

STATEMENT FOR THE RECORD

By the

The National Council for Incarcerated and Formerly Incarcerated Women and Girls

***Sexual Assault in U.S. Prisons Two Decades After the Prison Rape
Elimination Act
Subcommittee on Criminal Justice and Counterterrorism***

September 25, 2024

I. Failure of PREA

The National Council for Incarcerated and Formerly Incarcerated Women and Girls is led by formerly incarcerated Black women and has members in every federal prison for women. Like two of the witnesses at the hearing, our members have been – or are – victims of sexual harassment and abuse in prison. We know from experience that the Prison Rape Elimination Act (PREA) is an embarrassment.

The closure of FCI Dublin has grabbed the headlines, but PREA’s failure is pervasive. In fact, it is hard to find an incarcerated woman who has not been subject to sexual harassment or abuse. Recently, our counsel was reviewing a medical record for a client which stated she had had 2-5 male sexual partners during the period of her incarceration. There is no such thing as consensual sex between a prison staff member and an incarcerated person.¹ Her statement that she has been raped by 2-5

¹ 18 U.S.C. § 2243 (c); United States Department of Justice. *Prison Rape Elimination Act: Prisons and Jail Standards*. 28 C.F.R. Part 115. Docket No. OAG-131. RIN 1105-AB34. May 17, 2012. p. 7-9 <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PREA-Prison-Jail-Standards.pdf>

men met with indifference: no one encouraged her to file a PREA report, offered her counseling, or started an investigation.

Prison staff don't report sexual abuse and victims are scared to come forward. The National Council is an abolitionist organization led by formerly incarcerated women, yet women still hesitate to admit to us that they have been abused. Even if there is trust and the confidentiality of a legal visit, women hesitate to come forward because of the shame. People do not last long in prison by showing vulnerability. If women are not going to confide in their own lawyers, they are not going to tell a PREA auditor who parachutes in for a few days what is going on. And with good reason. When women incarcerated at FCI Dublin were scattered across the country after the prison was abruptly closed because of uncontrolled sexual abuse, staff at their new prisons called them "ho's from Dublin,' bitches,' rats' and 'snitches.'" ². Everyone in the system heard the unmistakable warning to keep quiet.

PREA is very expensive. Prison systems let physical plants decay, reduce medical care to the absolute minimum, skimp on equipment and cut classes, allegedly due to budget shortfalls. At the same time, there is money for PREA coordinators and inspectors who cannot stop the abuse. A 2012 DOJ Report estimated it would cost approximately \$6.8 billion for full state and local compliance

² <https://truthout.org/articles/survivors-of-prison-staff-abuse-say-transfer-to-new-facilities-hasnt-ended-harm/>

with PREA standards over 15 years (2012-2026).³ However, the same report claimed the BOP would not incur additional costs because “current practices are consistent with the requirements of the standard.”⁴ If true, the standards are useless; as of 2022, sexual abuse had taken place *at least* two-thirds of BOP facilities that housed women.⁵ If the standards are lacking – and it seems obvious they are – then additional costs of implementation are inevitable.

The bureaucratization of PREA – the expensive trainings, superficial inspections, and cumbersome reporting – complicates the obvious: people should not be sexually abused in prison. We don’t need clearinghouses, conferences, or even congressional hearings to know that. We need staff who regard incarcerated people as human so that they will treat them that way. We need a safe and reliable reporting system which is adequately staffed. We need transparent investigations in which the victim can tell his or her story free from retaliation, and we need accountability.

³ United States Department of Justice. Prison Rape Elimination Act: Regulatory Impact Assessment. 28 C.F.R. Part 115. Docket No. OAG-131. RIN 1105-AB34. May 17, 2012. p. 70 <https://www.prearesourcecenter.org/sites/default/files/library/prearia.pdf>

⁴ *Id.* at p. 115

⁵ United States Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs. Sexual Abuse of Female Inmates in Federal Prisons. December 13, 2022. p. 21, [https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf#:~:text=sexual%20abuse%20in%20prisons%20\(known%20as%20%E2%80%9CPREA%20audits%E2%80%9D\)%20found%20that](https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf#:~:text=sexual%20abuse%20in%20prisons%20(known%20as%20%E2%80%9CPREA%20audits%E2%80%9D)%20found%20that)

Even when PREA protocols are followed, justice is not done. A 2022 report to the United States Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs found that “Between 2012 and 2020, BOP has opened 5,415 internal affairs cases alleging sexual abuse of male or female prisoners by BOP employees.”⁶ Only 134 instances across 19 female facilities resulted in prosecution for sexual abuse or in substantiation of the allegation or about 2%.⁷ In addition, the report found that that the “BOP has a backlog of approximately 8,000 internal affairs cases alleging employee misconduct, some of which have been pending for more than five years.”⁸ At the hearing, senators expressed surprise and outrage that a guard who had raped a woman for two years got a sentence of three months. The only thing unusual about the case was that he received any jail time.⁹ In more than 50 percent of cases, there are no consequences at all.¹⁰

⁶ *Id.* p. 7

⁷ *Id.*

⁸ *Id.*

⁹ Only 38% of staff sexual assaults result in legal action. Jared Gans, DOJ report: Only 38 percent of prison staff-on-inmate sexual misconduct results in legal action, The Hill, Feb. 1, 2023, <https://thehill.com/homenews/administration/3839815-doj-report-only-38-percent-of-prison-staff-on-inmate-sexual-misconduct-results-in-legal-action/>

¹⁰ “Staff sexual misconduct led to the perpetrator’s discharge, termination or employment contract not being renewed in 44% of incidents. Staff perpetrators were reprimanded or disciplined following 43% of sexual harassment incidents.” Bureau of Justice Statistics, Press Release, Adult Correctional Authorities Reported Over 2,600 Inmate-on-Inmate and 2,200 Staff-on-Inmate Substantiated Sexual Victimization in 2016–2018 (Jan. 31, 2023), <https://bjs.ojp.gov/press-release/substantiated-incidents-sexual-victimization-reported-adult-correctional-authorities>

II. Robust Administrative Consequences Will Stop Sexual Abuse

Sexual assault in prison will not stop until both the perpetrators and enablers decide that the price of getting caught is too high. Criminal convictions will always remain elusive, as proving assault beyond a reasonable doubt in the secretive world of a prison will be difficult, costly, and time-consuming.

People who sexually abuse others in a prison setting must be incapacitated using administrative remedies. For instance:

- Staff who engage in sexually abusive behavior should have their security clearances revoked so they can no longer be in the prison or get a job at another one. If they are licensed law enforcement officers, their credentials should be suspended;
- Staff who cover up sexual abuse should face similar consequences, as should all mandatory reporters who do not report abuse. Executive staff who take no action should face the same penalty;
- Medical personnel who fail to report evidence of PREA violations should have their licenses suspended;
- Congress should strip qualified immunity from prison staff who engage in sexual abuse and allow judges to appoint counsel for tort claims against officers;
- Congress should waive sovereign immunity to allow claims under the Federal Tort Claims Act for sexual harassment and abuse;
- Congress should lower or eliminate exhaustion requirements under the PLRA for sexual assault claims so that prisons cannot cover up by refusing to process grievances or conduct thorough investigations; and
- A staff member who commits sexual assault should have to forfeit retirement benefits to the victim.

Administrative remedies require a lower standard of proof. Colleges and universities adjudicate allegations of sexual misconduct or discrimination under a

preponderance of the evidence standard of proof unless the institution already uses the clear and convincing evidence standard for “comparable proceedings.” Title IX Final Rule § 106.45(h)). If “more likely than not” is the appropriate standard for protecting college students, then incarcerated people should be accorded the same benefit of the doubt. Far more than college students, incarcerated people are forced to live in close quarters and are subject to authorities who have control over their lives and future. From this disadvantaged position, it is difficult enough to stop the abuse. By requiring a conviction or finding of substantiation to receive recompense, incarcerated people now must essentially prove the abuse beyond a reasonable doubt without lawyers, access to evidence, or consequences for witnesses or perpetrators who lie.

Finally, investigations must be handled by independent third parties, not the colleagues of the accused perpetrator. If a claim is substantiated, then the administrative penalties must be triggered. These will not include loss of liberty but a realistic chance of receiving economic and reputational sanctions will have a strong deterrent effect. Staff will have union support during the investigation and any appeals process and so their due process rights will be protected. Robust administrative remedies triggered at the “more likely than not” standard will even the playing field and give incarcerated people effective recourse.

III. A Comment About Staffing

The National Council would like to applaud Senator Ossoff's point at the hearing that the prevalence of sexual assault in the BOP has nothing to do with lack of staffing and everything to do with a culture that accepts sexual abuse as part of incarceration. Understaffing is a problem, but more money is not the automatic answer. Congress needs to think about decarceration. Specifically, Congress should create mechanisms for people to go home such as the lapsed elderly pilot program¹¹ or release for sexual assault victims.

Both elderly men and women have health conditions that make it difficult to function in prison. They are frequently unable to get adequate medical care in the BOP, whereas often their families can – and want to – care for them. In 2013, the BOP spent 19 percent of its total budget on incarcerating older adults. That money would go far in fixing crumbling infrastructure and increasing salaries to address the staffing shortage.¹² Congress recognized for over 20 years that it made no sense to warehouse elderly people in prison at taxpayer expense. The Second Chance Act of 2007 included a program that allowed the BOP to transfer elderly people to home confinement. The First Step Act extended that power but only until the end of fiscal year 2023.¹³ U.S. Senate Majority Whip Dick Durbin (D-IL) and Senator Chuck

¹¹ Walter Pavlo. "Old and Facing Federal Prison." *Forbes*. October 7, 2023. <https://www.forbes.com/sites/walterpavlo/2023/10/07/old-and-facing-federal-prison/?sh=23668d446b07>

¹² *Id.*

¹³ 34 USC 60541(g)(3).

Grassley (R-IA) introduced a bill to the Senate in April 2023 called the Safer Detention Act to continue the early release of elderly offenders, but the bill was referred to the Senate Judiciary Committee and has not been acted upon.¹⁴ The result is the demise of a program that allowed the BOP to send elderly people home, lessen the burden on prison staff, and save the BOP money. The program needs to be permanently enacted.

The women who were sexually abused at FCI Dublin (and elsewhere in the BOP) deserved compassionate release. As of November 2023, the U.S. Sentencing Commission has made documented sexual assault a “extraordinary and compelling” circumstance warranting a reduction in sentence. As it stands, however, only the rape victim’s sentencing judge has the power to release her, which requires 1) exhausting remedies; 2) filing a motion; and 3) a sympathetic judge. Congress needs to create a mechanism for incarcerated people who have been victims of sexual abuse to be released, similar the program that allowed the BOP to release the elderly.

¹⁴ U.S. Senate Committee on the Judiciary. “Durbin, Grassley Reintroduce Criminal Justice Reform Bills.” April 20, 2023. <https://www.judiciary.senate.gov/press/dem/releases/durbin-grassley-reintroduce-criminal-justice-reform-bills>. Bill status: <https://www.congress.gov/bill/118th-congress/senate-bill/1248/committees>