

RESOLUTION 06-03-2017 (REVISED)

DIGEST

Incarceration: National Standards to Prevent, Detect and Respond to Prison Rape

Adds Penal Code sections 2635.5, 2644, 2645, and 2646, and amends sections 2635 and 2636 to require the adoption of DOJ's National Standards to Prevent, Detect, and Respond to Prison Rape.

RESOLUTIONS COMMITTEE ANALYSIS

History:

Similar to Resolutions 06-12-2014 and 08-03-2015, which were approved in principle, and Resolution 01-09-2016, which was disapproved.

Reasons:

This resolution adds Penal Code sections 2635.5, 2644, 2645, and 2646, and amends sections 2635 and 2636 to require the adoption of DOJ's National Standards to Prevent, Detect and Respond to Prison Rape. Although California is already on its way to full adoption of the national standards by December 2022, this resolution will help promote existing policy, and funding shouldn't be a barrier to protecting people. The California Department of Corrections responds to state statutes more quickly than other recommendations.

The Federal Prison Rape Elimination Act of 2003 ("PREA") authorized the Attorney General to promulgate national standards to combat prison rape. (See 42 U.S.C. §§ 15606, 15607.) In 2012, the Department of Justice published a 268-page report setting forth its national standards. (See 28 C.F.R. §§ 115.5-115.501.) To ensure that each state becomes PREA-compliant, DOJ withholds five percent of its prison grant money unless the governor certifies that the standards: (1) are fully implemented, or (2) provides assurance of progress towards full implementation with a funding commitment of at least five percent of impacted DOJ grant money. (See, 42 U.S.C. § 15607(e).) In 2016, the Justice for All Reauthorization Act amended PREA to sunset the "assurance" option by December 2022, requiring each state to fully implement PREA by that deadline or lose federal funding. California is among 40 jurisdictions working towards full compliance.

California has made significant progress in revising agency regulations to conform with DOJ's national standards. (See *Operations Manual*, California Department of Corrections and Rehabilitation <<http://www.cdcr.ca.gov/PREA/docs/2016-DOM-54040.pdf>>.)

This resolution is similar to Senate Bill No. 716 (Lara) (Reg. Sess. 2013-2014), which died in the Assembly due to cost concerns.

The Resolutions Committee initially recommended disapproval of this resolution. The full Conference voted to approve.

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 and 2646 and amend sections 2635 and 2636 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 The Department of Corrections and Rehabilitation, each local corrections agency; each
7 city, county, and regional juvenile justice agency; each city, county, and regional police lockup;
8 and each private confinement company shall create a safe environment free from sexual abuse
9 for inmates, wards or arrestees, including those inmates, wards or arrestees subject to a United
10 States Immigration and Customs Enforcement hold and/or who identify as lesbian, gay, bisexual,
11 transgender, intersex (LGBTI) and/or gender variant, by adopting policies and procedures fully
12 implementing the National Standards to Prevent, Detect, and Respond to Prison Rape.

13
14 § 2635.5

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

16 (a) “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 (b) “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 (c) “Gender variant” means a person whose identity, appearance or manner does not
25 conform to traditional societal gender expectations.

26 (d) “Inmate” means any person incarcerated or detained in a prison or jail.

27 (e) “Intersex” means a person whose sexual or reproductive anatomy or chromosomal
28 pattern does not fit typical definitions of male or female. Intersex medical conditions are
29 sometimes referred to as disorders of sex development.

30 (f) “Jail” means a confinement facility of a city, county, city and county, or regional law
31 enforcement agency that has, as its primary use, the detention of persons pending adjudication of
32 criminal charges, persons committed to confinement for a misdemeanor or pursuant to
33 subdivision (h) of §1170, persons adjudicated guilty who are awaiting transfer to a state prison,
34 or person held under the authority of the federal government.

35 (g) “Lockup” means a facility belonging to a state, county, or local law enforcement
36 agency that contains holding cells, cell blocks, or other secure enclosures that are:

37 (1) Under the control of a law enforcement, court, or custodial officer; and

38 (2) Primarily used for the temporary confinement of individuals who have recently been
39 arrested, detained, or are being transferred to or from a court, jail, prison, or other agency.

40 (h) “Medical practitioner” means a health professional who, by virtue of education,
41 credentials, and experience, is permitted by law to evaluate and care for patients within the scope
42 of his or her professional practice. A “qualified medical practitioner” refers to such a

43 professional who has also successfully completed specialized training for treating sexual abuse
44 victims.

45 (i) Pat-down search means a running of the hands over the clothed body of an inmate,
46 detainee, or resident by an employee to determine whether the individual possesses contraband.

47 (j) "Private confinement company" means a for-profit or non-profit company operating in
48 the state that detains individuals, or that manages a facility that detains individuals, on behalf of a
49 federal, city, county, or regional government.

50 (k) "Strip search" means a search that requires a person to remove or arrange some or all
51 clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia.
52 Substantiated allegation means an allegation that was investigated and determined to have
53 occurred.

54 (l) "Transgender" means a person whose gender identity (i.e., internal sense of feeling
55 male or female) is different from the person's assigned sex at birth.

56

57 § 2636

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

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

64 (a) All inmates, wards and detainees in the custody of the California Department of
65 Corrections and Rehabilitation, each local corrections agency; each city, county, and regional
66 juvenile justice agency; each city, county, and regional police lockup; and each private
67 confinement company shall be assessed during an intake screening and upon transfer to another
68 facility for their risk of being sexually abused by other inmates or sexually abusive toward other
69 inmates, wards or detainees.

70 (b) Intake screening shall ordinarily take place within 72 hours of arrival at the facility.

71 (c) Such assessments shall be conducted using an objective screening instrument.

72 ~~(a)~~ (d) The Department of Corrections and Rehabilitation, each local corrections agency;
73 each city, county, and regional juvenile justice agency; each city, county, and regional police
74 lockup; and each private confinement company inmate classification and housing assignment
75 procedures shall take into account risk factors that can lead to inmates, detainees, and wards
76 becoming the target of sexual victimization or of being sexually aggressive toward others.

77 ~~Relevant considerations include~~ The following must be considered:

78 (1) Age of the inmate, detainee or ward.

79 (2) Whether the ~~offender is a violent or nonviolent offender~~ inmate, detainee or ward's
80 criminal history is exclusively nonviolent;

81 (3) Whether the inmate, detainee or ward served a prior term of commitment.

82 (4) Whether the inmate, detainee or ward has a ~~history of mental illness~~ mental, physical,
83 or developmental disability.

84 (5) Whether the inmate, detainee or ward has prior convictions for sex offenses against an
85 adult or child.

86 (6) The physical build of the inmate, detainee or ward.

87 (7) Whether the inmate, detainee or ward is or is perceived to be gay, lesbian, bisexual,
88 transgender, intersex, or gender variant.

89 (8) Whether the inmate, detainee or ward has previously experienced sexual
90 victimization.

91 (9) The inmate, detainee or ward's own perception of vulnerability

92 (10) Whether the inmate, detainee or ward is detained solely for civil immigration
93 purposes.

94 (e) The information from the risk screening required by (d) shall be used to inform
95 housing, bed, work, education, and program assignments with the goal of keeping separate those
96 inmates, detainees and wards at high risk of being sexually victimized from those at high risk of
97 being sexually abusive.

98 (f) Individualized determinations shall be made about how to ensure the safety of each
99 inmate, detainee or ward.

100 (g) In deciding whether to assign a transgender or intersex inmate, detainee or ward to a
101 facility for male or female inmates or wards, and in making other housing and programming
102 assignments, placements shall be considered on a case-by-case basis as to whether the placement
103 would ensure the inmate, detainee or ward's health and safety, and whether the placement would
104 present management or security problems.

105 (h) Placement and programming assignments for each transgender or intersex inmate,
106 detainee or ward shall be reassessed at least twice each year to review any threats to safety
107 experienced by the inmate, detainee or ward.

108 (i) A transgender or intersex inmate, detainee or ward's own views with respect to their
109 own safety shall be given serious consideration.

110 (j) Transgender and intersex inmates, detainees or wards shall be given the opportunity to
111 shower separately from other inmates, detainees or wards.

112 (k) Lesbian, gay, bisexual, transgender, or intersex inmates, detainees or wards shall not
113 be placed in dedicated facilities, units, or wings solely on the basis of such identification or
114 status, unless such placement is in a dedicated facility, unit, or wing established in connection
115 with a consent decree, legal settlement, or legal judgment for the purpose of protecting such
116 inmates, detainees or wards.

117 (l) Within a set time period, not to exceed 30 days from the inmate, detainee or ward's
118 arrival at a facility, the facility shall reassess the inmate, detainee or ward's risk of victimization
119 or abusiveness based upon any additional, relevant information received by the facility since the
120 intake screening.

121 (m) An inmate, detainee or ward's risk level shall be reassessed when warranted due to a
122 referral, request, incident of sexual abuse, or receipt of additional information that bears on the
123 inmate, detainee or ward's risk of sexual victimization or abusiveness.

124 (n) Inmates, detainees or wards may not be disciplined for refusing to answer, or for not
125 disclosing complete information in response to, questions asked pursuant to paragraphs (d)(4),
126 (d)(7), (d)(8), or (d)(9) of this section.

127 (o) Each facility shall implement appropriate controls on the dissemination within the
128 facility of responses to questions asked pursuant to this standard in order to ensure that sensitive
129 information is not exploited to the inmate, detainee or ward's detriment by staff or other inmates,
130 detainees or wards.

131 ~~(b)~~ (p) The Department of Corrections and Rehabilitation, each local corrections agency;
132 each city, county, and regional juvenile justice agency; each city, county, and regional police
133 lockup; and each private confinement company shall ensure that staff members intervene when
134 an inmate, detainee or ward appears to be the target of sexual harassment or intimidation.

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§ 2644

a) Inmates, detainees and wards at high risk for sexual victimization shall not be placed in involuntary segregated housing unless an assessment of all available alternatives has been made, and a determination has been made that there is no available alternative means of separation from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may hold the inmate, detainee or ward in involuntary segregated housing for less than 24 hours while completing the assessment.

(b) Inmates, detainees and wards placed in segregated housing for this purpose shall have access to programs, privileges, education, and work opportunities to the extent possible. If the facility restricts access to programs, privileges, education, or work opportunities, the facility shall document:

(1) The opportunities that have been limited;

(2) The duration of the limitation; and

(3) The reasons for such limitations.

(c) Inmates shall only be assigned to such involuntary segregated housing until an alternative means of separation from likely abusers can be arranged, and such an assignment shall not ordinarily exceed a period of 14 days.

(d) If an involuntary segregated housing assignment is made pursuant to paragraph (a) of this section, the facility shall clearly document:

(1) The basis for the facility's concern for the inmate's safety; and

(2) The reason why no alternative means of separation can be arranged.

(e) Every 14 days, the facility shall afford each such inmate a review to determine whether there is a continuing need for separation from the general population.

§ 2645

(a) The California Department of Corrections and Rehabilitation, each local corrections agency; each city, county, and regional juvenile justice agency; each city, county, and regional police lockup; and each private confinement company shall not conduct cross-gender strip searches or cross-gender visual body cavity searches (meaning a search of the anal or genital opening) except in exigent circumstances or when performed by medical practitioners.

b) All cross-gender and strip searches, cross-gender visual body cavity searches and all cross-gender patdown searches of female and transgender inmates, detainees and wards shall be documented.

(c) The facility shall implement policies and procedures that enable inmates, detainees and wards to shower, perform bodily functions, and change clothing without nonmedical staff of another gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. Such policies and procedures shall require staff of another gender to announce their presence when entering an inmate, detainee or ward housing unit.

(d) Staff shall not search or physically examine a transgender or intersex inmate, detainee or ward for the sole purpose of determining their genital status.

(e) The agency shall train security staff in how to conduct cross-gender patdown searches, and searches of transgender and intersex inmates, detainees or wards in a professional and respectful manner, and in the least intrusive manner possible, consistent with security needs.

181 § 2646
182 The California Department of Corrections and Rehabilitation, all lockups, state, county,
183 and local juvenile justice agencies, and private confinement companies shall adopt and
184 implement policies or procedures consistent with the requirements of sections 2636, 2637, 2638,
185 2639, 2644, and 2645. Adoption of these policies or procedures shall take place no later than
186 July 1, 2020.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

STATEMENT OF REASONS

The Problem: Does not comply with federal law. The National Standards to Prevent, Detect, and Respond to Prison Rape, known as the PREA Standards, include several provisions that direct agencies to pay particular attention to protecting lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals. Prisons are required, and jails are strongly incentivized and in some cases required, to comply with these standards. California has not been able to certify compliance with the PREA Standards and is at risk of losing federal funding. Although the PREA Standards apply to state and local facilities, existing California laws, policies and procedures do not incorporate the standards that specifically address the safety of the most vulnerable in custody.

Sexual violence is a rampant problem across all correctional and detention settings in California causing extreme psychological trauma and undue punishment beyond that of a person's incarceration or detention. LGBTI protections under the PREA Standards have yet to be adopted in California placing LGBTI prisoners, particularly transgender women, in serious physical and psychiatric danger. LGBTI inmates, detainees and wards are particularly vulnerable to sexual violence. LGBTI prisoners experience "the highest rates of sexual victimization" while in custody according to the U.S. Department of Justice. A study conducted by the University of California at Irvine with 315 transgender women as participants found transgender women in the custody of the California Department of Corrections and Rehabilitation (CDCR) were 13 times more likely to be sexually assaulted in prison than individuals in the general population. Transgender women are also subjected to coercive sex from fellow prisoners and correctional staff. Coercive sex "is oftentimes exchanged for protection or special privileges and is too often seen by officials as consensual." Unfortunately, because of the high incidents of sexual assault, transgender women are often housed in solitary confinement "for their own protection" either preemptively or as punishment for reporting abuses.

The Solution: Would require prisons, jails, 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 LGBT prisoners and those prisoners subject to a U.S. Immigration and Customs enforcement hold. By putting 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, this resolution would establish a number of important protections set forth in federal regulations to keep people from facing further punitive

measures - including confinement in administrative segregation - for their own protection

IMPACT STATEMENT

The resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

AB 550 (Goldberg) 2005 - Sexual Abuse in Detention Elimination Act – Filed with Secretary of State on September 22, 2005.

AB 382 (Ammiano) - 2009 – Vetoed by Governor on August 17, 2009

AB 633 (Ammiano) - 2010 – Vetoed by Governor on September 23, 2010

SB 716 (Lara) - 2013 – Passed Senate, died in Assembly.

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