

### WHAT IS PREA?

The Prison Rape Elimination Act (PREA) was passed by Congress and signed into law in 2003. The Act charged the Department of Justice (DOJ) with gathering data on the incidence of prison rape,<sup>1</sup> and created the National Prison Rape Elimination Commission (NPREC) to study the problem and recommend national standards to DOJ.<sup>2</sup> After nine years of study and commentary by experts, the DOJ promulgated a comprehensive set of regulations implementing the Act in May 2012.<sup>3</sup>

### ARE LGBTI INDIVIDUALS PARTICULARLY VULNERABLE IN PRISON, JAIL AND JUVENILE DETENTION?

Yes. Reports of harassment and sexual abuse of LGBTI individuals in custody are staggering.<sup>4</sup> Transgender and intersex individuals are at especially high risk because they are often assigned to placements based solely on an examination of their genital characteristics without accounting for the particular safety needs of each individual. There is also rarely any guidance offered to staff on how and when searches of transgender and intersex individuals should be done, which leave them particularly susceptible to abusive searches.

In addition, LGBTI individuals are often placed against their will in highly isolating and restrictive settings that not only fail to keep them safe, particularly from staff-perpetrated sexual abuse, but that also damage their health and reduce their chances of early release because of significant limitations imposed on educational, program and work opportunities in these settings.

### DO THE PREA REGULATIONS INCLUDE PROTECTIONS FOR LGBTI INDIVIDUALS?

Yes. The Department of Justice in its summary of the final PREA regulations recognized “the particular vulnerabilities of inmates who are [Lesbian, Gay, Bisexual, Transgender and Intersex] LGBTI or whose appearance or manner does not conform to traditional gender expectations” and included landmark protections against the types of assault,

harassment, and prolonged isolation that are commonly experienced by LGBTI individuals in custody.<sup>5</sup>

### HOW SHOULD FACILITIES PROTECT LGBTI INDIVIDUALS FROM ABUSE?

The final PREA regulations impose affirmative obligations on agencies to reduce the risk of sexual abuse of LGBTI individuals.

Agencies can take the following steps to follow PREA’s mandates and reduce the violence experienced by LGBTI individuals in custody.

#### **Eliminate searches for the sole purpose of determining genital characteristics.**

Under the PREA regulations, facilities cannot “search or physically examine a transgender or intersex inmate for the sole purpose of determining the inmate’s genital status.”<sup>6</sup> Any policy or practice that permits this type of search must be changed. If the genital status of a person is unknown and that information is relevant, it can be obtained by speaking with the individual, examining medical records or as part of a routine medical exam that all individuals undergo as part of intake.<sup>7</sup>

#### **Institute Individualizing Housing, Program and Work Assignments for Transgender & Intersex Individuals**

The PREA regulations require agencies to make individualized housing and program placements for all transgender and intersex individuals. This includes assignment of transgender and intersex individuals to male or female facilities. All such program and housing assignments must “be reassessed at least twice each year to review any threats to safety experienced by the inmate”<sup>8</sup> and an individual’s “own views with respect to his or her own safety shall be given serious consideration”<sup>9</sup> in these assessments. Any policy or practice that houses individuals based solely on their genital status must be changed.

To ensure a meaningful assessment of the housing and program needs of transgender and intersex individuals, upon intake, all transgender or intersex individuals should

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1 To learn more visit [www.aclu.org/preatoolkit](http://www.aclu.org/preatoolkit)

be provided with a form or screening questionnaire to be conducted or filled out in private that will allow the person to select the following: a preferred name, a preferred pronoun, where the person would feel safest being housed. Those preferences should be honored.

### **Institute procedures governing the searches of transgender and intersex individuals**

The PREA regulations require agencies to effectively train staff to conduct professional and respectful searches of transgender and intersex persons.<sup>10</sup>

The PREA Resource Center identifies three options for conducting searches of transgender and intersex individuals that would comply with PREA: “1) searches conducted only by medical staff; 2) searches conducted by female staff only, especially given there is no prohibition on the pat-searches female staff can perform (except in juvenile facilities); and 3) asking inmates/residents to identify the gender of staff with whom they would feel most comfortable conducting the search.”<sup>11</sup>

The PREA regulations also require that transgender and intersex individuals be permitted to shower privately.<sup>12</sup>

### **Limit the use of protective custody.**

The PREA regulations strictly regulate the use of protective custody (separation from others to address a current need for protection) because such housing often amounts to isolation or solitary confinement and therefore creates hardship for the vulnerable individual. Under PREA prisoners cannot be placed in “involuntary segregated housing” unless (1) an assessment of all available alternatives is made AND (2) a determination has been made that no alternative means of separation is available (and this determination must be made within the first 24 hours of involuntary segregation).<sup>13</sup> Under the PREA regulations, involuntary segregated housing should generally not exceed 30 days.<sup>14</sup> When prisoners are placed in protective custody, they must be given access to “programs, privileges, education, and work opportunities to the extent possible.”<sup>15</sup> Though agencies are given significant latitude with restrictions because of the “to the extent possible” qualification, the nature of, reason for and duration of any restrictions to program, privilege, education and work opportunities must be documented.<sup>16</sup>

## **ENDNOTES**

<sup>1</sup> See Prison Rape Elimination Act (Sexual Violence in Correctional Facilities), Bureau of Justice Statistics (last visited November 18, 2013), available at <http://www.bjs.gov/index.cfm?ty=tp&tid=20> (Listing Bureau of Justice Statistics data gathered since the act’s passage).

<sup>2</sup> Nat’l Prison Rape Elimination Comm’n., Nat’l Prison Rape Elimination Comm’n. Rep. 1 (June 2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf>.

<sup>3</sup> See Press Release, Department of Justice, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-ag-635.html> (summary of regulations).

<sup>4</sup> National Prison Rape Elimination Commission, Report 73 (June 2009); A. Beck et al., Sexual Victimization in Jails and Prisons Reported by Inmates, 2008-09, 14-15 (Bureau of Justice Statistics, Aug. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf>; V. Jenness et al., Violence in California correctional facilities: An empirical examination of sexual assault (Center for Evidence-Based Corrections 2009); 167-68; J.M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 166-68 (National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at [http://endtransdiscrimination.org/PDFs/NTDS\\_Report.pdf](http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf).

<sup>5</sup> 77 FR 37105 (June 20, 2012).

<sup>6</sup> 28 C.F.R. § 115.15 (e).

<sup>7</sup> Id.

<sup>8</sup> 28 C.F.R. § 115.42 (d).

<sup>9</sup> 28 C.F.R. § 115.42 (e).

<sup>10</sup> 28 C.F.R. § 115.15 (f).

<sup>11</sup> PREA Resource Center, “Frequently Asked Questions,” <http://www.prearesourcecenter.org/faq#n1069> (last visited November 18, 2013).

<sup>12</sup> 28 C.F.R. § 115.42 (f).

<sup>13</sup> 28 C.F.R. § 115.43 (a).

<sup>14</sup> 28 C.F.R. § 115.43 (c).

<sup>15</sup> 28 C.F.R. § 115.43 (b).

<sup>16</sup> Id.