

May 10, 2010

Robert Hinchman  
Senior Counsel  
Office of Legal Policy  
Department of Justice  
950 Pennsylvania Avenue NW.  
Room 4252  
Washington, DC 20530-0001

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

Dear Attorney General Holder,

On behalf of the Texas Association Against Sexual Assault (TAASA), I am submitting these comments in support of the recommended national standards developed by the National Prison Rape Elimination Commission.

TAASA is the statewide organization committed to ending sexual violence in Texas. A non-profit educational and advocacy organization based in Austin, TAASA member agencies comprise a statewide network of more than 80 crisis centers that serve rural and metropolitan areas. Founded in 1982, the agency has a strong record of success in community education, legal services, youth outreach, law enforcement training, legislative advocacy, and curricula and materials development. As community-based sexual assault programs comprise our membership, we assure you that such programs throughout Texas stand ready to support the Commission's recommended standards. Because this issue is critically important, thirty TAASA member agencies requested to sign-on to this letter so that their support could be specifically noted.

Unfortunately, in Texas, we are intimately familiar with the horror of prison rape. According to the U.S. Bureau of Justice Statistics, five of the ten prisons nationwide with the highest reported rates of rape in 2006 are in Texas. The rates of reported rape in those facilities range from 9.3 to 15.7 percent, compared with a national rate of 4.5 percent. As professionals working in the field of sexual violence, we believe sexual abuse should never be tolerated and that, regardless of custody status or criminal history, anyone who is assaulted deserves proper support by a qualified service provider and a thorough investigation.

We particularly applaud the U.S. Department of Justice's commitment, as noted in the Advanced Notice of Proposed Rulemaking, to remove the current ban on Victims of Crime Act (VOCA) funding for treatment and rehabilitation services for incarcerated victims of sexual abuse. That

restriction has prevented community rape crisis centers throughout the United States from providing counseling to incarcerated survivors of sexual violence, despite their commitment to serve all survivors.

Combined with a lifting of the VOCA funding ban, the Commission's recommended standards provide a critical, cost-effective tool for corrections facilities to address sexual abuse. Importantly, they represent an intelligent and workable 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 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. To that end, 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, and some limit its meaning to forcible vaginal-penile intercourse. *See, e.g.*, N.C. Gen. Stat. § 14-27.3, defining second degree rape as “vaginal intercourse.” Using the widely recognized terminology of “sexual abuse” in the standards will minimize confusion with state-specific criminal standards and will promote the zero-tolerance expectations and intent of PREA.

The Commission's definition of sexual abuse includes all 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. Importantly, that definition is not inconsistent with PREA's statutory definition. 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). Thus, the term “prison rape” is given an expansive statutory definition, including but not limited to rape. Consistent with PREA's intent and spirit, the statutory definition is expansive so that, as more information about the problem is learned, the proper scope of sexually inappropriate behaviors can be included.

Perhaps most importantly, practical considerations support an expansive understanding of sexual abuse as well. First, any sexual activity between inmates and staff should fall within the definition of “sexual abuse,” because of the inherent power differential between the parties. Excluding consensual activity would allow jailers to use their positions to coerce inmates with impunity. In addition, sexual harassment, voyeurism, and indecent exposure are known precursors to sexual assault and create a hostile environment for both inmates and staff. Addressing those forms of sexual misconduct will enable corrections officials to prevent rapes from occurring, which is PREA's primary objective.

Finally, 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. Indeed, doing so will force survivors of sexual abuse to suffer in silence, as fear that sexual abuse will be misconstrued as punishable consensual sexual activity will prevent them 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 of implementing the standards, even for the least prepared jurisdiction, will be small. Notably, facilities 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.

The cost of implementation will also be small relative to the benefits of doing so for the corrections agency, the individual inmate, 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 and investigations. Proper crisis intervention, medical care, and mental health care at the outset will help identify medical and psychiatric conditions and ensure they are treated in a proactive and cost-effective manner, resulting in substantial savings for inmate health care. In addition, implementing the standards will dramatically reduce litigation costs. Prison sexual assault cases commonly result in large damage awards that are far more costly than preventing assaults in the first place. *See, e.g., Neal v. Dep't of Corr.*, 2005 Mich. App. LEXIS 342 (\$100,000,000 settlement for over 500 female Michigan inmates abused in custody) and *Galloway v. Texas Youth Commission*, 1:07-CV-276 (LY) (W. Dist. Tex. 2008) (\$625,000 settlement for four juveniles abused in custody).

Second, the vast majority of inmates will one day return to their communities, bringing their emotional trauma and medical conditions with them. 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.

Finally, failing to implement the Commission's recommended standards would result in significant costs to society at large. After being born by corrections agencies for years, the financial costs related to treating long-term physical and mental health problems as a result of prison rape are transferred to the community upon the inmate's release.

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.

The Office of Management and Budget will eventually 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 protect inmates from abuse and to ensure that those who are victimized receive appropriate care. These most basic standards simply reflect the notion that every person has the right to be free from sexual abuse, no matter where they are housed.

In addition, varying compliance requirements based on factors such as the size and resources of a facility would undermine the standards and would needlessly complicate their otherwise straightforward expectations. Significantly, such complication would inevitably result in litigation. To create distinctions based on facility size or resources, the Department would have to establish arbitrary cut-off points, which necessarily would create bright-line rules for when facilities can shirk their duty to protect inmates. In turn, those cut-off points would inevitably be challenged by facilities at the margins. Moreover, the dynamic nature of corrections facilities would eventually require changes in the relevant factors at specific institutions, creating new questions about where a facility with changed circumstances would fit within the compliance hierarchy.

The Commission's final recommended standards are carefully and deliberately crafted to be flexible, ensuring corrections facilities with varying resources can comply. Various revisions to the standards evidence that intent. 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.

The standards should reflect the constitutional obligation of corrections facilities to address known risks of sexual violence, regardless of facility size, personnel, resource limitations, or other factors. Creating distinctions for the level of compliance required would 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.

### **Comments on the Standards**

The Commission's standards would help ensure that sexually abused inmates are afforded the same quality of care as survivors in the community. The result of extensive collaboration among corrections practitioners, advocates, academics, prison rape survivors, and other stakeholders, the recommended standards represent an informed and workable compromise that meets the most

basic needs of inmates while bearing in mind the resource limitations of corrections agencies. The standards are composed of proven measures that can remedy the mismanagement, deficient policies, and dangerous practices that underlie most incidents of prison rape.

### Prevention and Response Planning

Proper planning, through the development of sound policies and 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. Two examples are Standard PP-3 (inmate supervision) and Standard PP-7 (assessment and use of monitoring technology). Based on concerns voiced by corrections officials, the former was revised to require "inmate supervision necessary to protect inmates from sexual abuse," rather than the original requirement of "continuous sight and sound supervision of inmates." Likewise, the latter was revised to allow facilities to comply with the required use of appropriate, cost-effective monitoring technology through feasibility assessments that account for financial limitations.

Standard PP-4 (limits to cross-gender viewing and searches) has 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, the final recommended standard only prohibits *actually viewing* inmates of the opposite gender who are nude or performing bodily functions.

Many agencies already comply with PP-4's preclusion of routine cross-gender viewing and searches in their women's facilities. 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.

Importantly, limiting cross-gender viewing and searches need not conflict with employment discrimination laws, not must the introduction of such limits be unduly expensive. 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. In addition, pat searches can be limited to 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. Again, the cost savings corrections facilities would incur as a result of the efficiency demanded by the standards cannot be overemphasized.

Standard RP-1 (evidence protocol and forensic medical exams) relies upon the proven practice of uniform evidence collection, which will improve administrative and criminal investigations by maximizing the potential for obtaining usable physical evidence. The 2004 publication "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents" is the

definitive source for how to conduct a proper medical forensic examination. To ensure that these exams are conducted with the most effective cooperation of the victim, they must be provided free of charge, in the absence of corrections authorities, and include a victim advocate. Forensic examinations are critical to the investigation, but emotionally difficult and physically invasive for the victim. By providing clear information and unconditional support, victim advocates may help secure the survivors' full cooperation in the investigation while helping them begin the healing process.

Collaborating with outside experts is a cost effective 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. Reflective of concerns that corrections officials raised to the Commission, facilities can meet this standard even without formal memoranda of understanding, so long as they make serious efforts to reach out to these entities.

As a member association of service providers, we particularly support Standard RP-2 and are eager to establish these partnerships. Some corrections officials may fear that if outside counselors are allowed to speak confidentially with survivors, the officials will not know the full scope of what is happening in their institutions. To the contrary, just as in the community, survivors who feel safe and supported are much more likely to report the sexual abuse and are better prepared to fully cooperate with the investigation and prosecution. The experiences of jurisdictions that have already independently adopted the recommended standards bear that out. In addition, many prison rape survivors will not trust anyone from the corrections department that allowed for the abuse to occur. Notably, the proposed lifting of the ban on VOCA funding for assistance to inmates would greatly facilitate cooperation between corrections agencies and community service providers, thereby benefitting incarcerated survivors immensely.

### 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 orientation 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. Specialized training for investigators and medical and mental health staff (Standards TR-4, TR-5) is especially important to ensure that these professionals are able to fulfill their specific duties pertaining to the detection of and response to sexual abuse, including proper evidence preservation, assessing signs of sexual abuse, and ensuring that victims are adequately protected from further abuse and receive appropriate health care. Further, for investigators, it is imperative that training emphasize the difference between victim-specific

interviews and suspect interviews and be conducted by those having received training in victim-specific interviewing techniques.

Additionally, 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. That practice is punitive by default, as it results in a loss of services and programs, and leaves the victim isolated. Such isolation further traumatizes victims and makes it impossible for them to begin the healing process. 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 receive swift and thorough responses. 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. Likewise, third party reports (Standard RE-4) must be taken just as seriously. Unfortunately, inmates often experience significant barriers to the use of hotline services even when existent. Inmates typically have daytime schedules that do not permit calling during the day and may be prohibited from calling during later evening hours for security reasons. To truly encourage and facilitate reporting, facilities should take care to ensure access to hotlines as a practical matter, not just in theory.

Far too often, however, officials fail to respond appropriately to those reports that *are* made, instead failing to initiate an investigation, refusing to provide protective measures, or directly facilitating or participating in retaliatory behavior.

Trained advocates who can protect confidentiality are the best source of compassionate, skilled responses to sexual abuse survivors. Standard RE-3 (inmate access to outside confidential support services) will give inmates access to one of the most basic and proven mechanisms for an effective response: confidential emotional support services. Confidential counseling provides survivors with a safe and trusted way to discuss the sexual assaults, deal with their fears, develop appropriate coping skills, and understand that the abuse was not their fault. In addition, as noted above in reference to Standard RP-2, confidential services improve a survivor's ability to participate in an investigation of the assault. These services further enhance safety in the facility, because a survivor who receives quality care with the support of a counselor is likely to tell other inmate survivors about the experience and to encourage anyone experiencing sexual abuse to come forward.

Victims also 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 (PLRA) was intended to do, the varying and complex grievance procedures that must be fully navigated to meet the exhaustion requirement have barred prison rape survivors from seeking any judicial relief.

Many prison rape survivors are some of the most vulnerable prisoners, and some of the least likely to be able to understand complex grievance procedures. For example, juvenile, disabled, and Spanish-speaking inmates abused in Texas facilities commonly do not understand PLRA's grievance requirements, or how to file grievances in the facilities they were housed in. Moreover, many prisoners fail to file grievances even when they are aware of the requirements because they believe the system will never grant them relief. By allowing courts to focus on the substantive claims of sexual abuse survivors, instead of being barraged with technical challenges, this standard will ensure that prison rape issues unaddressed by the corrections facility can be resolved judicially without wasting court resources on unrealistic, technical requirements.

Finally, medical and mental health care are vital components of detecting and responding to sexual abuse. The minimal requirements of Standards MM-1 through MM-3 (screenings, access to emergency services, ongoing care) are a great start to ensuring that corrections health professionals are providing necessary services. Standard MM-2 rightfully recognizes that services should be provided free of charge and not dependent on whether the survivor names the perpetrator. The importance of follow-up mental health and medical services, like those mandated by Standard MM-3, cannot be underestimated. The successful recovery of a survivor rests heavily on the post-abuse services he/she receives. Just as survivors in the community have access to follow-up medical services and counseling, so should survivors in custody.

### Monitoring

Incident reviews and data collection (Standards DC-1 through DC-4) are important ways to learn about patterns of abuse within facilities and about the effectiveness of response measures. Making this information publicly available will provide much-needed transparency in otherwise highly secretive institutions. Officials need to be held accountable for the sexual abuse in their facilities, but that can only occur if outsiders have access to this important information.

Thus, we strongly support all standards that evince a recognition that external scrutiny is vitally important to the strength and quality of our corrections facilities. 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-effective 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. TAASA

and its aforementioned member agencies strongly urge 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,



Annette Burrhus-Clay  
Executive Director, TAASA

With Support From:

Regional Crime Victim Crisis Center  
PO Box 122  
Abilene, Texas

Family Crisis Center of the Big Bend  
P.O. Box 1470  
Alpine, TX 79831

SafePlace  
P.O. Box 19454  
Austin, TX 78760

Family Crisis Center  
P.O. Box 736  
Bastrop, TX 78602

Family Shelter of McCulloch County, Inc.  
P.O. Box 310  
Brady, TX 76825

Friendship of Women, Inc.  
P.O. Box 3112  
Brownsville, TX 78523

Hutchinson County Crisis Center, Inc.  
P.O. Box 182  
Borger, TX 79008

Wintergarden Women's Shelter, Inc.  
P.O. Box 1382  
Carrizo Springs, TX 78834

Johnson County Family Crisis Center  
P.O. Box 43  
Cleburne, TX 76033

The Women's Shelter  
P.O. Box 3368  
Corpus Christi, TX 78463

Dallas Area Rape Crisis Center  
634 Campbell Road, Suite 201  
Dallas, TX 75080

The Family Place  
P.O. Box 7999  
Dallas, TX 75209

Denton County Friends of the Family  
P.O. Box 640  
Denton, TX 76202

Arte Sana  
PO Box 1334  
Dripping Springs, TX 78620

Safe Place, Inc.  
306 W. 7<sup>th</sup> St.  
Dumas, TX 79029

Eastland County Crisis Center, Inc  
P.O. Box 1010  
Eastland, TX 76424

STARS Rape Crisis Center of El Paso  
710 N. Campbell St.  
El Paso, TX 79902

The Women's Center of Tarrant County  
1723 Hemphill St.  
Fort Worth, TX 76110

SAAFE House  
P.O. Box 1893  
Huntsville, TX 77342

Families In Crisis, Inc.  
P.O. Box 25  
Killeen, TX 76540

Women's Center of East Texas  
P.O. Box 347  
Longview, TX 75606

Lubbock Rape Crisis Center  
P.O. Box 2000  
Lubbock, Texas 79457

Mujeres Unidas/Women Together  
511 N. Cynthia  
McAllen, TX 78501

The Bridge Over Troubled Waters, Inc.  
P.O. Box 3488  
Pasadena, TX 77501

Panhandle Crisis Center  
P.O. Box 502  
Perryton, TX 79070

The Rape Crisis Center  
7500 US Highway 90W, Bldg 2, Suite 201  
San Antonio, TX 78227

Hays-Caldwell Women's Center  
P.O. Box 234  
San Marcos, TX 78667

Guadalupe Valley Family Violence Shelter,  
Inc.  
P.O. Box 1302  
Seguin, TX 78155

East Texas Crisis Center  
P. O. Box 7060  
Tyler, Texas 75711

Bay Area Turning Point  
P.O. Box 57543  
Webster, TX 77598