

RESOLUTION 06-12-2014

DIGEST

Criminal Law: Inmates: Sexual Abuse in Detention Elimination Act

Adds Penal Code sections 2635.5 and 2644 through 2648, and amends sections 2635 through 2639, and 2643 to conform with the Prison Rape Elimination Act of 2003.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution adds Penal Code sections 2635.5 and 2644 through 2648, and amends sections 2635 through 2639, and 2643 to conform with the Prison Rape Elimination Act of 2003. This resolution should be approved in principle because it will bring existing California law in line with federal requirements under the Prison Rape Elimination Act (“PREA”), codified at 42 U.S.C. § 15601.

The purpose of the Sexual Abuse in Detention Elimination Act (SADEA) (Pen. Code, § 2635 et seq.) was to prepare California for PREA. PREA’s purpose was to “provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations and funding to protect individuals from prison rape.” The act created the National Prison Rape Elimination Commission charged with developing standards for the elimination of prison rape. SADEA required specific practices designed to prevent sexual violence, such as inmate classification and housing procedures, response and investigation protocols, protection of inmates who file complaints, sexual abuse reporting recording protocols, creation of the Office of the Sexual Abuse in Detention Elimination Ombudsperson, and requiring the Office of the Inspector General to investigate reports of mishandled sex abuse incidents.

PREA standards became applicable to federal facilities when it was enacted in 2003 and to state and local facilities on August 20, 2012. Governors must certify compliance or accept a 5% reduction in federal grant funding for each year the state’s agencies fail to comply. California should comply with federal PREA requirements for multiple reasons, including the reduction of prison rape, reduction in inmate violence, reduction in recidivism, and prevention of the loss of federal funding for state and local agencies because PREA calls for adherence to a zero-tolerance standard for the incidence of inmate sexual assault and rape. The Department of Justice developed standards for detection, prevention, reduction, and punishment of prison rape. Furthermore, PREA allows for collection and dissemination of information on the incidence of prison rape.

This resolution is similar to SB 716 (Lara).

TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code sections 2635.5, 2644, 2645, 2646, and 2647, and to repeal and add Penal Code sections 2635, 2636, 2637, 2638, 2639, and 2643 to read as follows:

1 ~~§ 2635.~~

2 ~~The Department of Corrections and Rehabilitation shall review informational handbooks~~
3 ~~regarding sexual abuse in detention published by outside organizations. Upon approving the~~
4 ~~content thereof, handbooks provided by one or more outside organizations shall be made~~
5 ~~available to inmates and wards.~~

6
7 § 2635.

8 The Department of Corrections and Rehabilitation, each local corrections agency; each
9 city, county, city and county, and regional juvenile justice agency; each city, county, city and
10 county, and regional police lockup; and each private confinement company shall create a safe
11 environment free from sexual abuse for inmates or arrestees, including those inmates or arrestees
12 subject to a United States Immigration and Customs Enforcement hold, by adopting policies and
13 procedures implementing the United States Department of Justice's National Standards to
14 Prevent, Detect, and Respond to Prison Rape.

15
16 § 2635.5.

17 For purposes of this article, the following definitions shall apply:

18 (a) "Board" shall mean the Board of State and Community Corrections.

19 (b) "Detainee" means a person confined in a facility under government authority,
20 including arrestees, pretrial and post conviction inmates, prisoners, minors in the juvenile justice
21 system, and federal detainees held in any city, county, city and county, regional, or private
22 facility.

23 (c) "Full implementation" means that every facility of an agency, department, or
24 company shall be compliant with all material requirements of the policies and procedures
25 produced pursuant to this article. Full compliance may be achieved with de minimus violations
26 or discrete and temporary violations during otherwise sustained periods of compliance.

27 (d) "Jail" means a confinement facility of a city, county, city and county, or regional law
28 enforcement agency that has, as its primary use, the detention of persons pending adjudication of
29 criminal charges, persons committed to confinement for a misdemeanor or pursuant to
30 subdivision (h) of Section 1170, persons adjudicated guilty who are awaiting transfer to a state
31 prison, or persons held under the authority of the federal government.

32 (e) "Juvenile justice agency" means a city, county, city and county, or regional
33 government entity that confines juveniles pursuant to the juvenile justice system, the criminal
34 justice system, or under the authority of the federal government.

35 (f) "Lockup" means a facility belonging to a state, county, or local law enforcement
36 agency for the temporary confinement of individuals who have recently been arrested, detained,
37 or are being transferred to or from a court, jail, prison, or other agency.

38 (g) "Private confinement company" means a for-profit or nonprofit company operating in
39 the state that detains individuals, or that manages a facility that detains individuals, on behalf of
40 a federal, city, county, city and county, or regional government.

41
42 ~~§ 2636.~~

43 ~~For the purposes of this section, all references to classification of wards shall take effect~~
44 ~~upon the adoption of a classification system for wards developed by the Department of~~
45 ~~Corrections and Rehabilitation in compliance with *Farrell v. Allen*, Alameda County Superior~~
46 ~~Court Case No. RG 03079344.~~

47 ~~The following practices shall be instituted to prevent sexual violence and promote inmate~~
48 ~~and ward safety in the Department of Corrections and Rehabilitation:~~

49 ~~(a) The Department of Corrections and Rehabilitation inmate classification and housing~~
50 ~~assignment procedures shall take into account risk factors that can lead to inmates and wards~~
51 ~~becoming the target of sexual victimization or of being sexually aggressive toward others.~~

52 ~~Relevant considerations include:~~

- 53 (1) Age of the inmate or ward.
54 (2) Whether the offender is a violent or nonviolent offender.
55 (3) Whether the inmate or ward has served a prior term of commitment.
56 (4) Whether the inmate or ward has a history of mental illness.
57 (b) The Department of Corrections and Rehabilitation shall ensure that staff members
58 intervene when an inmate or ward appears to be the target of sexual harassment or intimidation.

59
60 § 2636.

61 The Department of Corrections and Rehabilitation and each jail facility shall adopt and
62 implement policies and procedures consistent with the requirements of Sections 115.5 to 115.86,
63 inclusive, of Title 28 of the Code of Federal Regulations for all facilities that house adult
64 inmates, including pretrial inmates and federal detainees. Adoption of these policies or
65 procedures shall take place no later than July 1, 2014. Full implementation of the policies or
66 procedures shall be completed no later than July 1, 2015.

67
68 ~~§ 2637.~~

69 ~~The Department of Corrections and Rehabilitation shall ensure that its protocols for~~
70 ~~responding to sexual abuse include all of the following:~~

71 ~~(a) The safety of an inmate or ward who alleges that he or she has been the victim of~~
72 ~~sexual abuse shall be immediately and discreetly ensured. Staff shall provide the safest possible~~
73 ~~housing options to inmates and wards who have experienced repeated abuse. Housing options~~
74 ~~may include discreet institution transfers.~~

75 ~~(b) Inmates and wards who file complaints of sexual abuse shall not be punished, either~~
76 ~~directly or indirectly, for doing so. If a person is segregated for his or her own protection,~~
77 ~~segregation must be nondisciplinary.~~

78 ~~(c) Any person who knowingly or willfully submits inaccurate or untruthful information~~
79 ~~in regards to sexual abuse is punishable pursuant to department regulations.~~

80 ~~(d) Under no circumstances is it appropriate to suggest that an inmate should fight to~~
81 ~~avoid sexual violence or to suggest that the reported sexual abuse is not significant enough to be~~
82 ~~addressed by staff.~~

83 ~~(e) Staff shall not discriminate in their response to inmates and wards who are gay,~~
84 ~~bisexual, or transgender who experience sexual aggression, or report that they have experienced~~
85 ~~sexual abuse.~~

86 ~~(f) Retaliation against an inmate or ward for making an allegation of sexual abuse shall be~~
87 ~~strictly prohibited.~~

88
89 § 2637.

90 Each lockup shall adopt and implement policies or procedures consistent with the
91 requirements of Sections 115.5, 115.6, and 115.111 to 115.186, inclusive, of Title 28 of the Code
92 of Federal Regulations. Adoption of these policies or procedures shall take place no later than
93 July 1, 2014. Full implementation of the policies or procedures shall be completed no later than
94 July 1, 2015.

95
96 ~~§ 2638.~~

97 ~~Thoughtful, confidential standards of physical and mental health care shall be~~
98 ~~implemented to reduce the impact of sexual abuse on inmates and wards in the Department of~~
99 ~~Corrections and Rehabilitation that include all of the following:~~

100 ~~(a) Victims shall receive appropriate acute trauma care for rape victims, including, but~~
101 ~~not limited to, treatment of injuries, HIV/AIDS prophylactic measures, and, later, testing for~~
102 ~~sexually transmittable diseases.~~

103 ~~(b) Health practitioners who conduct or encounter an inmate or ward suffering from~~
104 ~~problems that might indicate sexual abuse, such as trauma, sexually transmissible diseases,~~

105 pregnancy, or chronic pain symptoms, shall ask whether the patient has experienced sexual
106 abuse.

107 ~~(e) Practitioners should strive to ask frank, straightforward questions about sexual
108 incidents without shaming inmates or displaying embarrassment about the subject matter.~~

109 ~~(d) Confidential mental health counseling intended to help the victim to cope with the
110 aftermath of abuse shall be offered to those who report sexual abuse. Victims shall be monitored
111 for suicidal impulses, posttraumatic stress disorder, depression, and other mental health
112 consequences.~~

113 ~~(e) Any adult inmate in mental health counseling for any reason shall be entitled to speak
114 confidentially about sexual abuse.~~

115
116 § 2638.

117 A state, county, and local juvenile justice agency shall adopt and implement policies or
118 procedures consistent with the requirements of Sections 115.5, 115.6, and 115.311 to 115.386,
119 inclusive, of Title 28 of the Code of Federal Regulations. Adoption of these policies or
120 procedures shall take place no later than July 1, 2014. Full implementation of the policies or
121 procedures shall be completed no later than July 1, 2015.

122
123 § 2639.

124 ~~The Department of Corrections and Rehabilitation shall ensure that the following
125 procedures are performed in the investigation and prosecution of sexual abuse incidents:~~

126 ~~(a) The provision of safe housing options, medical care, and the like shall not be
127 contingent upon the victim's willingness to press charges.~~

128 ~~(b) Investigations into allegations of sexual abuse shall include, when deemed appropriate
129 by the investigating agency, the use of forensic rape kits, questioning of suspects and witnesses,
130 and gathering of other relevant evidence.~~

131 ~~(c) Physical and testimonial evidence shall be carefully preserved for use in any future
132 proceedings.~~

133 ~~(d) Staff attitudes that inmates and wards cannot provide reliable information shall be
134 discouraged.~~

135 ~~(e) If an investigation confirms that any employee has sexually abused an inmate or ward,
136 that employee shall be terminated. Administrators shall report criminal sexual abuse by staff to
137 law enforcement authorities.~~

138 ~~(f) Consensual sodomy and oral copulation among inmates is prohibited by subdivision
139 (e) of Section 286 and subdivision (e) of Section 288a, respectively. Without repealing those
140 provisions, the increased scrutiny provided by this article shall apply only to nonconsensual
141 sexual contact among inmates and custodial sexual misconduct.~~

142
143 § 2639.

144 (a) Private confinement companies shall adopt and implement the relevant policies or
145 procedures from Section 2636, 2637, or 2638. Adoption of these policies or procedures shall take
146 place no later than July 1, 2014. Full implementation of the policies or procedures shall be
147 completed no later than July 1, 2015.

148 (b) A private confinement company with a facility that only houses detainees under
149 contract with the United States Department of Homeland Security is exempt from the
150 requirements of subdivision (a).

151
152 § 2643.

153 ~~The provisions of this act are severable. If any provision of this act or its application is
154 held invalid, that invalidity shall not affect other provisions or applications that can be given
155 effect without the invalid provision or application.~~

157 § 2643

158 (a) On or before July 1, 2015, the agency, department, or company shall certify in writing
159 to the board that it has adopted policies or procedures as mandated by Section 2636, 2637, 2638,
160 or 2639 and shall transmit its policies and procedures electronically to the board.

161 (b) The board shall, in a timely manner, make the policies and procedures of each agency,
162 department, and company available to the public on an Internet Web site.

163 (c) The board shall provide a means for an interested member of the public to raise
164 substantial and specific concerns about the material insufficiency of the published policies or
165 procedures of any agency, department, or company. Upon receipt of these concerns from a
166 member of the public, the board shall have 90 days to review the relevant policies or procedures.
167 Any concerns by the public shall be raised with the board before July 1, 2015.

168 (d) On its own or in response to concerns raised by a member of the public, the board
169 shall notify the agency, department, or company whose policies or procedures do not meet the
170 requirements of Section 2636, 2637, 2638, or 2639 that it intends to reject the certification. This
171 notice shall be in writing and shall include a specific recommendation for the manner in which
172 the agency, department, or company may modify its policies or procedures to correct the
173 deficiencies. An agency, department, or company receiving this notification shall have 180 days
174 from the receipt of the written notice to adequately modify the policies and procedures. If, after
175 the 180-day period, the board finds that the policies and procedures are still inadequate, the
176 board shall reject the certification.

177
178 § 2644.

179 (a) Audits of facilities governed by this article shall be conducted on a three-year cycle.
180 Beginning July 1, 2015, each agency, department, or company shall ensure that each facility
181 operated by the agency, department, or company is audited at least once every three years. Any
182 agency, department, or company with three or more facilities shall ensure that approximately
183 one-third of its facilities are audited each year of an audit cycle.

184 (b) An audit conducted in compliance with Sections 115.401 to 115.405, inclusive, of
185 Title 28 of the Code of Federal Regulations shall suffice for the purposes of this section. For
186 private confinement companies with facilities that only house detainees under contract with the
187 United States Department of Homeland Security, an audit conducted under Sections 115.401 to
188 115.405, inclusive, of Title 6 of the Code of Federal Regulations shall suffice for the purposes of
189 this section.

190 (c) The board shall publish audit procedures consistent with the requirements of Sections
191 115.401 to 115.405, inclusive, of Title 28 of the Code of Federal Regulations that will govern all
192 audits required by subdivision (a). The board shall separately publish audit procedures consistent
193 with Sections 115.401 to 115.405, inclusive, of Title 6 of the Code of Federal Regulations for
194 private confinement companies with facilities that only house detainees under contract with the
195 United States Department of Homeland Security.

196 (d) The board shall also certify auditors, including, but not limited to, auditors who work
197 directly with the board, and maintain a publicly available list of California-certified auditors. At
198 its discretion, the board may rely on an auditor's certification by the United States Department of
199 Justice as evidence that the auditor is qualified to perform audits under this section. For private
200 confinement companies with facilities that only house detainees under contract with the United
201 States Department of Homeland Security, the board may rely on an auditor's certification by the
202 United States Department of Homeland Security as evidence that the auditor is qualified to
203 perform audits under this section.

204 (e) The board shall produce a standard audit report format or identify an existing audit
205 report format prior to July 1, 2015. An auditor shall, within 60 days of an audit or the completion
206 of a corrective action plan, complete a written audit report for each facility audited using the
207 standard report format. The auditor will forward the report to the board, which shall make the
208 reports available to the public on an Internet Web site.

209 (f) Acting on its own or in response to substantial and specific concerns from an
210 individual, the board may recommend or require an agency, department, or company to undergo
211 an expedited audit for one or more of its facilities. The board may only require an expedited
212 audit when it has sufficient reason to believe that a pattern and practice of sexual abuse is
213 occurring within a facility. An agency, department, or company shall be provided with a
214 reasonable opportunity to respond to evidence before an expedited audit can be required. The
215 board shall identify a public means by which the board can receive an individual's report of
216 substantial and specific concerns about a facility.

217
218 § 2645.

219 (a) The agency, department, or company shall collect accurate, uniform data for every
220 allegation of sexual abuse using a standardized instrument and set of definitions.

221 (b) The agency, department, or company shall aggregate the incident-based sexual abuse
222 data at least annually.

223 (c) The agency, department, or company shall annually review data collected and
224 aggregated pursuant to subdivisions (a) and (b) in order to assess and improve the effectiveness
225 of its sexual abuse prevention, detection, and response policies, practices, and training.

226 (d) The agency, department, or company shall ensure that the data collected pursuant to
227 subdivision (a) are securely retained.

228 (e) The agency, department, or company shall make all aggregated sexual abuse data
229 readily available to the public at least annually through its Internet Web site or other publicly
230 accessible means.

231 (f) Before making aggregated sexual abuse data publicly available, the agency,
232 department, or company shall remove all personal identifiers.

233 (g) The agency, department, or company shall maintain sexual abuse data collected
234 pursuant to subdivision (a) for at least 10 years after the date of its initial collection, unless
235 federal, state, or local law requires otherwise.

236
237 § 2646.

238 (a) An agency or department with an existing contract or agreement with a facility
239 defined in subdivision (c) shall probatively modify its contract or agreement to incorporate the
240 policies or procedures it adopts pursuant to Section 2636, 2637, 2638, or 2639. This modification
241 shall be completed prior to the submission of the certification required by Section 2643. If an
242 agency or department is involved in good faith negotiations to modify a contract or agreement on
243 the date the certification is required to be submitted to the board, the agency or department may
244 still submit its certification along with a request for 60 additional days to complete the
245 modification. At the end of those 60 days, the agency or department shall submit a supplemental
246 certification documenting the successful modification of the contract or agreement or withdraw
247 its certification.

248 (b) An agency or department that seeks to enter into a new contract or agreement with a
249 facility defined in subdivision (c) after January 1, 2014, shall incorporate the policies and
250 procedures it adopts pursuant to Section 2636, 2637, 2638, or 2639 into that contract or
251 agreement.

252 (c) For purposes of this section, "facility" means a city, county, city and county, or
253 regional agency or department that confines individuals in a public or private facility not covered
254 by Section 2636, 2637, 2638, or 2639. These facilities shall include, but are not limited to,
255 mental health facilities and out-of-state private confinement companies.

256
257 § 2647.

258 (a) A city, county, city and county, or regional agency or department that fails to provide
259 the certification required by Section 2643, has its certification rejected by the board, fails to have
260 its facility or facilities audited in a timely manner as required by Section 2644, or has one or

261 more facilities fail an audit after being given an opportunity to correct any deficiencies will have
262 subsequent board-administered grant renewals or awards reduced by 25 percent in the first year
263 of noncompliance and by 50 percent in the second year of noncompliance. An agency or
264 department that enters into a third year of noncompliance will be ineligible for any board-
265 administered grant renewals or awards until compliance is achieved. An agency or department
266 may show compliance by providing a valid certification or by completing a successful audit of a
267 facility that is delinquent for or has failed an audit.

268 (b) A private confinement company that fails to provide the certification required by
269 Section 2643, has its certification rejected by the board, fails to have its facility or facilities
270 audited in a timely manner as required by Section 2644, or has one or more facilities fail an audit
271 after being given an opportunity to correct any deficiencies will be assessed a five-hundred-
272 dollar (\$500) penalty on the first day the certification or audit is due or a failed audit is reported
273 to the board. The private confinement company will be assessed an additional one-thousand-
274 dollar (\$1,000) penalty every seven days thereafter until it provides a valid certification or
275 completes successful audits of any facilities that are delinquent for or have failed an audit. This
276 penalty shall be assessed and collected by the board.

277
278 § 2648.

279 The provisions of this article are severable. If any provision of this article or its
280 application is held invalid, that invalidity shall not affect other provisions or applications that can
281 be given effect without the invalid provision or application.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Sexual violence is a rampant problem across all correctional settings in California, causing extreme psychological trauma and undue punishment beyond that of a person's incarceration. LGBT inmates are particularly vulnerable to sexual violence. Although the federal PREA standards apply to state and local facilities, existing California law does not track the federal requirements. Existing law requires the Department of Corrections and Rehabilitation to institute certain practices to prevent sexual violence and promote inmate safety in the Department of Corrections and Rehabilitation. The existing state law is less comprehensive than federal regulations that protect prisoners from sexual violence from guards and other prisoners.

The Solution: This resolution would put all correctional facilities in California in line with many of the carefully considered federal guidelines under the PREA to protect prisoners from sexual violence both by guards and other prisoners. In doing so, the resolution would establish a number of important protections set forth in federal regulations to keep people from finding themselves from facing further punitive measures – including confinement in administrative segregation – for their own protection. The resolution would require prisons, jails, juvenile halls, and other custodial facilities, including private confinement companies, to adopt federal policies and procedures under the Prison Rape Elimination Act (PREA) and its implementing regulations to create a safe environment free from sexual abuse for inmates or arrestees, including those inmates or arrestees subject to a U.S. Immigration and Customs Enforcement hold. It would also implement oversight procedures for regular audits, data collection, reporting, and penalties for noncompliance.

LEGISLATIVE HISTORY

This resolution tracks the language of SB 716, the proposed Sexual Abuse in Detention Elimination Act, introduced by Senator Ricardo Lara in 2013 (as amended May 28, 2013).

IMPACT STATEMENT

The proposed resolution does not affect any other law, statute or rule.

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