

RESOLUTION 03-09-2018

DIGEST

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

Adds Penal Code sections 2635.5, 2644, 2645 and 2646, and amends section 2636 regarding prison searches and inmate housing, with an implementation deadline of July 1, 2021.

STATEMENT OF REASONS

The Problem: Existing law 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 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, specifically lesbian, gay bisexual, transgender, nonbinary and intersex (LGBTNI) prisoners. 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. LGBTNI protections under the PREA Standards have yet to be adopted in California placing LGBTNI prisoners, particularly transgender women, in serious physical and psychiatric danger. LGBTNI inmates and wards are particularly vulnerable to sexual violence. LGBTNI 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 CDCR were 14 times more likely to be sexually assaulted in prison than non-transgender individuals. 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: Require the California Department of Corrections and Rehabilitation (CDCR) to adopt federal policies and procedures under PREA and its implementing regulations to create a safer environment for inmates or arrestees, including LGBTQI prisoners. By putting CDCR in line with many of the carefully considered federal guidelines under 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

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 Penal Code section 2636 to read as follows:

1 § 2635.5

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

3 (a) “Intersex” is an umbrella term used to describe natural bodily variations, which can
4 include external genitalia, internal sex organs, chromosomes, or hormonal differences that
5 transcend typical ideas of male and female.

6 (b) “Nonbinary” is an umbrella term for people whose gender falls somewhere outside of
7 the traditional conceptions of strictly either female or male.

8 (c) “Transgender” means a person whose gender identity (i.e., internal sense of feeling
9 male or female) is different from the person’s assigned sex at birth.

10 § 2636

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

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

17 (a) All inmates and wards in the custody of the California Department of Corrections and
18 Rehabilitation, shall be assessed during an intake screening for their risk of being sexually
19 abused by other inmates and wards.

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

22 ~~(a)-~~ (c) The Department of Corrections and Rehabilitation inmate classification and
23 housing assignment procedures shall take into account risk factors that can lead to inmates and
24 wards becoming the target of sexual victimization.

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

26 (1) Age of the inmate or ward.

27 ~~(2) Whether the offender is a violent or nonviolent offender;~~

28 (3) Whether the inmate or ward has a history of mental illness.

29 (3) Whether the inmate or ward is transgender, intersex, or nonbinary.

30 (4) Whether the inmate or ward is, or is perceived to be gay, lesbian, or bisexual.

31 (5) Whether the inmate or ward has previously experienced sexual victimization.

32 (d) The information from the risk screening required by (d) shall be used to inform
33 housing, bed, work, education, and program assignments with the goal of keeping vulnerable
34 inmates and wards safe from sexual victimization.

35 (e) Individualized determinations shall be made about how to ensure the safety of each
36 inmate and ward.

37 (f) In deciding whether to assign a transgender, nonbinary or intersex person to a male or
38 female facility and in making other housing and programming assignments, placements shall be
39 considered on a case-by-case basis based on the inmate’s or ward’s own perception of safety.

40 (g) In general, transgender, nonbinary and intersex people must be housed in the general
41 population of the facility, unless the individual requests another type of housing for their own
42 safety (such as single cell, double cell, or administrative segregation), or staff raise and
43 document serious, specific, and articulable security or management concerns about placement of
44 that particular individual in that type of housing.
45

46 (h) Placement and programming assignments for each transgender, nonbinary, and
47 intersex inmate and ward shall be reassessed at least twice each year to review any threats to
48 safety experienced by the inmate or ward.

49 (i) Lesbian, gay, bisexual, transgender, nonbinary or intersex inmates and wards shall not
50 be placed in dedicated facilities, units, or wings solely on the basis of such identification or
51 status.

52 (j) Within a set time period, not to exceed 30 days from the inmate's or ward's arrival at a
53 facility, the facility shall reassess the inmate's or ward's risk of victimization based upon any
54 additional, relevant information received by the facility since the intake screening.

55 (k) An inmate's or ward's risk level shall be reassessed when warranted due to a referral,
56 request, incident of sexual abuse, or receipt of additional information that bears on the inmate
57 and ward's risk of sexual victimization.

58 (l) Inmates and wards may not be disciplined for refusing to answer, or for not disclosing
59 complete information in response to, questions asked pursuant to section (d).

60 (m) Each facility shall implement appropriate controls on the dissemination within the
61 facility of responses to questions asked pursuant to this standard in order to ensure that sensitive
62 information is not exploited to the inmate and ward's detriment by staff or other inmate and
63 wards.

64 (n) The Department of Corrections and Rehabilitation shall ensure that staff members
65 intervene and respond quickly when an inmate or ward appears to be the target of sexual
66 harassment or intimidation.

67
68 § 2644

69 (a) Inmates or wards at high risk for sexual victimization shall not be placed in
70 involuntary segregated housing unless an assessment of all available alternatives has been made,
71 and a determination has been made that there is no available alternative means of separation
72 from likely abusers. If a facility cannot conduct such an assessment immediately, the facility may
73 hold the inmate or ward in involuntary segregated housing for up to 36 hours while completing
74 the assessment.

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

79 (1) The opportunities that have been limited;

80 (2) The duration of the limitation; and

81 (3) The reasons for such limitations.

82 (c) Inmates and wards shall only be assigned to such involuntary segregated housing until
83 an alternative means of separation from likely abusers can be arranged, and such an assignment
84 shall not ordinarily exceed a period of 7 days.

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

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

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

89 (e) In the event an inmate or ward is voluntarily placed in segregated housing, or if
90 placed there involuntarily for over seven days, the facility shall afford each such inmate a review
91 to determine whether there is a continuing need for separation from the general population every

92 4 days.

93

94 § 2645

95 (a) When performing searches, the California Department of Corrections and
96 Rehabilitation custody staff will exercise sensitivity and provide explanations and an opportunity
97 for inmates to ask questions.

98 (b) Transgender, nonbinary, and intersex inmates must be given the opportunity to choose
99 the gender(s) of the person(s) who will perform any searches. Where the inmate chooses to have
100 two officers of different genders involved in the search, the inmate must be provided the choice
101 of which body parts are searched by whom. The inmate will be offered privacy in which to be
102 searched, including any search of prosthetics.

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

109 (d) Staff shall not search or physically examine an inmate or ward for the sole purpose of
110 determining their genital status.

111 (e) The agency shall train security staff in how to conduct searches of transgender,
112 nonbinary and intersex inmates and wards in a professional and respectful manner, and in the
113 least intrusive manner possible, consistent with security needs.

114

115 § 2646

116 The California Department of Corrections and Rehabilitation shall adopt and implement
117 policies or procedures consistent with the requirements of sections 2636, 2644, and 2645.

118 Adoption of these policies or procedures shall take place no later than July 1, 2021.

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

PROPONENT: Bay Area Lawyers for Individual Freedom

IMPACT STATEMENT

This 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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