



President

Cynthia Hujar Orr San Antonio, TX

President-Elect

Jim E. Lavine Houston, TX

First Vice President

Lisa M. Wayne Denver, CO

Second Vice President

Steven D. Benjamin Richmond, VA

Treasurer

Jerry J. Cox Mount Vernon, KY

Secretary

Theodore Simon Philadelphia, PA

Parliamentarian

E. G. Morris Austin, TX

Immediate Past President

John Wesley Hall Little Rock, AR

Directors

James A. H. Bell Knoxville, TN
Brian H. Bieber Coral Gables, FL
Blair G. Brown Washington, DC
William H. Buckman Moorestown, NJ
Ray C. Carter Jackson, MS
Anne M. Chapman Phoenix, AZ
Jay Clark Cincinnati, OH
Anthony Cotton Waukesha, WI
Steven J. Feldman Pleasantville, NJ
Drew Findling Atlanta, GA
Todd Foster Tampa, FL
Richard K. Gilbert Washington, DC
Tracy Green Los Angeles, CA
Bonnie Hoffman Leesburg, VA
Michael J. Iacopino Manchester, NH
Wm. O. "Bill" James, Jr. Little Rock, AR
Evan A. Jenness Santa Monica, CA
Rick Jones New York, NY
Elizabeth Kelley Cleveland, OH
Mark J. Mahoney Buffalo, NY
Ken Murray Phoenix, AZ
George H. Newman Philadelphia, PA
Kirk B. Obear Sheboygan, WI
Timothy P. O'Toole Washington, DC
Mark P. Rankin Tampa, FL
Martin A. Sabelli San Francisco, CA
Maria H. Sandoval San Juan, PR
Mark A. Satawa Southfield, MI
Marvin E. Schechter New York, NY
Gail Shifman San Francisco, CA
David B. Smith Alexandria, VA
Penelope S. Strong Billings, MT
Jeffrey E. Thoma Fairfield, CA
Jennifer Lynn Thompson Nashville, TN
Geneva Vanderhorst Washington, DC
Deja Vishny Milwaukee, WI
C. Rauch Wise Greenwood, SC
Solomon L. Wisenberg Washington, DC

Executive Director

Norman L. Reimer Washington, DC

May 10, 2010

Robert Hinchman, Senior Counsel
Office of Legal Policy, Department of Justice
950 Pennsylvania Avenue, N.W., Room 4252,
Washington, D.C. 20530

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

Dear Attorney General Holder,

The National Association of Criminal Defense Lawyers (NACDL) is submitting these comments in support of the national standards to prevent, detect, and respond to prison rape, recommended by the National Prison Rape Elimination Commission (NPREC) on June 23, 2009. These national standards are a milestone in the effort to end prisoner rape. The standards also represent a compromise, balancing the fiscal and security interests of corrections administrators with the basic right of all people, including inmates, to be free from sexual abuse. NACDL urges swift adoption of the standards, which will save thousands of men, women, and children from sexual abuse behind bars.

NACDL is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 10,000-plus direct members in 28 countries – and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

A. Response to the Questions in the Advance Notice of Proposed Rulemaking

1. *What would be the implications of referring to "sexual abuse" as opposed to "rape" in the Department's consideration of the proposed standards?*

NPREC's proposed standards intend to prevent, detect, and respond to "sexual abuse." The term "sexual abuse" is defined in the NPREC's report. However, the Prison Rape Elimination Act (PREA) directs the Department to issue a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison "rape," defined in section 10 of Public Law 108-79 (42 U.S.C. 15609(9)).

NACDL supports national standards that take an expansive approach and incorporate all staff sexual misconduct and all coercive sexual activity between inmates. The term "rape" has a relatively narrow definition according to local criminal laws. Therefore, using the widely recognized term "sexual abuse" in the standards will minimize confusion with the criminal standard for rape and will conform to the expectations and intent of PREA.

PREA's definition of rape includes all of the conduct within the Commission's definition of sexual abuse except for sexual harassment, staff-on-inmate voyeurism, and staff-on-inmate indecent exposure. These are known to be precursors to assaultive sexual abuse. Addressing these forms of sexual misconduct will enable officials to prevent rapes from occurring.

However, consensual sexual activity between inmates should not be incorporated into the definition of sexual abuse. Correction facilities remain free to establish disciplinary rules and regulations as they see fit, but conflating consensual sexual activity between inmates with the crime of rape is inconsistent with the PREA goals. In addition, doing so will force survivors of sexual abuse to suffer in silence, as fear that sexual abuse will be misconstrued and punished as prohibited sexual activity will prevent survivors from reporting their abuse or seeking medical assistance.

2. Would any of the Commission's proposed standards impose "substantial additional costs?"

PREA mandates that the Attorney General shall not establish a national standard "that would impose substantial additional costs compared to the costs presently expended by Federal, State and local prison authorities."

Compared to the billions of dollars spent on corrections every year, the costs for implementing these standards 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 consideration 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. Litigation costs will also be dramatically reduced. 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.

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.

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

The national 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 facility's size and resources will undermine the standards and will needlessly complicate their otherwise straightforward expectations.

In the final national standards, the Commission ensured that each provision was sufficiently flexible to account for distinctions between facilities and the variance in available resources. *See* Standard PP-3 (Inmate Supervision) and Standards RP-2 through RP-4 (Agreements with Outside Entities, Law Enforcement Agencies and the Prosecuting Authority).

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.

Establishing tiers of compliance will also result in a variety of problems, which are bound to culminate in litigation. To establish 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, corrections institutions are dynamic and tend to change, thereby creating a question about where a facility with changed circumstances would fit within the compliance hierarchy.

B. NACDL Comments on the National Standards

NACDL believes that the proposed national standards have the potential to improve safety in corrections facilities nationwide, both for officers and inmates. They are the result of extensive input from corrections practitioners, advocates, academics, prisoner rape survivors, and other stakeholders. Full implementation of these standards will reduce not only sexual abuse, but other forms of physical violence.

The requirements in the standards are urgently needed to improve safety in corrections facilities across the country. As the studies from the Bureau of Justice Statistics (BJS) have made clear, sexual violence is a serious problem across the country. Rather than being an inevitable part of incarceration, however, these abuses are often the result of mismanagement, deficient policies, and dangerous practices. The standards provide the best tool to date to address these issues.

1. 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.

For instance, Standard PP-3 (inmate supervision) requires that corrections officials provide “the inmate supervision necessary to protect inmates from sexual abuse.” This allows officials to use discretion in assessing the level of supervision adequate to 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.

Also, Standard PP-4 (limits to cross-gender viewing and searches), rather than limiting cross-gender supervision in any areas where inmates disrobe or perform bodily functions, which is consistent with international human rights standards, the standard only prohibits actually viewing inmates of the opposite gender who are nude or performing bodily functions. Although many agencies already comply with this standard, in light of the BJS data, which showed high percentages of abuse by female staff of male inmates, these protections are clearly needed in all facilities.

While some of PREA’s opponents claim that this standard would require substantial costs in hiring staff and for facility construction, other agencies have shown that it can be met with low-cost solutions.

2. Prevention

Preventing sexual abuse is at the heart of PREA, and the training and classification provisions in the standards represent well-established means of doing so. 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. At the same time, 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.

3. 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. However, it is still far too common that officials fail to respond to reports of sexual abuse appropriately, such as by failing to initiate an investigation, refusing to provide protective measures, or by directly facilitating or participating in retaliatory behavior.

When officials fail to protect inmates from sexual abuse, victims need access to legal redress that is not hindered by unrealistic and arbitrary procedural requirements. The standards recognize that the harsh procedural requirements of many prison systems, such as filing deadlines as short as two days cannot realistically be met by prison rape survivors. Similarly, the practice by some agencies of requiring that inmates report complaints to a specific officer, who may have been involved or complicit in the abuse, wholly undermines whatever policies facilities have in place to address sexual abuse. Rather than encourage frivolous lawsuits, this standard will increase the efficiency with which prison rape cases proceed, by allowing courts to focus on the substantive claims of rape survivors instead of litigating their compliance with technicalities.

4. Monitoring

External scrutiny is vitally important to the strength of any public institution. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions. The standards mandate the essential components of independent oversight in a cost-efficient manner. If implemented properly, outside monitoring will provide an 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 the facility.

Some jurisdictions already have an oversight entity in place, such as an inspector general or ombudsman's office, which can be empowered to conduct these reviews at minimal expense to the corrections agency. While facilities that are not currently overseen by any independent entity may have to incur some financial expense in order to arrange for independent audits, the tremendous benefits of this outside perspective will significantly outweigh the costs. By identifying areas of noncompliance and addressing potential hazards proactively, inefficient and dangerous practices will be reformed, resulting in fiscal savings and other benefits.

C. Conclusion

According to the evidence gathered, sexual violence in U.S. prisons and jails has reached crisis proportions. Strong standards are urgently needed to protect inmates from this devastating and common abuse. NACDL strongly urges you to promulgate the Commission's standards without delay, since they were mandated by the first federal civil law to address sexual violence behind bars. Every day that these critically important measures are not in place, men, women, and children will continue to be sexually abused while in custody.

Thank you for your consideration.

Respectfully,

Kyle O'Dowd
Associate Executive Director for Policy
National Association of Criminal
Defense Lawyers
Tel: 202-872-8600 ext. 226
E-mail: kyle@nacdl.org

Elizabeth Kelley
Chair, Corrections Committee
National Association of Criminal
Defense Lawyers