
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair

2023 - 2024 Regular

Bill No: AB 2833 **Hearing Date:** June 11, 2024
Author: McKinnor
Version: May 2, 2024
Urgency: No **Fiscal:** No
Consultant: MK

Subject: *Evidence: restorative justice communications*

HISTORY

Source: Initiate Justice

Prior Legislation: AB 60 (Bryan), Chapter 513, Stats. 2023
AB 1165 (McCarty) Chapter 22, Stats. 2023
AB 2598 (Weber), Chapter 914, Stats. 2022
AB 2167 (Kalra) Chapter 775, Stats. 2022

Support: 10P Program; ACLU California Action; Alliance for Boys and Men of Color; American Friends Service Committee; A New Way of Life Reentry Project; Alliance of Californians for Community Empowerment (ACCE) Action; American Friends Service Committee; API Equality-LA; Asian American Advancing Justice – Asian Law Caucus; California Attorneys for Criminal Justice; California Catholic Conference; California Public Defenders Assoc.; Californians for Safety and Justice; Californians United for A Responsible Budget; Centinela Youth Services; Community Works; Communities United for Restorative Youth Justice; Crime Survivors for Safety and Justice; Crop Organization; Ella Baker Center for Human Rights; Equal Justice USA; Friends Committee on Legislation of CA; GRACE Institute – End Child Poverty in CA; Grip Training Institute; Honoring Resilience; Initiate Justice Action; LA Defensa; Legal Services for Prisoner With Children; Los Angeles County Democratic Party; Oakland Privacy; Pacific Juvenile Defender Center; Peace Anger Love; Prosecutors Alliance; San Francisco Public Defender; SEIU California; Smart Justice California; The Collective Healing and Transformation Project; Vera Institute of Justice; White People 4 Black Lives

Opposition: None known

Assembly Floor Vote: 65 - 0

PURPOSE

This bill establishes that an individual's participation in and communications related to restorative justice processes are inadmissible in civil, criminal, juvenile, administrative or other proceedings, except as specified.

Existing law provides that, except as provided hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial of a juvenile for a criminal offense, whether heard in juvenile or adult court. (Cal. Const., art. I, § 28, (f), par. (3).)

Existing law defines “relevant evidence” as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evidence Code § 210.)

Existing law provides that it is the public policy of this state that the principal goals of sentencing for hate crimes includes restorative justice for immediate victims of the hate crimes and for the classes of persons terrorized by the hate crimes. (Penal Code § 422.86 (a)(3).)

Existing law requires the “Victim Protections and Resources” card law enforcement is required to distribute to victims of crime to include information on the availability of community-based restorative justice programs and processes available to them, including those available in carceral settings. (Penal Code § 679.027 (b)(3)(J).)

Existing law requires money held in the California Department of Corrections and Rehabilitation’s Inmate Welfare Fund for the benefit of incarcerated people to be used for, among other things, funding for innovative programming by nonprofit organizations offering programs that have demonstrated success and focus on offender responsibility and restorative justice principles. (Penal Code § 5006 (a)(1)(D).)

Existing law requires CDCR to establish the California Reentry and Enrichment Grant program to provide grants to community based organizations that provide rehabilitative services, including those that provide insight-oriented restorative justice and offender accountability programs. (Penal Code § 5007.3 (a)(2)(B).)

Existing law establishes the Second Chance Program and requires the committee formed by the Board of Community Corrections that makes recommendations on guidelines for the submission of grant proposals that, among other things, prioritizes proposals that advance principles of restorative justice while demonstrating a capacity to reduce recidivism. (Penal Code §§ 6046 & 6046.3 (b)(2).)

Existing law provides that when a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail of up to one year or by imprisonment in county jail for 2, 3, or 4 years. (Penal Code § 243 (d).)

Existing law provides that any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family’s safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison. (Penal Code § 422, (a).)

This bill provides that an individual's participation or nonparticipation in a restorative justice process and any communication within a restorative justice process are not admissible or subject to discovery and disclosure, and disclosure cannot be compelled in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process.

This bill provides a restorative justice communication is not made inadmissible by this section if any of the following has occurred:

- a) The participants in the restorative justice process all provide written consent that all or part of the communication may be disclosed, provided that such consent was knowing, intelligent, free of coercion, and voluntary. Where participants consent to a limited part of the communication, only that specific communication is subject to disclosure. Where a participant is deceased or cannot be located after reasonable efforts, their written consent is deemed to have been knowing, intelligent, free of coercion, and voluntary.
- b) The communication discloses information that a participant, including, but not limited to, a mandated reporter, is otherwise required by law to disclose.
- c) During the restorative justice process, a participant engages in any conduct that involves the use of force or the threat of force against another participant, and the restorative justice process ends as a result of this conduct. In such a case, only communication relevant to that conduct is admissible.

This bill provides that evidence that is obtained independently from the restorative justice process does not become inadmissible or protected from discovery solely because it was discussed or used in a restorative justice process.

This bill provides that the determination of whether a process qualifies as a restorative justice process pursuant to the section, if challenged, shall be determined by the court or finder of fact. In a hearing to make such a determination the court or finder of fact may consider information that would otherwise be inadmissible to the extent that the information is probative of the issue.

This bill provides that the provisions of this bill apply to all communications that take place during a restorative justice process including those that occur prior subsequent to enactment of this section, where the proceeding at which admission is sought occurs after the effective date of this section.

This bill defines "communication" as any communication or writing that is made or prepared for the purpose of, in the course of, or pursuant to, any phase of a restorative justice process.

This bill defines "restorative justice process" as a facilitated, community-based process in which parties who have caused harm or who have been harmed and community members collectively gather to identify and repair harm to the extent possible. Restorative justice processes focus on accountability, hearing, and safety and on the harms, needs and obligations of all parties involved through a participatory process and may or may not include a dialogue between participants.

This bill defines “participant” as a person who participates in a restorative justice program, including a facilitator, a person accused of or responsible for causing harm, a person who has been harmed, or participating community members.

This bill defines facilitator as a person who facilitates a restorative justice process.

This bill includes legislative findings and declarations.

COMMENTS

1. Need for This Bill

According to the author:

AB 2833 would provide comprehensive admissibility and confidentiality protections for all Restorative Justice processes that occur within the state. This would make clear that any information shared in the preparation for, in the course of, or pursuant to the Restorative Justice process is confidential and inadmissible in any future court proceeding.

2. Restorative Justice

According to one expert:

Unlike traditional criminal justice, restorative justice focuses on the accountability of the person who caused the harm, the needs of the wronged party, and the reintegration of both into society. Restorative processes seek to account for the needs of the person who caused the harm, the person or persons harmed, and the community, with the ultimate goal of repairing relationships and reducing recidivism. Through dialogue, the offending party can express accountability or remorse, and the victimized party may be able to speed the process of healing through understanding and restitution.

One of the most common RJ processes is victim/offender mediation or conferencing, which is a process in which the wronged party and offending party meet together to discuss the event and determine the best resolution. Early versions of these programs used the term "victim/offender" mediation, focusing on the categorization of the parties as if they were in criminal court. Today many programs today use terminology such as the "person who caused harm" or the "victimized party" to emphasize the relationship between the two, as opposed to their procedural labels. Whatever the program is called, during the in-person meeting, the parties generally have three conversations, each from their own perspective: 1) What happened? 2) What are the effects of the incident? And 3) How can the situation be made better? Successful conferences usually result in reparation agreements, which might include apologies, restitution, community service, or other terms agreed on by the parties.

Intake processes determine whether cases are eligible for RJ. Some programs, for example, require a participant to admit fault or responsibility as a condition of participating. Using RJ is a challenge when an alleged offending party maintains innocence, although some programs allow participation if that party acknowledges

accountability but not true remorse. Intake is also an excellent time to learn whether all the parties are interested in participating in the process and whether they can have a conversation and sit together.

Some parties may be willing to attend only if they can participate from different rooms, as happens in a caucus-based mediation. In other instances, a party, usually the wronged party, may not be willing to participate in a conference at all, as happened with Alyssa.

Sometimes the wronged party has experienced trauma from the incident or is simply afraid of sitting in a room with the person responsible for the original harm. Occasionally, the person who was harmed may not appreciate the process, as Alyssa indicated, and its potential value to both parties. In cases involving youth-on-youth incidents, the underlying relationships may be complicated, as they were with Janie and Alyssa, with some level of fault or responsibility on both sides. Even if a party does not participate in the conference, during the intake process the facilitator can still determine what the person who was harmed would like to see out of the process - such as restitution, an apology letter, or other terms that are satisfactory to all concerned.

When the person who was harmed refuses to participate, the use of a victim surrogate allows an offending party to participate in the process - and gain from its benefits. A victim surrogate stands in the shoes of *but does not role-play as* the person who was harmed. The most effective victim surrogates are those who have lived through a situation similar to the case at hand. In the case of Janie and Alyssa, a good surrogate would be someone around their age who has endured bullying or a hateful act. The victim surrogate participates in the conference by sharing the surrogate's own story and how it affected the surrogate. The surrogate will know in advance the type of remedy that the person who was harmed is seeking and will be authorized to agree to a resolution on that person's behalf.

Even with a stranger sitting in the chair of the person who was harmed, the person who caused the harm can still realize many of the benefits of the RJ process. The offending party must still account for his or her actions leading up to the incident and must listen to the surrogate's story about being the victim of a crime. In listening, the offending party may be able to empathize with the surrogate's situation and draw comparisons to his or her own past experience. Because the surrogate has authority to agree to a reparation agreement, the person who caused the harm will still be accountable to the harmed party and attempt to make that person whole.

(Blankley, *Expanding Options for Restorative Justice*, ABA Dispute Resolution Magazine (Mar. 31, 2020)

<https://www.americanbar.org/groups/dispute_resolution/publications/dispute_resolution_magazine/2020/dr-magazine-criminal-justice-reform/expanding-options-for-restorative-justice/> [last visited Mar. 26, 2024].)

3. Inadmissibility of statements during the restorative justice process.

This bill establishes a rule within Chapter 3 of the Evidence Code (that deals with “other evidence affected or excluded by extrinsic policies”), specifically an exclusionary rule for information about an individual’s participation in a restorative justice process and for all communications therein, except as specified. A person’s participation or non-participation in

or communications in a restorative justice process is shall not be admissible, discoverable or compelled in any arbitration, administrative adjudication, civil action, criminal action, or other proceeding regardless of completion or outcome of the process. There are exceptions to the rule when any of the following have occurred:

- All participants in the restorative justice process have provided written consent that all communication during the restorative justice process may be disclosed, or that a specific statement may be disclosed, provided that such consent was knowing, intelligent, free of coercion, and voluntary. Where participants consent to a limited part of the communication, only that specific communication is subject to disclosure. Where a participant is deceased or cannot be located after reasonable efforts, their written consent is deemed to have been knowing, intelligent, free of coercion, and voluntary.
- The communication discloses information that a participant, including, but not limited to, a mandated reporter, is otherwise required by law to disclose.
- During the restorative justice process, a participant engages in any conduct that involves the use of force or the threat of force against another participant, and the restorative justice process ends as a result of this conduct. In such a case, only communication relevant to that conduct is admissible.

What if, during the restorative justice process a person confesses to a murder or other similar crime? Should there be an exception for information leading to some types of crimes, such as a crime that can result in a life sentence?

4. Proposition 8 (Victim’s Bill of Rights) Requires Relevant Evidence to be Admitted:

Proposition 8 was passed by the voters in 1982. Proposition 8 included a provision referred to as “Truth in Evidence.” The “Truth in Evidence” provision of Prop. 8 requires that all relevant information be admitted during a criminal trial. Courts cannot exclude any "relevant evidence" even if gathered in a manner that violates the rights of the accused. Courts are still required to exclude evidence if such exclusion is required by the U.S. Constitution.

Any statutory change by the Legislature which limits the introduction of relevant evidence must be passed by a two-thirds vote. This bill would make an individual’s participation in and communications related to restorative justice processes inadmissible in civil and criminal proceedings. As such, this bill requires a two-thirds vote of the Legislature.

5. Argument in Support

The sponsor of this bill, Initiate Justice support this bill stating:

Survivors and victims of harm often do not feel their needs are met, or that they have a meaningful opportunity to be heard, in traditional criminal and juvenile legal processes. Only 14% of California survivors surveyed in 2019 reported feeling “very supported” by the criminal legal system after their experience of harm.¹ Restorative Justice is a model that centers the needs of people who have been harmed and is rooted in indigenous practices. It is a community-based, non-punitive process that provides victims/survivors and their loved ones the opportunity to ask questions, share about the impact of harm, and engage in

dialogue with the person who caused them harm. Restorative Justice processes have resulted in higher rates of satisfaction for victims and survivors than going through the criminal legal system.² Victims and survivors have also reported reduced feelings of fear, anger, post-traumatic stress symptoms, and depression after going through a Restorative Justice process.

Restorative Justice programs are effective tools for addressing conflict and harm within communities, an impact recognized this January 2024 in the results of a randomized control trial of San Francisco's Make It Right program featured in peer-reviewed *Econometrica*. However, as noted in a recent R Street Institute policy paper⁵, the ability for participants to speak freely without fear of repercussion is essential for the success of these processes. Currently, the absence of clear legal protections leaves individuals hesitant to engage fully in Restorative Justice, undermining its potential for healing and restoration.

AB 2833 aims to remedy this situation by establishing comprehensive protections for all Restorative Justice processes in California to ensure that information shared in Restorative Justice processes is inadmissible in future legal proceedings.

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