



# PREA and LGBTI Rights

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Every State in the country is attempting to show that their prisons, jails, and juvenile facilities comply with the new Federal regulations on sexual abuse and harassment. Following the unanimous passage of the Prison Rape Elimination Act (PREA) and another decade of research, horrifying testimony, and several drafts of regulations, a set of rules that aims to prevent and address sexual violence now applies to nearly all secure lock-up facilities.

Because lesbian, gay, bisexual, transgender, and intersex (LGBTI) inmates are particularly at risk for sexual victimization in these settings, the rules require States to adopt fairly progressive policies to protect these inmates from abuse and harassment. Creating a safe environment for LGBTI inmates requires far more than taking steps to prevent rape in prisons. Correctional facilities will have to prohibit and directly address homophobic slurs and other verbal harassment; they will have to discipline and relocate the perpetrators of the harassment—rather than isolating the victims for their own protection—and they will have to consider transgender inmates' views regarding whether they feel safer and more comfortable living with males or females.

It is an interesting moment in history—when policies and staff training in jails and prisons go a greater distance to support LGBTI people than those in most schools and workplaces. Of course, there will be some variation in the LGBTI policies adopted by different systems, and some will certainly stand out as models of best practice.

Correctional systems that want to aim higher than the basic protections required for Federal funding by going further to prevent and address sexual abuse and harassment behind bars will also affect public safety by improving inmates' prospects for success once released. In this article, I discuss the basic protections for LGBTI inmates that every juvenile and adult correctional system will need to put in place and offer some extra provisions they should adopt to become models of best practice.

## The Transgender Inmate

More than any other group, male-to-female transgender inmates (trans women) who are housed with men are at risk for sexual victimization and harassment in jails and prisons. A 2007 report found that trans women were 13 times more likely than other inmates to be sexually assaulted while in confinement and also far more likely to be sexually assaulted on multiple occasions. Trans women, many of whom have breasts and feminine appearances, are frequently targeted

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by male staff members for unnecessary and traumatic frisks and strip searches. They are exposed to unwanted sexual attention from both staff and other inmates in showers, and are often treated as if they invited the violence and sexual attention by choosing to make changes in their physical appearance.

Most jails and prisons have never used the word “transgender” in their policies, much less instituted formal protocols to protect transgender inmates. In fact, because there is little understanding of trans people and identity among the country’s general population, correctional staff and administrators have not been well equipped to respond to their unique safety needs.

The first step taken by the new PREA rules to eliminate sexual abuse and harassment of trans inmates is to define some basic terms:

- **Gender identity.** A person’s internal sense of feeling male or female.
- **Transgender.** A person whose gender identity is different from the person’s assigned sex at birth.
- **Gender nonconforming.** A person whose appearance or manner does not conform to traditional societal gender expectations.
- **Intersex.** A person whose sexual or reproductive anatomy or chromosomal pattern does not seem to fit typical definitions of male or female.

By defining these terms, the PREA rules educate and elicit compassion among practitioners working with trans inmates and prevent them from drafting policies based on misunderstanding or prejudice.

PREA also addresses the question of whether to house transgender inmates with males or females, prohibiting any hard-line rule about housing these inmates based on their assigned sex at birth. Jails, prisons, and juvenile facilities are now required to determine on a case-by-case basis whether a trans inmate will be safer housed with men or women. They also must give serious consideration to an inmate’s own views regarding his or her safety. Importantly, “transgender” is not defined by whether a person has undergone surgery or hormone treatment to change his or her anatomy and appearance. It is defined solely by a person’s internal sense of feeling male or female. Thus, a trans woman (male-to-female) inmate cannot be excluded from this protection because she has male genitalia or because the individual making housing decisions thinks she does not look “female enough.” Notably, trans men (female-to-male) inmates may have masculine appearances (facial hair, chest surgery, etc.), but may feel safer from sexual victimization when housed with women. Housing decisions must focus on minimizing the risk of sexual victimization on a case-by-case basis and ensure that transgender inmates feel safe.

The housing decision rule also applies to inmates who were born with intersex conditions, including:

- Individuals with atypical genitalia who are not clearly identifiable as male or female and whose genitals look male or female on the outside but who have different internal organs (e.g., having both a phallus on the outside and a uterus and ovaries on the inside, or having a clitoris, labia, and partial vagina, with testicles internally).
- Individuals with typical male or female organs but chromosomes that do not match their appearance (e.g., a person who appears physically to be male but has XX or XXY chromosomes).

PREA also now requires new policies related to showers, pat-downs, and strip searches. Transgender inmates and those born with intersex conditions must be allowed to shower separately from other inmates if they wish, and searches must be conducted in the least intrusive manner possible. Staff must receive specific training on conducting searches of trans people in a respectful and professional manner. PREA rules prohibit any searches or physical exams whose purpose is solely to determine an individual’s genital status.

The introduction of national regulations regarding the housing and treatment of trans and intersex inmates is groundbreaking, and the momentum of reforms, given that all States have to demonstrate compliance with the new rules, is breathtaking. But these rules may not go far enough.

If an invasive physical search of a transgender inmate is necessary, the best way to protect that individual from sexual exploitation is not merely to train staff on how to be professional, but to ensure that more than one staff member is conducting the search, and to ask the inmate which gender of staff member they feel most comfortable conducting the search.

The PREA rule on housing decisions is commendable, but facilities also should ensure that those decisions are made before an inmate is automatically given a male haircut. Transgender inmates should be provided the institutional clothing they prefer, including a bra for trans women (male-to-female) inmates. In addition, trans inmates should be called by the first name and pronoun they request, even if their names have not been legally changed. One of the most prevalent forms of bullying and harassment of transgender inmates is the insistence by others on referring to the inmate by his or her assigned sex at birth. In short, to create a safe environment for transgender inmates, those running a facility must demonstrate a commitment to being respectful and supportive of their gender identity.

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PREA, however, is silent on the unique medical care needs of transgender individuals. It should be ensured, for example, that physicians and nurses are knowledgeable and nonjudgmental regarding gender identity and health care related to gender transition. When an individual who was receiving transition-related hormone treatment before confinement arrives in a facility, medical staff should evaluate and authorize continued treatment in accordance with accepted professional standards.

For agencies that operate jails, prisons, and juvenile facilities, the take-home message is that if you want to end sexual victimization, start by treating those who are at risk of abuse and harassment with dignity. Transgender inmates are, by far, the most vulnerable population in confinement settings, and meeting the unique safety needs of this population requires protective and supportive measures beyond those now required by Federal law.

### **LGBTI Teenagers**

Because of their smaller size, teenagers in adult jails and prisons are extremely vulnerable to sexual victimization by other inmates, whether they identify as LGBTI or not. Although teenagers represent a small percentage of inmates in adult facilities, they account for a very large proportion of rape victims. Ironically, they are sometimes harmed further by measures that correctional administrators take to protect them, which often amount to long-term solitary confinement. When young people are isolated and deprived of social contact, they experience intense agitation, hopelessness, paranoia, hallucinations, and other mental health deterioration. In fact, those who are held in adult facilities are 36 times more likely to commit suicide while in custody than their same-age peers in juvenile facilities.

Reform advocates pushed the U.S. Department of Justice to use PREA as a vehicle to remove kids from adult facilities nationwide, and to require States to house them in juvenile facilities whether they were tried as juveniles or as adults. These advocates, however, did not succeed. The final PREA regulations focused instead on separating youth from adults in jails and prisons and not relying on solitary confinement to protect youth from sexual violence.

Although teenagers are generally safer in juvenile facilities than in adult facilities, sexual abuse happens in juvenile facilities too, so PREA also applies to them. Because the new rules have a broad focus—not only eliminating rape, but also preventing and addressing sexual harassment—they are vastly improving the environment for LGBTI teenagers.

Harassment of LGBTI youth and homophobic slurs are as rampant in juvenile detention and correctional facilities as they are in American schools. In fact, many LGBTI youth end up in the juvenile justice system as a result of their mistreatment by peers in school. Students who are routinely harassed based on their actual or perceived sexual orientation or gender identity are more likely than other students to be threatened or injured at school, more likely to get into fights, and more likely to skip school because they feel unsafe. Their home and families may not offer a refuge from the rejection and abuse they experience at school because many, if not most, LGBTI youth also experience rejection or outright intolerance from parents and other family members. When these youth end up in court, it is often because they have skipped school or run away from home. Others have brought weapons to school, struggled with drugs and alcohol, or engaged in dangerous, promiscuous, or criminal behavior to cope or survive. Although LGBTI youth are a minority, they are disproportionately represented in juvenile court.

In correctional facilities, where staff members have total control over the lives and well-being of those in their custody, harassment and mistreatment of LGBTI youth can go unchecked. Before PREA, few if any juvenile prison systems had policies or staff training involving LGBTI youth. The testimony of former inmates before the PREA Commission consistently referenced indecent and abusive treatment; widespread ignorance and intolerance of LGBTI identity; homophobic slurs; inaccurate assumptions by staff that LGBTI youth were sexual delinquents or posed a danger to their peers; and limited or nonexistent counseling services affirming or supportive of LGBTI identity. The correctional culture can also be a hostile environment for LGBTI staff, particularly for gay men. As a result, gay adults who might serve as role models and help curb the mistreatment of LGBTI youth are often closeted at work or simply seek employment elsewhere.

However, to comply with the new PREA rules, juvenile facilities are now training staff on communicating professionally with LGBTI and gender-nonconforming youth; hiring and scheduling more staff to better supervise youth; requiring staff to report abuse and harassment and take immediate measures to ensure the safety of youth being victimized; and holding staff accountable for failure to report and intervene in abuse and harassment. Model policies in several systems are going even further to establish and maintain a safe and supportive culture. For example, some policies outright prohibit employees from using terms that convey hatred, contempt, or prejudice toward LGBTI youth or that express LGBTI youth are abnormal, sinful, or can—or should—choose to change their sexual orientation or gender identity. Some model policies require staff training not only on how to communicate professionally with LGBTI youth, but also on understanding them, protecting them, and creating an environment in which they feel safe and accepted.

### **Punishment of Consensual Sex**

Jail and prison facilities are free to prohibit consensual sex between inmates, which means inmates can be punished for engaging in consensual sex. However, before the new PREA rules, some jail and prison systems would punish or prosecute inmates for engaging in consensual sex as though they had committed sexual abuse. These practices subjected inmates to extremely harsh punishments such as solitary confinement or new criminal charges, and they disproportionately harmed LGBTI inmates. Some systems went even further and presumed from the moment of intake

that LGBTI inmates were more likely to sexually abuse other inmates. These systems placed all LGBTI inmates in segregated housing or in housing units for sex offenders.

In extensive testimony before the PREA Commission, however, it was made clear that LGBTI inmates are far likelier to be the victims of sexual abuse than the perpetrators. PREA prohibits isolating LGBTI inmates or classifying them as sex offenders based simply on their sexual orientation or gender identity. It also clearly defines sexual abuse as nonconsensual and ensures that the measures put in place to protect abuse victims do not unfairly target consenting adults. Importantly, because the staff in correctional facilities exercises total control over the lives and well-being of inmates, any sexual contact between a staff member and an inmate is deemed to be abusive, and inmates cannot be punished for this sexual contact unless a thorough investigation determines that the staff member did not consent.

The rules for juveniles are murkier, though, because PREA's definition of sexual abuse includes sexual contact with someone who is "unable to consent." If two similarly aged girls or two similarly aged boys in a juvenile facility engage in voluntary sexual contact, their behavior may or may not be deemed "consensual" based on the State's age-of-consent laws. Although PREA requires staff to be trained in the applicable State laws, it does not distinguish between voluntary and involuntary conduct between teenagers. Juvenile facilities need to make these distinctions in their policies. When both teenagers can legally consent, their sexual contact should not be treated as abuse. When the teenagers' sexual contact is voluntary but not consensual because of a State's age-of-consent laws, the voluntary nature of the contact should still be taken into account when determining how to respond to the situation. Teenagers should not be targeted for prosecution for engaging in voluntary sexual activity with similarly aged peers.

### PREA As a Catalyst

The general public widely acknowledges rape as a fact of life in all correctional facilities. Prison jokes whose punch lines do not involve rape are rare. Although prisoners are not generally a sympathetic group in the eyes of the public, we as a society have declared—through the unanimous passage of PREA—that a sentence to a term of confinement in a jail or prison should not be a sentence to rape. As the PREA Commission and the Justice Department have examined and reexamined how to prevent and address sexual violence in lock-up facilities, they have established a surprising party line in those facilities: a strong stance against sexual violence requires a strong stance against homophobia and transphobia.

Because LGBTI individuals are uniquely vulnerable to sexual violence and harassment in confinement settings, the new PREA regulations have gone a great distance toward protecting them. Every State is undertaking extensive reforms to their correctional practices, changing the way they make housing decisions, the way they supervise and search inmates, the way they investigate and respond to allegations of abuse, and the medical and mental health care they provide to victims. This new sensitivity to sexual harassment has indirectly addressed prejudice toward LGBTI inmates. It has translated into staff training on creating harassment-free living conditions, and engaging with LGBTI inmates in a supportive and nonjudgmental way. It is a truly remarkable moment in time, when the righting of one societal wrong has carried with it the righting of another. Jails and prisons—improbable sites for cultural advancement—are blazing a trail for our other societal institutions to guard the safety and dignity of LGBTI people. n

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