Date of Hearing: April 2, 2024
Counsel: Andrew Ironside

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Kevin McCarty, Chair

AB 2833 (McKinnor) – As Introduced February 15, 2024

As Proposed to be Amended in Committee

SUMMARY: Establishes that an individual's participation in and communications related to restorative justice processes are inadmissible in civil and criminal proceedings. Specifically, **this bill**:

1) Provides that an individual's participation or nonparticipation in a restorative justice process and any restorative justice communication are not admissible or subject to 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.

2) Provides a restorative justice communication is not made inadmissible by this section if:

   a) The participants in a facilitated dialogue under a 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 not required;

   b) A participant, including, but not limited to, a mandated reporter, or other individual who is otherwise required by law to disclose the substance of the communication; or,

   c) During the restorative justice process, a participant commits battery resulting in serious bodily injury or criminal threats, as specified, in which case only the parts of a restorative justice communication that are limited to that conduct are subject to disclosure.

3) Provide that evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because it was discussed or used in a restorative justice process.

4) Provides that the provisions of this bill apply to restorative justice communications that occurred prior to the bill's enactment where the proceeding at which the admission is sought occurs after the bill's effective date.

5) Defines "restorative justice communication" as either of the following:

a) All communications, written or oral, that are made as part of any phase of the restorative justice process, including referral, preparation, pre-enrollment, enrollment, post-enrollment, a facilitated dialogue, and post-dialogue phases of the process; or

b) All memoranda, work products, documents, and other materials that are prepared for or submitted in the course of, or in connection with, any phase of a restorative justice process, including referral, preparation, pre-enrollment, enrollment, post-enrollment, a facilitated dialogue, and post-dialogue phases of the process.

6) 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 definition is not intended to include general restorative justice programming that is primarily focused on teaching and practicing restorative justice principles.

7) 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.

8) Includes legislative findings and declarations.

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) 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. (Pen. Code, § 422.86, subd. (a)(3).)

4) 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. (Pen. Code, § 679.027, subd. (b)(3)(J).)

5) 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. (Pen. Code, § 5006, subd. (a)(1)(D).)

6) 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. (Pen. Code, § 5007.3, subd. (a)(2)(B).)

7) 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. (Pen. Code, §§ 6046 & 6046.3, subd. (b)(2).)

8) 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. (Pen. Code, § 243, subd. (d).)

9) 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. (Pen. Code, § 422, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: 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**: This bill provides that an individual's participation or nonparticipation in a restorative justice process and any restorative justice communication are not admissible or subject to disclosure, and disclosure cannot be compelled in any legal proceeding. 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) **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.

4) **Argument in Support**: According to *Initiate Justice*, one of the bill's co-sponsors, "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. 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.

   "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.

   "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."

5) **Prior Legislation**:

a) AB 60 (Bryan), Chapter 513, Statutes of 2023, established the statutory right of victims of crimes to be informed that community-based restorative justice programs are available to them.

b) AB 1165 (McCarty), Chapter 22, Statutes of 2023, would require a pupil in grades 4-12 who is suspended or recommended for expulsion from school for participating in hate violence, as defined, to participate in a restorative justice program provided by the school. AB 1165 is pending hearing the Assembly Education Committee.

c) AB 1691 (Ortega), of the 2023-2024 Legislative Session, would have established the Community-Based Restorative Justice Grant Program to fund the implementation and operation of restorative justice programs that focus on individuals who have committed hate violence and the victims. AB 1691 was referred to, but did not receive a hearing in, this committee.

d) AB 2167 (Kalra), Chapter 775, Statutes of 2022, requires a court presiding over a criminal matter to consider alternatives to incarceration, including restorative justice.

e) AB 2598 (Weber), Chapter 914, Statutes of 2022, requires the Department of Education to develop evidence-based practices for restorative justice practice implementation in schools.

f) AB 886 (Chiu), of the 2021-2022 Legislative Session, is substantially similar to AB 1691 (Ortega) above. AB 886 was held on suspense in the Assembly Appropriations Committee.

g) AB 1670 (Bryan), of the 2021-2022 Legislative Session, would have created the Commission on Alternatives to Incarceration within the California Health and Human Services Agency to research, among other things, restorative justice practices and opportunities. AB 1670 was held on suspense in the Assembly Appropriations Committee.

h) AB 160 (Committee on Budget), Chapter 771, Statutes of 2022, requires CDCR, if the victim has submitted a request for notice that an offender is being released from CDCR custody, to provide information to the victim about opportunities for victims or their family members to engage in restorative justice programs.

i) SB 993 (Skinner), of the 2021-2022 Legislative Session, was substantially similar to AB 160 (Committee on Budget). SB 993 died on the inactive file in the Assembly.

j) SB 678 (Glazer), of the 2019-2020 Legislative Session, would have established the Restorative Justice Pilot Program and required a report to the Legislature on the effectiveness of the program. SB 678 was held in suspense in the Senate Appropriations Committee.

k) AB 2590 (S. Weber), Chapter 696, Statutes of 2016, revised existing legislative declarations concerning the purpose of punishment to instead state that the purpose of sentencing is public safety achieved through accountability, rehabilitation, and restorative justice, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

Community Works (Co-Sponsor)
ACLU California Action
All of Us or None Bakersfield
Alliance for Boys and Men of Color
American Friends Service Committee
Bend the Arc California
California Attorneys for Criminal Justice
California Coalition for Women Prisoners
California Public Defenders Association
Californians for Safety and Justice (CSJ)
Californians United for A Responsible Budget
Centinela Youth Services
Children's Defense Fund - CA
Communities United for Restorative Youth Justice (CURYJ)
Courage California
Crime Survivors for Safety and Justice
Critical Resistance, Los Angeles
Ella Baker Center for Human Rights
Ensuring Opportunity Campaign
Felony Murder Elimination Project
Freedom 4 Youth
Freedom Within Project
Fresh Lifelines for Youth
Friends Committee on Legislation of California
Grip Training Institute
Healing Dialogue and Action
Indivisible CA Statestrong
Initiate Justice
Initiate Justice Action
James Morehouse Project
Law Enforcement Action Partnership
Lawyers' Committee for Civil Rights of The San Francisco Bay Area
Legal Services for Prisoners With Children
Milpa Collective
National Youth Justice Network
Peace Anger Love
Rubicon Programs
Ryse Center
Sacred Purpose LLC

Sister Warriors Freedom Coalition
Smart Justice California, a Project of Tides Advocacy
Strawberry Creek Monthly Meeting, Peace, Earthcare and Social Witness Committee
Transformative Programming Works (TPW)
University of San Diego, Center for Restorative Justice
University of San Francisco School of Law | Racial Justice Clinic
Valorus
Young Women's Freedom Center
Youth Alive!
Youth Leadership Institute
Youth Will

1 Private Individual

Opposition

None

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