk of being deliberately or recklessly re-injured by persons who have custody of or supervisory control over them.

The California Department of Social Services (DSS) directs the efforts of county child welfare agencies (CWA) and child protective services (CPS) to investigate the circumstances of such injuries, identify the causes and provide remedial and preventive services to the children and, where appropriate, to their caretakers.

Local law enforcement assists CWA and CPS with investigations of serious child abuse and neglect to determine whether criminal offenses have occurred that necessitate intervention by the criminal justice system. Police and sheriff departments are the lead investigators for injuries to children which take place outside of their family or other living environment.

Assisting these agencies and law enforcement are categories of professionals required to report serious child abuse and neglect. Together, they make up California's child abuse reporting system.

This report by the CANRA Task Force is presented in several parts. Following the Introduction, the Overview discusses the work of the Task Force. The Reports section lists the findings and recommendations of the Task Fo1rce Subcommittees endorsed by the Task Force. These are presented in conceptual discussions as opposed to proposed statutory language.[1] A section for General Recommendations endorsed by the Task Force contains both recommendations and points that require additional study. The Proposed Statutory Amendment section presents statutory language for amendments to CANRA, which were unanimously endorsed by the Task Force.[2] The section on the Organizational Placement of the Child Abuse Central Index discusses the respective positions of the California Department of Justice (DOJ) and DSS regarding the appropriate agency to operate the non-investigative mission of the Child Abuse Central Index. Lastly, the Minority Report and accompanying replies by the Task

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[1]The Task Force agreed that proposed statutory language would not be submitted, with the exception of those set forth in the proposed statutory amendments section.

[2]These Proposed Statutory Amendments have been concurrently submitted to the Legislature in SB 1313 (Kuehl) for adoption.

Force members provide serious discussion to further educate on issues as to which the Task Force could not arrive at a consensus.

Creation of the CANRA Task Force

Calls for legislative reform, as well as litigation, were the impetus for the creation of the CANRA Task Force. Senate Bill 1312 (Peace) of the 2001-2002 legislative session would have required that, before submitting a report to the Child Abuse Central Index ("CACI" or "Index"), the investigating agency notify the known or suspected child abuser that he or she is to be reported to the Index, and the individual would then have had the right to a hearing regarding the proposed entry of the report into the Index. Senate Bill 1312 would have also provided persons who were reported to the Index prior to the bill's enactment with the right to a hearing to remove their name from the Index. And for those individuals who were reported to the Index before January 1, 1998, Senate Bill 1312 would have required that DOJ review listings in the Index and send notice to those individuals advising them of their right to a hearing. Finally, Senate Bill 1312 would have created a task force for the purpose of reviewing CANRA. Senate Bill 1312 ultimately failed passage in the Assembly Appropriations Committee.

Assembly Bill 2442 (Keeley) of the 2001-2002 legislative session (*Stats*. 2002, ch. 1064.) created the Child Abuse and Neglect Reporting Act Task Force for the purpose of reviewing CANRA and addressing: (1) the value of the Index in protecting children; and (2) changes needed with respect to CANRA, including the operation of the Index. (Pen. Code, § 11174.4.) The Task Force operated with the awareness that there have been significant calls for legislative reform and legal challenges to the operation of the Index.[3]

Overview of CANRA and the Child Abuse Central Index

The Index, administered by DOJ, was created by the Legislature in 1965 as a centralized system for collecting reports of suspected child abuse. CANRA is the statutory authority for the Index. (See Pen. Code, § 11164 et seq.) CANRA is "premised on the belief that reporting suspected child abuse is fundamental to protecting children." (*Strecks v. Young* (1995) 38 Cal.App.4th 365, 371.) The legislative purposes behind the Act are: (1) to identify child abuse victims for early intervention and protection by public authorities as early as possible (see *James W. v. Superior Court* (1993) 17 Cal.App.4th 246, 253); and (2) to provide "an important source of information assisting local law enforcement officials and child protective agencies in identifying, apprehending and prosecuting child abusers." (*Stats.* 1984, ch. 1613, §5, p. 5728.) Simply stated,"[t]he purpose of the Act is to protect children from abuse. [Pen. Code], § 11164(b). The statutory procedures for reporting are essential to the accomplishing of this purpose." (*Searcy v. Auerbach* (9th Cir.1992) 980 F.2d 609, 611.)

Under the predecessor statute to CANRA, only physicians, surgeons, and dentists were required to report instances of known or suspected child abuse to law enforcement officials.

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[3]The Task Force roster is found at the end of this report.

(*Stats*. 1965, ch. 1171.) Since then, the categories of mandated reporters have expanded. Today, the Act requires various categories of persons – including, but not limited to, teachers, school administrators, child care providers, peace officers, medical practitioners, therapists, commercial film developers, and clergy members – to report incidents of known or suspected child abuse or neglect. (See Pen. Code, § 11165.7.)[4]

Just as the definition of "mandated reporter" has expanded over time, so has the type of abuse that has to be reported. Under the predecessor statute to CANRA, not only were physicians, surgeons, and dentists the only mandated reporters of child abuse; the only type of abuse that had to be reported was physical abuse. In 1975, however, the definition of reportable abuse was expanded to include sexual abuse. Today, the Act defines the term "child abuse or neglect" as having several components: (1) physical abuse (defined as the infliction of physical injury by other than accidental means); (2) sexual abuse (including both sexual assault and sexual exploitation); (3) neglect (either general or severe); (4) willful cruelty or unjustifiable punishment; and, (5) unlawful corporal punishment or injury. (Pen. Code, §§ 11165.1, 11165.2, 11165.3, 11165.4, 11165.6.)

With expansion of the list of mandated reporters, the concomitant duty to report has also been extended. The duty to report is triggered when, based on knowledge or observation, the mandated reporter knows or reasonably suspects child abuse or neglect. (See Pen. Code, § 11166, subd. (a).) The mandated reporter must immediately or as soon as practicably possible make a phone report of known or suspected child abuse or neglect to any police or sheriff's department, county probation department (if designated by the county to receive such reports), or county welfare department. (Pen. Code, §§ 11165.9, 11166, subd. (a).)[5] He or she must follow that up with a written report within 36 hours. (Pen. Code, § 11166, subd. (a).)[6] A report by a mandated reporter is confidential, and a mandated reporter is immune from both criminal and civil liability for any report required or authorized under CANRA. (Pen. Code, §§ 11167, subd. (d), 11167.5, 11172, subd. (a).)[7] If a mandated reporter fails to make a report, however, he or she is subject to misdemeanor penalties. (Pen. Code, § 11166, subd. (b).)

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[4]For a broader discussion of CANRA see Appendix A, "General Information," which also presents several issues that were presented to the Task Force.

[5]The agency that receives the report is required to cross-report to the other designated agencies, as well as to the district attorney's office. (Pen. Code, § 11166, subds. (h), (i).) Also, when an agency receives a report of abuse at a licensed child care facility, it is required to notify the appropriate licensing agency. (Pen. Code, §§ 11166, subd. (a), 11166.2, 11166.3, subd. (b).)

[6]A copy of the form used for this purpose is found in Appendix A.

[7]Discretionary reporters have only limited immunity. A discretionary reporter is immune from liability unless it can be proven that he or she knowingly made a false report or that he or she made a false report with reckless disregard of its truth or falsity. (Pen. Code, § 11172, subd. (a).)

With the exception of school districts, training for mandated reporters is not required under the Act. (Pen. Code, § 11165.7, subds. (c), (d).) However, the absence of training does not excuse a mandated reporter from the duties imposed under CANRA. (Pen. Code, § 11165.7, subd. (e).)

Investigations play an important role in the operation of the Index. An agency may not forward a report to the Index unless it has conducted an active investigation. (Pen. Code, § 11169, subd. (a).)[8] Key to whether an investigation will lead to a report being forwarded to the Index is the determination of whether abuse occurred.[9] In order to be submitted to the Index, a report must be "substantiated" or "inconclusive." (See Pen. Code, §§ 11169, subd. (a), 11170, subd. (a)(1).) A "substantiated" report means one that the agency determines is based on some credible evidence of abuse; an "inconclusive" report is one that is not unfounded but in which the findings are inconclusive and there exists insufficient evidence to determine that child abuse or neglect occurred. (Pen. Code, § 11165.12, subds. (b), (c).)[10] After conducting an active investigation and creating an investigative report, the investigating agency must submit to DOJ a one-page summary report on every case of abuse or severe neglect which is determined not to be "unfounded" (i.e., to be false or inherently improbable, to involve an accidental injury, or not to constitute child abuse). (Pen. Code, §§ 11165.12, subd. (a), 11169, subd. (a), 11170, subd. (a)(1).)[11] Since January 1, 1998, with the enactment of Senate Bill 644, the investigating agency must provide notice to the subject upon submitting a report to the Index. (Pen. Code, § 11169, subd. (b).) Similarly, after the investigation is completed or the matter reaches a final disposition, the investigating agency is obligated to inform the mandated reporter of the results of the investigation and action the agency is taking with regards to the child or family. (Pen. Code, § 11170, subd. (b)(2).)

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[8]An "active investigation" requires assessing the nature and seriousness of the abuse, conducting interviews of the victim, suspect and witnesses, and gathering and preserving evidence. (See Cal. Code Regs, tit. 11, § 901, subd. (a).) The "active investigation" requirement was mandated under Senate Bill 644 (Polanco) (*Stats*. 1997, ch. 842).

[9]Much of the information concerning the welfare of the child also becomes part of the statewide Child Welfare Services/Case Management System (CWS/CMS) database maintained by DSS pursuant to Welfare and Institutions Code section 16501.5

[10]Originally the "inconclusive" category of report was entitled "unsubstantiated." However, with the enactment of Senate Bill 644, the name was formally changed to "inconclusive."

In many instances the Index contains reports where officials did not have probable cause for an arrest. But an entry in the Index is not a determination that the person has in fact committed abuse. (See *People ex rel Eichenberger v. Stockton Pregnancy Control Medical Clinic* (1988) 203 Cal.App.3d 225, 247 (conc. opn. by Puglia, J.) [reporting is not concerned with adjudicating guilt or fixing criminal responsibility].)

[11]A copy of the form used for this purpose is found in Appendix A.

DOJ acts only as a "repository" indexing the underlying reports, with the submitting agency responsible for the accuracy of its investigative report. (Pen. Code, § 11170, subd. (a)(2).) The Index may, accordingly, be analogized to the card catalog in a library: the Index does not contain the underlying investigative reports; it is only a pointer referring investigators to them.[12] The submitting agencies are charged with retaining the underlying investigative reports for at least the same period of time that DOJ is required to maintain the information from the report in the Index. DOJ is required to keep substantiated reports indefinitely and inconclusive reports for 10 years. (See Pen. Code, §§ 11169, subd. (c), 11170, subd. (a)(3).)

Access to the Index was initially limited to official investigations of open child abuse cases. In 1986, though, access to the Index was expanded to allow access for non-investigative functions, i.e., background checks – screening those applying for licensure by DSS as foster parents, day care operators, etc., and those seeking adoption or placement of children.[13] The right of access was subsequently further expanded to include county agencies that have contracted with the State for the performance of licensing duties; county child death review teams; investigative agencies, probation officers, and court investigators involved in the placement of children and adoption agencies. (Pen. Code, §§ 11170, subds. (b)(3), (b)(4), (b)(5), (c), 11170.5.)

The Index, however, is still used only as a pointer to the underlying investigative report maintained by the submitting agency. Thus, Penal Code section 11170, subdivision (b)(6)(A), provides that, with the exception of emergency placements and adoptions (See Pen. Code, §§ 11170, subd. (b)(6)(B), 11170.5), agencies querying the Index "are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, or placement of a child." (See also Cal. Code Regs., tit. 11, § 902.) Accordingly, child protective agencies and licensing authorities are independently authorized to obtain all reports referenced in the Index directly from the submitting agency. (Pen. Code, §§ 11167, 11167.5, subd. (b)(2).)[14]

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[12]DOJ is required to notify a reporting agency of any prior reports involving the individual(s) currently under investigation. (Pen. Code, § 11170, subd. (b)(1).) This "notice-back" function is intended to assist the agency's investigation of suspected abuse.

[13] The distinction between child abuse investigations and non-investigative functions is important. With the expansion of the Index into non-investigative areas, the operation of the Index has become the subject of litigation, discussed *infra.* This has also led to what is described as the current "dual mission" of the Index, serving the needs of law enforcement and other child protective agencies for investigative purposes and the needs of DSS for background checks.

[14]Moreover, persons identified as suspects in the Index can request that DSS clear them for entry in Trustline. Trustline is administered under the supervision of DSS pursuant to Health and Safety Code section 1596.60 et seq. A person listed in Trustline, which is a public record accessible by anyone, is cleared to be a "license exempt child care provider." This clearance can be obtained notwithstanding a listing in the Index if DSS determines that the indexed

Listing on the Index is not a *per se* bar, for example, for licensure of or employment in a child care center. Currently, with the exception of emergency placements and adoptions, information obtained from the Index may not be relied upon to make decisions regarding a person identified in an indexed report. Instead, decisions regarding individuals identified in indexed reports must be based on independent evaluations of the information in the reports held by the submitting agency, as relevant to the purpose of the current investigation, and on any additional investigation that may be necessary. (Pen. Code, § 11170, subd. (b)(6)(A).) Persons adversely affected by such decisions are afforded opportunities for redress in the legal system.[15]

Although DOJ is charged with administering the Index, DOJ plays an indirect role in controlling the names that are placed on or removed from the Index. Nonetheless, DOJ is authorized to delete reports under specific circumstances. DOJ must continually update the Index to assure that it does not contain unfounded reports. (Pen. Code, § 11170, subd. (a).) If an agency determines that a previously-filed report is unfounded, it must notify DOJ so that the report can be removed from the Index. (Pen. Code, § 11169, subd. (a).) This imposes the obligation on submitting agencies to follow up with DOJ and identify unfounded reports so that DOJ may delete the information from the Index.[16] Otherwise, information from an inconclusive report is kept for a 10-year period and then deleted unless a subsequent report concerning the same suspected child abuser is received in the interim. (Pen. Code, § 11170, subd. (a)(3).)

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investigative reports do not substantiate child abuse or that the person identified as a suspect in the reports does not "pose a threat to the health and safety of any person who is or may become a client." (Health & Saf. Code, § 1596.607, subd. (a)(3).) Any person denied entry into Trustline may appeal the denial and the appeal will be heard by an administrative hearing officer. (Health & Saf. Code, § 1596.607, subd. (b).)

[15]There are statutory schemes in some instances that allow for legal review. For example, if, following an independent evaluation of the underlying investigative file, a county welfare agency decides to remove a child from a parent's home, Welfare and Institutions Code sections 300 through 399 protects the parent by affording a hearing. Similarly, DSS is required to conduct an independent investigation to substantiate any allegations of child abuse or neglect before making a decision based on information obtained from the Index. (See Health & Saf. Code, §§ 1522.1, 1596.877.) DSS must also provide a hearing for the denial of a license or employment under the Administrative Procedures Act, governed by Government Code section 11500 et seq. (See Health & Saf. Code, §§ 1526, 1596.607, subd. (b), 1596.879.) Finally, the recommendation by DSS that an adoption be denied allows the affected party to seek redress in superior court.

[16]Civil Code Section 1798.18 of the Information Practices Act provides a similar obligation on submitting agencies to maintain only current records. This section provides: "Each agency shall maintain all records, to the maximum extent possible, with accuracy, relevance, timeliness, and completeness. Such standard need not be met except when such records are used to make any determination about the individual. When an agency transfers a record outside of state government, it shall correct, update, withhold, or delete any portion of the record that it knows or has reason to believe is inaccurate or untimely."

Information from a substantiated report is kept indefinitely.

Since the enactment of Senate Bill 644 in 1998, anyone may inquire whether he or she is listed in the Index. (Pen. Code, § 11170, subd. (e).)[17] If he or she is in fact listed in the Index, DOJ will provide him or her with the name of the submitting agency and report number. The requesting person is responsible for obtaining the investigative report from the submitting agency. (Pen. Code, §§ 11167.5, subd. (b)(11), 11170, subd. (e).) If a person is listed only as a victim of abuse he or she may ask to be deleted from the Index upon reaching the age of 18. (Pen. Code, § 11170, subd. (f).)

When an Index inquiry is received from a private citizen or from an agency for non-investigative functions (with the exception of emergency placements), DOJ will contact the agency that submitted the report to confirm that the investigative report still exists, that the report has not subsequently been determined to be unfounded, and that the report meets the current legal requirements for retention and dissemination. If the report does not comply with these standards for retention and dissemination, DOJ will delete the record from the Index after notifying the private citizen. (Cal. Code Regs., tit. 11, § 908, subd. (c).) If the request was made by an agency for a non-investigative function, DOJ will advise the requesting agency that there was no match and then delete the record from the Index. (Cal. Code Regs., tit. 11, § 908, subd. (b).)

Today, the Index contains approximately 905,000 entries, listing approximately 810,000 suspects and 1,000,000 victims. Per year, DOJ receives approximately 35,000 new reports to be added to the Index and some 10,000 inquiries for investigative purposes and 40,000 inquiries for non-investigative functions.[18]

As described above, CANRA has undergone amendments over the years to improve operation of the Index. Moreover, the Index has survived several legal challenges.

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[17]A private citizen must submit a notarized request to DOJ. (Pen. Code, § 11170, subd. (e).)

[18]The 40,000 non-investigative inquiries represent non-livescan inquiries made by way of a faxed request. These are for purposes of emergency child placements, and guardian/conservatorships. The 10,000 investigative and 40,000 non-investigative inquiries represent requests and not the number of names requested to be checked.

DSS is the largest user of the Index. Approximately 240,000 applicant livescan inquiries are submitted by DSS, counties and local agencies annually for purposes of foster care licensing, Trustline and adoptions. About 5 percent of these requests match Index entries.

Significant Legal Challenges to the Index

Cases reported here involve the Index in which the State or its officers or agencies were or are defendants. Cases against local agencies which implicate CANRA and the Index but did not involve State officials or agencies are not reported here.

Burt v. Orange County (Orange County Superior Court/Court of Appeal, Fourth Appellate District)

In a case which has received national publicity, a woman, whose infant may have been punctured by a hypodermic needle that she used to inject herself with pain medication, seeks to change the findings of a child abuse investigative report in which she is identified as a suspect and which is listed in the Index. The court ordered dismissal of DOJ from the case and entered judgment in favor of Orange County. The plaintiff's appeal is pending.

Gomez v. Lockyer (Los Angeles County Superior Court)

In a pending case, a grandparent challenges statutes which authorize release of Index information to local child welfare agencies without validating the continued existence of the child abuse investigative report when emergency placement of a child is necessary in the best interests of the child. The case is also a "taxpayer" action which challenges the operation of the Index insofar as investigative reports are indexed in the system without providing the "suspect" with an opportunity to contest the findings in the report and the information upon which the findings are based. DOJ and DSS have filed motions for judgment on the pleadings which will be heard on a date to be set by the court.

Humphries v. Los Angeles County (U.S. District Court, Central District)

In a pending case, a husband and wife allege that they were arrested based on the charge of torturing the husband's daughter and they seek damages from Los Angeles County for violation of their civil rights. Plaintiffs allege that they were not charged with the crime of torture and that they were found to be innocent in fact. According to the complaint, plaintiffs were charged with the crimes of corporal injury to a child and cruelty to a child but these charges were dismissed in the interests of justice. Allegedly Los Angeles County refuses to instruct DOJ to eliminate plaintiffs as suspects from the Index, which lists the child abuse investigative report concerning the daughter. Relying on the right of privacy, both state and federal, and the State Information Practices Act (Civ. Code, § 1798 et seq.), plaintiffs seek declaratory and injunctive relief against all defendants for elimination of any reference to the child abuse investigative report in the Index and for prohibition of policies and practices which allegedly preclude plaintiffs from examining the investigative reports and from challenging the accuracy of the contents of investigative reports. Plaintiffs also seek damages from defendants allegedly arising from identification of the investigative report via the Index. The case is scheduled for trial on July 13, 2004.

Whyte v. Lockyer (Kern County Superior Court)

In a pending case, a person who is identified as a suspect in several local child abuse investigative reports that are listed in the Index seeks injunctive and declaratory relief to establish that DOJ has the obligation under the Information Practices Act and the privacy provisions of the California Constitution (art. I, §1) to permit examination and correction of Index records by a person identified as a suspect. Existing law authorizes a suspect to examine the original investigative report maintained by the investigating agency pursuant to the Public Records Act (Gov. Code, § 6250 et seq.). The case is scheduled to go to trial in September 2004.

Miller v. Yuba County Human Services et al. (U.S. District Court, Eastern District/Ninth Circuit Court of Appeals)

On January 22, 2004, the Ninth Circuit affirmed the trial court judgment that entry of a suspect's name in the Index does not *per se* establish loss of a recognizable property or liberty interest sufficient to state a federal claim for relief. The case also established that grandparents who have not adopted a grandchild have no federally cognizable claim for violation of a right to family integrity when legal proceedings do not result in giving them custody of or visitation with the grandchild. Plaintiffs had also claimed that placing the grandfather's name on the Index violated his due process rights because he was classified as a child abuser without a hearing. The court declined to address this due process claim since it was not properly raised on appeal.

Roe and Roe v. Lockyer (U.S. District Court, Eastern District)

Plaintiffs, on behalf of themselves and other unnamed married couples, each of whom was allegedly identified as a suspect in an investigative report listed in the Index, sought injunctive and declaratory relief on the ground that failure to provide a hearing in which they could contest the information in the reports deprived them of federally protected rights. By order entered on June 20, 2003, the District Court granted DOJ's motion to dismiss with leave to amend. The court rejected the argument that being on the Index violates due process. The court specifically found that "[t]here is no constitutional right to inspect or immediately contest information contained in government files." Hence, a pre-listing hearing is not required. The plaintiffs filed an amended complaint but failed to respond to DOJ's second motion to dismiss the amended complaint. The Court entered judgment dismissing the lawsuit with prejudice on February 17, 2004.

Coe v. City of Los Angeles et al. (Los Angeles County Superior Court/Court of Appeal, Second Appellate District)

In an unpublished opinion issued March 20, 2001, the Court of Appeal affirmed a trial court judgment upholding the Index against a challenge that failure to provide a pre-entry hearing for suspects, or to allow them to inspect Index records pertaining to them, violated plaintiff's rights to equal protection, due process of law, and privacy. DOJ was a defendant and DSS intervened to defend the Index. The California Supreme Court denied plaintiff's petition for review on June 13, 2001. The case is now final as to the State on the substantive issues. Judgment was also entered in favor of the City against allegations that it illegally entered plaintiff's name in the Index and had made an unauthorized disclosure of the entry.

II.

OVERVIEW OF THE WORK OF THE TASK FORCE[19]

The issues presented to the Task Force were guided by the proposals in Senate Bill 1312 (Peace), the analysis of Assembly Bill 2442 (Keeley) prepared by the Juvenile Courts Bar Association, public commentary received both in writing and in person, and the wealth of experience brought by the appointed members of the Task Force.[20] The work of the Task Force was conducted through the Task Force and three subcommittees. The three subcommittees were formed to address the three most significant issues presented: Due Process, Investigations and Definitions.[21] There was a total of fourteen meetings, nine by the full Task Force and five by the subcommittees. A full discussion of the myriad of issues that came before the Task Force is not possible. Instead, this overview presents the larger substantive issues and the context in which the Task Force operated.

"Due Process"

In the initial meeting, Attorney General Bill Lockyer made one simple request: "Protect the children." This sentiment was repeatedly expressed by Task Force members when the Task Force addressed calls from the public for change. Although the Task Force followed its mandate to review the value of the Index in protecting children, the most prevalent calls for change were from individuals whose names had been placed on the Index as suspects. A misconception among the public is that the Index is accessible to all members of the public. Persons expressing concern over an Index listing on their privacy or reputation were not aware of this. The Index, however, does not operate in the same manner as a Megan's Law public registration. Additionally, individuals who believed their names had been unfairly placed on the Index as suspects contended that their inability to challenge placement of their name before being listed

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[19]The views expressed herein are solely the opinion of the Chair, Special Assistant Attorney General Alberto L. González.

[20]A copy of the Juvenile Courts Bar Association (JCBA) letter, dated March 29, 2002, is at Appendix B. The issues presented by the JCBA were distilled into specific questions presented to the Task Force that directed the early Task Force meetings. Those questions are found in Appendix C. The lack of mention of many subject matters or statutes in this Report does not suggest the matters were not discussed, merely that no recommendations resulted. The actual discussions can be found in the recorded and published minutes of the Task Force in the possession of DOJ.

[21]The Definitions Subcommittee was later combined with the Investigations and Training Subcommittee.

and their inability to remove their names afterwards, without expending significant monies on attorneys, amounted to a violation of their due process rights.[22]

Although the term "due process" was used to define the work of the Due Process Subcommittee, the Task Force operated with the understanding that no California court has yet found that the operation of the Index violates due process principles. Nevertheless, public commentary made it evident that principles of fairness required that the Task Force review the process by which individuals became listed on the Index and consider the difficulty in obtaining removal from the Index. The Task Force learned that some counties, for example, do allow for administrative review of listings and notify suspects that they can seek review and expungement. It became evident, moreover, that such processes throughout the State are not uniform or existent. Public commentary stressed that private litigation is a costly avenue and unavailable to many members of the public to challenge a listing on the Index. Accordingly, the Task Force spent considerable time discussing administrative processes, which might serve to remedy this concern. There was a consensus among the Task Force that good public policy warranted entertaining changes. There were concerns, however, over unintended consequences. A concern from law enforcement was that requiring police officers to appear at hearings to defend their determinations would deter reporting; another concern was the limited resources available to attend hearings. Several models of review were proposed but the Task Force could not agree on a broader proposal to require pre-listing hearings and "Skelly-type" hearings leading to hearings before State administrative law judges. Ultimately, the Task Force could not arrive at a consensus on hearing procedures and could only agree to lesser forms of review. Hence, in addition to the recommendations of the Task Force, a minority viewpoint is submitted supporting broader hearing procedures. All parties agreed, however, that no listing should be subject to challenge once a superior court has adjudicated the finding of child abuse.

The Task Force also did not accept the proposal of withholding a suspect listing from the Index pending review or adjudication. The rationale is that a listing should go forward pending removal, much as the Index operates now, to support law enforcement's interest in knowing of a listing and in maintaining the integrity of the law enforcement action. In the end, the Task Force had to balance a listing with the overriding purpose of the Index in protecting children from abuse. Any reticence in adopting significant changes by which individuals are reported or avenues by which their name might be removed may be attributed to the purpose behind the Act: to protect children from abuse. While recognizing the need for changes, members of the Task Force were also cognizant that additional mandates on local agencies providing for administrative reviews would further impact limited resources. Hence, the Task Force adopted the position that legislative mandates imposing procedures for review should be funded.

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[22]A 1990 report to the Legislature by DOJ recommended a procedure by which individuals could contest their listing as a suspect.

Definitions Used in Reporting Abuse

On a related issue, one member noted that "due process" can begin with the definitions used to place a suspect's name on the Index. A reoccurring issue is the efficacy of the definitions used to determine whether an investigation has found reportable child abuse.[23] Arguments were made that the definitions used to determine whether or not an incident qualifies for reporting required additional revision. For example, it was contended that "inconclusive" reports should not be reported to the Index. This contention, however, was rejected since inconclusive reports serve as an indicator of circumstances warranting heightened scrutiny and such reports serve an important tracking purpose in the State to notify law enforcement and CPS agencies of incidents in other jurisdictions. The Task Force also received information pertaining to the terminology in use in other states. In the end, the Task Force accepted only one recommendation to change the definition of a substantiated report.

Training and Investigation

With respect to training issues, the Investigations Subcommittee found that as to police officers and social workers, extensive training is available but there is a need for further attention to training. Because of the differing types of investigations, as between Child Protective Services and law enforcement, the Task Force concluded that a uniform approach is unworkable. It was acknowledged, moreover, that the quality in the performance of investigations differs due to such factors as: 1) workloads; 2) turnover; and 3) the perceived value of the Index report. It was determined that only the affected agencies could best adopt individual approaches to address these factors. Hence, any changes in these areas may be better addressed by stakeholder groups. Due to an ambiguity in the law, the Task Force remained concerned that not all employers of mandated reporters provide their employees who are mandated reporters with training on the duties imposed under CANRA statutes. The Task Force, accordingly, made a specific statutory recommendation strongly encouraging that employers provide their employees with training.

Dual Mission of the Index

An issue going to the crux of the operation of the Index is the present day "dual mission" of the Index. With the legislative changes in 1986, access to the Index was expanded beyond law enforcement investigations to child protective services investigations, DSS and county child care and foster care licensing, adoption agency checks on adoption applicants, DSS checks on individuals applying for the Trustline Registry, and child protective services checks for child placements.[24] DSS currently operates a federally-funded case management system called the Child Welfare Case Management System ("CWS/CMS"). CWS/CMS is a centralized electronic database of all case work files for children receiving child welfare services in this State. The database includes files for all children who are suspected or proven victims of child abuse or

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[23]The 1990 DOJ report to the Legislature had recommended changes to the terms "substantiated," unsubstantiated," and "unfounded," which were subsequently made.

[24]A flow chart is found at Appendix D showing the reporting process to the Index.

neglect. Generally, persons who may have committed the child abuse or who may have neglected the child are not specifically identified as "suspects" in the case files entered into CWS/CMS. DSS opposes the transfer to it of the civil or non-law enforcement investigative side of inquiries and has written separately in this report to support its position. DOJ has also written separately in this report to encourage further Legislative review since there is an apparent duplication of systems, although the systems are not yet entirely the same or compatible. Technology may provide the solution since an interface from DOJ to DSS allowing for an electronic sharing of Index information is possible. DOJ would then handle inquiries solely from law enforcement. All other inquiries would be handled by DSS. DSS's concern over whether their federal mandate would allow this expansion in purpose should be addressed since many other states' social service departments presently handle this function. By removing the non-law enforcement investigative functions from the Index, the "due process" recommendations would be altered dramatically since DSS already provides a hearing process when an interest is affected. Hence, it follows that the "dual mission" issue supplants the "due process" issue since the mission of the Index will determine the appropriateness of hearing procedures.

Differential Response

A development that did not affect the course of the Task Force but should be brought to the attention of the Legislature is that any future changes to CANRA should take into account the work of the Child Welfare Stakeholders Group. This group is proposing a "differential response" to issues arising in the family. The objective is to engage families in a strength and needs assessment. Differential response recognizes that families have economic and social problems best addressed by a social services approach, i.e., by providing needed services. The "differential response" approach assumes that referral to the Index may be counterproductive for "treatment" of the family unit. A "safety assessment" is being developed on how to assess a family's needs, such as for drug or alcohol programs. In terms of reporting to the Index, social agency investigators will not perform the investigation on whether there is reportable child abuse and instead assess the family for services, including court services or dependency proceedings. The safety assessment would replace the concept of an investigation. It is possible that many county child welfare agencies are already following the "differential response" approach to child abuse and neglect, which would offer one reason for the apparent decline in referrals to the Index in the last five years. The belief is that differential response will affect reporting to the Index.

Continued Support for CANRA

In the course of the Task Force meetings, several statutory amendments were identified that would clarify the Act, address specific concerns or correct problem areas. In doing so, it was assumed that the Act would remain a force in preventing child abuse and neglect in California. It was brought to the attention of the Task Force that many states are challenging the necessity of mandated reporting laws. Not surprisingly, when asked to take a position on whether the Task Force supported the Act, the Task Force voted unanimous support.

III.

REPORTS OF THE SUBCOMMITTEES

A. Due Process Subcommittee[25]

Availability of Process to Challenge CACI Listing

As has been the case in previous reviews of the Act, the availability of a consistent statewide process for challenging a listing on the Child Abuse Central Index ("CACI" or "Index") has dominated much of the present Task Force's discussion regarding the operation of the Act. As has been the case during these previous attempts to add some type of review process, up to and including the recent failure of SB 1312 (Peace), much of the discussion has involved resolving the conflict between general fairness and the cost in both time and funds to provide that fairness with the underlying goal of child protection.

Originally created as an investigative tool for law enforcement, use of Index listings has expanded dramatically during the past three decades. Corresponding with these expanded uses has been an increase in the number and nature of mandatory reporters under the Act. As the uses have multiplied and as the relationship of new categories of mandatory reporters to the child protection system has become more distant, there have been increasing calls by those facing listing on the Index for access to some process to challenge listings perceived by them to be inappropriate. During the past fifteen years, several task forces and groups have reviewed these concerns and have encouraged the development of some type of process to address this perceived unfairness.

Although there has been no finding to date in any litigation that the Act or the Index are invalid under either the state or federal constitutions, concerns about the fairness of an Index listing, especially when used for non-law enforcement purposes, did result in a notice requirement being added to the Act in 1998. The most recent effort to add additional process, SB 1312 (Peace), would have provided access to a full administrative hearing process in addition to the existing notice requirement. Senator Peace's bill failed in the legislature in large part because of concerns regarding potential costs in both dollars and the time of reporting agency staff.

Although there is general agreement that access to a consistent statewide process should be available to those listed on the Index, concern regarding the potential financial implications to reporting entities and the corresponding burdens on their staff continue. Many Task Force members are concerned that should these additional costs not be funded, any additional process provided could result in decreased reporting to avoid these costs or additional time burdens. If this were to happen, the underlying purpose of the Act, to protect children, could be jeopardized. Therefore, funding of any new procedures is viewed as essential to ensure both fairness and child protection.

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[25]Submitted by Professor Scott Wylie, Chair of the Due Process Subcommittee.

Finding One: The availability of private litigation to address the concerns of suspects is insufficient process to address challenges to a CACI listing.

Discussion: Due to the expense and complexity of private litigation options, leaving such as the sole method to address due process concerns places an enormous hurdle before all suspects wishing to challenge a CACI listing and makes such a challenge all but impossible for low or moderate income suspects. The law already requires notice to suspects, but then provides no method to act on that notice if a suspect believes that the government's action is inappropriate. While some counties appear to have informal mechanisms to address requests for listing removal, most do not appear to have such. In fact, it appears that there are still counties in which the notice requirement is not effectively in place. Such inconsistent access to process, if there is process at all, does not square with the concept of fairness and calls for some type of consistent, statewide process to be in place to address this issue.

The Task Force is concerned that a suspect's county of residence should not determine the level of process available. The Task Force also believes it is unfair for residents of one county to have access to a governmental review at little or no cost as residents of another county are required to hire expensive counsel and file suit to obtain review.

Recommendation: The Task Force recommends that the State create and fully fund a review process designed to provide basic fairness to suspects wishing to challenge a listing on CACI as defined further in Findings Two through Seven.

Finding Two: Because of different record retention and file review procedures, there may be many CACI listings which could be removed administratively because of the lack of an underlying file or because the referring agency determines that the CACI referral was not proper.

Discussion: In order for a matter to remain listed on CACI, the referring entity's underlying investigative file must continue to exist. Many such files have been purged due to age or otherwise eliminated by counties. In order to avoid the need to expend resources on unnecessary hearings and to ensure that precious resources are reserved for those cases in which they are most needed, the Task Force believes that there should be an administrative review process to allow the referring entity the opportunity to determine if the underlying file remains or to evaluate the records in that file to determine if a CACI referral was, in fact, proper or if the reporting category was proper. This review process would ensure that referring entities have a chance to review a file to determine if they wish to defend such and would allow for matters to be closed before any further process when files are no longer available or do not meet investigation standards. Deadlines for this process should be sufficient to allow the referring entity adequate time to complete a thorough review.

Recommendation: Before any further review process is available to a suspect, there should be an administrative pre-hearing review process to allow referring agencies the opportunity to determine if the underlying referral remains appropriate.

Finding Three: Many matters which result in CACI referrals also involve juvenile or criminal court cases. The court decisions in these matters often trump the decisions of the agencies referring the matters to CANRA.

Discussion: The Task Force is concerned that any CACI review process should not provide a second bite at the apple for suspect litigants already convicted of child abuse in a superior court action, but should be available to those who have not had an opportunity to challenge an accusation of abuse or neglect. As the standards for finding abuse or neglect are actually higher in superior court actions, especially those in a criminal court, allowing a subsequent review by in an administrative arena does not seem to advance the concerns as raised by the Task Force.

Recommendation: If the matter has been litigated by a California Superior Court, or equivalent court in another state, with a finding of child abuse or neglect, no additional process regarding a CACI listing should be available to suspects.

Finding Four: Although not specifically required by statute, many counties provide some type of administrative review process for an individual noticed of a CACI listing. However, the process that currently exists for suspects wishing to challenge a CACI listing is inconsistent across the State and virtually non-existent in many counties.

Discussion: To ensure statewide consistency and fairness, suspects seeking to challenge their listing on CACI should have access to the same process regardless of the source county of the initial CACI referral. At a minimum this process should include the right to review the underlying file and the right to request that the referring entity review the file to determine if a referral was proper. If the referring entity determines that the referral was proper, the suspect would have no right to a full administrative hearing until such time that an adverse decision is made by an entity that received information from CACI. While it is clear that some procedural accommodations would be needed to use this type of system for review of CACI listings (such as privacy protections for minor children's testimony or information), the Task Force believes that statewide consistency is important.

Recommendation: The process to challenge a CACI listing should be consistent statewide with access to a full hearing after any adverse decision is made using a CACI listing.

Finding Five: Because the notice requirement for CACI listings did not go into effect until 1998, and because this notice requirement has not been fully complied with in some counties until recent years, many suspects listed on CACI are not aware of their listing.

Discussion: At the heart of any fair process is the concept of notice. As many, if not most, of the suspects listed on CACI are not aware of the listing, any time limit on listing challenges should take this fact into account. The Task Force views this as a matter of basic fairness. While the Task Force does believe that such suspects should face the same time limits to challenge their listing upon actual discovery of the un-noticed listing as newly noticed suspects, they should also have the same challenge opportunity.

Recommendation: Suspects who are presently unaware of their pre-1998 listing on CACI should have the same opportunity, and face the same time limitations, to challenge a listing upon discovery of such as prospective suspects have upon notice of a new pending listing.

Finding Six: Despite the calls for access to process for suspects, it remains prudent to err on the side of child protection as such process is developed and implemented.

Discussion: In its considerations, the Task Force discussed a variety of process outlines and came to the conclusion that any process had to involve removing a listing from CACI, not delaying the adding of a listing. The Task Force believes that the threat of additional child victimization resulting from a delayed listing outweighs the burden of a potentially incorrect suspect listing pending the hearing process discussed above. Therefore, suspects should be listed, subject to removal, rather than having a listing delayed during review.

Recommendation: To uphold the spirit of CANRA and protect minor children, some form of listing (even if noted as challenged) should occur pending removal from CACI after a successful hearing process.

Finding Seven: Unfunded mandates which require additional staff resources, in both time and money, place burdens on reporting entity staff and create incentives which can be counterproductive to capturing all appropriate CACI referrals.

Discussion: Other than concerns over funding pressures and the limited number of hours available for reporting entity staff to accomplish an increasing number of tasks, there was little disagreement over the basic process procedures discussed above. That being said, many members of the Task Force indicated that requiring such a system without fully funding such could result in less efficient delivery of primary services (due to the time required to respond to listing challenges) or a reduction in the number of CACI referrals (in order to ultimately avoid

defending a listing). As both outcomes would not further child protection, members of the Task Force agree that funding is key to providing fairness and maintaining the child protection system.

Recommendation: The Task Force believes that new and sufficient funding, to the reporting entity and DOJ, is necessary prior to implementation of the process noted above while maintaining referrals when appropriate. If the Legislature were to implement a system that involved the use of the Administrative Law Judge system, the Task Force would make the same funding recommendation.

B. Investigations and Definitions Subcommittee[26]

Recommendation 1: CACI should continue to include "inconclusive reports," as they are critical to certain important child welfare investigatory functions. Concerns about the inclusion of inconclusive reports should be addressed by limiting access of this information for only critical child safety purposes, and by addressing due process concerns.

Discussion: CACI is a critical tool for the protection of children from abuse and neglect. CACI is a particularly important tool for child welfare services workers when investigating suspected cases of abuse and neglect, and when making emergency placements with relatives who have not otherwise been licensed as foster parents. While comparisons with other states are difficult and incomplete, it appears that California is among a minority of states that maintains the "inconclusive" category in their Index. However, most Task Force members believed that CACI's inclusion of "inconclusive" cases is important and appropriate for the protection of children from child abuse and neglect. Child Welfare Services professionals have found that a pattern of "inconclusive" cases of child abuse and neglect can be critical information to indicate a risk of child abuse. Research shows that some child abusers deliberately select pre-verbal victims, as those cases of child abuse are difficult to prove. Many of these instances of child abuse result in "inconclusive" referrals to CACI.

Recommendation 2: DOJ and DSS should consider convening a group of stakeholders to develop guidelines for investigation of child abuse in settings other than out-of-home care facilities.

Analysis: Fairly extensive training on conducting child abuse investigations exists for child welfare professionals and law enforcement officials. Most child welfare professionals receive training through one of five Regional Training Academies (RTAs), which are operated by DSS. The standardized curriculum for the RTAs is developed by the California Social Work Education Center at the University of California, Berkeley. Law Enforcement Officers receive

[26]Submitted by Frank Mecca, Chair of the Investigations and Training Subcommittee, which was later combined with the Definitions Subcommittee.

mandatory POST training. The subcommittee review of the training protocols and curricula indicated that they were thorough and robust.

At the discretion of the POST training providers, child welfare professionals may receive POST training along with law enforcement officers. Such "cross training" is seen as valuable, given the close collaboration required of social workers and law enforcement officers during child abuse investigations.

Despite the existence of extensive training for child welfare professionals and law enforcement officers, there are no regulatory or statutory guidelines for the investigation of child abuse in any setting other than a community care facility. Guidelines for the investigation of child abuse in out-of-home care facilities are contained in title 11, article 3 of the California Code of Regulations.

Stakeholders also found that despite the existence of apparently good training–and even if training is expanded–the quality of child abuse investigations varies across counties, law enforcement agencies and individual workers or officers. Several factors affect the quality of investigations, including: (a) the time child welfare workers and law enforcement professional have to conduct their investigations, given significantly growing workload demands and shrinking budgets; and (b) worker and supervisor experience level. Very high turnover rates in child welfare and law enforcement agencies have left many agencies with a relatively inexperienced workforce, which contributes to lower quality investigatory work. These variables will continue to be present for the foreseeable future.

Recommendations 3(a) and 3(b): DOJ and DSS should convene appropriate stakeholders to develop training materials specifically focused on whether, when, and how to make referrals to the CACI system, and record retention requirements for maintenance of underlying investigative reports.

(a) DOJ and DSS should convene appropriate stakeholders to develop training materials specifically focused on whether, when, and how to make referrals to the CACI system and record retention requirements for maintenance of underlying investigative reports.

(b) DOJ and DSS should convene appropriate stakeholders to develop training materials specifically focused on the appropriate ways for child welfare, licensing, and law enforcement professionals to utilize information they receive from CACI in their investigations.

Analysis: Currently available training focuses heavily on how to conduct child abuse investigations. A review of training curricula indicate that less attention is paid to: (a) whether, how and when to report to CACI after the investigation, and (b) how a child welfare or law enforcement professional should utilize information that he/she *receives* from CACI in his/her investigation.

Recommendation 4: DOJ should work with appropriate stakeholders to make modifications to the Child Abuse Investigation Report (Pen. Code, § 11169) to: (a) make mandatory the question as to whether the victims injuries result in death, and (b) modify the and make mandatory the question regarding possible disabilities of the victim, to capture the different types of possible disabilities that a victim may have (physical, developmental, other). The revised forms would not go into effect until these modifications are programmed into the State's Child Welfare Services Case Management System.

Analysis: Some Task Force members expressed concerns about the lack of systematic reporting on the incidence of abuse and neglect of children with disabilities. Members were concerned that incomplete reporting systems make it difficult to adequately track, treat, and prevent child abuse in this population.

Recommendation 5: The State should maintain the existing statutory categories of CACI referrals – substantiated, inconclusive, and unfounded. However, the definition of substantiated should be modified to align it with legislative intent and actual current practice.

Analysis: The definitions used for CACI referrals (substantiated, inconclusive, and unfounded) were generally viewed as appropriate and understandable, with one exception. The statutory definition of "substantiated" requires "some credible evidence" as the basis for substantiation. Given the remainder of the statutory scheme for CACI referrals, and given the current practice of social workers and police officers as reported to the Task Force, we believe that the definition of "substantiation" should be changed to a "finding following an investigation by a child protective services or law enforcement agency that abuse or neglect is more likely than not to have occurred." An amended definition for substantiated is submitted in the proposed statutory amendments of this report.

The Task Force considered proposals to make other changes to definitions and to add a new category of reports ("high index of suspicion"). The Task Force rejected these proposals as they were viewed as likely having the effect of making the system more complicated and less understandable, and thereby decreasing the value of the Index.

Recommendation 6: DOJ and DSS should convene a working group – similar to the composition of this Task Force – to review and make recommendations regarding the possible need for further modifications to CACI, if changes to the State's Child Welfare Services (CWS) Program – consistent with the CWS "Redesign" – warrant such.

Analysis: Reform of the State's Child Welfare Services could result in the need for further modifications to the CACI referral system. A major CWS "redesign" effort conducted by DSS for the past three years includes a recommendation that the State create a "differential response" system for responding to suspected cases of child abuse and neglect. Under this

system, some significant proportion of families that currently meet the definition that would result in a CACI referral would be served in a more voluntary and therapeutic way, as opposed to the traditional adversarial, court-oriented approach to child welfare services. The DSS redesign report calls for more child welfare worker discretion to forego the CACI report so long as the family is participating in good faith in these voluntary, non-court oriented services.

The changes contemplated by the redesign were, in fact, consistent with testimony received by the Task Force regarding the decline in the number of referrals to CACI over the past several years. Several Task Force members expressed concerns about the decline in the number of referrals to CACI by law enforcement and child welfare agencies, despite no apparent decline in the number of child abuse investigations. While no conclusive data exists to explain such a decline, child welfare and law enforcement professionals offered several possible causes. Child welfare professionals hypothesized that the 1998 statutory requirement to notify individuals who are being reported to CACI may be "chilling" some workers from making the CACI report, as these reports can often result in highly political and time-consuming controversies when the report in challenged by the subject of the referral. Child welfare professionals also report that CACI referrals can hamper clinical efforts to assist families in the child welfare system on a voluntary basis. Voluntary services are viewed as a superior method to help some families remediate the conditions presenting a risk of child abuse and neglect. Parents and their attorneys sometimes resist voluntary efforts once they learn they have been reported to CACI. Thus some speculate that these clinical issues are resulting in fewer referrals to CACI. Law enforcement members reported some similar concerns with respect to the workload that sometimes results from a CACI referral. Law enforcement representatives also reported that some agencies and officers perceive a low value to CACI referrals, which could be a factor in declining referral numbers.

Recommendation 7: County Child Welfare agencies must notify DOJ when they purge investigative case files that result in CACI listings. DOJ and the County Welfare Directors Association should work together to ensure that counties are aware of purging notification requirements.

Analysis: Courts have consistently upheld the constitutionality of the Index as a "pointer system." That is, CACI is not a repository of investigative reports; rather CACI is an index that "points" to the underlying investigative report housed in child protective service and law enforcement agencies throughout the State. Entities that are authorized to receive information are required to review the underlying investigative report whenever they receive information from CACI. DOJ reports instances where they have released CACI information to an authorized recipient who then determines that the underlying investigative report has been purged by local decision. This recommendation will enhance the due process rights of those listed on the Index while maintaining the constitutionality of the Index.

Recommendation 8: Policy-makers should seek opportunities to support to creation and use of Multi-Disciplinary Interview Centers (MDIC's).

Analysis: MDIC's are organizations where multiple law enforcement and child welfare agencies interview potential victims of child abuse, usually sexual abuse. The model was created to fulfill several goals: (1) the minimize the trauma to children caused by multiple interviews by numerous different agencies; (2) to develop appropriate interview tools and protocols to ensure the most accurate responses from children about their experiences, thus minimizing the possible effect of leading questions; and (3) to improve the investigations and ultimate disposition of law enforcement agencies and child protective service agencies. The Task Force received testimony and information that indicates that MDIC's are effective at accomplishing these goals. However, MDIC's are not available statewide. One reason for the lack of MDIC's in all areas of the State is the cost of developing, implementing and operating the centers. There have been several attempts by the Legislature to provide funding to promote the development of more MDIC's, however recent State fiscal problems have prevented their enactment.

IV.

GENERAL RECOMMENDATIONS OF THE TASK FORCE

Question One: Whether CACI should be amended to authorize professionals to report abuse based on observations made in medical reports?

Discussion: Presently, medical reports, including sexually transmitted disease reports, reports identifying girls pregnant under the age of 16 with the father over the age of 21, x-rays, hospital discharge summaries, and the like, yield information identifying child abuse or neglect that a mandated medical professional, such as the treating physician, may have failed to associate with a reportable event. In order to allow an improved system of checks and balances and ensure that medical professionals are reporting when they should, urgent attention should be given to under what circumstances persons who are presently mandated reporters should file child abuse reports on the basis of review of medical records prepared by others.

Recommendation: Urgent attention should be given to under what circumstances persons who are presently mandated reporters should file child abuse reports on the basis of review of medical records.

Question Two: Whether to modify CANRA to delete the term "child victim" or "victim" and replace with "child," and whether to replace the term "suspect," "perpetrator," or "alleged perpetrator" with "person listed in a report filed with CACI," "person listed in the report," or "person?"

Discussion: Presently, Penal Code section 11164, for example, uses the term "child victim." CANRA also uses the terms "suspect" and "alleged perpetrator." These terms are apparently rooted in the criminal investigative mission of the Index. However, in many cases there has been no adjudication of guilt or finding of actual abuse or neglect. Accordingly, the Legislature should consider whether changing the terminology would better serve the operation of the Index. There may be several instances where the present terminology accurately reflects its usage and where changes will leave the statute vague. Hence, a statute-by-statute review would be appropriate.

Recommendation: Consideration should be given to whether to change the terminology used in CANRA.

Question Three: Whether access to CACI should be expanded to allow probation departments to investigate probationers?

Discussion: This issue was presented to the Task Force in the context of expanding access to probation departments to allow access to CACI specific to their probationers. The majority of adult probationers are on felony grants of probation. Within this population there are

charges that speak to children being placed at risk, such as molestation, child endangerment, domestic violence, and drug sales, among others. Probation departments see CACI as an important tool in preparing court reports to allow for recommendations, particular as to the terms and conditions of probation, and also allowing for appropriate intervention. Additionally, juvenile wards may have a history of being abused and neglected that upon identification would allow for investigations and proper case management and supervision. The concern of the Task Force, among others, was ensuring that access has an appropriate nexus between the suspicion of abuse and access to CACI. Furthermore, allowing expanded access would require significant program rule changes within CACI for one select law enforcement agency. The Task Force recommends that access on adult probationers be allowed for the purpose of ensuring the safety and well-being of children in the home when the crime for which the adult is on probation carries with it a reasonable suspicion of child abuse. The Task Force also recommends that the Legislature study expanded access to CACI to ensure for the safety of children.

Recommendation: Access to CACI on adult probationers should be allowed for the purpose of ensuring the safety and well being of children in the home when the crime for which the adult is on probation carries with it a reasonable suspicion of child abuse. The Legislature should also study expanded access to CACI to ensure for the safety of children

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Question Four: Whether CANRA should provide for an ongoing validation procedure to allow the purging of listings from CACI that are no longer supported by underlying supporting documentation?

Discussion: The purpose of CACI is to serve as a "pointer" to inquiring agencies for information maintained by the local law enforcement or child welfare agency that conducted an investigation of child abuse. Existing regulations require DOJ to purge information if the reporting agency no longer maintains the underlying investigative report. In a special pilot project with the County of San Diego Health and Human Services, DOJ discovered that approximately 50 percent of CACI listings originating from that agency should be purged because the supporting documentation was no longer maintained at the local level. If this percentage held true for the entire State, it is possible that half of the 800,000 records which DOJ presently maintains in CACI should be purged. Therefore, the Task Force recommends that legislation be proposed mandating that DOJ work with local agencies to implement an ongoing validation of existing CACI listings so as to maintain only those records which can be supported with documentation maintained by the reporting agency. Local agencies should be given the discretion to participate depending on the availability of resources to engage in the purging process.

Recommendation: DOJ should be mandated to work with local agencies to implement an ongoing validation of existing CACI records to maintain only those records which can be supported with documentation maintained by the reporting agency.

Question Five: Whether access to CACI should be expanded to include checks on all employees or licensees who care for children, who have supervisory control over minors, or who volunteer their services with children?

Discussion: Access to CACI information is presently restricted for the purposes of child abuse investigations, licensing of individuals who care for children, adoptions, Trustline and the emergency placement of children. There are many other types of employees or licensees who care for children, who have supervisory control over minors, or who volunteer their services for which there is not a corresponding right to access to CACI for screening purposes, including certificated and non-certificated public and private school employees and volunteers in nonprofit organizations such as Little League, Boy and Girl Scouts, etc. The Task Force recommends that all groups of employees, licensees, and volunteers who care for or have supervision over children be considered as subject to clearances through CACI.

Recommendation: All employees, licensees, and volunteers who care for or have supervision over children should be subject to clearances through CACI.

Question Six: Whether a standing committee should be established to evaluate the effectiveness of the Child Abuse and Neglect Reporting Act and the operation of the Child Abuse Central Index?

Discussion: The establishment of an advisory committee would ensure that the recommendations of the Task Force are implemented and applied appropriately. The committee would serve without pay with the exception of reimbursement for travel expenses.

Recommendation: A standing committee should be established to evaluate the effectiveness of the Child Abuse and Neglect Reporting Act and the operation of the Child Abuse Central Index.

V.

PROPOSED STATUTORY AMENDMENTS TO THE CHILD ABUSE AND NEGLECT REPORT ACT[27]

The following proposed amendments, which were unanimously endorsed by the Task Force, have been submitted to the Legislature in SB 1313 (Kuehl).

PROPOSED AMENDMENT 1

Issue: Whether to amend the definition of reportable sexual assault under CANRA (Pen. Code, § 11165.1, subd. (a)).

Discussion: CANRA is somewhat confusing and inconsistent as to what types of voluntary sexual conduct between two minors must be reported.

Because acts in violation of subdivisions (a) and (b) of Penal Code section 288 are included within CANRA's definition of sexual assault, any sexual conduct involving a child under the age of 14 years must be reported. Thus, if voluntary sexual conduct occurs between a child under the age of 14 years and a child 14 years or older, the older child has violated Penal Code section 288 and a report is required. (There is a very significant exception, however. The courts have held that voluntary sexual conduct between children who are both under the age of 14 and who are of similar age and sophistication is not abusive conduct, and a report is consequently not required.) But if a minor 14 years or older engages in "heavy petting" with another minor 14 years or older, a report is not required. (The definition of sexual assault under CANRA does, however, encompass violations of paragraph (1) of subdivision (c) of section 288, which is touching of a 14- or 15-year-old by a person at least 10 years older.)

Turning to sexual conduct beyond heavy petting, the reporting law defines sexual assault by listing a number of prohibited acts, such as rape, oral copulation, sodomy, and sexual penetration. By omission, it appears that, where both participants are 14 or older, sexual intercourse does not have to be reported. However, oral copulation, sodomy, and sexual penetration (which includes penetration with a finger) must be reported if one or both of the participants are under 18, even if the acts are consensual. And although sexual intercourse between two minors who are both 14 years or older does not have to be reported, a report is required where a person 21 years or older engages in sexual intercourse with a minor under age 16 in violation of Penal Code section 261.5, subdivision (d).

At a minimum, it would appear that Penal Code section 11165.1, subdivision (a), should be amended to remove the inconsistency that currently exists in regard to the reporting of sexual intercourse involving two minors and the reporting of oral copulation, sodomy, and sexual penetration involving two minors.

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[27]Prepared by Julie Hokans, Deputy Attorney General, CANRA Task Force Staff.

Recommendation: Amend Penal Code section 11165.1, subdivision (a), as follows:

11165.1. (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), 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" also means conduct in violation of one or more of the following sections: Section 286 (sodomy), with the exception of subdivision (b)(1); Section 288a (oral copulation), with the exception of subdivision (b)(1); or Section 289 (sexual penetration), with the exception of subdivision (h).*

If this amendment is adopted, oral copulation, sodomy, and sexual penetration between two minors who are both 14 years or older will not have to be reported.

PROPOSED AMENDMENT 2

Issue: Whether to amend Penal Code section 11165.3 to reflect that, instead of defining "willful cruelty or unjustifiable punishment of a child," the language used therein defines "the willful harming or injuring of a child or the endangering of the person or health of a child."

Discussion: "Willful cruelty or unjustifiable punishment" is included within CANRA's definition of child abuse. (See Pen. Code, §§ 11165.5, 11165.6.) Penal Code section 11165.3 in turn defines "willful cruelty or unjustifiable punishment of a child" as follows: "a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of the child to be placed in a situation such that his or her person or health is endangered." This language is apparently taken straight from Penal Code section 273a, which is entitled "Willful harm or injury to child, or endangering person or health."

It does not make sense that the exact language of Penal Code section 273a is replicated in Penal Code section 11165.3 but is there said to describe "willful cruelty or unjustifiable punishment of a child" rather than "the willful harming or injuring of a child or the endangering of the person or health of a child." Furthermore, describing the proscribed conduct as "willful cruelty or unjustifiable punishment of a child" is potentially confusing given that the term "unlawful corporal *punishment* or injury" is listed under CANRA as a separate category of child abuse. (See Pen. Code, §§ 11165.4, 11165.5, 11165.6.)

Recommendation: Amend Penal Code section 11165.3 as follows:

11165.3. As used in this article, ~~"willful cruelty or unjustifiable punishment of a child"~~ *"the willful harming or injuring of a child or the endangering of the person or health of a child"* means a situation ~~where~~ *in which* any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or

> permits the person or health of the child to be placed in a situation such that his or her person or health is endangered.

If this amendment is made to Penal Code section 11165.3, the following amendments will need to be made to Penal Code sections 11165.5 and 11165.6:

> 11165.5. As used in this article, the term "abuse or neglect in out-of-home care" includes physical injury inflicted upon a child by another person by other than accidental means, sexual abuse as defined in Section 11165.1, neglect as defined in Section 11165.2, unlawful corporal punishment or injury as defined in Section 11165.4, or the ~~willful cruelty or unjustifiable punishment of a child,~~ *willful harming or injuring of a child or the endangering of the person or health of a child* as defined in Section 11165.3, where the person responsible for the child's welfare is a licensee, administrator, or employee of any facility licensed to care for children, or an administrator or employee of a public or private school or other institution or agency. "Abuse or neglect in out-of-home care" does not include an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a peace officer.

> 11165.6. As used in this article, the term "child abuse or neglect" includes physical injury inflicted by other than accidental means upon a child by another person, sexual abuse as defined in Section 11165.1, neglect as defined in Section 11165.2, ~~willful cruelty or unjustifiable punishment~~ *the willful harming or injuring of a child or the endangering of the person or health of a child* as defined in Section 11165.3, and unlawful corporal punishment or injury as defined in Section 11165.4. "Child abuse or neglect" does not include a mutual affray between minors. "Child abuse or neglect" does not include an injury caused by reasonable and necessary force used by a peace officer acting within the course and scope of his or her employment as a peace officer.

PROPOSED AMENDMENT 3

Issue: Whether to amend Penal Code section 11165.7, subdivision (b), to clarify that, in general, volunteers are *not* mandated reporters. Whether to amend Penal Code section 11165.7, subdivision (b), to reflect that, unlike other volunteers, Court Appointed Special Advocate program (CASA) volunteers *are* mandated reporters. Whether to amend Penal Code section 11165.7, subdivision (b), to explicitly provide that volunteers are encouraged to report known or suspected child abuse or neglect.

Discussion: Under Penal Code section 11165.7, subdivision (b), volunteers of public or private organizations whose duties require direct contact with and supervision of children are merely "encouraged" to obtain training in the identification and reporting of child abuse. This has been consistently interpreted to mean that volunteers are *not* mandated reporters. However, Penal Code section 11165.7, subdivision (a)(35), explicitly makes an exception for CASA volunteers, and Penal Code section 11165.7, subdivision (b), should be amended to reflect that

exception. Further, it was suggested at the February 24, 2003, Task Force meeting that Penal Code section 11165.7, subdivision (b), be amended to explicitly provide that volunteers are encouraged to report known or suspected child abuse or neglect (not only to obtain training in the identification and reporting of child abuse).

Recommendation: Amend Penal Code section 11165.7, subdivision (b), as follows:

11165.7. (b) *Except as provided in subdivision (a)(35) of this section, volunteers* ~~Volunteers~~ of public or private organizations whose duties require direct contact and supervision of children are *not mandated reporters but are* encouraged to obtain training in the identification and reporting of child abuse *and neglect and are further encouraged to report known or suspected instances of child abuse or neglect to an agency specified in Section 11165.9.*

PROPOSED AMENDMENT 4

Issue: Whether to amend Penal Code section 11165.7 to require that all employers of mandated reporters, not only school districts, provide their employees who are mandated reporters with training on the duties imposed under CANRA. Whether to amend Penal Code section 11165.7 to require public and private organizations to provide their volunteers whose duties require direct contact and supervision of children with training in the identification and reporting of child abuse and neglect.

Discussion: The language of Penal Code section 11165.7, subdivisions (c) and (d), is somewhat ambiguous, but it appears that school districts are the only employers currently required to provide their employees with training on the duties imposed under CANRA. (Penal Code section 11166.5, subdivision (d), provides that child visitation monitors "shall have received training in the duties imposed [under CANRA]," but the law does not mandate that any particular entity provide that training. And Penal Code section 11174.1, subdivision (b)(1), requires that DSS prescribe regulations designed to assure that employees of licensed community treatment facilities, day treatment facilities, group homes, and foster family agencies have had training on the provisions of CANRA, but, again, the law does not mandate that any particular entity provide the training.) Similarly, there is no requirement that public and private organizations provide their volunteers with training in the identification and reporting of child abuse and neglect (although, under Penal Code section 11165.7, subdivision (b), volunteers are "encouraged" to obtain such training).

At the December 8, 2003, Task Force meeting, it was concluded that employers should be "strongly encouraged" to provide their employees who are mandated reporters with training on the duties imposed under CANRA. Also, public and private organizations should be "encouraged" to provide their volunteers whose duties require direct contact and supervision of children with training in the identification and reporting of child abuse and neglect.

Recommendation: Amend Penal Code section 11165.7, subdivision (c), as follows:

11165.7. (c) ~~Training in the duties imposed by this article~~ *Employers are strongly encouraged to provide their employees who are mandated reporters with training in the duties imposed by this article. Such training* shall include training in child abuse *and neglect* identification and training in child abuse *and neglect* reporting. As part of that training, ~~school districts~~ *employers* shall provide to all employees being trained a written copy of the reporting requirements and a written disclosure of the employees' confidentiality rights.

Add the following as Penal Code section 11165.7, subdivision (f):

11165.7. *(f) Public and private organizations are encouraged to provide their volunteers whose duties require direct contact and supervision of children with training in the identification and reporting of child abuse and neglect.*

PROPOSED AMENDMENT 5

Issue: Whether to amend the definition of "Substantiated report" set out in Penal Code section 11165.12, subdivision (b).

Discussion: Penal Code section 11165.12, subdivision (b), defines the term "Substantiated report" for purposes of CANRA. Under that subdivision, a report can be "substantiated" on the basis of "some credible evidence." The Task Force found that the term "some credible evidence" provides inadequate guidance to investigators. Accordingly, the Task Force concluded that the term "some credible evidence" should be deleted from the definition of "Substantiated report" and that the definition should be amended to instead incorporate the term "evidence that makes it more likely than not that child abuse or neglect . . . occurred."

Recommendation: Amend Penal Code section 11165.12 as follows:

11165.12. (a) "Unfounded report" means a report ~~which~~ *that* is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect, as defined in Section 11165.6.
(b) "Substantiated report" means a report ~~which~~ *that* is determined by the investigator who conducted the investigation~~, based upon some credible evidence,~~ to constitute child abuse or neglect, as defined in Section 11165.6*, based on evidence that makes it more likely than not that child abuse or neglect so defined occurred*.
(c) "Inconclusive report" means a report ~~which~~ *that* is determined by the investigator who conducted the investigation not to be unfounded, but ~~in which~~ the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in Section 11165.6, has occurred.

PROPOSED AMENDMENT 6

Issue: Whether to amend Penal Code section 11166, subdivision (a), to clarify that a mandated reporter is not required to make a report of known or suspected child abuse or neglect if the victim is an adult at the time it is disclosed or discovered.

Discussion: An area that has caused confusion is the question of whether past child abuse or neglect needs to be reported. When the victim is a child at the time the abuse becomes known or suspected, the abuse must be reported, regardless of when it occurred. But if the victim is an adult at the time the abuse becomes known or suspected, the law is not so clear. (This issue usually arises when an adult is in therapy and discloses that, as a child, he or she was abused.) Penal Code section 11166, subdivision (a), provides that the duty to report arises whenever a mandated reporter "has knowledge of or observes *a child* whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." This language seems to demonstrate an intent that a report need *not* be made if the victim is an adult when the known or suspected abuse is disclosed or discovered (unless the reporter knows or reasonably suspects that there are children still under the age of 18 who are being, or have been, abused by the same person). As this is an area that has caused significant confusion, Penal Code section 11166, subdivision (a), should be amended to provide clarification.

Recommendation: Add the following language as new Penal Code section 11166, subdivision (a)(3) (and renumber current subdivision (a)(3) as subdivision (a)(4)):

> 11166. (a)*(3) A mandated reporter shall not make a report solely on the basis that he or she has knowledge of or suspects that an adult was the victim of abuse or neglect as a child.*

PROPOSED AMENDMENT 7

Issue: Whether to relocate to CANRA the reporting obligation currently imposed under Welfare and Institutions Code section 16513.

Discussion: The subject of Chapter 5 of Part 4 of Division 9 of the Welfare and Institutions Code is "State Child Welfare Services." Welfare and Institutions Code section 16513 provides for immunity for anyone who acting in good faith makes a report pursuant to that chapter (i.e., to anyone that reports a child to a county welfare department as endangered by abuse, neglect, or exploitation). Welfare and Institutions Code section 16513 also provides that any mandated reporter under CANRA "who has reason to believe that the home or institution in which a minor resides is unsuitable for the minor because of the neglect, abuse, or exploitation of such minor, shall bring such condition to the attention of the law enforcement agency pursuant to [CANRA]." Insofar as Welfare and Institutions Code section 16513 imposes an additional reporting requirement on mandated reporters, that reporting requirement should be located in CANRA rather than in the Welfare and Institutions Code.

Recommendation: Add the following language as new Penal Code section 11166, subdivision (e) (and reletter current subdivisions (e) through (i) as subdivisions (f) through (j)):

> 11166. *(e) Any mandated reporter who knows or reasonably suspects that the home or institution in which a child resides is unsuitable for the child because of the abuse or neglect of the child shall bring such condition to the attention of the agency to which, and at the same time as, he or she makes a report of the abuse or neglect pursuant to subdivision (a).*

Amend Welfare and Institutions Code section 16513 as follows:

> 16513. Anyone participating in good faith in the making of a report pursuant to this chapter shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report. ~~Any person required by law to report under Sections 11165 and 11166 of the Penal Code who has reason to believe that the home or institution in which a minor resides is unsuitable for the minor because of the neglect, abuse, or exploitation of such minor, shall bring such condition to the attention of the law enforcement agency pursuant to Sections 11165 and 11166 of the Penal Code.~~

PROPOSED AMENDMENT 8

Issue: Whether to amend Penal Code section 11166.05 to reflect that, under CANRA, a mandated reporter is required to report instances of known or suspected instances of mental suffering wilfully inflicted upon a child.

Discussion: As discussed *supra* under Proposed Amendment 2, CANRA's definition of child abuse includes "a situation where any person willfully causes or permits any child to suffer, or inflicts thereon, unjustifiable physical pain *or mental suffering* . . . ." (Pen. Code, § 11165.3, italics added.) Under this language, a mandated reporter clearly must make a report of mental suffering wilfully inflicted upon a child. Nevertheless, Penal Code section 11166.05 provides that "a mandated reporter who has knowledge of or who reasonably suspects that *mental suffering* has been inflicted upon a child or that his or her emotional well-being is endangered in any other way *may*" make a report. (Italics added.) This inconsistency in the law should be corrected by removing the reference to "mental suffering" in Penal Code section 11166.05.

The Task Force indicated that it wished to preserve that portion of Penal Code section 11166.05 that permits a report when a child's emotional well-being is endangered under circumstances falling short of the wilful infliction of mental suffering. The following recommended language, which incorporates the language of Welfare and Institutions Code section 300, subdivision (c), pertaining to children subject to the jurisdiction of dependency court, will accomplish that purpose while also conveying that only actionable conduct should be reported.

Recommendation: Amend Penal Code section 11166.05 as follows:

11166.05. Any mandated reporter who has knowledge of or who reasonably suspects that ~~mental suffering has been inflicted upon a child or that his or her emotional well-being is endangered in any other way may report the known or suspected instance of child abuse or neglect~~ *a child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others as a result of the conduct of a parent or guardian may make a report* to an agency specified in Section 11165.9.

PROPOSED AMENDMENT 9

Issue: Whether to move the four statutes in CANRA pertaining to child death review teams (Pen. Code, §§ 11166.7, 11166.8, 11166.9, 11166.95) out of CANRA and into a newly-created stand-alone article.

Discussion: Penal Code sections 11166.7, 11166.8, 11166.9, and 11166.95 pertain to child death review teams. It was unclear to the Task Force why those statutes are included in CANRA (Part 4, Title 1, Chapter 2, Article 2.5 of the Penal Code) rather than in a stand-alone article. As the Task Force observed, the statutes pertaining to elder death review teams are contained in a stand-alone article (Part 4, Title 1, Chapter 2, Article 2.7 of the Penal Code). It would seem that the statutes pertaining to child death review teams should also be contained in a stand-alone article.

Recommendation: Create Part 4, Title 1, Chapter 2, Article 2.6 of the Penal Code pertaining to "Child Death Review Teams." Move Penal Code sections 11166.7, 11166.8, 11166.9, and 11166.95 out of CANRA and into this new article after renumbering the statutes as Penal Code sections 11174.31, 11174.32, 11174.33, and 11174.34, respectively, as follows:

~~11166.7~~ *11174.31*. (a) Each county may establish an interagency child death team to assist local agencies in identifying and reviewing suspicious child deaths and facilitating communication among persons who perform autopsies and the various persons and agencies involved in child abuse or neglect cases. . . . .
. . . .

~~11166.8~~ *11174.32*. Subject to available funding, the Attorney General, working with the California Consortium of Child Abuse Councils, shall develop a protocol for the development and implementation of interagency child death teams for use by counties, which shall include relevant procedures for both urban and rural counties. . . . .

~~11166.9~~ *11174.33*. (a)(1) The purpose of this section shall be to coordinate and integrate state and local efforts to address fatal child abuse or neglect, and to create a body of information to prevent child deaths. . . . .

(b)(1) It shall be the duty of the California State Child Death Review Council to oversee the statewide coordination and integration of state and local efforts to address fatal child abuse or neglect and to create a body of information to prevent child deaths. . . . .

. . . .

~~11166.95~~ *11174.34*. The State Department of Social Services shall work with state and local child death review teams and child protective service agencies in order to identify child death cases that were, or should have been, reported to or by county child protective services agencies. . . . .

PROPOSED AMENDMENT 10

Issue: Whether to amend Penal Code section 11167, subdivision (a), so as to clarify that a mandated reporter is not required to make a report of child abuse in the absence of any identifying information about the victim.

Discussion: Dr. Tom Tobin, on behalf of the California Coalition on Sexual Offending (CCOSO), brought to the attention of the Task Force that some uncertainty exists as to whether, under the Penal Code section 11167, subdivision (a), mandated reporter must make a report of child abuse even in the absence of any identifying information about the victim. (CCOSO is concerned that if such reports are required, their efforts to provide court-ordered treatment to convicted sex offenders would be seriously hampered.) The Task Force agreed that the wording of Penal Code section 11167, subdivision (a), should be amended so as to clarify that a mandated reporter is not required to make a report of child abuse in the absence of any identifying information about the victim.

Recommendation: Amend Penal Code section 11167, subdivision (a), as follows:

11167. (a) Reports of suspected child abuse or neglect pursuant to Section 11166 shall include~~, if known,~~ the name, business address, and telephone number of the mandated reporter, and the capacity that makes the person a mandated reporter; *if known,* the child's name and address, present location, and, where applicable, school, grade, and class; *and, if known,* the names, addresses, and telephone numbers of the child's parents or guardians~~; the information that gave rise to the reasonable suspicion of child abuse or neglect and the source or sources of that information; and the name, address, telephone number, and other relevant personal information about the person or persons who might have abused or neglect the child~~. The mandated reporter shall make a report even if some of ~~this~~ *the above* information is not known or is uncertain to him or her. *When such a report is made, the following information shall also be included in the report: the information that gave rise to the reasonable suspicion of child abuse or neglect and the source or sources of that information; and, if known, the name, address, telephone number, and other relevant personal information about the person or persons who might have abused or neglected the child.*

PROPOSED AMENDMENT 11

Issue: Whether to amend Penal Code section 11167 to clarify that reports by mandated reporters are confidential. Whether to amend Penal Code section 11167.5, subdivision (a), so that it limits the disclosure of investigative reports (i.e., reports prepared by the investigative agencies after conducting active investigations) rather than reports by mandated reporters. Whether to combine Penal Code section 11167.5, subdivisions (b)(11) and (b)(13), and whether to specify that disclosure of investigative reports to persons who are listed in the Index is not subject to the provisions of the Public Records Act.

Discussion: Penal Code section 11167.5 provides that "[t]he reports required by Sections 11166 and 11166.2 [i.e., reports by mandated reporters] shall be confidential" and may only be disclosed as provided under subdivision (b) of that section. This is a legislative error that needs to be corrected. Access to reports by mandated reporters is governed by Penal Code section 11167, not Penal Code section 11167.5 (although Penal Code section 11167 itself should be amended so as to explicitly provide for the confidentiality of reports by mandated reporters). Penal Code section 11167.5 appears to contemplate not the disclosure of reports by mandated reporters but the disclosure of the subsequent *investigative report* (i.e., the report prepared by the investigative agency after conducting an investigation).

Penal Code section 11167.5, subdivision (b)(11), provides persons who have been identified as listed in the Index pursuant to Penal Code section 11170, subdivision (c) (pertaining to relative placements), with the right to access the investigative report. Similarly, Penal Code section 11167.5, subdivision (b)(13), provides persons who have verified with the Department of Justice (DOJ) that they are listed in the Index with the right to access the investigative report; however, the reference to the Public Records Act currently contained in Penal Code section 11167.5, subdivision (b)(13), renders that right illusory in that it permits the investigative agency to refuse to disclose the investigative report. Penal Code section 11167.5, subdivision (b)(13), should be amended to provide that disclosure is required notwithstanding the Public Records Act. And, for the sake of brevity, subdivisions (b)(11) and (b)(13) should then be combined into one subdivision.

Recommendation: Amend Penal Code section 11167, subdivision (a), as follows:

> 11167. (a)*(1)* Reports of suspected child abuse or neglect pursuant to Section 11166 shall include . . . .
>
> *(2) The reports required by Sections 11166 shall be confidential and may be disclosed only as provided in this section. Any violation of the confidentiality provided by this article is a misdemeanor punishable by imprisonment in a county jail not to exceed six months, by a fine of five hundred dollars ($500), or by both that imprisonment and fine.*

Amend Penal Code section 11167.5, subdivision (a), as follows:

> 11167.5. (a) ~~The reports required by Sections 11166 and 11166.2~~ *A child abuse or neglect investigative report that results in a summary report being filed with the Department of Justice pursuant to Section 11169, subdivision (a),* shall be confidential and may be disclosed only as provided in subdivision (b). . . . .

Amend Penal Code section 11167.5, subdivision (b), as follows (and renumber current subdivision (b)(14) as subdivision (b)(13)):

> 11167.5. (b) Reports of suspected child abuse or neglect and information contained therein may be disclosed only to the following:
>
> . . . .
>
> (11) Persons who have been identified by the Department of Justice as listed in the Child Abuse Central Index pursuant to subdivision (c) of Section 11170*, or persons who have verified with the Department of Justice that they are listed in the Child Abuse Central Index as provided by subdivision (e) of Section 11170. Disclosure under this paragraph is required notwithstanding the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).* Nothing in this paragraph shall preclude a submitting agency prior to disclosure from redacting the name, address, and telephone number of a witness, person who reports under this article, or *known or suspected* victim in order to maintain confidentiality as required by law.
>
> . . . .
>
> ~~(13) Persons who have verified with the Department of Justice that they are listed in the Child Abuse Central Index as provided by subdivision (e) of Section 11170. Disclosure under this section shall be subject to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Nothing in this section prohibits a submitting agency prior to disclosure from redacting the name, address, and telephone number of a witness, person who reports under this article, or victim to maintain confidentiality as required by law.~~

PROPOSED AMENDMENT 12

Issue: Whether to amend Penal Code section 11170, subdivision (b), so as to explicitly provide that information from the Index may be released to investigative agencies that are in the process of conducting child abuse investigations.

Discussion: Penal Code section 11170, subdivision (b)(1), currently provides only that *when an investigative agency submits a report of child abuse to the Index*, DOJ is required to immediately notify it of any information in the Index that is relevant to the report. In practice, however, in accordance with California Code of Regulations, title 11, section 907(a), information from the Index is also released to investigative agencies that are in the process of

conducting child abuse investigations (i.e., information is *not* just released to agencies upon the submission of reports to the Index). The legality of this procedure under existing law is described in an opinion by the Attorney General (65 Ops.Cal.Atty.Gen. 335, 340 (1982)). It would be beneficial, however, to explicitly provide in Penal Code section 11170 that relevant information from the Index may be released to investigative agencies that are in the process of conducting child abuse investigations.

Recommendation: Add the following language as new Penal Code section 11170, subdivision (b)(3) (and renumber current subdivisions (b)(3) through (b)(7) as subdivisions (b)(4) through (b)(8)):

> 11170. (b)*(3) The Department of Justice shall make available to an investigative agency that is conducting a child abuse investigation relevant information contained in the index.*

PROPOSED AMENDMENT 13

Issue: Whether to amend Penal Code section 11170, subdivision (b), so as to grant access to the Index to government agencies conducting background investigations of candidates for positions as peace officers.

Discussion: The Orange County Probation Department brought to the attention of the Task Force the fact that government agencies are currently not provided with access to the Index for purposes of conducting background investigations on candidates for peace officer positions. (Orange County Probation specifically wants access to the Index in screening prospective peace officers to supervise minors in juvenile facilities.) The Task Force decided to grant such access. (NOTE: Nothing in *Central Valley Ch. 7th Step Foundation, Inc. v. Younger* (1989) 214 Cal.App.3d 145 prohibits the use of information from the Index for the purpose of screening peace officer candidates. *Central Valley* specifically noted that "there is a compelling state interest that criminal justice agencies obtain all information necessary to evaluate the fitness of persons seeking employment as peace officers." (*Id.* at p. 168; see also Lab. Code, § 432.7, subd. (b); Pen. Code, §§ 13203, 13300.))

Recommendation: Add the following language to Penal Code section 11170 as new subdivision (b)(7) (assuming that Proposed Amendment 12 is adopted; otherwise, the following language should be added as new subdivision (b)(6)):

> 11170. (b)*(7) The department shall make available to a government agency conducting a background investigation pursuant to Government Code section 1031 of an applicant for a position as a peace officer, as defined in Section 830, information regarding a known or suspected child abuser maintained pursuant to this section concerning the applicant.*

Renumber current subdivisions (b)(6) and (b)(7) as subdivisions (b)(8) and (b)(9), respectively (again, assuming that Proposed Amendment 12 is adopted; otherwise, subdivisions (b)(6) and

(b)(7) should be renumbered as subdivisions (b)(7) and (b)(8)).

Amend what will become subdivision (b)(8) (and what is currently subdivision (b)(6)) as follows:

> 11170. (b)~~(6)~~*(8)*(A) Persons or agencies, as specified in subdivision (b), if investigating a case of known or suspected child abuse or neglect, or the State Department of Social Services or any county licensing agency pursuant to paragraph (3), or an agency or court investigator responsible for placing children or assessing the possible placement of children pursuant to paragraph (5), *or a government agency conducting a background investigation of an applicant for a position as a peace officer pursuant to paragraph (7),* to whom disclosure of any information maintained pursuant to subdivision (a) is authorized, are responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions regarding the quality of the evidence disclosed, and its sufficiency for making decisions regarding investigation, prosecution, licensing, ~~or~~ placement of a child*, or employment as a peace officer*.

PROPOSED AMENDMENT 14

Issue: Whether to amend Penal Code section 11170, subdivision (e), to restrict access to the Index by a person listed in a report filed therein.

Background: Penal Code section 11170, subdivision (e), authorizes anyone to verify if his or her name appears in the Index, and if he or she is listed in the Index, it requires that DOJ direct the person to the investigative agency that submitted the report. Existing law places no restrictions on the use of the information by the requestor, and it does not prohibit secondary disseminations of the information. This is so even though CANRA strictly limits access to the Index.

Agencies that are not provided with access to the Index have discovered that individuals who are eager to be employed, licensed, or certified are willing to contact the Index pursuant to Penal Code section 11170, subdivision (e), and to then furnish the agency with notification that a record does not exist. The Task Force decided that in order to curtail this practice, language similar to that in Penal Code section 11125 (pertaining to access to State summary criminal history information) should be added to Penal Code section 11170, subdivision (e).

Recommendation: Amend Penal Code section 11170, subdivision (e), as follows:

> 11170. (e)*(1)* Any person may determine if he or she is listed in the Child Abuse Central Index by making a request in writing to the Department of Justice. The request shall be notarized and include the person's name, address, date of birth, and either a social security number or a California identification number. Upon receipt of a notarized request, the Department of Justice shall make available to the requesting person information identifying the date of the report and the

submitting agency. The requesting person is responsible for obtaining the investigative report from the submitting agency pursuant to paragraph ~~(13)~~ *(11)* of subdivision (b) of Section 11167.5.

(2) No person or agency shall require or request another person to furnish a copy of a record, or notification that a record exists or does not exist, pursuant to paragraph (1) of this subdivision. A violation of this paragraph is a misdemeanor.

PROPOSED AMENDMENT 15

Issue: Whether to amend Penal Code section 11170.5 to require licensed adoption agencies obtaining information from the Index to obtain the original investigative report and to draw independent conclusions before acting on the information.

Discussion: Penal Code section 11170, subdivision (b)(6), requires that persons or agencies who obtain information from the Index for purposes of investigation, prosecution, licensure, or placement are responsible for obtaining the original investigative report from the submitting agency and for drawing independent conclusions regarding the quality of the evidence disclosed and its sufficiency for making decisions regarding investigation, prosecution, licensure, or placement of a child. In an apparent legislative oversight, Penal Code section 11170.5, which gives access to the Index to licensed adoption agencies, does not contain a parallel provision.

Recommendation: Amend Penal Code section 11170.5 as follows:

11170.5. (a) Notwithstanding paragraph (3) of subdivision (b) of Section 11170, the Department of Justice shall make available to a licensed adoption agency . . . *information* regarding a known or suspected child abuser maintained in the child abuse index . . . concerning any person who has submitted to the agency an application for adoption.

(b) A licensed adoption agency, to whom disclosure of any information pursuant to subdivision (a) is authorized, is responsible for obtaining the original investigative report from the reporting agency, and for drawing independent conclusions regarding the quality of the evidence disclosed and the sufficiency of the evidence for making decisions when evaluating an application for adoption.

(c) Whenever information contained in the Department of Justice files is furnished as the result of an application for adoption pursuant to subdivision (a), the Department of Justice may charge the agency making the request a fee. . . . .

PROPOSED AMENDMENT 16

Issue: Whether to delete Penal Code section 11170.6, which provides the City of San Diego with access to the Index for purposes of evaluating employees for its “6 to 6” program.

Discussion: In 1999, the City of San Diego sponsored Assembly Bill 181 (Zettel), which established San Diego's "6 to 6" Extended School Day Program as a license-exempt before-and after-school program in partnership with the School District. Included in that bill was Penal Code section 11170.6, which permitted the City of San Diego to access the Index for purposes of evaluating employees for the program.

With the subsequent passage of Proposition 49, After School Education and Safety Programs (ASESP) are funded throughout the State. All staff and volunteers in ASESP programs are required to be fingerprinted through the DOJ and to also have their names cleared through the Index. According to the City of San Diego, this is done through the DSS, Community Care Licensing, Live Scan, and/or Trustline. As the City of San Diego no longer has a need to access the Index directly, it does not object to Penal Code section 11170.6 being deleted from CANRA.

Recommendation: Delete Penal Code section 11170.6 in its entirety.

~~11170.6. (a) Notwithstanding paragraph (3) of subdivision (b) of Section 11170, the Department of Justice shall make available to the City of San Diego for purposes of evaluating employees for the "6 to 6" program information regarding a known or suspected child abuser maintained in the child abuse index pursuant to subdivision (a) of Section 11170 concerning any person who has submitted an application for employment in the "6 to 6" program.~~

~~. . . .~~

~~(2) All moneys received by the department pursuant to this subdivision shall be deposited in the Department of Justice Child Abuse Fund. Moneys in the fund shall be available, upon appropriation by the Legislature, for expenditures by the department to offset costs incurred for processing child abuse central index requests.~~

PROPOSED AMENDMENT 17

Issue: Whether to amend Penal Code section 11172, subdivision (a), so as to clarify that mandated reporters have absolute immunity for *all* reports they make, including those in which they gained knowledge or a reasonable suspicion of child abuse or neglect while acting outside of their professional capacity or outside the scope of their employment.

Discussion: There is a significant qualifier on the definition of a mandated reporter: the duty to report arises only if the knowledge or suspicion of abuse arises when a person in one of the identified classes is acting in his or her professional capacity or within the scope of his or her employment. (See Pen. Code, § 11166, subd. (a).) Some members of the Task Force expressed an interest in removing this qualifier. At the February 24, 2003, Task Force meeting, it was agreed that rather than removing this qualifier, Penal Code section 11172, subdivision (a), should be amended to clarify that mandated reporters have absolute immunity for *all* reports they make, including those in which they gained knowledge or a reasonable suspicion of child abuse or

neglect while acting outside of their professional capacity or outside the scope of their employment.

Recommendation: Amend Penal Code section 11172, subdivision (a), as follows:

11172. (a) No mandated reporter shall be civilly or criminally liable for any report required or authorized by this article*, and this immunity shall apply even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of his or her employment*. Any other person . . . .

VI.

ORGANIZATIONAL PLACEMENT OF THE CHILD ABUSE CENTRAL INDEX

A. Position of DOJ Regarding the Dual Mission of CACI

1. Background

Upon the inception of CACI in 1965, the collection of information from child abuse reports was designed to be housed in a confidential DOJ database, with access limited to official investigations of open child abuse cases. The information collected from the reports included suspect and victim descriptors; description of the alleged abuse (i.e., physical, sexual, etc.); determination of whether the report of abuse was substantiated, unsubstantiated, investigation initiated, etc.; date of the alleged abuse; location of the alleged abuse; information regarding interested parties; case number; and name and location of the submitting agency. Because it was strictly an investigative database, access through a manual inquiry system was restricted – based on need to know and right to know – and explicitly specified in the Penal Code.

However, in response to a reported child abuse tragedy, the Legislature expanded access to the Index in 1986 for non-investigative functions, i.e., for purposes of doing background checks for adoptive parents, foster families, emergency placement*s*, and people who work in childcare facilities. Examination of the reports for such purposes was deemed essential to assessing the risk of injury to a child from being placed with or under the supervision of a prospective caretaker. The information collected from reports required to serve non-investigative functions is suspect descriptors, case number, date of the alleged abuse, and name and location of the submitting agency. The Penal Code provides guidelines on how the information may be used for non-investigative functions. CACI responds to such inquiries by confirming whether an applicant is identified as a suspect in any child abuse investigative report indexed in CACI and by referring the inquiring agency to the investigative agency which submitted, and retains, the original report. An inquiring agency is prohibited from making any determinations regarding an applicant based on the identification by CACI unless it examines the original investigative report and makes an independent assessment of risk to children.

2. Discussion

The expansion of access to CACI in 1986 created dual missions for DOJ: CACI serves as an investigative database for investigative functions; it is also used for non-investigative functions. Information presented to the Task Force indicates that further study could productively be given to the questions of what State agency should manage CACI and whether CACI should continue in existence in its present form, trying to simultaneously meet the two missions.[28]

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[28]Further study would be especially appropriate if the State adopts the "differential response" philosophy recommended by the Child Welfare Services Stakeholders Group.

Currently, DSS manages the Child Welfare Services Case Management System (CWS/CMS), which is a centralized electronic database of all case files for children receiving child welfare services in this State. The database includes files for all children who are suspected or proven victims of child abuse or neglect. Generally, persons who may have committed the child abuse or who may have neglected the child are not specifically identified as "suspects" in the case files entered into CWS/CMS.

The central child abuse indexing function is administered by non-law enforcement agencies in all states except for California. Moreover, 85 percent of the reports indexed in CACI are originated by child welfare agencies. In addition, most child care licensing requiring CACI-assisted background checks is administered by DSS. Thus, with the approval of the federal government which subsidizes CWS/CMS, DSS could perform the central child abuse indexing function from its own database of non-law enforcement generated child abuse investigative reports if it retained specific identifying information for suspected child abusers in its files. This consolidation of DSS functions would result in efficient "one stop shopping." It should be noted, however, that DSS contends: (1) it would not be feasible to obtain approval from the federal government to upgrading CWS/CMS to perform this function; and (2) in the current fiscal climate, the proposition is prohibitively expensive.

If DSS did assume responsibility for CACI, DOJ would maintain an investigative database consisting solely of law enforcement generated reports of child abuse or neglect, which would be accessible exclusively by law enforcement agencies for investigative purposes.

3. Proposal

It is inefficient to continue to use one database for two separate and distinct missions. The business delivery media as well as the nature of the databases must be different. Therefore it is proposed that there be two databases operating to serve the two distinct missions. CACI, under the administration of DSS, would continue to be a resource for non-investigative functions as well as for child welfare agencies conducting child abuse investigations. A new database, Automated Child Abuse System (ACAS), would contain all of the information needed by law enforcement agencies conducting child abuse investigations and would be accessible directly via the California Law Enforcement Telecommunications System (CLETS).

B. Position of DSS Regarding the Dual Mission of CACI

A proposal has been made to consider transferring the operation of CACI from DOJ to DSS. The proposal is based on the assumption that the CACI is not a law enforcement activity, and should therefore not be controlled by DOJ. The proposal also contends that the large majority of checks of the CACI are made for programs operated or administered by DSS and that there would be efficiencies in transferring the program to the primary user. In addition, it has been pointed out that in all other states, the CACI process is operated by DSS or the equivalent organizations.

DSS strongly opposes the transfer of the CACI system for the following reasons:

- The CMS/CWS is not a suspect tracking system but a case management system for children and families receiving services.

- DSS believes that it has neither the infrastructure or program expertise which would support the successful operation of the CACI system.

- The primary system operated by DSS which includes information related to child abuse reports is the Child Welfare Case Management System (CWS/CMS). That system is designed for use by county social workers to manage child welfare programs operated by county social services agencies. It would be extremely difficult, if not impossible, to adapt this system for CACI use.

The CWS/CMS is designed as a case management system and it would be very difficult to modify it to become a universal incident reporting system. The likely result will be that it will be necessary for DSS to operate CACI as a separate system, without adequate technology resources to maintain both systems.

The primary use for the CWS/CMS is to make information available by the name of the child, or in the case of child abuse, by the name of the victim. There is no current mechanism to search for information by the name of the child abuse perpetrator, which would be essential to the CACI system. It is highly unlikely that the current CACI automated system could be compatible for use through the CWS/CMS even if such redesign could be accomplished.

The CWS/CMS is designed to include information related to in-home abuse and neglect. They system is not structured to accommodate information related to abuse that occurs in out of home care, which would be essential for use by law enforcement and the Licensing Division. It would require major redesign work to add cases where there is no assigned agency or social worker, as in noncaretaker abuse.

The operation of the CWS/CMS is supported by Federal funds, and is subject to tight controls over the functionality of the system. California is not currently in compliance with the federal requirement for functionality. Over the past two years, we have been negotiating with the federal government regarding their concerns with the funding, operation and completion of required functionality of the system. Attempting to incorporate the CACI functions into CWS/CMS would be extremely costly, and would increase the current risk of loss of millions of dollars in on-going federal funding, as well as the risk of having to repay federal enhanced development funding already expended on CWS/CMS. We cannot afford to be considering any major system modifications that are not directly related to unmet CWS/CMS functionality requirements and the child welfare services program improvement needs that threaten federal funding.

Based upon our discussion with DOJ staff, the system infrastructure for the CACI would likely need to be substantially upgraded to be compatible with the systems operated by DSS. Such an upgrade would likely be time-consuming and costly.

The CACI system includes reports from both Child Protective Services agencies and law enforcement. Transfer of the system would in effect mean that law enforcement agencies would be required to make child abuse reports to DSS. DSS has neither program expertise nor standing in the law enforcement community to make such a reporting relationship successful. For purposes of the CACI, DSS would in effect be in a supervisory/regulatory role over every law enforcement agency in the state.

DSS would need to be responsible for operating CACI, training, responding to policy questions, data reporting, and other administrative functions which would require ongoing relationships with law enforcement agencies.

DSS already has great difficulties in obtaining information from law enforcement agencies that is needed to make decisions on background checks and licensing complaints.

The option to maintain separate systems, one operated for social services agencies at DSS, and one operated for law enforcement at DOJ, would require duplicate systems and likely significantly increase administrative costs.

Even if resources were no a consideration, it is not good public policy to have the CACI administered in DSS. This CACI is used to alert licensing and other agencies of potential child abusers without regard to whether or not there is a child welfare case involved, and therefore should not be housed in DSS. In addition, placement within DOJ offers more objectivity in process oversight than that which would be offered through either DSS or a consortium representing local law enforcement.

There does not appear to be any significant benefit from the transfer of the CACI function to DSS.

As noted, rather than efficiencies, it is likely that transferring the CACI function will substantially increase costs and result in major systems implementation difficulties.

It is also unclear as to the degree that the California system for human services background checks is comparable to other states. Any analysis of the placement of the CACI function would require a thorough review of the systems used in different states before any conclusions could be reached.

VII.

MINORITY REPORT[29]

The Task Force worked diligently under the able leadership of Alberto González to come to grips with a broad range of issues under California's Child Abuse Reporting Law. The Task Force's Report contains many recommendations that, if enacted, will improve the reporting law. There is one issue, however, on which I part company with the Task Force Report. I refer to the question of whether persons listed on the Child Abuse Central Index (CACI) should have due process rights that are currently unavailable under California law.

Today, a person listed on CACI has no effective means to challenge the listing. Some counties provide a minimal form of post-listing review. Other counties provide no meaningful review. Being listed as a suspected child abuser on CACI is enormously stigmatizing. Moreover, a CACI listing can have serious adverse social and economic consequences for individuals. I believe California has a moral obligation to citizens who are listed on CACI to provide them with a robust mechanism to challenge CACI listings.

The Ninth Circuit Court of Appeals ruled in *Miller v. California*[30] that the Due Process Clause of the U.S. Constitution is not implicated by a CACI listing. I do not question the Ninth Circuit's interpretation of the U.S. Constitution. The question remains, is the answer the same under the California Constitution? Does the California Constitution require due process for persons listed on CACI? Litigation to answer that question is underway in State court, and we await a definitive ruling. Regardless of the outcome of the State court litigation, I believe the arguments in favor of due process outweigh arguments on the other side.

The overriding reason to provide due process for persons listed on CACI is fundamental fairness. It is wrong for the government to list someone as a child abuser but refuse to give the person an opportunity to challenge the accuracy of the listing. Moreover, given the present structure of CACI, it is certain that innocent people are listed. This is so because two categories of reports are listed on CACI, "substantiated" and "inconclusive." A report is substantiated when an investigator concludes on the basis of "some credible evidence" that abuse occurred. I am confident that most–although not all–substantiated reports are correct. A report is inconclusive when an investigator cannot determine one way or the other whether abuse occurred. There is no question that some–perhaps many–inconclusive reports do not represent abuse or neglect. Although I understand the reason to list inconclusive reports on CACI, I believe it is morally indefensible to deny due process to persons in circumstances where the government knows that some portion of them should not be listed. Even if California increased the level of proof

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[29]Separate Report by Task Force Member Professor John E.B. Myers, Chair of the Definitions Subcommittee. The opinions expressed herein are solely the opinion of Professor Myers.

[30] 355 F.3d 1172 (9th Cir. 2004).

required to list someone on CACI (as recommend in Proposal 2, *infra*), due process should be provided for the simple reason that investigators make mistakes, and due process is the acknowledged tool in our legal system to correct such mistakes.

There are several arguments against providing due process protections to persons listed on CACI. First, opponents of due process argue that if investigators learn that people listed on CACI have due process rights, investigators will hesitate to make CACI filings, and children may be harmed as a result. If I believed due process would jeopardize children, I would think long and hard about advocating due process. I do not believe, however, that affording citizens due process will have this effect. Indeed, I believe the net result of due process will be enhanced child protection. If investigators realize their decisions can be challenged, they are likely to perform careful investigations, with the result that CACI will contain more accurate data and less "junk." CACI will become a better tool to assist investigators.

A second argument against incorporating due process protections into CACI is that providing due process will unleash a flood of hearings before administrative law judges, bogging down the system with expensive and time-consuming proceedings. There is no question that people will request hearings, and I cannot deny that whatever the number of hearings turns out to be, it will certainly be greater than the current number which, because due process is denied, is zero. Nevertheless, I reject the "flood of hearings" argument. This argument is an example of the "parade of horribles" tactic that is often used to resist change. Opponents of change list a parade of horrible things that *might* occur if we change the status quo. Although it is true that some people listed on CACI will request hearings, that is the price we pay for treating people fairly and with dignity. Moreover, there is no evidence that the number of hearings will reach flood stage.

A third argument is that due process is unnecessary in light of the government's purpose for maintaining CACI. The government operates CACI not to harm adults but to protect children. Because the government's purpose is beneficent, due process is unnecessary. The best reply to this argument is from Justice Louis Brandeis, who observed that "experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding."[31] CACI serves important functions, but that does not undermine the need for fair procedures.

A fourth argument against due process is that being listed on CACI does no palpable harm to the individual. CACI is not open for inspection by the general public or the media. Thus, while a listing on CACI may be stigmatizing, the stigma is hidden in a government computer where no one can see it. But is this really so? Is the stigma of being listed as a suspected child abuser really hidden from scrutiny? Does a listing really do no harm? Not exactly. As the Task Force report states, access to CACI has been "expanded to allow access for non-investigative functions, i.e., background checks–screening those applying for licensure by DSS as foster parents, day care operators, etc., and those seeking adoption or placement of

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[31] *Olmstead v. United States*, 277 U.S. 438, 572-573 (1928, Brandeis, dissenting).

children. The right of access was subsequently further expanded to include county agencies that have contracted with the State for the performance of licensing duties; county child death review teams; investigative agencies, probation officers, and court investigators involved in the placement of children and adoption agencies." Thus, a broad and expanding range of agencies has access to CACI. Anyone listed on CACI must inevitably say to her or himself, "If I decide to become a foster parent, to adopt a child, or to work with children, my CACI listing will surface, people will look at me as a child abuser, I'll be investigated as though I'm a child abuser, and I may be denied the opportunity I seek to interact with children. Now, if this dilemma confronted only people are *are in fact* child abusers, I would say "That's your tough luck. Since you are a child abuser, I don't want you to adopt, foster, or care for children. CACI worked the way it is supposed to work." The problem is, for reasons explained above, CACI contains the names of many people who are *not* child abusers. Under current law, these people have no effective way to challenge their listing on CACI. Innocent people listed on CACI have two options. First, despite their innocence, they can forego their desire to adopt, foster, or care for children and spare themselves the indignity of an unjust investigation. Second, they can apply for the license they desire, suffer the humiliation of an unjust investigation, and win or lose. If they lose, they *finally* have a right to a due process hearing. This is simply not a satisfactory state of affairs. The remedy is to give people listed on CACI due process rights at the outset so that those who shouldn't be on CACI aren't on CACI.

The fifth argument, and the real driving force behind opposition to due process for persons listed on CACI, is money. Opponents of due process fear the cost of administrative hearings. I understand the concern. Opponents who are employed by government agencies struggle to serve the public with limited resources. I applaud them for their efforts. Yet, the reply to the "its too expensive" argument is that due process isn't free. A system of due process protections will cost tax dollars. Yet, I believe money spent ensuring that Californians are treated fairly by their government is money well spent.

Thus, I believe the Child Abuse Reporting Law should be amended to afford due process protections to individuals listed on CACI. This report ends with two proposals in the form of legislative bills. Proposal number 1 recommends the creation of due process rights for persons listed on CACI.

Proposal number 2 recommends the same due process protections contained in Proposal number 1. Proposal number 2 differs from Proposal number 1 in that Proposal number 2 recommends changes to the definitions contained in Section 11165.12 of the reporting law. Presently, Section 11165.12 defines "substantiated," "inconclusive," and "unfounded" reports. Proposal number 2 recommends that the standard of proof to substantiate a report be raised from "some credible evidence" to a preponderance of the evidence. Additionally, Proposal number 2 recommends that the Legislature add a new category called "high index of suspicion." Under Proposal number 2, only reports that are substantiated or high index of suspicion would find their way onto CACI. Inconclusive reports would no longer be listed on CACI. Both of the proposals are based in part of S.B. 1312 by Senator Peace in 2002.

Proposal Number 1

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares the following:

(a) This act shall be known and may be cited as the Child Abuse Central Index Reform Act.

(b) The Legislature reiterates the importance of the role that state and local government officials serve in protecting children, which has been the primary goal of the Child Abuse Central Index (CACI) since it was created in 1965.

(c) The Legislature intends to strengthen the Due Process rights of persons investigated for child abuse and neglect and listed on CACI.

(d) The Legislature finds that the changes in this act will enhance the State's ability to protect children by improving the accuracy of information on CACI.

(e) The CACI contains the names of more than 800,000 persons investigated for possible abuse or neglect, and the names of more than one million children. Most of the adults and children have not received written notification of the fact that they are listed on CACI, in major part because written notification was not required prior to January 1, 1998.

SECTION. 2. Section 11165.12 of the Penal Code is amended to read:

11165.12. Unfounded report; substantiated report, inconclusive report

As used in this article, the following definitions shall control:

(a) "Unfounded report" means a report which is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect, as defined in Section 11165.6.

(b) "Substantiated report" means a report which is determined by the investigator who conducted the investigation, based upon some credible evidence, to constitute child abuse or neglect, as defined in Section 11165.6.

(c) "Inconclusive report" means a report which is determined by the investigator who conducted the investigation not to be unfounded, but in which the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect, as defined in Section 11165.6, has occurred.

SECTION. 3. Section 11169 of the Penal Code is amended to read:

Section 11169. Child abuse and neglect reports; transmittal to Department of Justice; notice to persons listed in reports; Due Process protections

(a) An agency specified in Section 11165.9 shall forward to the Department of Justice a report in writing of every case it investigates of child abuse or neglect which is determined following investigation to be "Substantiated" or "Inconclusive," other than cases coming within subdivision (b) of Section 11165.2. [subdivision (b) of Section 11165.2 refers to general neglect]. If a report has previously been filed which subsequently proves to be unfounded, the Department of Justice shall be notified in writing of that fact and shall not retain the report. The reports required by this section shall be in a form approved by the Department of Justice and may be sent by fax or electronic transmission.

(b) At the time an agency specified in Section 11165.9 forwards a report in writing to the Department of Justice pursuant to subdivision (a), the agency shall also notify in writing the person listed in the report as the person responsible for the known or suspected child abuse or neglect that he or she has been reported to the Child Abuse Central Index. The notice required by this section shall be in a form approved by the Department of Justice and shall notify the person of his or her right to receive a copy of the report described in paragraph (a) containing the allegation and to the rights described in subdivision (c).

(c) An agency specified in Section 11165.9 shall send the notice prescribed in subdivision (b), by first-class registered mail no more than 15 days after completion of the investigation.

(1) Upon receipt of the notice prescribed in subdivision (b), the person notified of his or her listing on CACI may request a review by the agency specified in Section 11165.9 that forwarded the CACI report to the Department of Justice. A request for review under this subsection must be received by the agency within 30 days after receipt of notice by the person listed on CACI. Within 30 days of receipt of a request for review under this subsection, the agency shall provide an opportunity for the person listed in the CACI report to provide written and oral information in person in support of the position that the agency should amend or expunge the CACI report. To prepare for the review, the person listed in CACI shall be given access to the CACI report filed by the agency with the Department of Justice, and shall have access to the agency's investigative file, provided that appropriate steps shall be taken by the agency to protect the confidentiality of persons mentioned in such reports and files. The right of access specified in this subsection shall be provided at a time that allows the person requesting a review adequate time to study the report and file in preparation for the review. The review required by this subsection shall be conducted by three supervisory level employees of the agency. None of the reviewers shall have had any direct involvement in the investigation of the case. The review panel shall render its decision within 15 days of the opportunity required by this subdivision, and shall promptly notify the person listed in CACI of its decision.

(2) If the review panel described in subdivision (c)(1) finds that there was a material error

in the CACI report that makes the report unfounded, the agency shall correct its records and shall inform the Department of Justice. The Department of Justice shall correct its records and shall expunge the report from CACI. The Department of Justice shall inform the person listed in the report of the correction or expungement under this subdivision within 30 days. The Department of Justice and the agency that forwarded the CACI report to the Department of Justice shall notify any persons or agencies to which incorrect information was disseminated by the Department of Justice or the agency. The person listed in the report shall be informed that the notification has been given.

(3) If the review panel described in subdivision (c)(1) finds that there was no material error in the CACI report filed with the Department of Justice, the agency that forwarded the CACI report to the Department of Justice shall notify the person listed in the report that the person may request an administrative hearing from the Department of Justice in accordance with the California Administrative Procedure Act of the Government Code. The notice required by this subdivision shall be by first-class registered mail, and shall be given within 7 days of the review panel's decision. A person seeking an administrative hearing pursuant to this subdivision must file a request for such hearing with the Department of Justice within 30 days after receipt of notice. To prepare for the hearing, the person listed in CACI shall be given access to the CACI report filed by the agency with the Department of Justice, and shall have access to the agency's investigative file, provided that appropriate steps shall be taken by the agency to protect the confidentiality of persons mentioned in such reports and files. The right of access required in this subsection shall be provided at a time that allows the person requesting a hearing adequate time to study the report and file in preparation for the hearing. The agency that forwarded the CACI report to the Department of Justice shall be the respondent in the hearing and shall have the burden of proof by a preponderance of the evidence. The Department of Justice shall not be a party to the hearing. During the hearing, the fact that there is a superior court finding of abuse or neglect against the person listed in the report in regard to an allegation contained in the report shall create an irrebuttable presumption that the allegation is substantiated.

(4) If a hearing pursuant to this section finds material error in the information in the CACI report, the agency that reported the information shall correct its records accordingly, and inform the Department of Justice. The Department of Justice shall correct its records. If the hearing determines that the report is unfounded, the Department of Justice shall expunge the report from CACI. The Department of Justice and the agency shall notify any persons or agencies to which incorrect information was given. The person listed in the report shall be informed that the notification has been given.

(5) Judicial review of a hearing decision under this section shall be governed by Section 11523 of the Government Code. The person listed in the report shall be informed of the decision in accordance with Section 11518 of the Government Code.

(6) The requirements of this section shall apply with respect to reports forwarded to the Department of Justice on and after the date on which this section becomes operative.

(d) Agencies specified in Section 11165.9 shall retain child abuse or neglect investigative

reports that result in a report filed with the Department of Justice pursuant to subdivision (a) for the same period of time that the information is required to be maintained on the Child Abuse Central Index pursuant to this section. Nothing in this section precludes an agency from retaining the reports for a longer period of time if required by law.

SECTION 4. Section 11169.5 is added to the Penal Code, to read:

Section 11169.5. Due process procedures for reports filed prior to the effective date of this Act.

(a) The Department of Justice shall, by January 1, 2008, review all listings on the Child Abuse Central Index that were entered prior to the effective date of this section, and shall compare its CACI listings with the child protective agency or law enforcement agency that initiated the listing to determine whether the underlying investigative files still exist. For any listing on CACI for which the underlying investigative files are deemed lost or destroyed, the listing shall be expunged from CACI.

(b) If the files underlying the CACI listing are found to exist, the Department of Justice and the investigating agency shall jointly review each file to determine whether there is probable cause to determine that the person listed on CACI engaged in the alleged abuse or neglect. If probable cause is not found, the listing on CACI shall be expunged.

(c) For listings on CACI that the Department of Justice and the investigating agency deem that there is probable cause to believe that the person listed on CACI engaged in the alleged abuse or neglect, written notification of the CACI listing shall be given by first-class registered mail to the person's last known address. The notice shall inform the person that he or she has the rights contained in 11169(c).

SECTION 5. Section 11170 of the Penal Code is amended to read:

Section 11170. Child Abuse Central Index

(a)(1) The Department of Justice shall maintain an index of all reports of child abuse and neglect submitted pursuant to section 11169. The index shall be known as the Child Abuse Central Index. The index shall be continually updated by the Department of Justice and shall not contain any reports that are determined to be unfounded. The Department of Justice may adopt rules governing record keeping and reporting pursuant to this article.

(2) To protect the dignity of persons named in reports as suspected perpetrators of child abuse or neglect, the Child Abuse Central Index shall not describe such persons as "perpetrator" or "alleged perpetrator." Instead, such persons shall be described as "Person listed in a report filed with the Child Abuse Central Index" or "Person listed in the report," or "Person."

(3) The Department of Justice shall act only as a repository of reports of suspected child abuse and neglect to be maintained in the Child Abuse Central Index pursuant to paragraph

(a)(1). The submitting agencies are responsible for the accuracy, completeness, and retention of the reports described in this section. The Department of Justice shall be responsible for ensuring that the Child Abuse Central Index accurately reflects the reports it receives.

(4) Within the Child Abuse Central Index, the Department of Justice shall maintain two categories of reports of child abuse or neglect: "Pending" and "Listed on the Index." A report shall be categorized as "Pending" until the period of time has expired within which the person listed in the report may request a review or hearing pursuant to Section 11169, or, if a review or hearing is requested pursuant to Section 11169, until the matter is finally resolved. If no review or hearing is requested, or if upon completion of the review and hearing processes, the report is found to be "substantiated" or "inconclusive," the report shall be categorized as "Listed on the Index."

Proposal Number 2

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares the following:

(a) This act shall be known and may be cited as the Child Abuse Central Index Reform Act.

(b) The Legislature reiterates the importance of the role that state and local government officials serve in protecting children, which has been the primary goal of the Child Abuse Central Index (CACI) since it was created in 1965.

(c) The Legislature intends to strengthen the Due Process rights of persons investigated for child abuse and neglect.

(d) The Legislature finds that the changes in this act will enhance the State's ability to protect children by improving the accuracy of information on CACI.

(e) The CACI contains the names of more than 800,000 persons investigated for possible abuse or neglect, and the names of more than one million children. Most of the adults and children have not received written notification of the fact that they are listed on CACI, in major part because written notification was not required prior to January 1, 1998.

SECTION. 2. Section 11165.12 of the Penal Code is amended to read:

11165.12. As used in this article, the following definitions shall control:

(a) "Substantiated report" means a finding following an investigation by an agency specified in Section 11165.9 that abuse or neglect is more likely than not to have occurred.

(b) “High index of suspicion report” means a finding by an agency specified in Section 11165.9 that abuse or neglect is strongly suspected but cannot be substantiated following investigation.

(c) “Inconclusive report” means a finding by an agency specified in Section 11165.9 that abuse or neglect is not unfounded, but in which the findings do not rise to the level of a high index of suspicion, and are inconclusive as to whether child abuse or neglect occurred.

(d) “Unfounded report” means a finding following an investigation by an agency specified in Section 11165.9 that abuse or neglect did not occur.

SECTION. 3. Section 11169 of the Penal Code is amended to read:

Section 11169. Child abuse and neglect reports; transmittal to Department of Justice; notice to persons listed in reports; Due Process protections

(a) An agency specified in Section 11165.9 shall forward to the Department of Justice a report in writing of every case it investigates of child abuse or neglect which is determined following investigation to be “Substantiated” or “High index of suspicion,” other than cases coming within subdivision (b) of Section 11165.2. [subdivision (b) of Section 11165.2 refers to general neglect]. If a report has previously been filed which subsequently proves to be inconclusive or unfounded, the Department of Justice shall be notified in writing of that fact and shall not retain the report. The reports required by this section shall be in a form approved by the Department of Justice and may be sent by fax or electronic transmission.

(b) At the time an agency specified in Section 11165.9 forwards a report in writing to the Department of Justice pursuant to subdivision (a), the agency shall also notify in writing the person listed in the report as the person responsible for the known or suspected child abuse or neglect that he or she has been reported to the Child Abuse Central Index. The notice required by this section shall be in a form approved by the Department of Justice and shall notify the person of his or her right to receive a copy of the report described in paragraph (a) containing the allegation and to the rights described in subdivision (c).

(c) An agency specified in Section 11165.9 shall send the notice prescribed in subdivision (b), by first-class registered mail no more than 15 days after completion of the investigation.

(1) Upon receipt of the notice prescribed in subdivision (b), the person notified of his or her listing on CACI may request a review by the agency specified in Section 11165.9 that forwarded the CACI report to the Department of Justice. A request for review under this subsection must be received by the agency within 30 days after receipt of notice by the person listed on CACI. Within 30 days of receipt of a request for review under this subsection, the agency shall provide an opportunity for the person listed in the CACI report to provide written and oral information in person in support of the position that the agency should amend or expunge the CACI report. To prepare for the review, the person listed in CACI shall be given

access to the CACI report filed by the agency with the Department of Justice, and shall have access to the agency's investigative file, provided that appropriate steps shall be taken by the agency to protect the confidentiality of persons mentioned in such reports and files. The right of access specified in this subsection shall be provided at a time that allows the person requesting a review adequate time to study the report and file in preparation for the review. The review required by this subsection shall be conducted by three supervisory level employees of the agency. None of the reviewers shall have had any direct involvement in the investigation of the case. The review panel shall render its decision within 15 days of the opportunity required by this subdivision, and shall promptly notify the person listed in CACI of its decision.

(2) If the review panel described in subdivision (c)(1) finds that there was a material error in the CACI report that makes the report inconclusive or unfounded, the agency shall correct its records and shall inform the Department of Justice. The Department of Justice shall correct its records and shall expunge the report from CACI. The Department of Justice shall inform the person listed in the report of the correction or expungement under this subdivision within 30 days. The Department of Justice and the agency that forwarded the CACI report to the Department of Justice shall notify any persons or agencies to which incorrect information was disseminated by the Department of Justice or the agency. The person listed in the report shall be informed that the notification has been given.

(3) If the review panel described in subdivision (c)(1) finds that there was no material error in the CACI report filed with the Department of Justice, the agency that forwarded the CACI report to the Department of Justice shall notify the person listed in the report that the person may request an administrative hearing from the Department of Justice in accordance with the California Administrative Procedure Act of the Government Code. The notice required by this subdivision shall be by first-class registered mail, and shall be given within 7 days of the review panel's decision. A person seeking an administrative hearing pursuant to this subdivision must file a request for such hearing with the Department of Justice within 30 days after receipt of notice. To prepare for the hearing, the person listed in CACI shall be given access to the CACI report filed by the agency with the Department of Justice, and shall have access to the agency's investigative file, provided that appropriate steps shall be taken by the agency to protect the confidentiality of persons mentioned in such reports and files. The right of access required in this subsection shall be provided at a time that allows the person requesting a hearing adequate time to study the report and file in preparation for the hearing. The agency that forwarded the CACI report to the Department of Justice shall be the respondent in the hearing and shall have the burden of proof by a preponderance of the evidence. The Department of Justice shall not be a party to the hearing. During the hearing, the fact that there is a superior court finding of abuse or neglect against the person listed in the report in regard to an allegation contained in the report shall create an irrebuttable presumption that the allegation is substantiated.

(4) If a hearing pursuant to this section finds material error in the information in the CACI report, the agency that reported the information shall correct its records accordingly, and inform the Department of Justice. The Department of Justice shall correct its records. If the hearing determines that the report is inconclusive or unfounded, the Department of Justice shall expunge the report from CACI. The Department of Justice and the agency shall notify any

persons or agencies to which incorrect information was given. The person listed in the report shall be informed that the notification has been given.

(5) Judicial review of a hearing decision under this section shall be governed by Section 11523 of the Government Code. The person listed in the report shall be informed of the decision in accordance with Section 11518 of the Government Code.

(6) The requirements of this section shall apply with respect to reports forwarded to the Department of Justice on and after the date on which this section becomes operative.

(d) Agencies specified in Section 11165.9 shall retain child abuse or neglect investigative reports that result in a report filed with the Department of Justice pursuant to subdivision (a) for the same period of time that the information is required to be maintained on the Child Abuse Central Index pursuant to this section. Nothing in this section precludes an agency from retaining the reports for a longer period of time if required by law.

SECTION 4. Section 11169.5 is added to the Penal Code, to read:

Section 11169.5. Due process procedures for reports filed prior to the effective date of this Act.

(a) The Department of Justice shall, by January 1, 2008, review all listings on the Child Abuse Central Index that were entered prior to the effective date of this section, and shall compare its CACI listings with the child protective agency or law enforcement agency that initiated the listing to determine whether the underlying investigative files still exist. For any listing on CACI for which the underlying investigative files are deemed lost or destroyed, the listing shall be expunged from CACI.

(b) If the files underlying the CACI listing are found to exist, the Department of Justice and the investigating agency shall jointly review each file to determine whether there is probable cause to determine that the person listed on CACI engaged in the alleged abuse or neglect. If probable cause is not found, the listing on CACI shall be expunged.

(c) For listings on CACI that the Department of Justice and the investigating agency deem that there is probable cause to believe that the person listed on CACI engaged in the alleged abuse or neglect, written notification of the CACI listing shall be given by first-class registered mail to the person's last known address. The notice shall inform the person that he or she has the rights contained in 11169(c).

SECTION 5. Section 11170 of the Penal Code is amended to read:

Section 11170. Child Abuse Central Index

(a)(1) The Department of Justice shall maintain an index of all reports of child abuse and neglect submitted pursuant to section 11169. The index shall be known as the Child Abuse

Central Index. The index shall be continually updated by the Department of Justice and shall not contain any reports that are determined to be unfounded. After the effective date of this act, the index shall no longer contain new reports categorized as inconclusive. The Department of Justice may adopt rules governing record keeping and reporting pursuant to this article.

(2) To protect the dignity of persons named in reports as suspected perpetrators of child abuse or neglect, the Child Abuse Central Index shall not describe such persons as "perpetrator" or "alleged perpetrator." Instead, such persons shall be described as "Person listed in a report filed with the Child Abuse Central Index" or "Person listed in the report," or "Person."

(3) The Department of Justice shall act only as a repository of reports of suspected child abuse and neglect to be maintained in the Child Abuse Central Index pursuant to paragraph (a)(1). The submitting agencies are responsible for the accuracy, completeness, and retention of the reports described in this section. The Department of Justice shall be responsible for ensuring that the Child Abuse Central Index accurately reflects the reports it receives.

(4) Within the Child Abuse Central Index, the Department of Justice shall maintain two categories of reports of child abuse or neglect: "Pending" and "Listed on the Index." A report shall be categorized as "Pending" until the period of time has expired within which the person listed in the report may request a review or hearing pursuant to Section 11169, or, if a review or hearing is requested pursuant to Section 11169, until the matter is finally resolved. If no review or hearing is requested, or if upon completion of the review and hearing processes, the report is found to be "substantiated" or "high index of suspicion," the report shall be categorized as "Listed on the Index."

VIII.

REPLIES TO THE MINORITY REPORT

The replies by members of the Task Force who wished to address the Minority Report are found following this page.

February 27, 2004

Mr. Alberto Gonzalez,
Chairman of the CANRA Task Force
Office of the Attorney General
1300 I Street
Sacramento, CA 95814

Dear Chairman Gonzalez:

I am disturbed by John Myers' minority report. It does not represent the intent of the majority satisfactorily or accurately. It is inflammatory in its description of the coordinated actions of law enforcement investigators and the medical professionals who assist them.

John Myers writes, "Moreover, a CACI listing can have serious adverse social and economic consequences for individuals." In fact, CACI is a pointer system that leads to investigations conducted by other responsible agencies. In almost every instance, CACI reports are reviewed and incorporated into a new investigation before any adverse decision is considered. Any adverse impact to the suspected child abuser is the result of the new investigation and not the result of the CACI listing. If an adverse decision is made after a diligent investigation, there are mechanisms in place to obtain due process.

Myers asserts that he supports due process, but he disagrees with the due process decision of the Ninth Circuit Court of Appeals and disposes with a potential future ruling of a State court. Myers states, "Regardless of the outcome of the State court litigation, I believe the arguments in favor of due process outweigh the arguments on the other side." Due process is a right and a responsibility. If a competent court determines that a CACI listing does not implicate due process, is that decision valid or should we negate that process to accept the individual opinion of John Myers? As Myers negates the competency of the courts based on his personal opinion, Myers opines on the cumulative competency of the CANRA task force.

John Myers postulates that "it is morally indefensible to deny due process to persons in circumstances where the government knows some portion of them should not be listed." It appears that Myers is searching for a perfect system. Unfortunately, it does not exist in the real world. While I agree with the thought, I am pragmatic enough to know that there is no fail safe system for anything. Even in the most rigorous of adjudication processes, i.e., trial by a jury of peers coupled with endless appeals, the concept of perfection in outcomes is unattainable.

John Myers states, "If I believed due process would jeopardize children, I would think long and hard about advocating due process." I must ask why he would have to think. The essence of justice is often blind. Regardless of outcomes, we are often expected to do the right thing. If Myers' interpretation of due process is correct and so determined by a competent court, then it should be done regardless of the incidental jeopardy it may cause. Myers should have thought long and hard prior to writing the minority report. I believe that Myers' proposals will harm children every bit as adamantly as he believes they won't. When investigators are diverted from

their already burdensome case loads to attend hearings, it will result in less time devoted to each investigation. The result is harm to our children.

Myers comments, "If investigators realize their decisions can be challenged, they are likely to perform very careful investigations, with the result that CACI will contain more accurate data and less "junk." This erroneously assumes that investigators are not doing quality work. What factual information does Myers have for this statement? If he has personal knowledge of poor investigations, he must do what any responsible citizen must do. He must report the inferior work to the appropriate agency's supervision. I am overwhelmingly certain that law enforcement investigators take their work very seriously, especially in child abuse investigations. The consequences of a poor investigation to the investigator and the agency are enormous. Not only would they cringe at the thought of producing "junk investigations," they would subject themselves to community outrage and litigation.

John Myers opines, "There is no question that people will request hearings, and I cannot deny that whatever the number of hearings turns out to be, it will certainly be greater than the current number which, because due process is denied, is zero. Nevertheless, I reject the 'flood of hearings' argument." If the courts through due process determine that hearings are not necessary, then why would we provide hearings that would succeed in "bogging down the system with expensive and time consuming proceedings?" I guess, then, that by Myers' estimation I am a person marching with the "Parade of Horribles" that is supposedly used to resist change.

To the contrary, I embrace change that I believe will be productive. I embrace change that occurs for the benefit of the majority and the minority with fairness and objectivity.

I base my decisions on my life experience and my knowledge of the criminal justice system. It is not lost to me that we in the United States are the most litigious country in the world. It preserves our freedoms, and it demands our acceptance of responsibility. If we implement either of John Myers' recommendations, we will be establishing two levels of review or due process. We will be taking multiple bites from a poison fruit: the first, an internal administrative review and the second bite of the apple, a hearing in accordance with the California Administrative Procedure Act of the Government Code. People testified before the committee that they were wrongly placed on CACI even though they had been tried and convicted in a competent court of law for child abuse. What would lead us to think that people placed on CACI would not utilize both levels of review to their full advantage? It is human nature. If John Myers is wrong in his guess that people will not flood the system with frivolous challenges, then who suffers? The children suffer.

John Myers assigned the "agency" the burden of proof by a preponderance of the evidence. Currently, CACI listings consist of "substantiated," "inconclusive," and "unfounded" cases. The unfounded cases are not a problem because they do not result in a CACI listing. Proving a substantiated case with a preponderance of evidence is not a problem to me. However, proving that a case is inconclusive by a preponderance of evidence is a problem. What does that mean? Would the "agency" be required to demonstrate with fifty one percent of the evidence that the

investigator cannot determine one way or the other whether abuse occurred? The value of that exercise is lost on me.

Professor Myers stated that “the real driving force behind opposition to due process for persons listed on CACI is money.” Money, of course, is a serious concern, especially in today’s economic environment. I voted that State mandates be accompanied by appropriate funding. However, I thought I made it clear that it was not my “real driving force.” The real driving force is the protection of our children. With more than thirty three years of law enforcement experience in urban America, I have too often seen incidents in our society like the recent Florida abduction where a repeat offender “allegedly” abducts and murders a 12 year old girl. I have seen first hand the horrors committed by individuals who have no respect for the sanctity of our children or their due process rights to live without fear of injury or death. I have been to the crime scenes to lift their victims with my hands and to the hospitals and morgues to view the parade of horrible inhuman behavior that breaks bones, burns skin, and leaves bruises to the body and mind. I have watched the problem grow in families and give birth to new generations of abusers as a result of their work. No, Professor Myers, it is not just the money; it is something much more profound that drives the opposition.

Finally, I feel it is the obligation of the writers of the majority report to clearly and quite pointedly articulate the position of the task force with respect to the positions put forward by Professor Myers. It should be clear that all of the dissenting issues were fully discussed by both sub-committees and the full task force.

Additionally, I must emphasize that Professor Myers articulately made the arguments for his dissenting opinion during our discussions. They were not adequately compelling to resonate with a chord of agreement by the majority of task force members. The task force rejected his arguments after careful deliberation. Since we are unable to reconvene the task force so that I can convey my opposition to the minority report; this letter of rebuttal will have to serve as my voice to maintain the integrity of the dutiful work to which so many contributed.

Respectfully submitted,
/s/ Robert M. Luman,
CANRA Task Force Member

March, 9, 2004

Mr. Alberto González
Chairman of the CANRA Task Force
Office of the Attorney General
1300 I Street
Sacramento, California 95814

Dear Chairman González:

I write separately to address the due process discussion and recommendation from my personal perspective. It is important that CACI be preserved as a resource to be used in the investigations of child abuse. The first mission of the Department of Justice is child safety.

As noted in Section VI, it is DOJ's position that there should be two distinct databases: CACI, used for non-investigative child protection purposes; and a new database, accessible exclusively by law enforcement agencies or child protection agencies for investigative purposes. I agree with this position. I also firmly believe that the question of whether there should be hearings afforded to people named as suspects needs to be answered after this dual database issue is resolved, because it is only when the reports are used for non-law enforcement or non-investigative purposes that due process is implicated.[32] In other words, the opportunity for an adversarial administrative hearing process is triggered by the non-investigative use of the CACI information. If DOJ continues to maintain a database of reports of suspected abuse solely for law enforcement or investigative purposes, then all reports must be included in the database. I strongly urge the Legislature, the Governor's staff, DSS, and DOJ to continue this discussion about the bifurcation of the database.

Insofar as CACI is used for child placement and non-investigative purposes, I believe the Task Force is headed in the right direction. I concur with the Task Force recommendation for administrative review by someone with broader responsibility than the worker preparing the investigative report to determine whether the report should be indexed in CACI is an important advancement. An opportunity for anyone who is identified in the report as a "suspect" to discuss the matter with the "reviewer" before an indexing decision is made or either to appeal the indexing decision after the information has been sent to the DOJ may resolve some issues at the

[32] The issue of the constitutionality of the Child Abuse and Neglect Reporting Act (Act) and the lack of statutory due process on the front end has been squarely before federal courts and California courts. The courts have ruled that the Act is constitutional and that a CACI listing alone does not trigger due process rights. None of the litigation involving CACI has demonstrated that anyone suffered any prejudice to employment prospects, childcare licensing or child placement simply from being listed in CACI. The back end due process safeguards seem to be working as designed to prevent abuse of investigative reports.

lowest level. This review is especially important in investigations of child abuse allegations made in connection with custody disputes and corporal punishment. Most litigation challenging CACI involve anxieties arising from these contexts rather than concern about use of CACI information, which by itself cannot legally be used to make any determination about a "suspect."

I am advocating for one step further: an opportunity for an administrative hearing if resolution is not reached at the lowest level. I believe that the administrative review contemplated by the Task Force–as well as an adversarial administrative hearing process–is required as a matter of fairness, which should be implemented only with sufficient funding as a matter of public policy.

If, however, an administrative review and/or hearing concludes that the child abuse report should not be considered/retained for non-investigative purposes–employment prospects, childcare licensing or child placement–it must be retained for law enforcement investigatory purposes. How this will be accomplished needs further discussion.

Respectfully submitted,
/s/ Debbie Hesse
CANRA Task Force Member