



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

Friday, May 7, 2010

Dear Attorney General Holder:

We are writing to support 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.

GMHC works to end the HIV epidemic and uplift the lives of all impacted, and has been a leader in our field since the emergence of HIV in 1981. Ending prison rape and addressing the heightened risk for sexual violence which lesbian, gay, bisexual and transgender (LGBT) inmates face is a vital part of this mission. We would additionally like to support the comments of several colleague organizations, including the National Center for Lesbian Rights, the National Center for Transgender Equality, and the American Civil Liberties Union who have submitted extensive and detailed comments on the proposed standards and the three questions contained the Advance Notice of Proposed Rulemaking. In areas where we do not have extensive expertise on the criminal justice system, we defer to and support our colleagues' thoughtful comments. We do, however, want to specifically support the standards noted in this comment for their particular importance to the LGBT community and HIV prevention.

The sexual abuse of LGBT people violates their basic human rights, violates the government's constitutional obligation to provide safe and humane conditions of confinement, and impedes the likelihood of a successful transition back into the community. Additionally, prison rape significantly increases risk of HIV for incarcerated persons, and therefore the communities they return to. Because the recommended standards specifically recognize this reality and include several important measures to combat it – and 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. If implemented, the Commission's standards have the potential to improve the safety of all people, including LGBT people, involved in the justice system.

All available research on sexual abuse in detention facilities has found the same reality: LGBT people are particularly vulnerable to sexual abuse and are, in fact, sexually abused at rates significantly higher than non-LGBT inmates/detainees. Prison rape also significantly increases the risk of HIV infection for incarcerated persons. To protect incarcerated persons from HIV, we must take significant steps to eliminate prison rape and support those inmates most vulnerable to sexual violence in prison.

Prison rape may expose victims to HIV

Our prisons put inmates at heightened risk for HIV when they fail to protect incarcerated persons from rape. Ending prison rape is necessary to ensure the health and safety of incarcerated persons. Incarceration and associated risk of rape is one element of complex system which puts formerly and currently incarcerated persons and their communities at heightened risk for HIV. Inmates confined in state and federal prisons have AIDS at 5 times (.5%) and HIV at 4 times (2.3 to 2.98%) that of the U.S.

population.¹ By working to end prison rape through implementing the standards recommended by the National Prison Rape Elimination Commission we can take significant steps to decrease the risks of inmates to contract HIV through prison rape.

- Approximately 25% of the United States population living with HIV passes through the correctional system annually.²
- New York prisons held about one quarter of all inmates known to be HIV positive as of the end of 2000.³
- Without official access to latex barriers, prisoners use ineffective makeshift devices, like rubber gloves and used plastic wrap, in attempts to practice safer sex.⁴

Prisoners who are gay, transgender, or perceived to be gay or gender nonconforming, are at high risk of sexual abuse in prison

To effectively address prison rape it is vital that we understand the ways in which LGBT inmates, and inmates targeted by sexual violence due to perceived sexual and gender identity are at high risk for sexual abuse while incarcerated.

- In male facilities, gay men, particularly those exhibiting stereotypically “effeminate” characteristics and transgender women are extremely vulnerable to sexual abuse.^{5,6}
- One study, for example, found that 41% of gay men were sexually assaulted in prison, as opposed to 9% of heterosexual men.⁷ This same study found that 53% of a sample of 80 self-identified homosexual prisoners in a medium-security California prison had experienced sexual harassment and/or threats.⁸
- James Robertson, professor of corrections at Minnesota State University, Mankato, has reviewed a number of studies of male-male rape in prison dating back to the 1960s. Nearly all present non-

¹ National Commission on Correctional Healthcare. (2002). *The health status of soon-to-be-released prisoners: A report to Congress*. Available at http://www.ncchc.org/pubs_stbr.html. Cited in Robertson (2003).

² Spaulding, A., Stephenson, B., Macalino, G., Ruby, W., Clark, J., & Flanigan, T. (2002). Human immunodeficiency virus in correctional facilities: A review. *Clinical Infectious Diseases*. 35: 305-312. Cited in Braithwalte, R. L. & Arriola, K.R.J. (2003). Male prisoners and HIV prevention: A call for action ignored. *American Journal of Public Health*. 93(5): 759-763.

³ Maruschak, L., (2002, October). *HIV in prisons, 2000*. Washington, DC: U.S. Department of Justice, Office of Justice Programs. NCJ 196023.

⁴ Mahon, N. (1996). New York inmates’ HIV risk behaviors: The implications for prevention policy and programs. *American Journal of Public Health*. 86(9): 1211-5.

⁵ Mariner, J. (1999). *No escape: Male rape in U.S. prisons*. New York: Human Rights Watch. p. 71.

⁶ *Roderick Keith Johnson, v. Gary Johnson*, 385 F.3d 503, 512 (5th Cir. 2004)

⁷ Wooden, W. & Parker, J. (1982). *Men behind bars*. New York: Plenum Press. p. 18.

⁸ Wooden & Parker (1982). Cited in Robertson, J. (1999). Cruel and unusual punishment in United States prisons: Sexual harassment among male inmates. *American Criminal Law Review* 36(1). Journal article retrieved online through LexisNexis; no page numbers available.

consensual sex and rape as widespread in prisons. One found such abuse more prevalent in state prisons than in federal prisons.⁹

- Many male inmates consent to sexual acts against their will to avoid violence, apparently feeling there are no other options.¹⁰
- *The New York Times* reported in 2004 on the case of Roderick Johnson, a gay man forced into “daily sex acts” of sexual slavery in a Texas prison:

“The Crips already had a homosexual that was with them,” Mr. Johnson explained. “The Gangster Disciples, from what I understand, hadn’t had a homosexual under them in a while. So that’s why I was automatically, like, given to them.” According to court papers and [Johnson’s] own detailed account, the Gangster Disciples and then other gangs treated Mr. Johnson as a sex slave. They bought and sold him, and they rented him out. Some acts cost \$5, others \$10...”I was forced into oral and anal sex on a daily basis...Not for a month or two. For, like, 18 months.”¹¹

- T.J. Parsell, later board chair of Stop Prisoner Rape, was sentenced to prison in Michigan at age 17 for armed robbery. His first day in jail, Parsell was drugged and gang raped. “When they were done, they flipped a coin to see which one I belonged to,” Parsell said.¹²
- In 1973 Stephen Donaldson, a Quaker peace activist, was arrested and held for two nights in a Washington, D.C. jail for trespassing at the White House to protest the U.S. policy in southeast Asia. During his brief stay in jail Donaldson was gang-raped approximately 60 times by numerous inmates.¹³
- Keith DeBlasio, a gay man, told officials that he felt vulnerable in the open dormitory unit at a federal prison and that he felt threatened by a gang member, but he and the gang member were housed together anyway. Keith was repeatedly raped by the gang member who threatened to stab him and used other gang members to intimidate him so that he would not fight back or report the abuse. Keith contracted HIV from this abuse.¹⁴
- Kendall Spruce is a bisexual man who was raped by more than 25 other inmates over the course of nine months during his incarceration at an Arkansas state prison. He contracted HIV as a result of the attacks. Although he reported the abuse, prison officials failed to provide him with

⁹ Robertson (1999).

¹⁰ Man, C. & Cronan, J., (2001/2002) Forecasting sexual abuse in prisons: The prison subculture of masculinity as a backdrop for “deliberate indifference.” *Journal of Criminal Law & Criminology*. 92. 153.

¹¹ Liptak, A. (2004, October 16). Ex-inmate’s suit offers view into sexual slavery in prisons. *New York Times*. A1. Cited in Ries, D. (2005). *Journal of Law & Policy*. 915-916.

¹² Associated Press (2006, January 17). Disputed study: Prison rape, sexual assault rare. Accessed January 20, 2006, from <http://www.msnbc.msn.com/id/10896343/>

¹³ Bruning, F. (1995, April 23). A former inmate speaks out about rape in U.S. prison system. *Seattle Times*, A16. Cited in Man, C., & Cronan, J. (2001, fall/2002, winter). Forecasting sexual abuse in prison: The prison subculture of masculinity as a backdrop for “deliberate indifference.” *Journal of Criminal Law and Criminology*. 92(127). 18.

¹⁴ *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (August 13, 2005) (testimony of Keith DeBlasio).

safe housing. Because of his sexual orientation, they told him that he must have enjoyed being raped.¹⁵

- Placing transgender women in men's prisons because they have not surgically altered their genitalia places them far too often into a "virtual torture chamber of incessant sexual humiliation."^{16, 17} For example, the University of California's Center for Evidence-Based Corrections found in 2007 that "Sexual assault is *13 times* more prevalent among transgender inmates, with 59 percent reporting being sexually assaulted."¹⁸ In this study, transgender victims were also far more likely than other victims to have been sexually assaulted on multiple occasions.¹⁹
- The American Psychological Association and the National Commission on Correctional Health Care have both issued statements recognizing that transgender inmates are at especially high risk of abuse and calling for their protection.²⁰
- In women's facilities, lesbians and other women who are seen as transgressing gender boundaries are often at heightened risk of sexual torture and other ill treatment. Actual or perceived sexual orientation was found to be one of four categories that make a female prisoner a more likely target for sexual abuse, as well as a target for retaliation when she reports that abuse.²¹

Same-sex rape is a widespread problem in prisons

Prison rape has been called "America's oldest, darkest, yet most open secret."²²

- A 2000 study of prisoners in four Midwestern states found that approximately one in five male inmates reported pressured or forced sex while incarcerated. About one in ten male inmates

¹⁵ *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars*, Hearing Before the National Prison Rape Elimination Commission (August 13, 2005) (testimony of Kendell Spruce).

¹⁶ Rosenblum, D. (2000) "Trapped" in Sing Sing: Transgendered prisoners caught in the gender binarism, *Michigan Journal of Gender Law*, 6(499): 517.

¹⁷ COMMISSION REPORT, at 148. See also Sylvia Rivera Law Project, *supra* note 4; Stop Prisoner Rape, *In the Shadows: Sexual Violence in US Detention Facilities* (2006), available at http://www.justdetention.org/pdf/in_the_shadows.pdf; Stop Prisoner Rape & ACLU National Prison Project, *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners* (2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf>.

¹⁸ V. Jenness et al., *Violence in California correctional facilities: An empirical examination of sexual assault 3*. (Center for Evidence-Based Corrections 2009) (emphasis added).

¹⁹ *Id.* at 29-30.

²⁰ See American Psychological Association Policy Statement, *Transgender, Gender Identity, and Gender Expression Non-Discrimination* (2008), available at <http://www.apa.org/about/governance/council/policy/transgender.aspx>; National Commission of Correctional Health Care, *Position Statement: Transgender Health Care in Correctional Settings* (2009), available at <http://www.ncchc.org/resources/statements/transgender.html>.

²¹ Curtin, M. (2002). Lesbian and bisexual girls in the juvenile justice system. *Child and Adolescent Social Work Journal*, 19(4): 285-301.

²² Man, C.D. & Cronan, J.P. (2001/2002). Forecasting sexual abuse in prison: The prison subculture of masculinity as a backdrop for "deliberate indifference." *Journal of Criminal Law & Criminology*. 92(127-128).

reported that they had been raped.²³ Another study showed that in women's prisons, rates of sexual coercion varied from six percent to as high as 27%.²⁴

- Twenty-six years ago, in a dissent to the case *U.S. vs. Bailey* in which he was joined by Justice William Brennan, U.S. Supreme Court Justice Harry Blackmun wrote:

“The complaints that this Court, and every other American appellate court, receives almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality are not always the mouthings of the purely malcontent... The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim.”²⁵

- According to the Prison Rape Elimination Act, “experts have conservatively estimated that at least 13% of the inmates in the United States have been sexually assaulted in prison.”²⁶ The conservative *National Review* reports that this figure, equivalent to 12,000 rapes, represents more rapes than are reported annually against women in New York City, Los Angeles, Philadelphia, Boston, San Diego, and Phoenix combined.²⁷
- “[I]t is widely believed that sexual harassment such as intimidation, propositions, extortion, assault and rape runs rampant in the prison system,” according to Olga Giller, editor-in-chief of the *Cardozo Women's Law Journal*. Giller cites a number of studies to back up her claim.²⁸
- A 1982 Federal Bureau of Prisons study reported that 9-20% of federal inmates, especially new or homosexual inmates, were victims of rape. The study also reported that 30% of federal prison inmates engaged in homosexual activity while incarcerated.²⁹
- Stop Prisoner Rape, a Los Angeles-based national advocacy group, now called Just Detention International, was contacted by 507 survivors of prison rape from 2002 through January 23, 2006. Most of these contacts take the form of letters from prisoners. Of these 507 self-reported survivors of prison rape:

²³ Struckman-Johnson, C. & Stuckman-Johnson, D. (2000). Sexual coercion rates in seven midwestern prisons for men. *The Prison Journal*. (80): 379.

²⁴ Struckman-Johnson, C. & Stuckman-Johnson, D. (2002). Sexual coercion reported by women in three Midwestern prisons. *Journal of Sex Research*. 39(3). Journal article retrieved online through Academic Search Premier, no page numbers available.

²⁵ *United States vs. Bailey*, 444 U.S. 394 (1980). Dissenting opinion of Mr. Justice Blackmun, joined by Mr. Justice Brennan. Accessed January 20, 2006, from <http://www.healylaw.com/cases/bailey1.htm>

²⁶ The Prison Rape Elimination Act. (2005). 42 U.S.C. 15601(2).

²⁷ Lehrer, E. (2003, June 2). A blind eye, still turned: Getting serious about prison rape. *National Review*. 10.

²⁸ Giller, O. (2004, summer). Patriarchy on lockdown: Deliberate indifference and male prison rape. *Cardozo Women's Law Journal*, 10(659). Accessed January 20, 2006, from <http://www.spr.org/en/academicarticles/giller.html>

²⁹ Nacci, P. & Kane, T. (1982). Sex and sexual aggression in federal prisons. Washington, DC: Federal Bureau of Prisons. Cited in Kantor, E. (2003). HIV transmission and prevention in prison. San Francisco: University of California. Accessed January 25, 2006, from <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S14X>

- 413 are men (81.5%)
- 63 are woman (12.5%)
- 26 are transgender (6%)
- 98 (19%) identified as gay, lesbian, bisexual or transgender.³⁰

Who is at most risk

Human Rights Watch reported a number of characteristics which can make prisoners more likely to be raped:

These include youth, small size, and physical weakness; being white, gay, or a first offender; possessing “feminine” characteristics such as long hair or a high voice; being unassertive, unaggressive, shy, intellectual, not street-smart, or “passive”; or having been convicted of a sexual offense against a minor...prisoners with several overlapping characteristics are much more likely than other inmates to be targeted for abuse.³¹

Giller notes that “[r]ace and sexuality intersect at the heart of prison rape.”

An anonymous ex-prisoner painfully recounted the role that race played in his sexual assault recalling, “[s]ince I’m light skinned the first dudes that raped me were blacks who thought I was white. After word got out that I was black, they left me alone but then the whites took me off. After that I was a ‘black’ punk and passed on to whites.”³²

Prison officials are often unaware of the extent of the problem

According to Human Rights Watch, many prison officials do not understand or acknowledge the extent of prison sexual abuse:

Prison authorities, unsurprisingly, generally claim that prisoner-on-prisoner sexual abuse is an exceptional occurrence rather than a systemic problem, Prison officials in New Mexico, for example, responding to our 1997 request for information regarding “the ‘problem’ of male inmate-on-inmate rape and sexual abuse” (the internal quote marks are theirs), said that they had “no recorded incidents over the past few years.” The Nebraska Department of Correctional Services informed Human Rights Watch that such incidents were “minimal.”³³

³⁰ Personal communication with Kathy Hall-Martinez, executive director, Stop Prisoner Rape, January 24, 2006.

³¹ Mariner, J. (2001). *No escape: Male rape in U.S. prisons*. New York: Human Rights Watch. p. 5.

³² Anonymous. The story of a black punk. In Sabo, D. et al. (eds.) (2001). *Prison masculinities*. Philadelphia: Temple University Press. 127. Cited in Giller (2004). 3. Accessed January 20, 2006, from <http://www.spr.org/en/academicarticles/giller.html>

³³ Mariner (2001). 4.

Victims of rape in prison face many barriers to reporting their abuse

Many of those subjected to such abuse are reluctant to report their experiences, fearing retaliation by both prisoners and staff, and having justifiably little faith in receiving the appropriate relief. When instances are reported or claims filed, victims are frequently subjected to further abuse, ignored, or told that the incident was their fault or that they deserved what happened to them.

- Those who report rapes are often not believed or told that they consented. They are often accused of being gay, the implication being that if they were gay they wanted it.³⁴ When prisoners known to be gay or transgender report prison rape they are often told that they enjoyed the act, and that it was consensual. Others have reported that if they do not have physical evidence of an attack (e.g. wounds, scratches), their claims are not believed and considered unsubstantiated by prison authorities. Prisoners who report rape are not protected from other inmates, who may retaliate against the prisoner for being a “snitch.”^{35, 36}
- Punishment for prisoner rape is rare.³⁷

Rape can cause physical and psychological harm, as well as transmit deadly and debilitating diseases

Human Rights Watch documented a wide range of physical effects of prison rape that depend on whether it was accompanied by a violent attack (beating etc.), whether there was anal penetration, and whether a lubricant was used:

Prisoners with whom Human Rights Watch is in contact have suffered rape-related injuries ranging from broken bones to lost teeth to concussions to bloody gashes requiring dozens of stitches. A few, like former Texas inmate Randy Payne, were killed during sexual assaults.³⁸

Survivors of rape in prison often leave prison in a state of “extreme psychological stress, a condition identified as rape trauma syndrome.”³⁹ Other conditions often brought on by the experience of prison rape include low self-esteem, shame, depression, nightmares, self-hatred, suicidality, uncontrollable anger, and violence.⁴⁰ In fact, the psychological problems caused by being raped while in prison likely play a major role in ex-prisoners’ frequent difficulties reintegrating into society upon release. They could be a major factor in high recidivism rates.

³⁴ Letter to Human Rights Watch from J.G., Florida, September 4, 1996. Mariner (2001).

³⁵ Lee, A., (2003) Nowhere to go but out: The collision between transgender & gender-variant prisoners and the gender binary in America’s prisons. Berkeley: Boalt Hall School of Law. 14. Posted on Sylvia Rivera Law Project website, accessed January 20, 2006, from http://www.srlp.org/documents/alex_lees_paper2.pdf

³⁶ Roderick Keith Johnson, v. Gary Johnson, 385 F.3d 503, 512 (5th Cir. 2004)

³⁷ Mariner (2001). 151.

³⁸ Ibid. 110-111.

³⁹ Ibid. 112.

⁴⁰ Ibid.

Support for Commission recommendations which specifically address LGBT issues and HIV risks

- 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, and transgender (LGBT) specific issues. Given the hugely disproportionate rates of sexual abuse against members of our community, this is an egregious oversight. The needs of LGB 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 LGBT 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 LGBT 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.*

Conclusion

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 people specifically. These standards will address the ways in which our current prison system heightens the risk of HIV for incarcerated persons, and bolsters the epidemic in the communities they return to. These changes are urgently needed and we urge you to promulgate the standards with our recommended modifications without delay.

Thank you for your consideration.

Sincerely,



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