



May 7, 2010

Attorney General Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: Docket No. OAG-131; AG Order No. 3143-2010
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder:

We are writing to support of the recommended national standards for the prevention, detection, response, and monitoring of sexual abuse developed by the National Prison Rape Elimination Commission and to offer areas where we think they could be improved.

All available research on sexual abuse in detention facilities has found the same sad reality: lesbian, gay, bisexual and transgender (LGBT) people are particularly vulnerable to sexual abuse and are, in fact, sexually abused at rates significantly higher than non-LGBT inmates/detainees. Because the recommended standards specifically recognize this reality and include several important measures to combat it – and, of course, because the proposed standards have the potential to improve the safety of *all* involved in the justice system – we urge that they be adopted as soon as possible.

Equality California does not work extensively in criminal justice areas. Because the problem of sexual abuse against LGBT people in detention facilities is so severe, so pervasive and so widespread, we feel compelled to submit these comments. Several colleague organizations, including the National Center for Lesbian Rights, the National Center for Transgender Equality, and the American Civil Liberties Union have submitted extensive and detailed comments on the proposed standards and the three questions contained the Advance Notice of Proposed Rulemaking. We defer to and support our colleagues' thoughtful comments. We do, however, want to specifically support the following standards for their particular importance to the LGBT community:

- The **Prevention Planning (PP)** and **Response Planning (RP)** standards impose a welcome, zero tolerance approach to all forms of sexual abuse and require facilities to promulgate clear protocols to respond effectively to sexual violence. The **Reporting (RE) and Official Response (OR)** standards respond directly to the most common reasons given by inmates for why they fail to report sexual abuse. These standards are particularly important to LGBT people because research indicates that their reports of sexual abuse are often treated less seriously than reports by non-LGBT inmates and not given an appropriate response.

- **Training and Education (TR)** will help employees, volunteers, contractors, and inmates know how to prevent, detect, and respond to incidents of sexual abuse. We strongly support **TR-1's** requirement that staff training include strategies for communicating effectively and professionally with all inmates.

However, we are very concerned that none of the related TR Standards or Assessment Checklists specifically reference lesbian, gay, bisexual, transgender, and intersex (LGBTI) specific issues. Given the hugely disproportionate rates of sexual abuse against members of our community, this is an egregious oversight. The needs of LGBTI and gender-nonconforming inmates are specifically included in the Screening for Risk checklist (SC2) and should be similarly included in the TR checklists.

The omission is compounded by the failure of the proposed standards to list mandatory topics to be covered in training under the standard. We recommend that the standards required all staff and vendor training programs to include the topics listed in Appendix B.

- **Screening for Risk of Sexual Victimization and Abusiveness (SC) and Assessment and Placement of Residents (AP)** will help ensure that facilities are aware of each individual's particular risk of victimization and that an inmate's sexual orientation, genital status, or gender identity does not subject that person to more punitive conditions. Given the heightened vulnerability to sexual abuse of LGBTI inmates, we strongly support the inclusion of a gay or bisexual sexual orientation and gender nonconformance (e.g., transgender or intersex identity) in the criteria for screening male inmates for risk of victimization in adult prisons and jails. At the same time, we also strongly support the checklists' inclusion of an inmate's own perception of vulnerability in the screening of male and female inmates. As discussed below, we believe these criteria must be in screening instruments for all facilities, including those used for female inmates and juvenile residents. *Moreover, the corollary standards for lockups (PP-4) should include the risk factors identified in the Discussion section for this standard.*

Because some LGBTI inmates may be fearful of consequences for disclosing their sexual orientation/gender identity, *we also recommend clarifying that inmates may not be disciplined for their responses or lack of response to screening questions.*

Segregation of Vulnerable Inmates. We strongly support the proposed standards' forbidding the segregation of vulnerable inmates except temporarily and as a last resort, and the requirement of equal access to programs and services (**SC-2** and **AP-2**). *The Juvenile standards need to be brought into conformity with the Adult standards in the following ways (a) the prohibition on segregating vulnerable inmates needs to be included in Juvenile standard AP-2; (b) Juvenile standard AP-1 needs to clearly provide, as do the adult standards, that sexual orientation, gender identity, and gender nonconformance are indicators for risk of victimization and not for*



sexually abusive conduct; and (c) residents' own perceptions of their vulnerability should be included as an indicator of their risk of victimization, as is provided in the Adult standards.

To be fully effective, SC-2 should clearly prohibit classification based solely on birth gender, and should explicitly require that facilities make an individualized determination as to whether a transgender inmate will be housed in a men's or women's facility. In community corrections, as in other settings, SC-2 should provide that risk of victimization should not limit access to programs and opportunities to the extent possible.

- We support the **Investigations (IN) and Discipline (DI)** standards because they will help ensure that all allegations of abuse, including third-party and anonymous reports, are fully investigated. Far too often, LGBTI victims feel their reports of abuse are not taken as seriously as those made by non-LGBTI inmates and, consequently, perpetrators who target LGBT inmates for abuse are able to act with impunity.
- **Medical and Mental Health Care (MM)** standards recognize the critical role that medical and mental health staff play in identifying an inmate's risk for victimization and responding to abuse when it occurs. LGBTI inmates may feel more comfortable disclosing abuse, or fear of abuse, to medical or mental health staff than to custodial staff.

The MM standards, however, are sorely lacking because neither they nor the TR standards require the medical or mental health staff have any training on dealing with sexual abuse or evidence collection, generally, or the specific issues/challenges faced by LGBTI survivors or survivors of same-sex abuse, specifically. Because sexual abuse in detention facilities is so common, the standards should require all medical and mental health staff to have basic training in this area, including more specificity about when a forensic examination should be obtained.

- **Data Collection and Review (DC)** standards properly require agencies to collect and review sexual abuse incident data and use that analysis in prevention, detection, and response policies and practices. We also appreciate that the standards require using the data to assess problem areas, including any racial dynamics. *We urge the checklists also include "sexual orientation/gender identity dynamics" to help gauge, prevent and respond to anti-LGBT bias behind acts of sexual abuse.*
- **Cross-Gender Supervision:** Because data shows that a significant percentage of sexual abuse is perpetrated by staff members of the opposite sex, we strongly support standard **PP-4 (PP-5 for Lockups)**. We understand there is considerable pushback from the correctional industry on this point and we urge you not to yield.



Rather than limiting cross-gender supervision in *all* areas where inmates disrobe or perform bodily functions – the norm in most other western countries – the final proposed standard only prohibits *actually viewing* inmates of the opposite gender who are nude or performing bodily functions and performing body cavity, strip and pat searches on inmates of the opposite sex. The standard also makes exceptions to this requirement in cases of emergencies or other extraordinary or unforeseen circumstances. These requirements can be met with low-cost solutions.

PP-4's basic limitations on cross-gender viewing and searches represent the minimum steps necessary to protect LGBTI and other vulnerable inmates from staff sexual abuse.

While we strongly support the proposed standards on cross-gender searches and viewing, we are concerned by the lack of guidance regarding how this standard applies to transgender and intersex inmates. At present, transgender women in particular are frequently searched by male staff, notwithstanding having breasts and a feminine appearance. This practice invites abuse, as documented in testimony before the Commission.

Transgender and intersex inmates should be asked to specify the gender of staff they feel can most safely search them. This approach is currently used by the District of Columbia Police Department, the New York State Office of Children and Family Services, and numerous jurisdictions in Canada and the United Kingdom.

We also strongly urge that the standards include a clear requirement that strip and visual body cavity searches of any inmate be conducted only for legitimate, contraband-related purposes. Searches of inmates for the sole purpose of determining genital status should be prohibited.

Because research shows that sexual abuse of transgender inmates occurs disproportionately in showers, all facilities should provide transgender and intersex inmates private access to showers, separate from other inmates.

- **Consensual Sexual Activity between Inmates.** The singular reason PREA was enacted was to address sexually *abusive* behavior. Consequently, the PREA standards should not be used to deal with consensual sexual contact. *All four sets of standards should distinguish clearly between sexual abuse, which should always fall under the purview of these standards, and consensual sexual activities between inmates, which a facility may prohibit, but should not treat as sexual abuse.* This would help to distinguish between the serious harms and trauma of sexual abuse that PREA is intended to prevent and a facility's interest in preventing sexual activity between inmates. It would also ensure that facilities do not further penalize and pathologize same-sex sexual activity.

Because the majority of residents in juvenile facilities are minors, we urge the Department to specify the limited circumstances under which juvenile facilities can treat voluntary sexual contact between residents as abuse. In most states, the age of consent is 16, and in all but a handful of states minors 14 or older can consent to sexual contact with others who are close to them in age. In addition, many juvenile facilities house youth over the age of 18. Considering that many residents of juvenile facilities are old enough to consent to sexual activity with other similarly-aged youth, changes to the proposed standards are required.

The Adult, Lockup, and Community Corrections standards define sexually abusive penetration to include only *nonconsensual* sexual penetration and penetration involving an inmate who is unable to consent or refuse. However, the juvenile standards require that facilities treat *any* sexual penetration between residents as sexual abuse, regardless of whether the activity is voluntary and the residents involved are legally able to consent. As a result, (a) facilities would have to use their limited resources investigating and filing reports for sexual activity that would not be considered sexual abuse in any other setting; and (b) residents involved in substantiated reports of *non-abusive* sexual penetration would be treated the same as residents found to be perpetrators of actual sexual abuse. This is a plain injustice and will fall disproportionately on LGBTI youth.

The inclusion of the words “**who is unable to consent or refuse**” in the definition of resident-on-resident sexually abusive contact could be read to require juvenile facilities to treat some voluntary sexual activity between residents as sexual abuse solely based on the age or relative ages of the youth involved. We urge you to take the following steps to prevent a misapplication of the standards to cases of voluntary sexual contact between similarly aged youth.

- *The standards should state that a state’s age of consent laws are controlling and, therefore, the standards do not apply to voluntary sexual contact between minors who, under the laws of that state, can legally consent to engage in such contact.*
- *Standard **OR-1** should state explicitly that it does not expand facilities’ mandatory reporting requirements beyond a state’s definition of child abuse (as most states do not consider statutory rape between youth to be child abuse).*
- *Standard **DI-2** should discourage the use of harsh sanctions to punish similarly-aged youth who engage in voluntary, but legally non-consensual, sexual contact. Specifically, facilities should not treat these youth as sexually aggressive, violent, or deviant, or attempt to change their sexual orientation. In addition, interventions for “victims” and “perpetrators” of voluntary sexual contact should not be more punitive than those for sexual contact that is forced, coerced, or violent.*



- *Standard TR-1 should require that facilities provide training for employees that covers the topics in the three above recommendations.*

If adopted, the Commission's proposed standards would constitute a long-overdue response to sexual abuse of individuals in adult prisons and jails, immigration detention, lock-ups, community corrections, and juvenile facilities, generally, and LGBT and intersex people specifically. They are urgently needed and we urge you to promulgate the standards with our recommended modifications without delay.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Mario Guerrero".

Mario Guerrero

Government Affairs Director