

# TEXAS CIVIL RIGHTS PROJECT

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

Dear Attorney General Holder,

As an attorney who has represented prison rape survivors and on behalf of the Texas Civil Rights Project (TCRP), I am submitting these comments in support of the recommended national standards developed by the National Prison Rape Elimination Commission.

TCRP, unfortunately, is intimately familiar with the realities of prison rape. TCRP has represented a number of prison rape survivors—victims of both prison staff and other prisoners. Among our clients are several children who were sexually assaulted in the Texas Youth Commission. One of these young men has never been able to recover from what happened to him—his psychological problems will last the rest of his life. Another was unable to live with what was done to him, and took his own life. Prison rape has devastated these young men and their families.

PREA is an important accomplishment, and addresses a vital problem. These standards represent a compromise, balancing the fiscal and security interests of corrections administrators with the basic right of all people, including prisoners, to be free from sexual violence. Swift ratification of these provisions will spare thousands of men, women, and children the devastation of sexual abuse behind bars.

## **Response to the questions in the ANPR**

1. *What would be the implications of referring to “sexual abuse” as opposed to “rape” in the Department’s consideration of the Commission’s proposed national standards?*

Truly establishing a zero-tolerance standard for prison rape requires addressing the full spectrum of sexual violence. The national standards should take an expansive approach and incorporate all staff sexual misconduct and all coercive sexual activity between inmates.

The term “rape” is often understood to have a narrow definition in accordance with its use in criminal law. Different states define rape differently. For example, Louisiana defines rape to require “the act of anal, oral, or vaginal sexual intercourse ...,” La. Rev. Stat. Ann. § 14: 41, while North Carolina’s definition of rape is limited to “vaginal intercourse,” N.C. Gen. Stat. § 14-27.3, and Arkansas’s definition includes “sexual intercourse or deviate sexual activity,” Ark. Code Ann. § 5-14-3. Using the widely recognized terminology of “sexual abuse” in the standards will minimize confusion with the state-specific criminal standards and will conform to the expectations and intent of PREA.

The Commission’s definition of sexual abuse includes the behaviors delineated in PREA’s definition of rape as well as sexual harassment (inmate-on-inmate and staff-on-inmate), staff-on-inmate voyeurism, and staff-on-inmate indecent exposure. Notably, PREA defines prison rape to “*include[]* the rape of an inmate in the actual or constructive control of prison officials.” 42 U.S.C. § 15609(8) (emphasis added). Unlike other definitions in the law, the term “prison rape” isn’t defined to mean rape, only to include it. Consistent with PREA’s intent and spirit, the statutory definition is expansive so that, as more information about the problem was learned, the proper scope of sexually inappropriate behaviors could be included.

Texas law, for example, also criminalizes sexual contact between correctional staff and prisoners, whether or not the contact is “consensual.” *See* Texas Penal Code § 39.04(a)(2). A broader definition is important to prevent jailers from claiming sex was “consensual” in an inherently coercive environment. Even when physical coercion is not involved, TCRP has litigated cases where prison staff offered favors or other inducements for sex, or simply placed inmates in a situation where they were afraid to refuse. A more expansive definition is required to prevent jailers from using their position to coerce inmates.

While the full spectrum of sexual abuse must be addressed as part of a comprehensive response to prison rape, consensual sexual activity between inmates should not be incorporated into the definition of sexual abuse. Unlike relations between prison guards and prisoners, there is not an inherent power differential between inmates. Corrections agencies remain free to establish disciplinary rules and regulations as they see fit, but conflating consensual sexual activity between inmates with the crime of rape serves no legitimate purpose and thwarts many of PREA’s goals. On the contrary, doing so will force survivors of sexual abuse to suffer in silence, as fear that sexual abuse will be misconstrued as prohibited consensual sexual activity and that they will face punishment will prevent survivors from reporting their abuse or seeking medical assistance. This disincentive to reporting will allow sexual violence to flourish – and will increase the vulnerability of many inmates, such as those who are gay or transgender, who are known to be at especially high risk for abuse but are often mistakenly assumed to have consented to any sexual activity.

2. *Would any of the Commission’s proposed standards impose “substantial additional costs”?*

Relative to the billions of dollars spent on corrections every year, the costs for implementing these standards, even for the least prepared jurisdiction, will be small. Moreover, prisons and jails that have basic policies and practices in place to protect people in their charge, as they are legally required to do regardless of PREA, can meet the standards' requirements through low and no-cost options, such as repurposing staff and incorporating information about sexual abuse into existing training and orientation materials.

Any considerations of the cost of protecting inmates from sexual abuse must be understood in light of the dramatic benefits of doing so – for the agency, the individual, and society at large. For the agency, implementing the standards' provisions will promote safety and efficiency, resulting in net savings in areas such as staffing, investigations, and inmate health care. Moreover, preventing sexual abuse and providing victimized inmates with appropriate follow-up care minimizes the likelihood that inmates will suffer the long-term emotional trauma that often prevents prison rape survivors from becoming self-sufficient members of society upon release.

Moreover, preventing sexual abuse behind bars is a public safety issue. Victims of prison rape may be more likely to commit sexual offenses upon their release, especially when they were victimized as juveniles. Preventing sexual abuse in custody may spare people in the wider community from experiencing sexual violence.

Litigation costs will also be dramatically reduced. Prison sexual assault cases can result in large damage awards that are far more costly than preventing assaults in the first place. *See, e.g., Galloway v. Texas Youth Commission*, 1:07-CV-276 (LY) (W. Dist. Tex. 2008) (\$625,000 settlement for four juveniles abused in custody). Even in Texas, large jury awards in sexual assault cases are common.

Moreover, many standards reflect specific requirements imposed by civil litigation or recommended by the Department of Justice in investigations initiated pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997. *See, e.g., Women Prisoners v. District of Columbia*, 877 F.Supp. 634, 679-81 (D.D.C. 1994) (ordering, among other things, that: male employees announce their presence when entering a female housing unit and not invade the privacy of women prisoners without a valid penological reason; instances of sexual harassment be reportable orally or in writing to any staff member; a confidential hotline be established as an additional reporting option; law enforcement be contacted upon receipt of any allegation of unwelcome sexual intercourse or unwelcome sexual touching), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995) (vacating portions unrelated to sexual abuse allegations, modifying training and staff reporting provisions regarding sexual abuse claims and provisions concerning other issues), *remanded by*, 93 F.3d 910 (D.C. Cir. 1996); Letter from R. Alexander Acosta, Assistant Attorney General, Department of Justice, Special Litigation Section, to Hon. Mike Huckabee, Governor of Arkansas 31 (Nov. 25, 2003) (recommending, among other things, specialized training for investigators, revising the investigation process to coordinate administrative and criminal investigations and to

ensure that investigation continues to completion even if accused staff member is fired or resigns; establishing confidential reporting mechanisms, reviewing grievances, and developing and implementing policies and procedures to provide for privacy in inmate shower areas).

Beyond the economic impact, the moral costs of allowing sexual violence to continue must also be considered. Every person has the right to be free from sexual abuse, regardless of custody status and criminal history. When the government removes someone's liberty, it has the absolute responsibility to protect that person from abuse.

Ultimately, the Office of Management and Budget will require the Department to conduct a cost-benefit analysis of the standards. An examination of costs alone, such as the cost projection study currently being conducted by Booz Allen Hamilton, will not meet this requirement. We urge you to begin the required analysis by examining the full range of benefits that will come from implementing the recommended standards.

*3. Should the Department consider differentiating within any of the four categories of facilities for which the Commission proposed standards?*

The standards represent basic measures that all facilities must put in place to meet their constitutional obligation to protect inmates from abuse. Varying compliance requirements based on factors such as the size and resources of a facility will undermine the standards and will needlessly complicate their otherwise straightforward expectations. Regardless of where they are incarcerated, all people have the same right to be protected from sexual violence.

Establishing tiers of compliance will result in a morass of problems, which are bound to culminate in litigation. To create these distinctions, the Department would have to establish arbitrary cut-off points, creating a bright line rule for when facilities can shirk their duty to protect inmates, and these cut-off points will inevitably be challenged by facilities on the margins. Even once those distinctions are defined, the dynamic nature of corrections institutions will inevitably result in changes in these factors at specific institutions, thereby creating a question about where a facility with changed circumstances would fit within the compliance hierarchy.

In their final recommended standards, the Commission took pains to ensure that each provision was sufficiently flexible to account for the distinctions between facilities and the variance in available resources. This resulted in revisions to standards that we strongly supported. For example, in Standard PP-3 (inmate supervision) rather than requiring that cameras or other monitoring technology be installed, the recommended standards merely require that upper management assess whether such technology is needed, given the unique factors of that facility's environment. (Despite this change, TCRP would strongly encourage making camera use mandatory. Video surveillance has been a huge deterrent to sexual abuse in the Texas Youth Commission since cameras were installed following the 2007 sex abuse scandal.)

Creating distinctions for the level of compliance required will send a dangerous message that certain types of facilities do not need to put in place the measures necessary to protect inmates from sexual abuse. Failing to address the known risk of sexual violence is a constitutional violation, regardless of facility size, personnel, resource limitations or other factors.

### **Comments on the Standards**

If implemented, the Commission's standards will help ensure that facilities better meet their constitutional obligation to protect inmates from abuse. These standards are the result of extensive input from corrections practitioners, advocates, academics, prisoner rape survivors, and other stakeholders. Corrections officials were engaged throughout the process and, as advocates, we have accepted significant concessions to help solidify the middle ground that was identified by the Commission. Full implementation of these standards will reduce not only sexual abuse, but other forms of physical violence, including gang-related activity.

The base requirements in the Commission's standards are urgently needed to improve safety in corrections facilities nationwide. They are proven measures that can remedy the mismanagement, deficient policies, and dangerous practices that underlie most incidents of prison rape. Many of the Commission's recommended standards have been imposed on systems upon the finding of a constitutional violation, and all of these provisions are substantially less costly than years of litigation.

### **Prevention and Response Planning**

Proper planning, through the development of sound policies and the collaboration with outside resources, is essential to improving safety. It is also indicative of the strong leadership needed to effectively address sexual violence in detention. The provisions in this section reflect the innovations and concerns raised by corrections leaders throughout the process. In fact, a comparison of the Commission's recommended standards with a draft version released for public comment in 2008 illustrates the significant deference provided to officials.

For example, Standard PP-3 (inmate supervision) requires corrections officials to provide "the inmate supervision necessary to protect inmates from sexual abuse." In comparison, the 2008 draft standard required "continuous sight and sound supervision of inmates." The final recommended version of the standard permits officials to utilize discretion in assessing the level of supervision adequate for maintaining inmate safety. While upper management is required to review critical incidents and monitor technology needs, there is no requirement that such technology be purchased or installed.

Likewise, Standard PP-7 (assessment and use of monitoring technology) calls for the use of appropriate, cost-effective technology, but this provision was amended from its draft version to allow officials to meet its requirements through a feasibility assessment and plan that accounts for financial limitations. As a result, any significant expense that could have been imposed from these standards has already been eliminated.

Standard PP-4 (limits to cross-gender viewing and searches) has also been revised to substantially reduce its requirements, despite findings in each of the BJS' inmate surveys that a significant percentage of sexual abuse in all types of corrections facilities is perpetrated by staff members of the opposite sex. Rather than limiting cross-gender supervision in any areas where inmates disrobe or perform bodily functions – which, consistent with international human rights standards, is the norm in most other western countries – the final recommended standard only prohibits *actually viewing* inmates of the opposite gender who are nude or performing bodily functions.

Limiting cross-gender viewing and searches need not conflict with employment discrimination laws, nor must the introduction of such limits be unduly expensive. In fact, many agencies already comply with PP-4's preclusion of routine cross-gender viewing and searches in their women's facilities. Officers of the opposite gender can work throughout a facility while still complying with this standard if basic privacy measures are adopted, such as requiring officers of the opposite gender to announce themselves before entering a dormitory area, and providing inmates with screens or towels that can be raised during shower and toilet use. Pat searches can be conducted only at locations near points of contact with potential contraband, allowing for more thorough searches at the most appropriate times and freeing up staff resources for other critical job functions.

Collaborating with outside experts is a no-cost way for facilities to enhance dramatically their relevant expertise. Standards RP-2 to RP-4 (agreements with outside public entities and service providers, law enforcement agencies, and prosecuting authority) encourage officials to take advantage of the expertise available in their community, by proactively reaching out to reporting entities, direct service providers, police, and prosecutors and defining the proper role for each of these professionals in the response to a sexual assault at the facility. Standard RP-2 is particularly important, as many prison rape survivors will not trust anyone from the corrections department that allowed for the abuse to occur.

### Prevention

Preventing sexual abuse is at the heart of all PREA-related initiatives, and the training and classification provisions in the standards represent well-established means of doing so. Rather than imposing stringent curricula, Standards TR-1 through TR-5 (training and education) include basic information that can be incorporated into pre-existing staff training sessions and inmate orientations workshops. Policies aimed at eliminating sexual abuse in detention become meaningful only if corrections staff, contractors, and volunteers are appropriately trained to take action to prevent and address incidents of sexual violence. Similarly, inmates must be aware of their absolute right to be free from sexual abuse, and that the facility will not tolerate sexually predatory treatment of inmates.

Proper classification is critical to ensuring that potential predators and potential victims are not housed together. It can also help break the insidious and common corrections practice of automatically placing the victim in protective custody following an incident of sexual abuse. This practice is punitive by default as it results in a loss of services and

programs, and leaves the victim isolated. Standards SC-1 (screening for risk of victimization and abusiveness) and SC-2 (use of screening information) address these concerns, relying on the BJS data and other academic research that have identified certain populations that are especially vulnerable to abuse.

#### Detection and Response

In the aftermath of a sexual assault, inmates need safe, effective reporting options that are responded to swiftly and thoroughly. The ability to contact any trusted staff member and the creation of hotlines to outside entities have proven to be important mechanisms for encouraging reports. Hotlines were particularly effective in the Texas Youth Commission. Likewise, third party reports (Standard RE-4) must be taken just as seriously.

Even when a report is made, far too often, officials do not respond appropriately, but instead fail to initiate an investigation, refuse to provide protective measures, or directly facilitate or participate in retaliatory behavior. TCRP has represented survivors who reported assaults by officers, only to have the same officers victimize them again when they were not given any protection.

Moreover, victims need access to legal redress that is not hindered by unrealistic and arbitrary procedural requirements. Standard RE-2 (exhaustion of administrative remedies) recognizes that the harsh procedural requirements of many prison grievance systems – such as filing deadlines as short as two days – cannot realistically be met by prison rape survivors. The Texas Department of Criminal Justice, and many Texas jails, for example, require prisoners to file a grievance within 15 days of a sexual assault, or risk losing their legal remedies. Rather than weed out frivolous lawsuits, as the Prison Litigation Reform Act was intended to do, the varying and complex grievance procedures that must be fully navigated to meet the exhaustion requirement has barred prison rape survivors from seeking any judicial relief. Many prison rape survivors are some of the most vulnerable prisoners, and least likely to be able to understand complex grievance procedures. TCRP has represented juvenile, disabled, and Spanish-speaking prison rape survivors who never understood the PLRA's grievance requirements, or how to file grievances in the facilities they were housed in. Many prisoners fail to file grievances, even when they are victims of a serious offense like a sexual assault, because they believe they will never get relief from the grievance system and it is a "waste of time." By allowing courts to focus on the substantive claims of rape survivors, instead of being barraged with technical challenges, this standard will ensure that prison rape issues unaddressed by the facility can be resolved judicially without wasting court resources on unrealistic, technical requirements.

Similarly, at least one court has interpreted the PLRA's "physical injury" requirement to exclude claims for sexual assault.<sup>1</sup> Under the PLRA, a prisoner must show a "physical injury" to recover damages for an emotional or mental injury.<sup>2</sup> Though this decision

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<sup>1</sup> *Hancock v. Payne*, 2006 U.S. Dist. LEXIS 1648 (S. Dist. MS 2006).

<sup>2</sup> *See* 42 U.S.C. § 1997e(e).

appears to be an outlier, a procedural barrier to justice that tells prison rape survivors they have not suffered a “physical injury” is both insulting and bad public policy.

### Monitoring

Data collection and review (Standards DC-2 through 4) are important ways to learn about patterns of abuse within facilities and about the effectiveness of response measures taken. Making this information publicly available provides much-needed transparency in otherwise highly secretive institutions. Officials need to be held accountable for the sexual abuse in their facilities, but this can only occur if outsiders have access to this important information.

Litigation is an ineffective and expensive way to address prison rape. Nonetheless, in most jurisdictions, it is the only way to address egregious and ongoing problems. External scrutiny is vitally important to the strength of any public institution – and corrections facilities are no exception. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions.

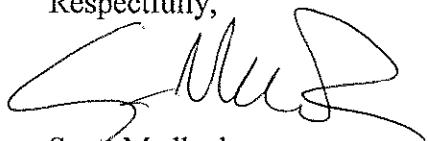
Standard AU-1 (audit requirement) mandates the essential components of independent oversight in a cost-efficient manner. Done properly, this outside monitoring will provide a credible, objective assessment of a facility’s safety, identifying problems that may be more readily apparent to an independent monitor than to an official working within a corrections system. It will also help hold systems accountable when they do not meet the requirements of the standards.

### **Conclusion**

Sexual violence in U.S. prisons and jails has reached crisis proportions. Strong standards are urgently needed to protect inmates from this devastating, but all too common abuse. TCRP strongly urges you to promulgate the Commission’s standards without delay. Every day that these critically important measures are not in place, men, women, and children will continue to be raped while in custody.

Thank you for your consideration.

Respectfully,



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