



**WOMEN'S
REFUGEE
COMMISSION**

BY ELECTRONIC SUBMISSION

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U.S. Department of Justice
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RE: Docket No. OAG-131; AG Order No. 3244-2011
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder:

On behalf of the Women's Refugee Commission, I am submitting these comments on the Department's Notice of Proposed Rulemaking which would establish Prison Rape Elimination Act National Standards ("PREA Standards") to protect persons in confinement from rape and other forms of sexual abuse. The Department proposes PREA Standards that would apply to confinement facilities for criminal offenders, but that would not apply to facilities used to confine immigration detainees. This is contrary to the provisions of PREA. It is also directly contrary to the central rationale stated in the Department's own notice—that "[p]rotection from sexual abuse should not depend where an individual is incarcerated: It must be *universal*." *National Standards to Prevent, Detect, and Respond to Prison Rape*, Notice of Proposed Rulemaking, 76 Fed. Reg. 6248, 6250 (Feb. 3, 2011) ("NPRM") (emphasis supplied).

The Women's Refugee Commission urges the Department to revise this incorrect position and adopt a final rule that applies the PREA Standards to confinement facilities for immigration detainees and that provides the additional standards necessary to protect this extremely vulnerable population.

I. The Women's Refugee Commission's Interest in the PREA Standards

Since 1997, the Women's Refugee Commission ("WRC") has advocated for the protection, access to safety, and right to due process of refugee, migrant, and asylum seeking women, children, and families. WRC advocates with the Departments of Homeland Security, Health and Human Services, Justice and State and with Congress to promote immigration enforcement policies and procedures that reaffirm family unity, protect children, unburden state social service organizations, and strengthen society as a whole. The WRC regularly engages in field research and fact-finding to assess current policies and promote positive policy reforms.

WRC's fact-finding missions reveal that many detained immigrant women have suffered abuse, and detained immigrant women are particularly vulnerable to abuse during confinement. In order to protect these vulnerable women, the nation's confinement system requires additional safeguards and stronger standards for policy, oversight, and accountability.

The WRC has devoted substantial resources to identifying these cases and raising the profile of this issue with policymakers and the public. On August 14, 2008 the WRC submitted comments on the National Prison Rape Elimination Commission's ("PREA Commission") June 2009 Report ("PREA Report"). In addition, the WRC has issued reports concerning this issue for more than a decade. Reports that address this issue include *Liberty Denied: Women Seeking Asylum Imprisoned in the United States* (1997); *Behind Locked Doors: Abuse of Refugee Women at the Krome Detention Center* (2000) ("Krome Report I"); *Innocents in Jail: INS Moves Refugee Woman from Krome to Turner Guilford Knight Correctional Center Miami* (2001) ("Krome Report II"); *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children* (2002); *Locking Up Family Values: The Detention of Immigrant Families* (2007); *Halfway Home: Unaccompanied Children in Immigration Custody* (2009); and *Migrant Women and Children at Risk: In Custody in Arizona* (2010) ("Arizona Report").

II. PREA Applies to Confinement Facilities for Both Criminal and Civil Detainees

PREA defines a "prison" as "any confinement facility of a Federal, State or local government." PREA § 10(7), 42 U.S.C. § 15609(7) (2006). The statute does not exclude immigration detention facilities or persons confined in them. Therefore, the Act's mandate to issue standards to eliminate prison rape in the nation's prisons applies to immigration detention facilities and references in the statute to prison rape include persons in immigration detention facilities who are raped, sexually assaulted or sexually abused.¹

PREA then requires the Department to adopt "national" standards applicable to the nation's prisons in order to allow for "the detection, prevention, reduction, and punishment of prison rape." PREA § 8, 42 U.S.C. § 15607. This section does not exclude any subset of confinement facilities and instead relies on the Act's broad definitions of prison and prison rape. Thus, the national standards apply to *all* confinement facilities, including correctional facilities, detention facilities of the Department of Homeland Security that house adult immigrants, facilities of the Department of Health and Human Services that house immigrant children, and any other confinement facility.

This interpretation is consistent with the broad purposes of the Act—the first of which is to "establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States." PREA § 3(1), 42 U.S.C. § 15602(1). The purposes of the Act match the statute's broad definitions of prison and prison rape by establishing priorities and mandating accountability for

¹ The statute further clarifies the meaning of "prison rape" in a manner that is consistent with this interpretation. See PREA § 10(8). This definition specifies that prison rape "includes" (but is not limited to) rapes of inmates in both the actual and constructive control of prison officials. While the statute defines "inmate" more narrowly (PREA § 10(2)) the statute does not suggest in any way that this definition overrides the broad definition of "prison."

“each prison system” and for “prison officials”—clearly indicating that Congress intended to deal with the problem of prison rape throughout the nation’s prisons. *See* PREA § 3.²

If there were any doubt about coverage of immigration facilities and immigrant detainees, the legislative history confirms that Congress intended to include them within the scope of PREA and the national standards established pursuant to PREA. For example, the House Report that accompanied the statute stated that “this legislation, including both the reporting requirements and the standards and protections developed by the Attorney General are intended to apply to all individuals detained in the United States in both civil and criminal detentions.” H. Rep. No. 108-219, at 14 (2003). The House Report also contains the statement of Representative Scott, an original co-sponsor of the act and the ranking member of the Subcommittee on Crime, Terrorism and Homeland Security of the House Judiciary Committee at the time PREA was passed in the House, who noted that the statute “covers all inmates in all prisons” and then went on to clarify that the inclusion of all inmates did not exclude civil detainees:

No detainee, regardless of whether he or she is being held on criminal charges or in civil detention, shall be excluded from any reports, nor be exempted from the protections provided for under any standards related to this legislation. In the end, and perhaps most importantly, the effort to combat prison rape is a moral imperative.

Id. at 115. Senator Edward M. Kennedy, a lead co-sponsor of PREA in the Senate and a member of the Senate Judiciary Committee and ranking member of the Subcommittee on Immigration, Border Security and Citizenship at the time PREA was passed by the Senate, specifically called attention to immigration detainees in his remarks opening the Judiciary Committee’s hearing on the Prison Rape Reduction Act of 2002, a precursor to PREA.³ Senator Kennedy stated:

Today, the Judiciary Committee considers a serious problem in prisons, jails, and detention centers. . . . We know that hundreds of thousands of inmates across the nation, not only convicted prisoners, but pre-trial detainees and immigration detainees, as well, are victims of sexual assault each year.

Later in his remarks at the first hearing of the PREA Commission, Senator Kennedy again discussed the applicability of PREA to facilities confining immigrant detainees.⁴

² While one of the statute’s purposes references a consequent benefit to “correctional facilities” (*see* PREA § 3(4)) there is no indication of an intent to exclude non-correctional facilities. The reference also demonstrates that if Congress had wished to exclude civil facilities, it easily could have done so.

³ *Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong., at 1 (July 31, 2002).

⁴ Senator Kennedy stated that “[i]n the legislation [PREA], Congress expresses its unanimous commitment to end the epidemic of rape and sexual abuse in the Nation’s prisons.” He observed that “until this law was passed, the Federal Government had never conducted a

The President's signing statement also recognizes that the Act deals with "prison rape in Federal, State and local *institutions*." Statement on Signing of the Prison Rape Elimination Act of 2003 (Sept. 4, 2003), Public Papers of the Presidents of the United States, George W. Bush, 2003 Vol. 2, p. 1148 (emphasis supplied). The President's statement contains no suggestion that "institutions" confining immigration detainees are excluded from the coverage of PREA.

A contrary interpretation of the statute would illogically assume that Congress intended to eliminate prison rape in some of the nation's confinement facilities, but not others and that it decided to take special measures to end prison rape of criminals, but not of civil detainees. The statute and its legislative history do not support such an illogical interpretation.

III. The Department's Implementation of the Act Not Only Contradicts the Act Itself, but Also Departs from the Implementation of the Act to Date and Undermines the Policy Goals of the Act

Following the enactment of PREA, both of the primary government institutions that have carried out the Act's mandates prior to the Department have interpreted the Act as applicable to immigration detention. The Department fails to provide any credible explanation for its departure from these prior interpretations of the Act's scope.

First, the Bureau of Justice Statistics—which PREA directs to carry out "a comprehensive statistical review and analysis of the incidence and effects of prison rape" (PREA § 4(a)(1), 42 U.S.C. § 15603(a)(1))—has consistently included detention facilities used to confine immigration detainees in its statistics since 2004.⁵ For example, in its 2011 PREA Special Report, the BJS analyzes data on sexual victimization which includes information from 18 facilities operated by U.S. Immigration and Customs Enforcement, an agency of the

reliable study on the issue even though more than 2,000,000 men and women are now behind bars in the Nation and 200,000 more are held in immigration detention facilities each year." He drew the Commission's attention in particular to unaccompanied immigrant children, noting that they are now under the jurisdiction of HHS, "but nonetheless they are being held and detained in a lot of kind [sic] of centers." Senator Edward M. Kennedy, Remarks during the Nat'l Prison Rape Elimination Comm'n Hearing: *The Cost of Victimization: Why Our Nation Must Confront Prison Rape* at 3-4, 16 (June 14, 2005), at http://www.cybercemetery.unt.edu/archive/nprec/20090820160727/http://nprec.us/docs/SenatorEdwardKennedyRemarks_Vol_1.pdf.

⁵ See Bureau of Justice Statistics Special Reports on the Prison Rape Elimination Act of 2003 (PREA): *Sexual Victimization Reported by Adult Corr. Auths.*, 2007-2008, BJS Prod. No. NCJ 231172 (Jan. 2011) (examining 2007 and 2008 data from the Survey of Sexual Violence) ("2011 PREA Special Report"); *Sexual Violence Reported by Corr. Auths.*, 2006, BJS Prod. No. NCJ 218914 (Aug. 2007) (presenting data from the 2006 Survey on Sexual Violence); *Sexual Violence Reported by Corr. Auths.*, 2005, BJS Prod. No. NCJ 214646 (July 2006) (presenting data from the 2005 Survey); *Sexual Violence Reported by Corr. Auths.*, 2004, BJS Prod. No. NCJ 210333 (July 2005) (presenting data from the 2004 Survey). This series of reports are available through <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbse&sid=63>.

Department of Homeland Security.⁶ It begins by noting that the “Survey of Sexual Violence (SSV) is an annual collection based on official records that the Bureau of Justice Statistics (BJS) has conducted since 2004. It is one of a number of BJS data collections that *are conducted to meet the mandates of the Prison Rape Elimination Act of 2003.*”⁷

Second, the PREA Commission, which the statute established in order to study the conditions that give rise to prison rape, understood that PREA covers the highly vulnerable class of immigration detainees. PREA directed the Commission’s study to include:

- a review of existing Federal, State, and local government policies and practices with respect to the prevention, detection, and punishment of prison rape;
- an assessment of the relationship between prison rape and prison conditions, and of existing monitoring, regulatory, and enforcement practices that are intended to address any such relationship.
- an assessment of the relationship between prison rape and levels of training, supervision, and discipline of prison staff; and
- an assessment of existing Federal and State systems for reporting incidents of prison rape.

PREA § 7(d)(2). The Commission was directed to provide a report within two years that would include its findings and conclusions and “recommended national standards for reducing prison rape” (PREA § 7(d)(3)) and was instructed to secure information “directly from any Federal department or agency” (PREA § 7(g), (h)).

In response to this mandate, the Commission formed working groups and conducted hearings to gather information for its report that specifically included information on prison rape in facilities used to confine immigration detainees. The Commission’s expert working groups included as members individuals from ICE and HHS,⁸ and the Commission held a hearing in December 2006 that focused on immigration detention. Witnesses at that hearing included Asa Hutchinson, Former Undersecretary for Border and Transportation Security for DHS; Sergio Medina, Field Coordinator for the Southern California Office of Refugee Resettlement unaccompanied minors program; Rebekkah Tosado, Director for Review and Compliance in the DHS Office for Civil Rights and Civil Liberties; Mayra Soto, a transgender woman who was

⁶ 2011 PREA Special Report at 57-59. The 2011 PREA Special Report is directly available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf>.

⁷ *Id.* at 1 (emphasis supplied).

⁸ Members included John Milian, Detention and Deportation Officer, Criminal Alien Program, ICE Office of Detention and Removal; Maureen Dunn, Director of Unaccompanied Children’s Services, HHS Office of Refugee Resettlement, HHS; Vanessa Garza, Associate Director for Trafficking Policy, HHS Office of Refugee Resettlement. *See* PREA Report at 239-40 (Appendix D: NPREC Standards Development Expert Committee Members).

raped by an immigration officer while in a holding cell at the San Pedro Service Processing Center; and several immigration advocates.⁹

In its report, the Commission devoted an entire chapter to an analysis of prison rape and sexual abuse committed against immigration detainees (PREA Report at 175-188) and included a specific finding that a “large and growing number of detained immigrants are at risk of sexual abuse. Their heightened vulnerability and unusual circumstances require special interventions.” *Id.* at 21-23. The Commission’s reasoning emphasized that immigrant detainees are most vulnerable when in immigration-specific detention: “Because immigration detainees are confined by the agency with the power to deport them, officers have an astounding degree of leverage.” *Id.* at 22.

Finally, there can be no doubt that sexual abuse of immigration detainees has been and continues to be a very serious problem. *See* Human Rights Watch, *Detained and at Risk, Sexual Abuse and Harassment in United States Immigration Detention* (Aug. 2010);¹⁰ WRC Krome Reports; WRC Arizona Report. Hence, the need to protect immigration detainees from the scourge of prison rape remains as pressing now as it was when PREA was enacted, and the purposes of PREA require that immigration detention facilities be included in the coverage of the Act and subject to the National Standards that the Act mandates.

IV. The Justice Department’s Explanation for Its Decision To Adopt Narrow Standards That Exclude Facilities Used To Confine Immigrant Detainees Cannot Withstand Scrutiny

In its NPRM, the Department states that the Commission did not define the term “prison” and goes on to decide that the term does “not encompass facilities primarily used for the civil detention of aliens pending removal from the United States.” NPRM, 76 Fed. Reg. at 6250. Inexplicably, the Department ignores the fact that PREA provides a clear definition of “prison” which is substantially broader than the Department’s definition. The Department cites no statutory basis for its arbitrary decision to define “prisons” for the purposes of its PREA Standards to exclude facilities used to confine immigration detainees—an interpretation that is in direct conflict with PREA’s statutory definition. As the statute states, the “term ‘prison’ means any confinement facility of a Federal, State, or local government” PREA § 10(7).

The Department compounds this error by interpreting “PREA to authorize and require the Attorney General to make national standards binding only on the Bureau of Prisons, which houses criminal inmates.” NPRM, 76 Fed. Reg. at 6265. This reliance on the provision of PREA that makes the Standards binding on the Bureau of Prisons immediately (*see* PREA § 8) does not support its claim that the Standards only apply to the Bureau. This provision deals with

⁹ *See* Nat’l Prison Rape Elimination Comm’n, *Pub. Proceedings: Hearing: The Elimination of Prison Rape: Immigration Facilities and Pers./Staffing/Labor Relations, Dec. 13-14, 2006*, http://www.cybercemetery.unt.edu/archive/nprec/20090820154934/http://nprec.us/home/public_proceedings/proceedings_sxvimmigrdet_d13.php (last visited Apr. 1, 2011).

¹⁰ This report is available at <http://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>.

timing of when the PREA Standards become binding. It does not limit the applicability of the standards and cannot override the broad definition of prison that Congress used in the Act. The provision shows only that Congress did not expect the PREA Standards to be binding on all of covered institutions *on the day the final standards are published*.¹¹

The Department attempts to avoid PREA's requirement to develop national standards to address prison rape—*i.e.*, rape and sexual abuse in “any confinement facility”—by observing that its proposed standards “may be considered” by other Federal Agencies. NPRM, 76 Fed. Reg. at 6265. However, the Department cites no provision of PREA that would authorize Federal agencies controlling confinement facilities merely to “consider” the PREA national standards.¹² PREA requires that those standards must be applied in all Federal confinement facilities.¹³ There are no exclusions and this requirement necessarily includes facilities used by the Department of Homeland Security (“DHS”) and its subordinate agencies to confine immigrant men, women and children and in facilities used by the Department of Health and Human Services’ Division of Unaccompanied Children’s Services (“HHS-DUCS”) to confine unaccompanied immigrant children. The statute’s direction that the Department publish “national standards” for all Federal confinement facilities is a logical outcome because it assures reasonable consistency in efforts to carry out the Act’s overall purpose of eliminating prison rape throughout the nation’s facilities for confining people.

The fact that some confinement facilities are controlled by Federal Agencies other than the Department of Justice does not permit the Department to evade its statutory responsibility. The Department of Justice establishes rules and procedures that apply to other agencies in other contexts. For example, the Department and the Department of State issue regulations that govern the conduct of other government organizations that encounter victims of human trafficking. *See, e.g.*, 28 C.F.R. § 1100.27(a) (“both [DOJ] and [DOS] have been directed to promulgate regulations”), 1100.27(b) (“The regulations in this subpart apply to *all federal law enforcement personnel, immigration officials, and DOS officials*”) (emphasis supplied).

The Department also cites an existing December 2, 2008 “Performance Based National Detention Standard” (“PBNDS”) of the Department of Homeland Security’s Immigration and Customs Enforcement agency (“ICE”) that relates to sexual abuse and assault prevention.¹⁴ The Department does not explain the relevance of this standard, and there is nothing in PREA that

¹¹ Congress did not establish a specific timetable for applicability of the standards at other Federal facilities and the Department is free to establish a reasonable timetable for agencies other than the Bureau of Prisons to implement the PREA Standards.

¹² While Section 8(a)(3) of the Act authorizes the Department to provide a “list of improvements for consideration” in the event that the Department did not establish a national standard because the standard “would impose substantial additional costs,” the Act does not allow agencies to treat standards that the Department does establish as mere options to consider.

¹³ *See supra* Section II.

¹⁴ *See ICE/DRO Detention Standard, Sexual Abuse and Assault Prevention and Intervention* (Dec. 2 2008), available at http://www.ice.gov/doclib/dro/detention-standards/pdf/sexual_abuse_and_assault_prevention_and_intervention.pdf (“ICE Sexual Abuse Standard”).

gives the Department authority to exclude Federal confinement facilities because they have, in some form, adopted standards applicable to sexual abuse and assault within their facilities.

ICE's effort to develop its own standards is a positive step, but it is no substitute for applying the PREA national standards. The ICE standards do not encompass all of the PREA standards. For example, the proposed PREA Standards require that an agency that contracts for confinement of persons under its control, including other government agencies, must include in contract renewals or new contracts "the entity's obligation to adopt and comply with the PREA standards." NPRM, 76 Fed. Reg. at 6278 (proposed § 115.12(a)). However, the ICE Sexual Abuse Standard contains a large number of procedures, which, while applicable to ICE facilities, are not directly applicable to state or local facilities used by ICE to confine immigration detainees under Intergovernmental Service Agreements ("IGSAs"). Such IGSAs may "adopt, adapt or establish alternatives" if they meet the "intent" represented by the PBNDS.¹⁵ Clearly, the obligation imposed by the PREA national standards is clearer, more direct, and more effective.

Moreover, the ICE standard does not cover the confinement facilities of DHS's Customs and Border Protection Agency or the HHS-DUCS's confinement facilities for unaccompanied immigrant children. Hence, the ICE standard leaves a critical gap and fails to protect immigrants detained in facilities controlled by other agencies. PREA prohibits such a gap. PREA directs the Department to establish "national standards" to prevent and punish prison rape. A patchwork of inconsistent agency-specific standards would not comply with this mandate.

V. The Department Should Reconsider Its Rejection of the Supplemental Standards Recommended by the Commission for Facilities that House Immigration Detainees

The Department also erred in its decision to reject the supplemental standards recommended by the PREA Commission for facilities that hold immigration detainees. Though the Department offers two conclusory explanations for this decision, neither explanation responds to the Commission's reasons for recommending the supplemental standards. The Department ignores the Commission's findings that immigration detainees are "especially vulnerable to sexual abuse" and in many cases "can be almost defenseless by the time they are detained and may even expect to be abused." PREA Report at 21-22.

First, the Department cites concerns that the Commission's recommended supplemental standards would impose a "significant burden" on prisons, including comments that singled out the Commission's ID-6 standard, which would separate immigration detainees. NPRM, 76 Fed. Reg. at 6265. However, the Department provides neither supporting evidence nor an explanation of why this recommendation would impose an additional burden compared to current prison policies. Even if there were some burden associated with this standard, the Department has not met the statutory standard—a showing that a proposed standard "would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison

¹⁵ ICE Sexual Abuse Standard at 1 (Section 1: Purpose and Scope). Provisions in the Standard that are not specifically required for IGSA's are shown in the Standard in italics.

