



UNITED NATIONS CONVENTION AGAINST TORTURE

Report on the United States' Compliance

Submission by the Human Rights Campaign to the United Nations Committee Against Torture

“[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.”¹

Report of the United Nations High Commission for Human Rights, documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.

I. Organization

The Human Rights Campaign (HRC) is the nation’s largest lesbian, gay, bisexual, and transgender (LGBT) organization with more than 1.5 million members and supporters. By inspiring and engaging individuals and communities, HRC strives to end discrimination against LGBT people and realize a world that achieves fundamental fairness and equality for all.

II. Summary

1. Lesbian, gay, bisexual, transgender, and intersex (LGBTI) people are particularly vulnerable to abuse when they enter into institutionalized settings. Juan Mendez, UN Special Rapporteur on Torture, noted that members of the LGBTI community are doubly at risk in immigration detention centers, where they are at the “bottom of the hierarchy,” and where “male-to-female transgender prisoners [are highly susceptible] to physical and sexual abuse if placed within the general prison population.”²
2. This is one of the primary reasons why the United Nations Committee Against Torture (CAT) expressed concern over “reports of brutality and use of excessive force” by law enforcement and the “numerous allegations of [the] ill-treatment of

¹Report 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.

²*Id.*

vulnerable groups,”³ including members of sexual minorities. To that end, and in furtherance of article 16 of the Convention Against Torture to “undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1,”⁴ 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.” Shortly before CAT released these recommendations, the United States enacted the Prison Rape Elimination Act (PREA). This legislation is a significant step forward, but without consistent, full implementation LGBTI detainees and prisoners will continue to lack adequate protections.

III. Legal Framework

3. PREA’s enactment was the result of an alarming rate of sexual violence in American confinement facilities. Passed and signed into law in 2003, PREA received bipartisan support. 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). It also directed DOJ to gather data on the incidence of sexual assault in the United States. After nine years of extensive comment periods and discussion with advocates 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 LGBTI or whose appearance or manner does not conform to traditional gender expectations.”⁵
4. In May 2012, President Barack Obama issued a Presidential Memorandum⁶ 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. 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.”⁷
5. These tailored provisions have not worked to protect LGBTI detainees. DHS’s regulations require detention centers to “*consider* the detainee’s gender self-identification as gay, lesbian, bisexual, transgender, intersex, or gender non-conforming,”⁸ and that a detention center should not base a decision solely on identity

³Conclusions 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>.

⁴ Convention Against Torture, U.N. Doc., Article 14 (1985), at <http://www.hrweb.org/legal/cat.html>.

⁵ 28 C.F.R. § 115 (2012).

⁶ 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>.

⁷ 6 C.F.R. § 115 (2014).

⁸ *Id.* § 115.42 (emphasis added).

documents or physical anatomy. All decisions, however, shall be “consistent with the safety and security considerations of the facility.” This language potentially provides less protection to LGBTI detainees than the DOJ’s 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*.”⁹ It is unclear whether DOJ or DHS have ever placed a transgender individuals in a facility based on the individual’s gender identity.

6. In September 2013, DHS issued a review of its use of segregation for ICE detainees. “Administrative segregation” is used by DHS as a “non-punitive form of separation from the general population for administrative reasons,”¹⁰ but can 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.¹¹ DHS’s 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.”¹² It also decreed that review and oversight of decisions to retain detainees in segregation shall take place if segregation occurs for more than fourteen days.
7. DHS’s 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 used by DHS in detention facilities as a non-punitive measure, studies have shown that administrative segregation can have lasting emotional and psychological harm¹³ 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.”¹⁴

⁹ 28 C.F.R. § 115.42 (emphasis added).

¹⁰ Review of the Use of Segregation for ICE Detainees (September 4, 2013) *available at* http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf (last visited Sept. 19, 2014).

¹¹ 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 (last visited Sept. 19, 2014).

¹² *Id.*

¹³ 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 (last visited Sept. 19, 2014), 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/> (last visited Sept. 19, 2014), 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> (last visited Sept. 19, 2014). (“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.”)

¹⁴ 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 (last visited Sept. 19, 2014).

8. This presents an untenable dilemma for many transgender detainees: speak out about a reasonable fear to one's safety and risk being segregated, which, if placed there for too long, can potentially cause lasting emotional and psychological harm.

IV. **United States Response**

9. In 2013, the United States provided to the CAT a combined third, fourth, and fifth periodic report concerning the implementation of its obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁵ The United States said that the periodic report was an "important tool in the development of practical and effective human rights strategies by the U.S. government" and that the report gave the United States "the opportunity to engage in a process of stock-taking and self-examination."¹⁶ Indeed, the United States answers related to its PREA implementation strategy were thorough. For example, the report noted the success of DHS's Office for Civil Rights and Civil Liberties (CRCL) to investigate complaints from the public alleging violations of civil rights or civil liberties by DHS personnel, programs, or activities. Moreover, CRCL has implemented a system to identify, track, and investigate incidents of sexual violence. And DHS has provided avenues for redress for the victims of sexual violence, including monetary compensation.¹⁷

V. **Continuing Problems**

10. 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 LGBTI detainees face. Key challenges still remain:
 - It is unclear if the Department of Homeland Security has ever placed a detainee in housing facility based on gender identity, if requested, although it is believed that it has been requested by detainees and the Department's implementing regulations require them to consider the request.
 - While placing a detainee in a housing facility that is based on gender identity should be the primary goal, if that is requested by a detainee, the Department of Homeland Security should also employ detainees in alternatives to detention. While the Department has done so in the past, there appears to be no consistent policy as it pertains to transgender detainees.
 - DHS should limit the use of administrative segregation to situations where safety is in jeopardy and there are no alternatives to detention available.

¹⁵ 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>.

¹⁶ *Id.*

¹⁷ The United States' report was released before the release of DHS's implementing PREA regulations.

VI. **Suggested Recommendations**

- The United States must fully implement the Prison Rape Elimination Act. In the immigration context, this requires concerted effort by DHS to implement its regulations and ensure that an LGBTI individual's assessment with respect to his or her safety, and the need for housing in facilities consistent with gender identity, becomes a paramount consideration. Until full implementation occurs, DHS should continue to find ways to employ alternatives to detention for more detainees than those who currently qualify. Other federal agencies that have confinement facilities under their authority, such as the Departments of Justice and Health and Human Services, should also hasten to implement their regulations during the next reporting period.
- Under federal law, individuals seeking asylum are required to apply within one year of last entry into the United States. Many individuals are unaware of this deadline, and the consequences are particularly acute for LGBTI individuals. LGBTI refugees often do not know that persecution for being LGBTI can sometimes on its own be a sufficient basis to apply for asylum. What is more, many who have fled an oppressive and unforgiving environment for sexual minorities are uncomfortable disclosing their sexual orientation or gender identity. The one year deadline is arbitrary, and Congress should remove it.
- A further problem of cultural competency arises for those who play a large role in the asylum process. For example, an Iraqi transgender man recently noted that the individual at the UN's Refugee Agency, UNHCR, who was processing his application had no idea what it meant to be transgender and therefore had no comprehension as to why one had to flee one's home. This lack of understanding, which asylum seekers report has also occurred when interacting with U.S. government officials, inhibits an official's ability to work with an asylum applicant to articulate the reasons why safe haven in the United States is vital.

VII. **Recommended Questions**

- Can you provide an example of when the Department of Homeland Security has placed a detainee in a sex-segregated facility consistent with a detainee's gender identity?
- What efforts are the Departments of State and Homeland Security undertaking to ensure that officials who work directly with individuals seeking asylum, and officials in detention centers, have the proper educational competency to address the unique issues that the LGBTI community faces?

Submitted By: Human Rights Campaign/hrc.org

Contact Name: Remington Gregg, Esq.

Contact Phone/Email: 202.423.2881/remington.gregg@hrc.org