



Written Statement of David Stacy  
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State of Civil Rights at Immigration Detention Facilities  
U.S. Civil Rights Commission  
January 30, 2015

Mr. Chairman and Members of the Commission:

My name is David Stacy, and I am the Government Affairs Director for the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual, and transgender (LGBT) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all. On behalf of HRC's more than 1.5 million members and supporters nationwide, I am honored to submit this statement regarding the state of civil rights at immigration detention facilities. While there are many important issues to address – including some that my colleagues from other organizations will discuss – my remarks are specifically limited to the civil rights of LGBT individuals in immigration detention.

## I. **Introduction**

LGBT<sup>1</sup> people are particularly vulnerable to abuse when they enter institutionalized settings. Juan Mendez, United Nations Special Rapporteur on Torture, noted that worldwide, “[M]embers of sexual minorities are disproportionately subjected to torture and other forms of ill-treatment because they fail to conform to socially constructed gender expectations. Indeed, discrimination on grounds of sexual orientation or gender identity may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place.”<sup>2</sup> In addition, he added that the LGBT community is at the “bottom of the hierarchy,” and that “male-to-female transgender prisoners [are highly susceptible] to physical and sexual abuse if placed within the general prison population.”<sup>3</sup>

The United States, as a member state subject to the Convention against Torture (CAT), has an obligation to guard against all forms of cruel, inhuman or degrading treatment or punishment at the hands of the government. Unfortunately, the United Nations Committee against Torture has expressed concern over “reports of brutality and use of excessive force” by U.S. law enforcement, including “numerous allegations of ill-treatment of vulnerable groups,”<sup>4</sup> including members of sexual minorities. To that end, the CAT's most recent recommendations called on the United States to “design and implement appropriate measures to prevent all sexual violence in all its detention centres” in furtherance of Article 16, which requires each country to “undertake to prevent in any

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<sup>1</sup> LGBT is the term often used in the United States while many international organizations often include “intersex.”

<sup>2</sup> Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/19/41 (2011), at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41\\_English.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/19session/A.HRC.19.41_English.pdf)

<sup>3</sup>*Id.*

<sup>4</sup> Conclusions and Recommendations of the Committee Against Torture, U.N. Doc. CAT/C/USA/CO/2 (2006), at <http://www.ushrnetwork.org/sites/ushrnetwork.org/files/catrecommendations2006.pdf>.

territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in [A]rticle 1.”<sup>5</sup>

## II. Troubling Statistics<sup>6</sup>

The Department of Justice’s Bureau of Justice Statistics (BJS) is charged with collecting, analyzing, and publishing data related to crime in the United States.<sup>7</sup> According to BJS’s National Former Prisoner Survey,<sup>8</sup> 38.6% of homosexual and 33.7% of bisexual male former prisoners reported sexual victimization by another inmate. In stark comparison, only 3.5% of heterosexual male former prisoners reported sexual victimization. Heterosexual and lesbian women reported similar incidents of sexual victimization (13.1% and 12.5%, respectively), while 18.1% of bisexual women<sup>9</sup> reported sexual victimization.<sup>10</sup> It is worth noting that former inmates reported fewer incidents of sexual victimization when housed in a community-based correction facility, such as a halfway house.<sup>11</sup>

The third National Inmate Survey, also released by BJS, revealed equally troubling statistics. Among heterosexual prisoners in state and federal facilities, an estimated 1.2% reported sexual victimization by another inmate, and 2.1% reported sexual victimization by staff. In comparison, an astounding 12.2% of non-heterosexual inmates (LGB, and “other sexual orientations”) reported sexual victimization by another inmate, and 5.4% reported sexual victimization by staff.<sup>1213</sup>

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<sup>5</sup> Convention Against Torture, U.N. Doc., Article 14 (1985), at <http://www.hrweb.org/legal/cat.html>. (For the purposes of the CAT, “torture” is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”)

<sup>6</sup> Cited statistics are only for adult inmates.

<sup>7</sup> The Prison Rape Elimination Act, discussed in more detail below, directed DOJ to gather data yearly on the incidence of sexual assault in the United States.

<sup>8</sup> Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, *Sexual Victimization Reported by Former State Prisoners, 2008*, at 16 (May 2012), available at <http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf>.

<sup>9</sup> The percentage of misconduct by staff is lower, but still alarming. 5.2%, 17.5%, and 11.8% of heterosexual, bisexual, and homosexual men reported sexual victimization by prison staff. Heterosexual, bisexual, and lesbian women reported 3.7%, 7.5%, and 8.0% of sexual victimization, respectively, against prison staff. *See id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 10.

<sup>12</sup> Allen J. Beck, Bureau of Justice Statistics, U.S. Department of Justice, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-2012* (May 2013), available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

<sup>13</sup> Heterosexual jail inmates reported 1.2% and 1.7% victimization by another inmate and staff, respectively, while 8.5% and 4.3% of non-heterosexual jail inmates reported sexual victimization.

Best estimates suggest that approximately 90 to 100 transgender detainees are housed in ICE detention daily.<sup>14</sup> In December 2014, BJS released a supplemental table of sexual victimization of transgender inmates. Combining the first, second, and third National Inmate Surveys,<sup>15</sup> BJS found that 24.1% and 16.7% of transgender inmates in state and federal prisons were the victims of sexual victimization by an inmate and staff, respectively.

Finally, a BJS special report on sexual victimization as reported by adult correctional authorities<sup>16</sup> noted: “The most common response in substantiated incidents of sexual victimization among inmates was to place the victim in administrative segregation or protective custody.”<sup>17</sup> Given the disproportional incidents of sexual victimization against LGBT detainees, it follows that a disproportionate number of LGBT individuals are being placed in segregated custody.

In sum, the BJS surveys conclusively demonstrate that LGBT people in custody in the United States constitute a high-risk population.

### III. **Prison Rape Elimination Act (PREA) and Agency Policies**

Responding to the alarming rate of sexual violence in American confinement facilities, the United States Congress enacted the Prison Rape Elimination Act (PREA) in 2003 with bipartisan support. In addition, the statute created a National Prison Rape Elimination Commission to study the problem of sexual violence in confinement facilities and to recommend national standards to the Department of Justice (DOJ). After nine years of extensive comment periods and discussions with advocates, researchers, and state and local officials, DOJ promulgated a set of comprehensive regulations. In its summary of the final rule, DOJ recognized “the particular vulnerability of inmates who are LGBT or whose appearance or manner does not conform to traditional gender expectations.”<sup>18</sup>

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<sup>14</sup> This number is based on the estimate that ICE houses 30,000 to 34,000 individuals each night (the so-called “bed mandate”) (see Doris Meissner, et al., Migration Policy Institute, *The Deportation Dilemma: Reconciling Tough and Human Enforcement*, 45-46 (April 2014), available at <http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement>), and estimates from the Williams Institute (see <http://williamsinstitute.law.ucla.edu/mission/>), a think tank at UCLA dedicated to LGBT research, that estimates that .3% of the adult American population is transgender.

<sup>15</sup> For the years 2007, 2008-2009, and 2011-2012.

<sup>16</sup> 573 ICE facilities were surveyed in addition to state and federal prisons, military facilities, and Indian county jails.

<sup>17</sup> Allen J. Beck & Ramona R. Rantala, Bureau of Justice Statistics, U.S. Department of Justice, *Sexual Victimization Reported by Correctional Authorities, 2009-2011*, at 11 (Jan. 2014), available at <http://www.bjs.gov/content/pub/pdf/svraca0911.pdf>.

<sup>18</sup> See Dep’t of Justice, *National Standards to Prevent, Detect, and Respond to Prison Rape*, 28 C.F.R. § 115 (May 17, 2012).

In May 2012, President Barack Obama issued a presidential memorandum<sup>19</sup> directing agencies with federal confinement facilities that are not subject to DOJ's final rule, including the Department of Homeland Security (DHS), to promulgate agency regulations.<sup>20</sup> DHS finalized its regulations in March 2014. In promulgating its own rules, however, DHS said that "because of [the agency's] own unique circumstances, [it] has adopted the overall structure of DOJ's regulations and has used its content to inform the provisions of the [rule], but has tailored individual provisions to maximize their efficacy in DHS confinement facilities."<sup>21</sup>

In short, these tailored provisions have not protected LGBT detainees. Two examples provide greater clarity. First, while DOJ's regulations mandate that transgender persons have the opportunity to shower separately from others, DHS limited this protection by adding the vague and unexplained qualifier, "when operationally feasible."<sup>22</sup> Second, DHS's regulations mandate that detention centers not base a decision on housing, for example, solely on identity documents or physical anatomy. Rather, the rules require detention centers to "*consider* the detainee's gender self-identification as gay, lesbian, bisexual, transgender, intersex, or gender non-conforming."<sup>23</sup> All decisions, however, shall be "consistent with the safety and security considerations of the facility." Disappointingly, this language potentially provides less protection to LGBT detainees than the DOJ regulations, which state that "[a] transgender or intersex inmate's own views with respect to his or her own safety shall be given *serious consideration*."<sup>24</sup> To date, there is no publicly available evidence that DHS has ever placed a transgender individual in a facility consistent with the individual's gender identity.

### *ICE Segregation Memo*

In September 2013, ICE issued a new directive on the use of segregation of detainees that from the general population.<sup>25</sup> "Administrative segregation" is typically used as a "non-

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<sup>19</sup> President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies*, "Implementing the Prison Rape Elimination Act" (May 17, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/05/17/presidential-memorandum-implementing-prison-rape-elimination-act>.

<sup>20</sup> Other agencies, such as the U.S. Department of Health and Human Services (HHS), also have confinement facilities that fall under PREA.

<sup>21</sup> Dep't of Homeland Security, *Standards to Prevent, Detect, and Respond to Sexual Abuse and Assault in Confinement Facilities*, 6 C.F.R. § 115 (Mar. 7, 2014).

<sup>22</sup> *Id.* § 115.42.

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> Dep't of Justice, *supra* note 18, 28 C.F.R. § 115.42 (emphasis added).

<sup>25</sup> Within DHS, Immigration and Custom Enforcement (ICE) oversees the nation's largest civil detention system.

punitive form of separation from the general population for administrative reasons,”<sup>26</sup> but can also be used as a disciplinary measure, to isolate those who are a threat to others, or to protect a particularly vulnerable member of the detention population.<sup>27</sup> The segregation memo declared that “placement in segregation should occur only when necessary and in compliance and with applicable detention standards,” and that ICE “shall ensure the safety, health, and welfare of detainees in segregated housing in its immigration detention facilities.”<sup>28</sup> The policy also requires that ICE’s Enforcement and Removal Operations review and oversee decisions to retain detainees in segregation for more than fourteen days.

In addition, the segregation memo states that placement in segregation should only occur when necessary. That is, as a form of last resort and not as a policy norm. Although segregation is used as a non-punitive measure for many LGBT detainees, studies have shown that it can still have lasting emotional and psychological harm<sup>29</sup> on a detainee. Human Rights Watch has noted that “most independent psychiatric experts, and even correctional mental health staff, believe that prolonged confinement in conditions of social isolation, idleness, and reduced mental stimulation is psychologically destructive. How destructive depends on each prisoner’s prior psychological strengths and weaknesses, the extent of the social isolation imposed, the absence of activities and stimulation, and the duration of confinement.”<sup>30</sup>

To its credit, DHS has taken implementation of the segregation memo seriously and does constantly monitor and assess those in (non-punitive) administration segregation. Nevertheless, many LGBT detainees face an untenable dilemma: remain silent if fearful for one’s personal safety or speak out and risk segregation, which can potentially cause lasting emotional and psychological harm.

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<sup>26</sup> U.S. Immigration and Customs Enforcement, *Policy Directive 11065.1: Review of the Use of Segregation for ICE Detainees* (Sept. 4, 2013), available at [http://www.ice.gov/doclib/detention-reform/pdf/segregation\\_directive.pdf](http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf) (hereinafter the “segregation memo”).

<sup>27</sup> New York Civil Liberties Union, *Boxed In: The Trust Cost of Isolation in New York Prisons*, available at [http://www.nyclu.org/files/publications/nyclu\\_boxedin\\_FINAL.pdf](http://www.nyclu.org/files/publications/nyclu_boxedin_FINAL.pdf) (last visited Jan. 15, 2015).

<sup>28</sup> *Id.*

<sup>29</sup> See generally Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, available at [http://www.hrw.org/reports/2003/usa1003/18.htm#\\_ftn516](http://www.hrw.org/reports/2003/usa1003/18.htm#_ftn516) (last visited Jan. 15, 2015), David Kaiser and Lovisa Stannow, *The Shame of Our Prisons: New Evidence*, *The New York Review of Books* (Oct. 24, 2013), available at <http://www.nybooks.com/articles/archives/2013/oct/24/shame-our-prisons-new-evidence/>, and Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, *Crime and Justice* Vol. 34 No. 1, 441, 455 (2006), available at <http://www.jstor.org/stable/10.1086/500626>. (“While it is often very difficult to compare prison populations, prison conditions (segregation is not necessarily solitary confinement), and health issues across national borders, it is reasonable to conclude that significantly higher rates of psychiatric morbidity should be expected among prisoners in disciplinary or administrative segregation/isolation compared with the general prison population.”)

<sup>30</sup> Human Rights Watch, *supra* note 29.

## *2011 PBNDS*

ICE's first major step toward the goal of protecting detainees from sexual assault was the promulgation of the 2011 Performance-Based National Detention Standards (PBNDS) for "Sexual Abuse and Assault Prevention and Intention." The 2011 PBNDS was developed before DHS's PREA regulations or the segregation memo. Implementation of the 2011 PBNDS has been slow (possibly slowed further since DHS released its PREA regulations), and PBNDS, like the segregation memo, are only internal policies that do not have the force of law. Nevertheless, these policies still provide ICE facilities and staff with important guidelines on ways to prevent and respond to sexual assault and should be fully implemented.

## *Other Mechanisms to Protect Detainees*

In 2013, the United States provided to the U.N. Committee Against Torture a combined third, fourth, and fifth CAT periodic report.<sup>31</sup> The United States noted that the periodic report is an "important tool in the development of practical and effective human rights strategies by the U.S. government" and that the report gives the United States "the opportunity to engage in a process of stock-taking and self-examination."<sup>32</sup> Indeed, the United States answers related to its PREA implementation were thorough. For example, the report noted the success of DHS's Office for Civil Rights and Civil Liberties (CRCL) in investigating complaints from the public alleging violations of civil rights or civil liberties by DHS personnel, programs, or activities. CRCL remains committed to investigating complaints, and their office serves as a useful resource to advocates like HRC. Moreover, CRCL has implemented a system to identify, track, and investigate incidents of sexual violence. In addition, DHS has provided avenues for redress for the victims of sexual violence, including monetary compensation.<sup>33</sup>

However, the real problem is not a lack of statistics, or a dearth of procedures in place for reporting and tracking sexual assaults, but rather the frustratingly slow pace of policy changes that will help to prevent, and thereby alleviate, the need for redress in the aftermath of a sexual assault, and the lack of education of the unique issues that LGBT detainees face.

## **IV. Suggested Policy Recommendations**

To that end, HRC urges DHS to swiftly work to protect all LGBT detainees. This should

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<sup>31</sup> Dep't of State, *Convention Against Torture Periodic Review of the United States of America* (Aug. 5, 2013), available at <http://www.ushrnetwork.org/sites/ushrnetwork.org/files/periodic.pdf>.

<sup>32</sup> *Id.*

<sup>33</sup> The United States' report was released before the release of DHS's implementing PREA regulations.

be done in several ways:

- DHS must fully implement PREA and PBNDS. This means that DHS should ensure that all facilities comply with the agency’s PREA regulations (including privately-owned contracted facilities), and that appropriate PREA audits take place in each facility in a timely manner. If this requires contract renegotiation, then appropriate contract modification should be negotiated by the end of FY 2016.
- Given the heightened risk of sexual assault against LGBT detainees, particularly transgender detainees, using limited resources to detain transgender individuals should not be an ICE priority except for cases involving serious public safety concerns.
- In cases where statute requires mandatory custody, DHS should categorize alternative forms of detention, such as home confinement and community-based supervision, as detention, even for those subject to mandatory custody. This would remove non-dangerous LGBT detainees from oftentimes dangerous confinement facilities.

#### V. **Asks for the Commission**

The Commission has a unique opportunity to engage with DHS in an environment of candor that is often unavailable to non-governmental advocates. HRC urges the Commission to use this opportunity to understand the challenges confronting DHS as the agency works to increase accountability, limit detention, and fully implement PREA and protect LGBT detainees:

- According to a 2014 Government Accountability Office (GAO)<sup>34</sup> report, transgender individuals were victims in 20% of substantiated reports of sexual assault and abuse between October 2009 and March 2013. While comprehensive, the report does not address the unique problems that LGBT individuals face. In fact, the acronym “LGBT” is not utilized once throughout the whole report.<sup>35</sup> The Commission should ask GAO to specifically investigate reports of sexual assault and violence against LGBT detainees, including the number of substantiated, unsubstantiated, and unfounded allegations,<sup>36</sup> as well as the steps that are being taken to protect LGBT detainees from unique and pervasive harassment.

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<sup>34</sup> U.S. Government Accountability Office, *Immigration Detention: Additional Actions Needed to Strengthen Management and Oversight of Facility Costs and Standards*, GAO-15-153 (Oct. 2014), available at <http://www.gao.gov/assets/670/666467.pdf>.

<sup>35</sup> The report does not address lesbian, gay, or bisexual detainees at all.

<sup>36</sup> This standard is used in ICE Directive 11062.2 (“Sexual Abuse and Assault Prevention and Intervention”).



- The Commission should ask DHS for a written report on the progress made to implement its PREA regulations, with special emphasis on implementation of 6 C.F.R. §§ 115.15(a)-(c) as applied to transgender detainees, 115.15(j) (training on searching transgender detainees), 115.31(a)(7) (staff training on communicating with LGBT individuals), 115.41(c)(7) (identifying LGBT detainees in screening), 115.42(b) (placement of transgender detainees), 115.42(c) (separate shower access for transgender detainees), and 115.86(b) (consideration of LGBT status in sexual assault incident reviews).
- The Commission should request a written response from DHS on the status of implementing each recommendation from the GAO report. DHS received a copy of the draft report and concurred with each recommendation except one, noting that it would implement throughout 2015.

## VI. **Conclusion**

Thank you for the opportunity to provide this information to the Commission. Please do not hesitate to contact my staff or me as you continue to study this important subject.