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TESTIMONY BY THE COMMITTEE ON CORRECTIONS AND
COMMUNITY REENTRY OF THE NEW YORK CITY BAR ASSOCIATION

PUBLIC HEARING OF THE NEW YORK CITY BOARD OF CORRECTION
ON PROPOSED RULES RELATING TO SEXUAL ABUSE AND SEXUAL
HARASSMENT, JULY 26, 2016

On behalf of the Corrections and Community Reentry Committee of the New York City Bar Association (the “Association”), we write in support of the authority of the New York City Board of Correction (the “Board”) to adopt rules that revise the Minimum Standards of the Board to address sexual abuse of people detained in city jails. Generally the Committee supports the rules the Board published on June 14, 2016; however, we suggest strengthening the rules in two areas described below.

The Association is an independent, non-governmental organization of over 24,000 lawyers, law professors, and government officials from the United States and 50 other countries. Throughout its 146-year history, the Association has consistently advocated for a fair, just, and efficient judicial process and respect for the rule of law. The Corrections and Community Reentry Committee is a group of attorneys and legal professionals from a range of private, governmental and non-profit backgrounds who work to address issues affecting the people who live and work in New York’s correctional institutions.

Background

In 2003, the United States Congress passed the Prison Rape Elimination Act (“PREA”) to “establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States.” 42 U.S.C. § 15602(1). By its terms, PREA expressly defines “prison” to include local jails like those under the Board’s oversight authority. 42 U.S.C. § 15609(7)(A). Likewise, the regulations promulgated by the United States Attorney General to implement the directives of PREA apply to jails as well as prisons. 28 C.F.R. 115, Subpart A (setting standards for “adult prisons *and jails*”) (emphasis added).

When states certify that they are in compliance with the PREA standards, however, the certification applies only to those facilities “under the operational control of

the State’s executive branch,” 28 C.F.R. § 115.501(b), not those “under the operational control of counties, cities, or other municipalities.” 77 Fed. Reg. 37106, 37115. For this reason, although the PREA standards apply to New York City jails, the rules and practices governing those jails have yet to be updated to comply with PREA. Worse, the evidence suggests that significant and unacceptable levels of sexual violence exist in New York City jails, including sexual abuse of incarcerated women by staff.¹

The Committee Supports Adoption of the Proposed Rules

The Committee supports the adoption of the Board’s proposed rules. We believe these rules are an important first step in reducing the incidence of sexual abuse in city jails, providing for access to more services for survivors of sexual abuse, and increasing accountability for those who sexually abuse people in city jails. The Board’s rules reflect the intent to codify the Federal PREA standards in city law, which will provide for more enforcement, monitoring and accountability. The Board’s rules also go further than the federal PREA standards in some respects, which the Committee supports. We urge the Board to adopt the proposed rules and require that the New York City Department of Correction (“DOC”) implement and achieve compliance with the regulations as quickly as possible, with regular reporting to the Board.

Additional Recommendations

The Committee also recommends that the Board amend the rules in two areas: first, urging that the New York City Department of Investigation (“DOI”) conduct all investigations related to sexual abuse allegations, and second, including a provision regarding housing of transgender people.

With respect to investigations, only a small number of filed complaints alleging sexual abuse by corrections officers are referred for prosecution (in 2014, none of the 61 complaints were referred for prosecution).² Recent New York City Council hearings have brought out the fact that the DOC has been permitted to conduct its own investigations of sexual abuse by its staff.³ Allowing the DOC to conduct its own reviews creates a conflict of interest, or at least the appearance of a conflict of interest, and raises questions about why so few sexual abuse complaints are prosecuted.

¹ Letitia James, Public Advocate for the City of New York, Petition to the New York City Board of Correction for Rulemaking Pursuant to the City Administrative Procedure Act Concerning Sexual Abuse and Sexual Harassment at New York City Jails, *available at* http://pubadvocate.nyc.gov/sites/advocate.nyc.gov/files/petition_to_the_nyc_board_of_correction.pdf.

² Declaration of Letitia James, Public Advocate for the City of New York, *Doe v. City of New York*, 15 CV 03849 (AKH) (S.D.N.Y., Oct. 9, 2015), p. 14, decl. 45.

³ *See, e.g.*, Council of City of NY T2015-3850, oversight hearing on the unique issues facing women in city jails (Dec. 15, 2015).

To address this problem, the Board should make clear in the rules that DOC and Health and Hospitals staff are required to refer all allegations of sexual abuse by staff to the City’s Department of Investigation (DOI), an independent oversight agency which does not report to the Commissioner of DOC. Pursuant to a long-standing Mayoral Order, all city agencies and employees must refer allegations of corrupt or criminal activity to DOI, so that independent investigations will be pursued by an entity without a conflict of interest.⁴ There are clear conflicts of interest presented when Deputy Commissioner-level staff in the DOC Investigations Division or DOC General Counsel are delegated the task of deciding whether DOC staff have created liability exposure for the agency. When DOI conducts an investigation, it makes an independent decision and must “forward a copy of [a] written report or statement of findings” “to the appropriate prosecuting attorney.”⁵ Independent investigations by DOI will play an integral role in ensuring accountability for staff and addressing sexual violence in city jails.

Additionally, the Board should create rules to forbid the DOC from making housing decisions based solely on genitalia or sex at birth, so that DOC housing decisions may include housing the person according to their gender identity. Any DOC practice of relying exclusively on genitalia would violate PREA.⁶ Since DOC practices in this area have varied over the years as commissioners have changed,⁷ the Board should take steps to ensure that DOC policy consistently complies with federal law. This is important because people who are transgender and exclusively housed in jail facilities that match only their sex assigned at birth are at much higher risk of sexual violence compared to their cisgender counterparts.⁸ Such a rule would be consistent with New York City

⁴ Mayoral Executive Order 16 (July 26, 1978), Section 4(e) (“upon receipt of any information concerning corrupt or other criminal activity or conflict of interest related to his or her agency, the Inspector General of such agency shall report directly and without undue delay such information to the Department of Investigation, and shall proceed in accordance with the Commissioner’s directions”); Section 4(f) (“No officer or employee other than the Commissioner [of DOI], an Inspector General, or an officer or employee under their supervision, shall conduct any investigation concerning corrupt or other criminal activity or conflicts of interest without the prior approval of the Commissioner or an Inspector General”). *See also* Charter of the City of New York, Chapter 34, Section 803(d) (“The jurisdiction of the commissioner [of the Department of Investigation] shall extend to any agency, officer, or employee of the city”).

⁵ Charter of the City of New York, Chapter 34, Section 803(c).

⁶ PREA requires that housing determinations be made on an individualized basis and give “serious consideration” to a transgender or intersex person’s own views with respect to his or her own safety. 28 CFR §115.42(d)-(e).

⁷ During the tenure of Commissioner Martin Horn, voluntary “gay housing” was abolished. During the tenure of Commissioner Dora Schriro, housing was assigned according to sex at birth. During the tenure of Commissioner Joseph Ponte, an effort has been made to provide some voluntary transgender housing. *New York Set to Close Jail Unit for Gays*, New York Times (2005), last viewed August 31, 2016, *available at*: http://www.nytimes.com/2005/12/30/nyregion/new-york-set-to-close-jail-unit-for-gays.html?_r=0; *see also*, *New York’s Largest Jail to Open Housing Unit for Transgender Women*, Huffington Post (2016), last viewed August 31, 2016, *available at*: http://www.huffingtonpost.com/2014/11/18/rikers-transgender-women_n_6181552.html.

⁸ Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates 2011-2012*, Supplemental Tables, *available at* http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

policies which are evolving to ensure the rights of transgender and intersex people.⁹ The Board’s proposed rules should also require that the DOC’s individualized housing review focus on safety and sexual assault prevention, taking into account self-expressed gender identity.

In conclusion, we support the Board’s rule-making initiative to make the national PREA standards a reality in New York City jails, and we urge you to adopt the additional recommendations above.

Corrections and Community Reentry Committee
Alex Lesman, Chair

⁹ N.Y.C. Admin. Code 8-102(23) (the New York City Human Rights Law); *see also* N.Y.C. Commission on Human Rights, Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression: Local Law No. 3 (2002); N.Y.C. Admin. Code 8-102(23), *available at*: http://www.nyc.gov/html/cchr/downloads/pdf/publications/GenderID_InterpretiveGuide_2015.pdf (noting that the law “requires that individuals be permitted to use single-sex facilities, such as bathrooms or locker rooms, and participate in single-sex programs, consistent with their gender, regardless of their sex assigned at birth, anatomy, medical history, appearance, or the sex indicated on their identification.”)