

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2833 (McKinnor)
Version: June 13, 2024
Hearing Date: June 18, 2024
Fiscal: No
Urgency: No
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SUBJECT

Evidence: restorative justice communications

DIGEST

This bill provides that, except as specified, 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 shall not be compelled, in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process.

EXECUTIVE SUMMARY

"Restorative Justice is a comprehensive philosophy of justice. Various forms of Restorative Justice have been practiced throughout history in cultures around the world. Restorative Justice offers a complete approach to addressing the needs of all affected parties: victims, offenders, and communities."¹ Restorative justice relies on trust and openness among the parties involved. To ensure restorative justice processes are effective in this regard, this bill establishes a rule of evidence that an individual's participation or nonparticipation in such processes and any communications within them are not admissible or subject to disclosure in any other proceedings regardless of completion or outcome of the process, except as specified.

This bill is sponsored by Initiate Justice. It is supported by a wide range of organizations, including A New Way of Life Reentry Project and the Los Angeles County District Attorney's Office. No timely opposition has been received by the Committee. This bill passed out of the Senate Public Safety Committee on a vote of 4 to 0.

¹ *Restorative Justice*, Chief Probations Officers of California, <https://www.cpoc.org/position-paper/restorative-justice>. All internet citations are current as of June 12, 2024.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) 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, subd. (f), par. (3).)
- 2) 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. (Evid. Code § 210.)
- 3) Establishes numerous privileges, allowing the holder of the privilege, or a person who is authorized to claim the privilege on their behalf, to prevent another from disclosing a confidential communication, whether made orally, in writing, or otherwise conveyed between the parties in the confidential relationship. (Evid. Code §§ 954, 966, 980, 994, 1014, 1033, 1034, 1035.8, 1037.5, 1038.)

This bill:

- 1) Provides that, except as specified, 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 shall not be compelled, in any arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding regardless of completion or outcome of the process.
- 2) Provides that a communication within the restorative justice process is not made inadmissible hereby if any of the following has occurred:
 - a) 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.
 - b) The communication discloses information that a participant, including 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.
 - d) During the restorative justice process, a participant discloses that they were involved in a crime that could result in a life term for which the participant had not been previously charged.
- 3) Applies to all communications that take place during a restorative justice process, including those that occur prior or subsequent to enactment of this bill, where the arbitration, administrative adjudication, civil action, criminal action, juvenile action, or other proceeding at which admission is sought occurs after the effective date of the bill.
 - 4) Defines “restorative justice process” as a facilitated, community-based process in which parties who have caused harm or who have been harmed and in which community members may collectively gather to identify and repair harm to the extent possible. Restorative justice processes focus on accountability, healing, 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. If challenged, the determination of whether a process qualifies shall be determined by the court or finder of fact. 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.
 - 5) Clarifies 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.
 - 6) Makes findings and declarations regarding the benefits and mechanisms of restorative justice.

COMMENTS

1. Embracing restorative justice

According to the California Department of Corrections and Rehabilitation (CDCR):

The commonly accepted definition for “restorative justice” used internationally is “a process whereby parties with a stake in a specific crime resolve collectively how to deal with the aftermath of the crime and its implications for the future.”

Objectives of restorative justice are to attend to victims' needs, enable those responsible for committing the crime to assume responsibility for their action, reintegrate them into the community, and recreate a working community that supports victims and rehabilitation of the incarcerated individual.²

The Legislature has repeatedly indicated its strong support for and encouragement of restorative justice processes. AB 60 (Bryan, Ch. 513, Stats. 2023) establishes that victims of crimes have the statutory right to be notified of the availability of community-based restorative justice programs and processes available to them, including programs serving their community, county, county jails, and juvenile detention facilities. AB 2167 (Kalra, Ch. 775, Stats. 2022) requires a court presiding over a criminal matter to consider alternatives to incarceration, including restorative justice. AB 1165 (McCarty, Ch. 22, Stats. 2023) encourages local educational agencies (LEAs) to refer both the victim and perpetrator of an incident of racist bullying, harassment, or intimidation to a restorative justice program that suits the needs of both the victim and the perpetrator. AB 2598 (Weber, Ch. 914, Stats. 2022) requires the Department of Education to develop evidence-based practices for restorative justice practice for LEAs to implement to improve campus culture and climate.

2. Ensuring restorative justice processes are able to operate effectively

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.

Following the lead of a growing number of states, this bill protects the fact of participation/nonparticipation in and the communications within restorative justice processes from being admissible or subject to discovery in future proceedings. There are exceptions where, for instance, a mandated reporter's duties are triggered or there is knowing consent of the parties otherwise.

The effectiveness of such processes, similar to that in mediation, is heavily reliant on the participants feeling comfortable communicating openly without threat of further consequences. As stated by the author:

Expressions of true remorse and accountability, and commitments to repair harm can lead to healing and restoration in [a restorative justice]

² *Restorative Justice*, CDCR, <https://www.cdcr.ca.gov/victim-services/rj-overview/>.

process that isn't possible in standard criminal processes. In order to accomplish this, a person who caused harm needs to feel safe being fully honest about their actions. However, when confidentiality is not guaranteed, the relevant parties often feel unable to share their stories openly, for fear of future recrimination.

Initiate Justice, the sponsor of the bill, explain the need for it:

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 paper, 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.

3. Support

Prosecutors Alliance Action writes in support:

Restorative justice is a 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 programs have proven effective in addressing conflict and harm within communities, serving both the needs of victims and the public at large. However, the absence of clear legal protections in current law cause many individuals to avoid engaging in these processes.

AB 2833 will address the barriers to participation by establishing protections for restorative justice processes in California to ensure that information shared in restorative justice processes is inadmissible in future legal proceedings.

Writing in support, A New Way of Life Reentry Project explains their reasoning for supporting restorative justice:

Survivors and victims of harm often do not feel their needs are being 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. 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. Victims and survivors have also reported reduced feelings of fear, anger, post-traumatic stress symptoms, and depression after going through a Restorative Justice process.

SUPPORT

Initiate Justice (sponsor)

10p Program

A New Way of Life Reentry Project

Alliance for Boys and Men of Color

Alliance of Californians for Community Empowerment (ACCE) Action

American Friends Service Committee

API Equality-LA

Asian Americans Advancing Justice - Asian Law Caucus

Californians for Safety and Justice

Californians United for A Responsible Budget

Centinela Youth Services

Communities United for Restorative Youth Justice (CURYJ)

Crime Survivors for Safety and Justice

Crop Organization; the

Ella Baker Center for Human Rights

Equal Justice USA

Friends Committee on Legislation of California

Grace Institute - End Child Poverty in CA

Grip Training Institute

Honoring Resilience

Initiate Justice

LA Defensa

Legal Services for Prisoner With Children

Los Angeles County Democratic Party

Los Angeles County District Attorney's Office

National Institute for Criminal Justice Reform

Oakland Privacy

Pacific Juvenile Defender Center

Peace Anger Love

Prosecutors Alliance

San Francisco Public Defender

Secure Justice

SEIU California
Smart Justice California, a Project of Tides Advocacy
The Collective Healing and Transformation Project
Vera Institute of Justice
White People 4 Black Lives

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation:

SB 379 (Umberg, 2024) requires CDCR to establish and maintain an Accountability Letter Bank (ALB) program, with the goal of providing a voluntary opportunity for incarcerated persons under their jurisdiction to be accountable for the harm they have caused and to express remorse to those they have harmed, and to allow victims, survivors, and next of kin to receive a letter of accountability from an incarcerated person when, and if, they choose to receive a letter that is addressed to them, as specified. The program requires the letters to be reviewed by an ALB program facilitator to ensure they are not harmful to the victim, survivor, or next of kin. SB 379 additionally requires CDCR to establish and maintain a Victim Offender Dialogue program, with the goal of providing voluntary opportunities for restorative justice processes between victims, survivors, and next of kin and people who are incarcerated or on parole, facilitated by nonprofit, community-based restorative justice organizations. SB 379 is currently in the Assembly Appropriations Committee.

AB 1919 (Weber, 2024) requires a school district to document any alternative means of correction used prior to the suspension of a student and requires LEAs to adopt at least one of the best practices for restorative justice implementation developed by the California Department of Education. AB 1919 is currently in the Senate Education Committee.

Prior Legislation:

AB 60 (Bryan, Ch. 513, Stats. 2023) *See Comment 1.*

AB 1165 (McCarty, Ch. 22, Stats. 2023) *See Comment 1.*

AB 2167 (Kalra, Ch. 775, Stats. 2022) *See Comment 1.*

AB 2598 (Weber, Ch. 914, Stats. 2022) *See Comment 1.*

PRIOR VOTES:

Senate Public Safety Committee (Ayes 4, Noes 0)

Assembly Floor (Ayes 65, Noes 0)

Assembly Judiciary Committee (Ayes 12, Noes 0)

Assembly Public Safety Committee (Ayes 8, Noes 0)
