



LGBT PEOPLE AND THE PRISON RAPE ELIMINATION ACT

July 2012

Sexual abuse is rampant in prison and detention facilities today, and lesbian, gay, bisexual, transgender and gender nonconforming people are among those most at risk. To address this crisis, Congress unanimously passed the Prison Rape Elimination Act (PREA) in 2003. After nearly a decade of study and review, the U.S. Department of Justice issued final regulations to implement PREA in May 2012.

These rules represent an historic step toward ending the crisis of sexual abuse in confinement. This resource outlines key protections provided by the PREA Standards and what they mean for LGBT people.

WHAT DO THE PRISON RAPE ELIMINATION ACT STANDARDS DO?

The Prison Rape Elimination Act (PREA) Standards are a comprehensive set of federal rules that address all aspects of a facility's operations as they relate to preventing, detecting, and responding to abuse. Among the most important protections are the following:

Screening and classification

- Facilities must screen all individuals at admission and upon transfer to assess their risk of experiencing or perpetrating abuse, including identifying those who may be at risk because of their transgender status, gender nonconformity, sexual orientation, or intersex condition. The individual's own perception of their vulnerability must also be considered.
- Individuals may not be disciplined for any refusal or nondisclosure during screening regarding gender identity, sexual orientation, intersex condition, disability status, or prior sexual victimization.
- Facilities must use this information to make appropriate, individualized decisions about an individual's security classification and housing placement.

A Crisis of Sexual Abuse in Confinement

More than 200,000 youth and adults are sexually abused in prisons, jails, and juvenile detention facilities each year according to federal estimates. (U.S. Department of Justice, Feb. 3, 2011). These statistics point to a grave, systemic failure to protect individuals from abuse. While anyone can become the victim of sexual violence, transgender and gender nonconforming people are at significant risk in confinement. A study of California prisons found that transgender women in men's prisons were 13 times as likely to be sexually abused as other inmates (Center for Evidence-Based Corrections, 2009). Those who are young, have disabilities or mental illness, are gay, lesbian or bisexual, or are incarcerated for the first time are also especially vulnerable. Survivors of sexual abuse behind bars suffer the same trauma as other abuse survivors. When combined with inadequate counseling and medical care, this abuse can lead to post-traumatic stress disorder, depression, substance abuse, HIV and other infections that take a heavy toll on survivors, their families and communities, and public budgets.

WHAT DO THE PREA STANDARDS DO? (CONTINUED)

Housing transgender people

- Decisions about where a transgender person, or a person with an intersex condition, is housed must be made on a case-by-case basis; they cannot be made solely on the basis of a person's anatomy or gender assigned at birth. This means that, for example, every transgender woman must be assessed individually to determine whether she would be best housed with other women instead of in a men's facility. An individual's views regarding their personal safety must be seriously considered.
- These decisions must be reassessed at least twice per year to consider changed circumstances such as incidents of abuse or changes in an individual's appearance or medical treatment.
- All transgender people and people with intersex conditions must be given the opportunity to shower separately from other inmates if they wish, regardless of where they are housed.

Protective custody

- Facilities too often respond to the problem of abuse by placing survivors and those most at risk in isolation. When prolonged, this isolation can amount to torture. The Standards restrict such uses of "protective custody" by requiring that all available alternatives be assessed before placing an inmate involuntarily in segregated housing. Alternatives might include relocating a perpetrator of abuse, providing heightened supervision, changing housing placement or cellmates, placement in a single-occupancy cell within the general population, or transfer from a men's to a women's facility or vice versa.
- In cases where inmates must be placed in segregation or isolation, access to programs, education, and other opportunities must continue to the greatest extent possible. Moreover, segregation—when it must be used—should not last for longer than 30 days. Agencies must document the reasons for any restrictions on programs or other opportunities and any use of segregation beyond 30 days.

Segregated LGBT pods or units

- In some facilities, gay, lesbian, bisexual, or transgender individuals are housed in separate units. Some people may prefer to be housed in this way because they may feel they are safer from being abused by other inmates. However, these units can also pose some risk of further stigmatizing individuals and making them more vulnerable to harassment and abuse by staff. Individuals in such segregated units may also be restricted in their access to education, jobs, and other programs and opportunities.
- The Standards place some limits on separate housing for LGBT people. LGBT people may be housed in separated, dedicated housing units only if such placement is voluntary or is based on a case-by-case assessment that includes other factors; if the unit also houses other groups of vulnerable individuals; or if the unit was established as part of the resolution of a lawsuit to protect LGBT people.

Searches

- The Standards prohibit all cross-gender strip searches and cavity searches except in emergencies, or those conducted by a medical professional. Cross-gender pat searches of female inmates by male staff are also generally prohibited. Any cross-gender searches that occur must be documented.
- The Standards do not specifically state how these requirements apply to transgender people. Many agencies permit transgender individuals to make a choice at admission as to whether they will be searched by male or female officers for purposes of these requirements, and NCTE recommends this as a best practice that conforms to the standards.
- All searches must be conducted in the least intrusive manner possible, and staff must be trained on how to be professional and respectful in conducting searches of transgender people. No search or physical exam may be conducted when the only purpose is to determine the inmate's genital status.

WHAT DO THE PREA STANDARDS DO? (CONTINUED)

Minors in adult facilities

- Many correctional experts recommend that minors should never be housed in adult prisons. The Standards do not completely prohibit this practice, but they require separation of youthful inmates from adult inmates both inside and outside of housing units, and outside of housing units unless there is direct staff supervision.

Staff training

- All facilities must train staff on a variety of issues related to sexual abuse prevention, including interacting professionally with LGBT and gender nonconforming people and those with intersex conditions.

Reporting abuse

- Fear of retaliation and further contact with abusers are obstacles to reporting sexual abuse in confinement. The Standards stipulate that individuals must have multiple ways to internally make private reports of sexual abuse and harassment, retaliation (by staff or other inmates), and any staff negligence that may have contributed to abusive incidents.
- Individuals will also have at least one way to report abuse or harassment outside of the correctional department/agency, and may choose to do so anonymously. No discipline may be taken against an inmate for filing a grievance unless the agency can demonstrate that it was filed in bad faith.

Support for survivors of abuse

- When a person has experienced sexual abuse, the Standards require facilities to ensure that the individual is separated from alleged abusers and protected from retaliation. Facilities must provide immediate and ongoing medical and mental health care as needed; gather and preserve evidence and conduct an investigation; report to appropriate law enforcement authorities; report the results of investigations to abuse survivors; and take appropriate corrective action. Facilities must also permit individuals to access support from outside organizations in as confidential a manner as possible.

Consensual sex vs. sexual abuse

- The Standards define sexual abuse between inmates as sexual contact made without consent, through threat or coercion, or when a person is unable to consent. The Standards permit facilities to prohibit sex of any kind between inmates. However, facilities may not treat consensual sex as equivalent to sexual abuse.
- The Standards define any sexual contact with inmates by a staff member as sexual abuse. Inmates cannot be disciplined for sexual contact with staff unless the agency finds after investigation that the staff member did not consent.
- Staff must be trained on distinguishing between consensual sexual activity and abuse, and in juvenile facilities must also be trained on applicable age of consent laws.

Grievances and access to courts

- Federal law limits inmates' access to the courts by first requiring that they go through (exhaust) all steps of an institution's internal grievance system. In an effort to relieve some of the unfair effects of this law on survivors of sexual abuse, the Standards require agencies to adjust their procedure to deem grievances related to sexual abuse "exhausted" in certain circumstances. The Standards prohibit imposing a time limit on when an inmate may submit a grievance regarding sexual abuse. An agency must deem a grievance regarding sexual abuse to be exhausted if it is denied at any stage of appeal, or is not responded to by a set deadline.

WHAT DO THE PREA STANDARDS DO? (CONTINUED)

- The Standards also require agencies to provide a way for inmates to submit grievances without being required to address the issue directly with facility staff, and to permit inmates to get assistance with their grievances from third parties.
- If agencies fully implement the Standards, these requirements would make it easier for abuse survivors to ultimately bring their claims to court. However, individuals should be aware that their grievance will be subject to the procedures an agency has in place at the time of the grievance, whether or not they comply with the PREA Standards.

Compliance and Enforcement

- Each agency must designate staff with sufficient time and resources to oversee compliance with the Standards.
- Each facility must be audited once every three years by an independent auditor, with 1/3 of all facilities audited each year. The Department of Justice may recommend auditing a particular facility sooner if it is deemed necessary. Auditors must have access to copies of any relevant documents and be able to interview and receive correspondence from inmates and local organizations.
- The Standards are legally binding on federal prisons starting in 2012.
- Starting in 2013, each state's Governor must certify annually, based on the latest audits, that state-run facilities are in compliance or making a good faith effort to comply, or suffer a financial penalty.
- Accrediting organizations such as the American Correctional Association that receive federal funds must adopt accreditation standards consistent with the PREA Standards.

PREA rules apply to:

- Prisons and jails;
- Short-term police lock-ups (such as police stations);
- Juvenile detention centers; and
- Community confinement facilities (including halfway houses, rehabilitation centers and other community residential facilities for those completing a criminal sentence, fulfilling a condition of pre-trial release, or post-release supervision).

Specific requirements differ for each type of facilities. All agencies must ensure that their contractors are in compliance with applicable Standards.

WHAT'S NEXT?

Facilities covered by the Standards must comply or risk losing required accreditations and/or a portion of their federal funding, and many have already begun taking steps to comply. The Standards are immediately binding on federal prisons. However, much still remains to be done:

Pressing for implementation at the local level. Advocacy and assistance from LGBT organizations and individuals at the local level, together with others concerned about ending abuse, is needed to ensure that jails, lock-ups and other entities come into full compliance with the Standards. NCTE and other organizations listed below may be able to provide technical assistance for local advocacy efforts.

Ensuring compliance. Strong action will be needed by accrediting organizations, the Department of Justice, and the Governors of each state to monitor compliance and impose penalties when needed.

Protecting detained immigrants. The current Standards do not apply to many facilities that house individuals being detained for immigration purposes. The Department of Homeland Security and other federal agencies are required to develop their own rules to comply with PREA, to be completed in early 2013. Advocacy is needed to ensure these standards are at least as strong as the Department of Justice rules.

HOW CAN I REPORT ABUSE?

Individuals who have experienced or are aware of sexual abuse should follow the grievance procedures of the institution involved and, if possible, obtain legal assistance. Be aware of any deadlines that may apply regarding statutes of limitations for criminal or civil actions regarding the abuse, as well as the institution's procedures for emergency grievances. Processes for filing a grievance should be available both within the agency (without involving the abuser) and through an outside/independent organization or company. You should follow whichever procedure you are most comfortable with. In federal prisons, you can write to the appropriate Regional Director (<http://www.bop.gov/about/ro/index.jsp>) if you are unsure of other channels for filing your grievance. Remember that if you would like to file a lawsuit in court regarding sexual abuse, you may need to file an institutional grievance first. (Note: While an individual may file a lawsuit in response to incidents of sexual abuse or other serious mistreatment, there is no general right to sue for failing to follow the procedural requirements of PREA.)

The Special Litigation Section (<http://www.justice.gov/crt/complaint/#eight>) of the US Department of Justice Civil Rights Division investigates cases of *systematic* civil rights violations in prisons, jails, detention facilities, as well as other institutional facilities that are run by state or local governments. This means that a single incident of discrimination or abuse is not generally enough to trigger a Special Litigation investigation, but widespread violations in the institution affecting many individuals are considered. Complaints can be submitted to the Special Litigation Section by mail or telephone.

HOW CAN I GET LEGAL HELP?

While NCTE does not provide legal services or referrals, there are many other organizations that do provide legal assistance to incarcerated or formerly incarcerated people. You can try your local legal aid or legal services organization, or national or regional organizations such as the Transgender Law Center, Lambda Legal, the National Center for Lesbian Rights, the ACLU, and others listed below or on NCTE's website.

Additional Resources

National Standards to Prevent, Detect and Respond to Prison Rape

Code of Federal Regulations, Title 28, Part 115

Full text: <http://www.prearesourcecenter.org/library/488/standards/departement-of-justice-national-prea-standards>

Report systemic abuse

Civil Rights Division

Special Litigation Section

877-218-5228

<http://www.justice.gov/crt/complaint>

Legal service organizations

<http://www.lsc.gov/find-legal-aid>

Immigration legal service providers

<http://www.justice.gov/eoir/probono/states.htm>

Jailhouse Lawyer's Handbook

<http://jailouselaw.org/>

Support for survivors

Just Detention International

3325 Willshire Blvd., Suite 340

Los Angeles, CA 90010

415-252-1444

<http://www.justdetention.org>

TGI Justice Project

349 9th St., Suite 202B

San Francisco, CA 94103

213-384-1400

<http://www.tgjip.org>

Legal help or referrals

ACLU National Prison Project
915 15th St., NW, 7th Floor
Washington, DC 20005
212-549-2500
<http://www.aclu.org>

Lambda Legal Midwest Region
11 East Adams, Suite 1008
Chicago, IL 60603
312-663-4413
<http://www.lambdalegal.org/mro>

Lambda Legal Southern Region
730 Peachtree St., NE Suite 1070
Atlanta, GA 30308
404-897-1880
<http://www.lambdalegal.org/sro>

National Center for Lesbian Rights
870 Market St., Suite 370
San Francisco, CA 94102
415-392-6257
<http://www.nclrights.org/>

Gay & Lesbian Advocates & Defenders
30 Winter St., Suite 800
Boston, MA 02108
617-426-1350
<http://www.glad.org>

Transgender Legal Defense and Education Fund
151 W 19th St., Suite 1103
New York, NY 10011
646-862-9396
<http://transgenderlegal.org>

Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
<http://ccrjustice.org/>

Immigration detention

Immigration Equality
40 Exchange Place, Suite 1705
New York, NY 10005
<http://www.immigrationequality.org>
212 714-2904

Lambda Legal National Headquarters
129 Wall Street
New York, NY 10005
212-809-8585
<http://www.lambdalegal.org/nhq>

Lambda Legal South Central Region
3500 Oak Lawn Ave., Suite 500
Dallas, TX 75219
214-219-8585
<http://www.lambdalegal.org/scro>

Lambda Legal Western Region
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
213-382-7600
<http://www.lambdalegal.org/wro>

Transgender Law Center
870 Market St., Room 400
San Francisco, CA 94102
415-865-0176
<http://transgenderlawcenter.org>

Sylvia Rivera Law Project
147 W 24th St., 5th Floor
New York, NY 10011
212-337-8550
<http://srlp.org>

Transformative Justice Project of Illinois
2040 N. Milwaukee Ave.
Chicago, IL 60647
773-272-1822
<http://tjlp.org/>

Juvenile justice

The Equity Project
info@equityproject.org
<http://www.equityproject.org>

National Immigrant Justice Center
208 LeSalle St., Suite 1818
Chicago, IL 60604
<http://immigrantjustice.org>