

ASSEMBLY BILL

No. 1334

**Introduced by Assembly Member Swanson
(Coauthors: Assembly Members Laird and Leno)**

February 23, 2007

An act to amend Sections 286 and 288a of, and to add Section 5012 to, the Penal Code, relating to corrections.

LEGISLATIVE COUNSEL'S DIGEST

AB 1334, as introduced, Swanson. Corrections: sexual barrier protection devices.

Under existing law, the Secretary of the Department of Corrections and Rehabilitation is responsible for the administration of the state prisons. Existing regulation prohibits inmates from participating in illegal sexual acts.

This bill would enact the Inmate and Community Public Health and Safety Act, which would require the secretary to allow any nonprofit or health care agency to distribute sexual barrier protection devices, as specified. The bill would state that the distribution of those devices shall not be considered a crime nor shall it be deemed to encourage sexual acts between inmates. The bill would specify that possession of one of those devices shall not be used as evidence of illegal activity for purposes of administrative sanctions.

Under existing law, sodomy or oral copulation with any person while confined in a state or local correctional institution is a crime.

This bill would state that those criminal provisions do not prohibit the provision of sexual barrier protection devices or products pursuant to the above authorization.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. This act shall be known, and may be cited as, the
2 Inmate and Community Public Health and Safety Act.

3 SEC. 2. Section 286 of the Penal Code is amended to read:
4 286. (a) Sodomy is sexual conduct consisting of contact
5 between the penis of one person and the anus of another person.
6 Any sexual penetration, however slight, is sufficient to complete
7 the crime of sodomy.

8 (b) (1) Except as provided in Section 288, any person who
9 participates in an act of sodomy with another person who is under
10 18 years of age shall be punished by imprisonment in the state
11 prison, or in a county jail for not more than one year.

12 (2) Except as provided in Section 288, any person over the age
13 of 21 years who participates in an act of sodomy with another
14 person who is under 16 years of age shall be guilty of a felony.

15 (c) (1) Any person who participates in an act of sodomy with
16 another person who is under 14 years of age and more than 10
17 years younger than he or she shall be punished by imprisonment
18 in the state prison for three, six, or eight years.

19 (2) Any person who commits an act of sodomy when the act is
20 accomplished against the victim’s will by means of force, violence,
21 duress, menace, or fear of immediate and unlawful bodily injury
22 on the victim or another person shall be punished by imprisonment
23 in the state prison for three, six, or eight years.

24 (3) Any person who commits an act of sodomy where the act
25 is accomplished against the victim’s will by threatening to retaliate
26 in the future against the victim or any other person, and there is a
27 reasonable possibility that the perpetrator will execute the threat,
28 shall be punished by imprisonment in the state prison for three,
29 six, or eight years.

30 (d) Any person who, while voluntarily acting in concert with
31 another person, either personally or aiding and abetting that other
32 person, commits an act of sodomy when the act is accomplished
33 against the victim’s will by means of force or fear of immediate
34 and unlawful bodily injury on the victim or another person or
35 where the act is accomplished against the victim’s will by

1 threatening to retaliate in the future against the victim or any other
2 person, and there is a reasonable possibility that the perpetrator
3 will execute the threat, shall be punished by imprisonment in the
4 state prison for five, seven, or nine years.

5 (e) Any person who participates in an act of sodomy with any
6 person of any age while confined in any state prison, as defined
7 in Section 4504, or in any local detention facility, as defined in
8 Section 6031.4, shall be punished by imprisonment in the state
9 prison, or in a county jail for not more than one year. *This*
10 *subdivision does not prohibit the provision of sexual barrier*
11 *protection devices or products pursuant to Section 5012, to inmates*
12 *in state prison or local detention facilities.*

13 (f) Any person who commits an act of sodomy, and the victim
14 is at the time unconscious of the nature of the act and this is known
15 to the person committing the act, shall be punished by
16 imprisonment in the state prison for three, six, or eight years. As
17 used in this subdivision, “unconscious of the nature of the act”
18 means incapable of resisting because the victim meets one of the
19 following conditions:

20 (1) Was unconscious or asleep.

21 (2) Was not aware, knowing, perceiving, or cognizant that the
22 act occurred.

23 (3) Was not aware, knowing, perceiving, or cognizant of the
24 essential characteristics of the act due to the perpetrator’s fraud in
25 fact.

26 (4) Was not aware, knowing, perceiving, or cognizant of the
27 essential characteristics of the act due to the perpetrator’s fraudulent
28 representation that the sexual penetration served a professional
29 purpose when it served no professional purpose.

30 (g) Except as provided in subdivision (h), a person who commits
31 an act of sodomy, and the victim is at the time incapable, because
32 of a mental disorder or developmental or physical disability, of
33 giving legal consent, and this is known or reasonably should be
34 known to the person committing the act, shall be punished by
35 imprisonment in the state prison for three, six, or eight years.
36 Notwithstanding the existence of a conservatorship pursuant to
37 the Lanterman-Petris-Short Act (Part 1 (commencing with Section
38 5000) of Division 5 of the Welfare and Institutions Code), the
39 prosecuting attorney shall prove, as an element of the crime, that

1 a mental disorder or developmental or physical disability rendered
2 the alleged victim incapable of giving consent.

3 (h) Any person who commits an act of sodomy, and the victim
4 is at the time incapable, because of a mental disorder or
5 developmental or physical disability, of giving legal consent, and
6 this is known or reasonably should be known to the person
7 committing the act, and both the defendant and the victim are at
8 the time confined in a state hospital for the care and treatment of
9 the mentally disordered or in any other public or private facility
10 for the care and treatment of the mentally disordered approved by
11 a county mental health director, shall be punished by imprisonment
12 in the state prison, or in a county jail for not more than one year.
13 Notwithstanding the existence of a conservatorship pursuant to
14 the Lanterman-Petris-Short Act (Part 1 (commencing with Section
15 5000) of Division 5 of the Welfare and Institutions Code), the
16 prosecuting attorney shall prove, as an element of the crime, that
17 a mental disorder or developmental or physical disability rendered
18 the alleged victim incapable of giving legal consent.

19 (i) Any person who commits an act of sodomy, where the victim
20 is prevented from resisting by an intoxicating or anesthetic
21 substance, or any controlled substance, and this condition was
22 known, or reasonably should have been known by the accused,
23 shall be punished by imprisonment in the state prison for three,
24 six, or eight years.

25 (j) Any person who commits an act of sodomy, where the victim
26 submits under the belief that the person committing the act is the
27 victim's spouse, and this belief is induced by any artifice, pretense,
28 or concealment practiced by the accused, with intent to induce the
29 belief, shall be punished by imprisonment in the state prison for
30 three, six, or eight years.

31 (k) Any person who commits an act of sodomy, where the act
32 is accomplished against the victim's will by threatening to use the
33 authority of a public official to incarcerate, arrest, or deport the
34 victim or another, and the victim has a reasonable belief that the
35 perpetrator is a public official, shall be punished by imprisonment
36 in the state prison for three, six, or eight years.

37 As used in this subdivision, "public official" means a person
38 employed by a governmental agency who has the authority, as part
39 of that position, to incarcerate, arrest, or deport another. The
40 perpetrator does not actually have to be a public official.

1 (l) As used in subdivisions (c) and (d), “threatening to retaliate”
2 means a threat to kidnap or falsely imprison, or inflict extreme
3 pain, serious bodily injury, or death.

4 (m) In addition to any punishment imposed under this section,
5 the judge may assess a fine not to exceed seventy dollars (\$70)
6 against any person who violates this section, with the proceeds of
7 this fine to be used in accordance with Section 1463.23. The court,
8 however, shall take into consideration the defendant’s ability to
9 pay, and no defendant shall be denied probation because of his or
10 her inability to pay the fine permitted under this subdivision.

11 SEC. 3. Section 288a of the Penal Code is amended to read:

12 288a. (a) Oral copulation is the act of copulating the mouth
13 of one person with the sexual organ or anus of another person.

14 (b) (1) Except as provided in Section 288, any person who
15 participates in an act of oral copulation with another person who
16 is under 18 years of age shall be punished by imprisonment in the
17 state prison, or in a county jail for a period of not more than one
18 year.

19 (2) Except as provided in Section 288, any person over the age
20 of 21 years who participates in an act of oral copulation with
21 another person who is under 16 years of age is guilty of a felony.

22 (c) (1) Any person who participates in an act of oral copulation
23 with another person who is under 14 years of age and more than
24 10 years younger than he or she shall be punished by imprisonment
25 in the state prison for three, six, or eight years.

26 (2) Any person who commits an act of oral copulation when
27 the act is accomplished against the victim’s will by means of force,
28 violence, duress, menace, or fear of immediate and unlawful bodily
29 injury on the victim or another person shall be punished by
30 imprisonment in the state prison for three, six, or eight years.

31 (3) Any person who commits an act of oral copulation where
32 the act is accomplished against the victim’s will by threatening to
33 retaliate in the future against the victim or any other person, and
34 there is a reasonable possibility that the perpetrator will execute
35 the threat, shall be punished by imprisonment in the state prison
36 for three, six, or eight years.

37 (d) Any person who, while voluntarily acting in concert with
38 another person, either personally or by aiding and abetting that
39 other person, commits an act of oral copulation (1) when the act
40 is accomplished against the victim’s will by means of force or fear

1 of immediate and unlawful bodily injury on the victim or another
 2 person, or (2) where the act is accomplished against the victim’s
 3 will by threatening to retaliate in the future against the victim or
 4 any other person, and there is a reasonable possibility that the
 5 perpetrator will execute the threat, or (3) where the victim is at the
 6 time incapable, because of a mental disorder or developmental or
 7 physical disability, of giving legal consent, and this is known or
 8 reasonably should be known to the person committing the act,
 9 shall be punished by imprisonment in the state prison for five,
 10 seven, or nine years. Notwithstanding the appointment of a
 11 conservator with respect to the victim pursuant to the provisions
 12 of the Lanterman-Petris-Short Act (Part 1 (commencing with
 13 Section 5000) of Division 5 of the Welfare and Institutions Code),
 14 the prosecuting attorney shall prove, as an element of the crime
 15 described under paragraph (3), that a mental disorder or
 16 developmental or physical disability rendered the alleged victim
 17 incapable of giving legal consent.

18 (e) Any person who participates in an act of oral copulation
 19 while confined in any state prison, as defined in Section 4504 or
 20 in any local detention facility as defined in Section 6031.4, shall
 21 be punished by imprisonment in the state prison, or in a county
 22 jail for a period of not more than one year. *This subdivision does*
 23 *not prohibit the provision of sexual barrier protection devices or*
 24 *products pursuant to Section 5012, to inmates in state prison or*
 25 *local detention facilities.*

26 (f) Any person who commits an act of oral copulation, and the
 27 victim is at the time unconscious of the nature of the act and this
 28 is known to the person committing the act, shall be punished by
 29 imprisonment in the state prison for a period of three, six, or eight
 30 years. As used in this subdivision, “unconscious of the nature of
 31 the act” means incapable of resisting because the victim meets one
 32 of the following conditions:

- 33 (1) Was unconscious or asleep.
- 34 (2) Was not aware, knowing, perceiving, or cognizant that the
 35 act occurred.
- 36 (3) Was not aware, knowing, perceiving, or cognizant of the
 37 essential characteristics of the act due to the perpetrator’s fraud in
 38 fact.
- 39 (4) Was not aware, knowing, perceiving, or cognizant of the
 40 essential characteristics of the act due to the perpetrator’s fraudulent

1 representation that the oral copulation served a professional purpose
2 when it served no professional purpose.

3 (g) Except as provided in subdivision (h), any person who
4 commits an act of oral copulation, and the victim is at the time
5 incapable, because of a mental disorder or developmental or
6 physical disability, of giving legal consent, and this is known or
7 reasonably should be known to the person committing the act,
8 shall be punished by imprisonment in the state prison, for three,
9 six, or eight years. Notwithstanding the existence of a
10 conservatorship pursuant to the provisions of the
11 Lanterman-Petris-Short Act (Part 1 (commencing with Section
12 5000) of Division 5 of the Welfare and Institutions Code), the
13 prosecuting attorney shall prove, as an element of the crime, that
14 a mental disorder or developmental or physical disability rendered
15 the alleged victim incapable of giving consent.

16 (h) Any person who commits an act of oral copulation, and the
17 victim is at the time incapable, because of a mental disorder or
18 developmental or physical disability, of giving legal consent, and
19 this is known or reasonably should be known to the person
20 committing the act, and both the defendant and the victim are at
21 the time confined in a state hospital for the care and treatment of
22 the mentally disordered or in any other public or private facility
23 for the care and treatment of the mentally disordered approved by
24 a county mental health director, shall be punished by imprisonment
25 in the state prison, or in a county jail for a period of not more than
26 one year. Notwithstanding the existence of a conservatorship
27 pursuant to the provisions of the Lanterman-Petris-Short Act (Part
28 1 (commencing with Section 5000) of Division 5 of the Welfare
29 and Institutions Code), the prosecuting attorney shall prove, as an
30 element of the crime, that a mental disorder or developmental or
31 physical disability rendered the alleged victim incapable of giving
32 legal consent.

33 (i) Any person who commits an act of oral copulation, where
34 the victim is prevented from resisting by any intoxicating or
35 anesthetic substance, or any controlled substance, and this condition
36 was known, or reasonably should have been known by the accused,
37 shall be punished by imprisonment in the state prison for a period
38 of three, six, or eight years.

39 (j) Any person who commits an act of oral copulation, where
40 the victim submits under the belief that the person committing the

1 act is the victim’s spouse, and this belief is induced by any artifice,
 2 pretense, or concealment practiced by the accused, with intent to
 3 induce the belief, shall be punished by imprisonment in the state
 4 prison for a period of three, six, or eight years.

5 (k) Any person who commits an act of oral copulation, where
 6 the act is accomplished against the victim’s will by threatening to
 7 use the authority of a public official to incarcerate, arrest, or deport
 8 the victim or another, and the victim has a reasonable belief that
 9 the perpetrator is a public official, shall be punished by
 10 imprisonment in the state prison for a period of three, six, or eight
 11 years.

12 As used in this subdivision, “public official” means a person
 13 employed by a governmental agency who has the authority, as part
 14 of that position, to incarcerate, arrest, or deport another. The
 15 perpetrator does not actually have to be a public official.

16 (l) As used in subdivisions (c) and (d), “threatening to retaliate”
 17 means a threat to kidnap or falsely imprison, or to inflict extreme
 18 pain, serious bodily injury, or death.

19 (m) In addition to any punishment imposed under this section,
 20 the judge may assess a fine not to exceed seventy dollars (\$70)
 21 against any person who violates this section, with the proceeds of
 22 this fine to be used in accordance with Section 1463.23. The court
 23 shall, however, take into consideration the defendant’s ability to
 24 pay, and no defendant shall be denied probation because of his or
 25 her inability to pay the fine permitted under this subdivision.

26 SEC. 4. Section 5012 is added to the Penal Code, to read:

27 5012. (a) The Secretary of the Department of Corrections and
 28 Rehabilitation shall allow any nonprofit or public health care
 29 agency to distribute sexual barrier protection devices such as
 30 condoms and dental dams to inmates. Any agency that distributes
 31 those devices shall be subject to all relevant laws and regulations
 32 regarding visitors to correctional facilities.

33 (b) The distribution of those devices shall not be considered a
 34 crime nor shall it be deemed to encourage sexual acts between
 35 inmates.

36 (c) Possession of a device distributed pursuant to subdivision
 37 (a) shall not be used as evidence of illegal activity for purposes of
 38 administrative sanctions.

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