

**RESOLUTION 08-03-2015**

**DIGEST**

Criminal Law: Inmate’s Sexual Abuse in Detention Elimination Act

Adds Penal Code sections 2635.5 and 2644 through 2648, and amends Penal Code sections 2635 through 2639, and 2643 to conform to federal law regarding prison sexual abuse.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Association recommends that legislation be sponsored to add Penal Code sections 2635.5, 2644, 2645, 2646, 2647, and 2648, and to amend Penal Code sections 2635, 2636, 2637, 2638, 2639, and 2643, to read as follows:

§2635

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

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

12  
13 §2635.5

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

15           (a) “Board” shall mean the Board of State and Community Corrections.

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

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

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

29           (e) “Juvenile justice agency” means a city, county, city and county, or regional  
30 government entity that confines juveniles pursuant to the juvenile justice system, the criminal  
31 justice system, or under the authority of the federal government.

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

35 (g) “Private confinement company” means a for-profit or nonprofit company operating in  
36 the state that detains individuals, or that manages a facility that detains individuals, on behalf of a  
37 federal, city, county, city and county, or regional government.

38  
39 §2636

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

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

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

49 ~~Relevant considerations include:~~

50 ~~(1) Age of the inmate or ward.~~

51 ~~(2) Whether the offender is a violent or nonviolent offender.~~

52 ~~(3) Whether the inmate or ward has served a prior term of commitment.~~

53 ~~(4) Whether the inmate or ward has a history of mental illness.~~

54 ~~(b) The Department of Corrections and Rehabilitation shall ensure that staff members~~  
55 ~~intervene when an inmate or ward appears to be the target of sexual harassment or intimidation.~~

56 The Department of Corrections and Rehabilitation and each jail facility shall adopt and  
57 implement policies and procedures consistent with the requirements of Sections 115.5 to 115.86,  
58 inclusive, of Title 28 of the Code of Federal Regulations for all facilities that house adult  
59 inmates, including pretrial inmates and federal detainees. Adoption of these policies or  
60 procedures shall take place no later than July 1, 2016. Full implementation of the policies or  
61 procedures shall be completed no later than July 1, 2017.

62  
63 §2637

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

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

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

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

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

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

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

83 Each lockup shall adopt and implement policies or procedures consistent with the  
84 requirements of Sections 115.5, 115.6, and 115.111 to 115.186, inclusive, of Title 28 of the Code  
85 of Federal Regulations. Adoption of these policies or procedures shall take place no later than  
86 July 1, 2016. Full implementation of the policies or procedures shall be completed no later than  
87 July 1, 2017.

88  
89 §2638

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

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

96 (b) ~~Health practitioners who conduct or encounter an inmate or ward suffering from~~  
97 ~~problems that might indicate sexual abuse, such as trauma, sexually transmissible diseases,~~  
98 ~~pregnancy, or chronic pain symptoms, shall ask whether the patient has experienced sexual~~  
99 ~~abuse.~~

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

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

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

108 A state, county, and local juvenile justice agency shall adopt and implement policies or  
109 procedures consistent with the requirements of Sections 115.5, 115.6, and 115.311 to 115.386,  
110 inclusive, of Title 28 of the Code of Federal Regulations. Adoption of these policies or  
111 procedures shall take place no later than July 1, 2016. Full implementation of the policies or  
112 procedures shall be completed no later than July 1, 2017.

113  
114 §2639

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

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

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

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

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

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

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

133 (a) Private confinement companies shall adopt and implement the relevant policies or  
134 procedures from Section 2636, 2637, or 2638. Adoption of these policies or procedures shall take  
135 place no later than July 1, 2016. Full implementation of the policies or procedures shall be  
136 completed no later than July 1, 2017.

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

140  
141 §2643

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

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

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

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

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

164  
165 §2644

166 (a) Audits of facilities governed by this article shall be conducted on a three-year cycle.  
167 Beginning July 1, 2015, each agency, department, or company shall ensure that each facility  
168 operated by the agency, department, or company is audited at least once every three years. Any

169 agency, department, or company with three or more facilities shall ensure that approximately  
170 one-third of its facilities are audited each year of an audit cycle.

171 (b) An audit conducted in compliance with Sections 115.401 to 115.405, inclusive, of  
172 Title 28 of the Code of Federal Regulations shall suffice for the purposes of this section. For  
173 private confinement companies with facilities that only house detainees under contract with the  
174 United States Department of Homeland Security, an audit conducted under Sections 115.401 to  
175 115.405, inclusive, of Title 6 of the Code of Federal Regulations shall suffice for the purposes of  
176 this section.

177 (c) The board shall publish audit procedures consistent with the requirements of Sections  
178 115.401 to 115.405, inclusive, of Title 28 of the Code of Federal Regulations that will govern all  
179 audits required by subdivision (a). The board shall separately publish audit procedures consistent  
180 with Sections 115.401 to 115.405, inclusive, of Title 6 of the Code of Federal Regulations for  
181 private confinement companies with facilities that only house detainees under contract with the  
182 United States Department of Homeland Security.

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

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

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

204  
205 §2645

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

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

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

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

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

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

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

223  
224 §2646

225 (a) An agency or department with an existing contract or agreement with a facility  
226 defined in subdivision (c) shall probatively modify its contract or agreement to incorporate the  
227 policies or procedures it adopts pursuant to Section 2636, 2637, 2638, or 2639. This modification  
228 shall be completed prior to the submission of the certification required by Section 2643. If an  
229 agency or department is involved in good faith negotiations to modify a contract or agreement on  
230 the date the certification is required to be submitted to the board, the agency or department may  
231 still submit its certification along with a request for 60 additional days to complete the  
232 modification. At the end of those 60 days, the agency or department shall submit a supplemental  
233 certification documenting the successful modification of the contract or agreement or withdraw  
234 its certification.

235 (b) An agency or department that seeks to enter into a new contract or agreement with a  
236 facility defined in subdivision (c) after January 1, 2017, shall incorporate the policies and  
237 procedures it adopts pursuant to Section 2636, 2637, 2638, or 2639 into that contract or  
238 agreement.

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

243  
244 §2647

245 (a) A city, county, city and county, or regional agency or department that fails to provide  
246 the certification required by Section 2643, has its certification rejected by the board, fails to have  
247 its facility or facilities audited in a timely manner as required by Section 2644, or has one or  
248 more facilities fail an audit after being given an opportunity to correct any deficiencies will have  
249 subsequent board-administered grant renewals or awards reduced by 25 percent in the first year  
250 of noncompliance and by 50 percent in the second year of noncompliance. An agency or  
251 department that enters into a third year of noncompliance will be ineligible for any board-  
252 administered grant renewals or awards until compliance is achieved. An agency or department  
253 may show compliance by providing a valid certification or by completing a successful audit of a  
254 facility that is delinquent for or has failed an audit.

255 (b) A private confinement company that fails to provide the certification required by  
256 Section 2643, has its certification rejected by the board, fails to have its facility or facilities  
257 audited in a timely manner as required by Section 2644, or has one or more facilities fail an audit  
258 after being given an opportunity to correct any deficiencies will be assessed a five-hundred-  
259 dollar (\$500) penalty on the first day the certification or audit is due or a failed audit is reported  
260 to the board. The private confinement company will be assessed an additional one-thousand-

261 dollar (\$1,000) penalty every seven days thereafter until it provides a valid certification or  
262 completes successful audits of any facilities that are delinquent for or have failed an audit. This  
263 penalty shall be assessed and collected by the board.

264  
265 §2648

266 The provisions of this article are severable. If any provision of this article or its  
267 application is held invalid, that invalidity shall not affect other provisions or applications that can  
268 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 Prison Rape Elimination Act (PREA) standards apply to state and local facilities, existing California law does not track the federal requirements.

The Solution: This resolution would require prisons, jails, juvenile halls, and other custodial facilities, including private confinement companies, to adopt federal policies and procedures under 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.

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.

### **IMPACT STATEMENT**

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

### **CURRENT OR PRIOR RELATED LEGISLATION**

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).

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**RESPONSIBLE FLOOR DELEGATE:** Denise Bergin

**RESOLUTIONS COMMITTEE RECOMMENDATION  
APPROVE IN PRINCIPLE**

History:

Identical to 06-12-2014, which was approved in principle.

Reasons:

This resolution adds Penal Code sections 2635.5 and 2644 through 2648, and amends Penal Code sections 2635 through 2639, and 2643 to conform to federal law regarding prison sexual abuse. This resolution should be approved in principle to bring California law in line with federal guidelines and lessen the pervasiveness of sexual assault in prisons and jails.

In 2003, Congress passed the Prison Rape Elimination Act of 2003 (42 U.S.C. § 15601 et seq.) ("PREA"), which established a commission to recommend "national standards for enhancing the detection, prevention, reduction, and punishment of prison rape." (42 U.S.C. §§ 15606 subd. (d)(1), (e)(1).) In response, California enacted the Sexual Abuse in Detention Elimination Act of 2005 (Pen. Code, §§ 2635-2643) ("SADE") which 1) required inmates be provided informational handbooks regarding sexual abuse; 2) mandated the adoption by the California Department of Corrections and Rehabilitation ("CDCR") of specified policies, practices and protocols on the placement and health care of inmates and the investigation of sexual abuse; 3) created the Office of the Sexual Abuse in Detention Elimination Ombudsperson to ensure resolution of sexual abuse complaints; and 4) required the CDCR to develop guidelines for allowing outside organizations to provide resources and counseling to inmates.

The proponent contends the SADE and CDCR policies do not track the federal standards and fail to adequately protect against rampant sexual violence, particularly against LGBT inmates. This resolution would mandate compliance with the national standards and create new evaluation and enforcement provisions, including regular audits of all facilities, a system of data collection, review and retention, and potential fines for privately run prisons. It would broaden coverage to a wide range of confinement facilities, including immigrant detention centers, and would codify the consideration of detainees' sexual orientation and gender identity as a risk factor in housing assignments and other classifications. It does not, however, provide funding for this increased oversight. The resolution largely tracks the PREA regulations and is modeled on the language of Senate Bill 716 (2012-2014 Reg. Sess.) which passed the Senate but died in the Assembly because of cost concerns.