

Women in Custody

As the number of women in prison continues to grow, issues concerning the safety and dignity of women in such settings become ever more pressing. Prisons and jails in the US now hold more than 190,000 women¹ - more than 100 percent up from 2001.² Amnesty International has previously highlighted a number of issues of concern regarding women in prison and particularly expressed concerns at the incidence of custodial sexual misconduct and shackling of women in labor and during birth.

In the following, specific discussions on the issues covered in the report are presented. Each heading corresponds to the content in the state pages. Under the general headings, overall discussions and Amnesty International's position and recommendations on the issues are presented. Hereafter, categories and data presented in the report are introduced.

I. Custodial Sexual Misconduct

Amnesty International's 1999 report "*Not part of my sentence*": *Violations of the Human Rights of Women in Custody* and 2001 report *Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women* highlighted the fact that sexual abuse at the hands of staff is one of the most egregious abuses faced by women in custody. It is a harsh reality faced by many women who are incarcerated in the US, regardless of their sentence. Women are subjected to sexually offensive language, male staff touching their breasts and genitals when conducting searches, male staff watching while they are naked, and sexual assault.

Amnesty International, the United Nations Committee Against Torture³ and other organizations, both governmental and nongovernmental, have found that custodial sexual misconduct is widespread. A UN report documented widespread sexual misconduct by male correction staff against women inmates, including a wide range of abusive sexual practices in the context of custody in the US.⁴ The findings of the report, written in 1999 by the former United Nations Special Rapporteur on violence against women, its causes and consequences, remain highly relevant. The Department of Justice's Bureau of Justice Statistics (BJS) reports that in 2004, allegations of staff sexual misconduct were made in all but one state prison and in 41% of the local jails and private prisons and jails that it

¹ Allen J. Beck and Paige M. Harrison, *Prison and Jail Inmates at Mid-Year 2004*, Washington, D.C.: The Bureau of Justice Statistics, Office of Justice Programs, April, 2005.

² According to the Bureau of Justice Statistics, there were 94,336 female inmates in State and Federal institutions in July 2001. At [Http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf)

³ The Committee notes concern over the treatment of female detainees and prisoners—sexual assault by law enforcement officers and prison personnel as well as generally humiliating and degrading conditions. United Nations High Commissioner for Human Rights, "Conclusions and Recommendations of the Committee against Torture: United States of America," 05/15/2000. CAT/C/24/6 (Concluding Observations/Comments).

⁴ The Special Rapporteur on violence against women, its causes and consequences, "Report of the mission to the United States of America on the issue of violence against women in state and federal prisons," the Fifty-fifth session, Item 12 (a) of the provisional agenda, E/CN.4/1999/68/Add.2, January 4, 1999.

surveyed.⁵ In the survey undertaken pursuant to PREA specifications, the Bureau of Justice Statistics examined more than 2,700 correctional facilities holding 79% of all adults and juveniles in custody and, using statistical sampling methods, found a total of 2,298 allegations of staff sexual misconduct against male and female inmates and 624 allegations of staff sexual harassment. The Bureau of Justice Statistics indicated that 30% of these were substantiated and that more than half of the substantiated cases involved women as victims. It further notes that women are overrepresented among victims of sexual abuse given that there are far fewer women than men in prisons and jails.⁶ Similarly, the Office of the Inspector General (OIG) reports that from fiscal years 2000 to 2004, the OIG opened sexual abuse investigations of 351 subjects who allegedly sexually abused inmates in federal facilities.⁷

Amnesty International believes the incidence of custodial sexual misconduct may be significantly higher than official or other reports are able to document. Researchers of sexual abuse in a noncustodial setting have found that victims often do not report, especially if they know the perpetrator or live in close proximity. These issues are magnified in a prison setting.⁸ As reported in *“Not part of my sentence”*, prisoners, lawyers and other sources have told Amnesty International that prisoners are often reluctant to complain for a variety of reasons, including the following:

1. The difficulty of proving an allegation, particularly when the only evidence is the prisoner’s account;⁹
2. The possibility that making a complaint may place a prisoner in protective segregation while the complaint is investigated, which many have said they find punitive;
3. Fear of retaliation.

The issue of underreporting is acknowledged by the BJS, which states in its report the following:

Administrative records alone cannot provide reliable estimates of sexual violence. Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities. At present there are no reliable

⁵ Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004*, July 2005, NCJ 210333.

⁶ Women comprise 8.6% of the total number of inmates in prisons and jails in the US. Allen J. Beck and Paige M. Harrison, *Prison and Jail Inmates at Mid-Year 2004*, Washington, D.C.: The Bureau of Justice Statistics, Office of Justice Programs, April 2005.

⁷ These numbers cover both women and men. Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates*, U.S. Department of Justice, April 2005.

⁸ Peggy Heil, *Prison rape: what we know today*, Corrections Compendium, 09/01/05.

⁹ According to the BJS, in 55% of allegations of staff sexual misconduct in prisons, the evidence was insufficient to determine if events had occurred. Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004*, 07/2005.

estimates of the extent of unreported sexual victimization among prison and jail inmates and youth held in residential facilities.¹⁰

Correctional staff may also find it difficult to report—because of a “code of silence” dictating that staff protect one another rather than follow proper procedure.¹¹ Furthermore, it is important to keep in mind when assessing the number of reported cases that only a small percentage of the reported incidents lead to disciplinary action; even fewer lead to criminal prosecution and even fewer to actual convictions.

In the “*Initial Report of the United States of America to the United Nations Committee Against Torture*” the US Department of State admits that the absence of reliable national statistics precludes an accurate statistical description of the frequency with which incidents of abuse and brutality by law enforcement takes place.¹² The lack of statistics may be remedied by PREA, which requires the BJS to develop new national data collections on the incidence and prevalence of sexual violence, including custodial sexual violence, within correctional facilities. The Bureau of Justice Statistics is currently developing tools to gather victim reports of sexual violence, and its first report, released in July 2005, relied upon incidents reported to correctional authorities. AI strongly encourages federal, state and local authorities to participate in this important effort by developing consistent reporting and tracking mechanisms and sharing this information with BJS.

A prisoner’s race, language, disability, sexual orientation, gender identity or other status may affect the likelihood of abuse and affect her ability to obtain remedies. Bias from correctional staff on the basis of a woman’s identity may also mean they are more at risk of retaliation. Amnesty International is concerned by the treatment of transgender women in custody. In its 2005 publication *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, AI documented a number of cases of custodial sexual misconduct involving transgender women at the hands of correctional staff as well as by other inmates, in which staff either instigated abuse or stood by while it took place.¹³ Such concerns have also been reported by Stop Prison Rape and ACLU.¹⁴

The issue of custodial sexual misconduct takes on added urgency when considered in light of the fact that many women in custody have suffered sexual abuse prior to their incarceration. A study by the US Department of Justice found that women in prison are much more likely than those in the general population to have been victims of sexual abuse. A third of those surveyed in state prisons and a quarter of those in local jails said they had been raped before incarceration. Furthermore, approximately 30%, twice as

¹⁰ Bureau of Justice Statistics, *Sexual Violence Reported by Correctional Authorities, 2004*, 07/2005, p. 2.

¹¹ Michelle Gaseau and Keith Martin, *Secrets Behind Bars: Sexual Misconduct in Jails—Jails Take Pro-active Role to Prevent Illegal Behavior*, corrections.com, 04/21/2003.

¹² US Department of State, “Initial Report of the USA to the UN Committee Against Torture,” Part I, p. 16.

¹³ Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.*, September 2005, pp 59–65.

¹⁴ *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners*, Stop Prisoner Rape and ACLU National Prison Project, 2005.

many as the general population, said they had been abused as children.¹⁵ Studies in prisons in New York and Ohio uncovered even more shocking statistics, finding that as many as 90% of women inmates had been sexually abused prior to their incarceration.¹⁶ While it is difficult to know the exact scale of the problem, it is clear that a significant portion of women in custody have been victims of sexual abuse in the past. Personal history of abuse can make women even more vulnerable to being abused in custody. In addition, custodial sexual misconduct can be even more harmful for women who have been victims in the past, as subsequent abuse can cause women to relive the trauma they experienced after the initial abuse.

Legal Framework

Under international law, rape of a prisoner by correctional staff is considered to be an act of torture.¹⁷ Other forms of sexual abuse are clearly violations of the internationally recognized prohibition of cruel, inhuman or degrading treatment or punishment, which governments are called upon to interpret “so as to extend the widest possible protection against abuses, whether physical or mental.”¹⁸ Sexual abuse also violates other rights, including the right to be treated with respect for human dignity, the right to privacy, the right to liberty and security of the person, and the right to equal protection under the law, all enshrined in the International Covenant on Civil and Political Rights (ICCPR—which the US has ratified). Sexual abuse further violates rights, such as the right to the highest attainable standard of physical and mental health, which is part of the rights contained in the Universal Declaration of Human Rights (UDHR) and formally stated in the International Covenant on Economic, Social and Cultural Rights (ICESCR, which the US has signed but not ratified). Sexual abuse in custody is included within the protections of

¹⁵ Caroline Wolf Harlow, Ph.D., BJS Statistician, “Prior Abuse Reported by Inmates and Probationers,” US Department of Justice, Bureau of Justice Statistics, April 1999, NCJ 172879, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf>.

¹⁶ Angela Browne, et al., “Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women” (*International Journal of Law & Psychiatry* 22 (3-4), 1999. Correctional Institution Inspection Committee, Evaluation and Inspection Report on the Ohio Reformatory for Women, p. 135 August 12, 2005, available at <http://www.ciic.state.oh.us/reports/orw.pdf>.

¹⁷ In a report to the United Nations Commission on Human Rights, then United States Special Rapporteur on Torture Professor Kooijmans noted that “since it was clear that rape or other forms of sexual assault against women in detention were a particularly ignominious violation of the inherent dignity and the right to physical integrity of the human being, they accordingly constituted an act of torture.” United Nations Committee on Human Rights, UN Doc E/CN.4/1992/SR.21, 21 February 1992, para. 35. Furthermore, other international bodies have also found this: European Court of Human Rights, case of Aydin v. Turkey (57/1996/676/866), Judgment of 25 September 1997, para. 86; Mejía v Peru, 1 March 1996, Annual Report of the Inter-American Commission on Human Rights 1995, page 187. International Criminal Tribunal for Rwanda, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, ICTR Chamber I, judgment of 2 September 1998, para. 597; International Criminal Tribunal for the former Yugoslavia, Prosecutor v. Zejnir Delalic, Case No. IT-96-21, ICTY Trial Chamber II, Judgment of 16 November 1998, discussion, paras. 475-496, and findings, paras. 943, 965; Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, ICTY Trial Chamber, Judgment of 10 December. 1998, paras. 264-9.

¹⁸ Explanatory footnote to Principle 6, “United Nations Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.”

the Declaration on the Elimination of Violence against Women, which notes that women in detention are especially vulnerable to violence.¹⁹

In addition, the high incidence of sexual assault within prisons may violate the US Constitution. The US Supreme Court has expressly acknowledged that “an inmate has a constitutional right to be secure in her bodily integrity and free from attack by prison guards”²⁰ and has held that the right to be secure in one’s bodily integrity includes the right to be free from sexual abuse.²¹ The Supreme Court has also ruled that deliberated indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment.²²

In 2003, Congress passed the Prison Rape Elimination Act (PREA). PREA is the first federal law to address rape and sexual assault in detention and applies to all US correctional and detention facilities. Among the stated purposes of the Act are establishing a zero-tolerance standard of sexual assaults of any kind within detention; to make the prevention of prison rape a top priority in each prison system; to develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; and to increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities.²³ The Act was drafted primarily to combat inmate-on-inmate sexual assault, but its language makes clear that it is also concerned with staff sexual misconduct²⁴ (and a lesser offense, staff sexual harassment,²⁵ which PREA also considers a form of sexual violence).

Finally, custodial sexual misconduct is a crime in every state but one (Vermont). See further discussion of state legislation below.

It is also important to note that international law guarantees victims of human rights violations, including women in custody who are victims of sexual misconduct, a right to a remedy for the violations they have suffered.²⁶ The UN Human Rights Committee, the

¹⁹ Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, UN Doc. A/48/49 (1993).

²⁰ Smith v. Cochran, [2003 U.S. App. LEXIS 16518](#) (10th Cir. Okla., Aug. 12, 2003), citing to [Hovater v. Robinson, 1 F.3d 1063, 1068 \(10th Cir. 1993\)](#).

²¹ Smith v. Cochran, [2003 U.S. App. LEXIS 16518](#) (10th Cir. Okla., Aug. 12, 2003).

²² Farmer v. Brennan, 511 U.S. 825 (1994).

²³ Prison Rape Elimination Act of 2003, Public Law 108-79, 108th Congress.

²⁴ PREA defines staff sexual misconduct as any behavior or act of a sexual nature directed toward an inmate by an employee, volunteer, official visitor, or agency representative. Romantic relationships between staff and inmates are included. Consensual or nonconsensual sexual acts include intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; or completed, attempted, threatened, or requested sexual acts; or occurrences of indecent exposure, invasion of privacy, or staff voyeurism for sexual gratification.

²⁵ PREA defines staff sexual harassment as repeated verbal statements or comments of a sexual nature to an inmate by employee, volunteer, official visitor, or agency representative, including: demeaning references to gender or derogatory comments about body or clothing; or profane or obscene language or gestures.

²⁶ International Covenant on Civil and Political Rights, Article 2 (3). General Comment 20, referring to article 7 prohibiting torture and cruel treatment or punishment and specifically mentioning people deprived

Committee Against Torture, and regional human rights bodies have all found that states must conduct a prompt, thorough and effective, and independent, investigation into allegations of human rights violations such as custodial sexual misconduct, and that the investigation should lead to the identification and prosecution of those responsible.²⁷

Scope of the Report

Amnesty International believes there should be attention on the whole continuum of sexual abuse. First, Amnesty International is concerned that there are many abuses that, based on the facts, should be prosecuted as rape or (as appropriate) first-degree sexual assault. It is clear that neither the states nor the federal government have adequate investigations and prosecutions of these crimes of rape in custodial settings. Second, Amnesty International is concerned with the wide range of coercive sexual practices between correctional staff and contractors and prisoners that do not qualify under existing laws as rape but must be investigated and punished as abuses of fundamental rights.

These relations, whether apparently initiated by the inmates or not, are inherently abusive because of the gross difference in power between the parties. Engaging in such relations may be the primary way for inmates to gain access to essential aspects of dignity, such as medication, hygienic products, and extended child visits, or aspects of life that rise above prison survival, such as access to more food or cigarettes. These interactions are based on the control of such goods by the state, the correctional staff as the direct distributors of the goods—many of which constitute rights—and the inability of inmates to negotiate in any other way. The legal responsibility for such coercive relations thus lies with the state and its agents, correctional staff and contractors. By definition, sexual activity between correctional staff and inmates is a violation of the staff’s custodial duties. Therefore, as noted in the sections below, neither the state’s nor the staff member’s response can include arguing that the inmate “consented,” as consent is irrelevant to the elements of the crime committed by the staff.

Amnesty International has added a new category of questions to this survey in order to assess the policies and procedures in place to address official response to allegations of custodial sexual misconduct. This was done following reports to the organization that while legislation and some policies prohibiting the practice have been implemented in most states, many perpetrators are not prosecuted under the law and in some cases do not even meet with administrative repercussions for their actions. In many cases, individuals are simply placed on administrative leave or fired, but no further action is taken, to avoid publicity and scandal. Amnesty International is concerned that response to allegations of custodial sexual misconduct may frequently be inappropriate and inadequate.

It is important to note that the legal regime to respond to sexual abuse is not gender specific, and Amnesty International emphasizes that it should be vigorously enforced in all circumstances, regardless of whether the victim is male or female. Because this report

of their liberty, adds that, “Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.”

²⁷ See, e.g., Velasques Rodrigues v. Honduras (IACtHR) para. 174; Assenov v. Bulgaria (ECtHR) para. 102; Hajrizi Dzemajl v. Yugoslavia (CAT) para. 9.4; Sadik Onder v. Turkey (ECtHR) para. 42.

focuses on women, media reports and cases addressing allegations and incidents of custodial sexual misconduct against male inmates have not been included. However, numerous such cases exist.²⁸

Amnesty International is also concerned about alarming rates of inmate-on-inmate sexual assault in prisons and jails across the United States. However, we believe that custodial sexual misconduct is a distinct problem that must be dealt with in a manner consistent with the specifics of that situation. For example, issues arising from investigating sexual misconduct and protecting victims and witnesses from retaliation are very different if the alleged perpetrator is a staff member or an inmate.

Survey of Statutes on Custodial Sexual Misconduct

When Amnesty International published *“Not part of my sentence”* in 1999, 14 states had no laws specifically prohibiting sexual relations between inmates and staff of jails and prisons. Since that time, Amnesty International activists have campaigned for change, working with other human rights organizations and legislators. In 2001, at the time of the first publication of *Abuse of Women in Custody*, six states still had no law.²⁹ Today, only one state, Vermont, has no law prohibiting custodial sexual misconduct.

Both the definition of sexual misconduct and the penalty imposed for violations vary from state to state. In some states custodial sexual misconduct laws, while ostensibly intended to protect the rights of inmates, may in fact violate them. For example, four state statutes include provisions that may be used to penalize the inmate for custodial sexual misconduct—in one case, even in the event of physical coercion. Amnesty International strongly supports the revision or strengthening of existing laws that do not provide sufficient protection, as well as the introduction of effective and rights-promoting legislation in Vermont, which lacks any protection.

It should be noted that existing state rape statutes are assumed to cover inmates—meaning that a case will be prosecuted as rape based on the evidence, regardless of who the victim and alleged offender may be. Failure to prove rape then would require the prosecution of the lesser offense of custodial sexual misconduct, where such legislation exists. The fact that the victim in such cases is incarcerated should automatically trigger at a minimum a custodial sexual misconduct investigation and, if evidence is uncovered, prosecution. This report examines the laws regarding custodial sexual misconduct and does not look further into statutes dealing with rape in general.

The survey in this section focuses on custodial sexual misconduct statutes. The section provides a description of the protection the law offers, including the penalties for violators convicted under the law—and highlights those aspects of laws that are harmful to the rights of inmates.

²⁸ According to the BJS, 69% of the victims of custodial sexual misconduct in state prisons were male and 67% while 30% of victims in local jails were male. BJS report, page 8.

²⁹ These states were: Alabama, Minnesota, Oregon, Vermont, Wisconsin and Utah, which had a bill pending signature into law.

Does the statute impose a criminal penalty on the inmate?

Statutes must be evaluated for whether or not they penalize the inmate for sexual activity. Amnesty International believes that although states may regulate sexual activity within prisons to the extent required by security and in conformity with fundamental rights of privacy and bodily integrity as protected by international human rights standards, inmates should never be penalized for coming forward and reporting sexual abuse, which would be the practical implication of statutes that allow for penalizing inmates for sex with correctional staff. Victims of sexual assault will be intimidated not to report the abuse to authorities, regardless of the formality of the complaint, if they may be threatened with prosecution if they continue with their claim. As reported in *“Not part of my sentence”*, many inmates who are subjected to abuse are already reluctant to come forward because they fear their claims are difficult to prove, given the circumstances in which the abuse has taken place, or because they fear retaliation by the accused staff member or his colleagues. Amnesty International believes that a statute that makes retaliation for complaints of sexual misconduct by staff lawful and sanctioned is a violation of the rights to an effective remedy for violations as well as of the equal protection of the law.

Does the statute cover all relevant forms of sexual abuse?

Some statutes limit the forms of sexual abuse for which correctional staff can be prosecuted to those situations when penetration is involved. Amnesty International believes that all sexual contact between inmates and correctional staff is inherently abusive and should be covered by the statute. Custodial sexual misconduct under the statute should be widely defined to include coercive sexual practices (in cases not amounting to rape), or assault and threatened sexual assault, and a wide range of sexual contacts such as inappropriate touching (as between the staff and inmate, or including coerced or traded sexual activities between inmates at the behest of staff).

Although AI has not focused on explicit language and gestures as a form of custodial sexual misconduct, AI considers such behavior abusive and believes it should be prohibited and punished accordingly. The Prison Rape Elimination Act differentiates staff sexual harassment involving verbal statements of a sexual nature or obscene gestures from staff sexual misconduct (defined as including such sexual behavior as intentional sexual touching, sexual acts, indecent exposure, invasion of privacy and staff voyeurism for sexual gratification). Under PREA, both staff sexual misconduct and staff sexual harassment are considered forms of sexual violence.

Does the law allow an officer to claim that an inmate consented to the sexual act(s) to avoid prosecution?

In some states, the custodial sexual misconduct statutes allow correctional staff members to defend themselves by stating that the sexual contact in question was consensual. As mentioned above, Amnesty International believes that sexual relations between staff and inmates are inherently abusive because of the considerable difference in power between the parties. Statutes should bar sexual contact between staff and inmates and leave no room for exceptions.

Does the statute cover all custodians and staff in contact with inmates?

Correctional officers are not the only people in an unequal position of power who come into contact with inmates. All custodial staff members or contractors who deal with inmates are in a position to abuse the power differential with an inmate. Amnesty International believes that it is of great importance that the statutes provide for the widest possible definition of staff—including vendors, kitchen staff, medical staff and parole officers.

Does the statute cover all places where an inmate might be abused?

It is essential that state statutes cover all places of detention. The number of jurisdictions and the many different types of settings in which incarcerated persons come into contact with correctional staff and contractors mean that the statute must explicitly cover all places of detention—from prisons to jails to persons under custodial control of the state outside of prison.³⁰ Amnesty International is concerned that the lack of complete coverage could result in impunity for staff who abuse inmates outside of the areas protected by the statute or who are employed in facilities beyond the reach of the statute.

Is the penalty a felony?

Some states have a graduated approach, defining certain types of sexual misconduct as either a felony or a misdemeanor, depending on the nature and severity of the violation. Other states define all such conduct as a felony, and still others treat all such conduct as a misdemeanor. This category lists the type of penalty imposed in each state, highlighting the discrepancies between jurisdictions. Amnesty International is concerned that the level of the penalty is proportionate to the nature of the harm and believes that a felony charge must be available to prosecutors. In no case should states use the custodial sexual misconduct statute as a catchall prosecution to excuse them from conducting the necessary inquiry to determine the true nature of the abuse, including rape prosecutions.

Allegations and Incidents

While laws and policies help create an atmosphere in which such conduct is not acceptable, research indicates that the problem of custodial sexual misconduct persists even in states that have passed such legislation, as discussed above.

Amnesty International does not claim to have covered all the allegations or incidents of sexual custodial misconduct nationwide in this section and stresses that custodial sexual misconduct is severely underreported. Many incidents are never reported to correctional authorities because incarcerated women fear that they lack credibility in the eyes of authorities and/or they fear retaliation for coming forward. Only a small number of incidents make it into the news; fewer become indictments that are investigated further; and even fewer lead to prosecutions or appropriate administrative disciplinary action.

³⁰ Amnesty International is concerned that many incidences of coercive sex by officers against persons not yet charged or in conditions of formal detention are currently irremediable under CSM statutes as drafted. In the case of *Mejia v. Peru* [Case 10.970, Report No. 5/96, Inter-Am. C.H.R., OEA/Ser.L/V/II.91 Doc. 7 at 157 (1996)] the Inter-American court found that rape by military police in a woman's home was sufficiently "in custody" to justify the application of the torture prohibitions of the American Convention on Human Rights which the US has signed but not ratified. Likewise the views of the Human Rights Committee, which oversees the implementation of the ICCPR have made it clear that custodial violations such as torture and CID may occur outside of formal incarceration, as well as in detention for other purposes such as of asylum seekers or of mental health patients.

This section includes information from several different sources, including state attorney generals' offices, news sources, AI reports and reports from other nongovernmental organizations, and relevant court cases that have addressed the issues. These may use different benchmarks—making direct comparisons between states and sources difficult—and will be discussed in the following under each heading. The inclusion of a case does not imply that Amnesty International has found it to have particular merit, but merely reflects that an incident has been reported.

Allegations and incidents from both state and local jurisdictions are included. Custodial sexual misconduct legislation should cover all custodial settings, as discussed above, which is why all incidents, regardless of where they have taken place, are of interest in this report. AI's survey on policies and practices is limited to the level of state department of corrections as a practical matter, as the US has a fragmented and localized custodial system, including state and local jails and police departments—and anywhere a parolee may reside.

Indictments/Convictions (answer to AI letter requesting the information)

In 2000, 2002 and 2005, Amnesty International contacted attorney generals in states that have laws forbidding sexual interaction between custodial staff and inmates, inquiring about the number of prosecutions and subsequent convictions under the statutes in question. The results of these surveys are presented under this category. Where the attorney general referred us to other official sources in a state, this information is included. The survey does not reflect the number of prosecutions under rape statutes. As mentioned above, rape and torture prosecutions should go forward in cases in which the evidence calls for such measures—but in this category we focus on custodial sexual misconduct statutes.

Incidents reported in select media since January 2000

Amnesty International conducted a news search via Nexis and through the materials of organizations compiling such reports (Stop Prison Rape and *Prison Legal News*) to find reports about allegations, prosecutions, disciplinary actions and convictions on sexual custodial misconduct. These numbers may underestimate the scope of the problem, since all such cases will be not be reported in the news, particularly for allegations that are not substantiated. We searched for incidents that took place between January 2000 and October 2005 and present this secondary source material without further investigation of the cases.

Other reported incidents

Under this heading, Amnesty International included information about cases and allegations mentioned in official reports by government agencies, United Nations' investigators and other nongovernmental organizations, as well as incidents that have surfaced in court cases. Amnesty International has relied upon the secondary source material presented here without further investigation of the cases.

Policies, Practices and Procedures of Guarding Specific to Women Inmates

Allegations of custodial sexual abuse of women prisoners in the United States nearly always involve male staff members who are allowed unsupervised access to female jail and prison inmates in many jurisdictions. Men form a large proportion of the staff in prisons and jails in which women are incarcerated. One survey of prisons in 40 states found that on average, 41% of the correctional officers working with female inmates are men.³¹

Employing men to guard women is inconsistent with international standards. Rule 53 of the Standard Minimum Rules for the Treatment of Prisoners provides that no male member of staff shall enter part of the institution set aside for women unless accompanied by a woman officer and that “women prisoners shall be attended and supervised only by women officers.” The rules provide that male staff such as doctors and teachers may provide professional services in female facilities but should always be accompanied by female officers.³² Radhika Commaraswamy, former Special Rapporteur on violence against women, its causes and consequences, expressed grave concern over the practice of allowing male officers to guard women in the US.

Amnesty International has called on United States authorities to ensure that female prisoners are directly supervised only by female staff as required under international standards. Amnesty International believes that certain practices allowed in the United States are inherently cruel and degrading or are open to abuse, such as allowing male staff to conduct pat-down searches of clothed women for contraband, and allowing male staff to patrol areas where women may be viewed in their cells while dressing or washing or when taking showers.

The United States authorities have argued that antidiscriminatory employment laws in the US mean that they cannot refuse to employ male guards in women’s prisons (or female guards in male prisons). The Supreme Court has denied the claim that women prisoners should be supervised only by women officers, under Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity statute. However, international standards provide that measures designed solely to protect the rights and special status of women are not considered discriminatory.³³ Indeed, a growing number of jurisdictions in the United States have placed certain restrictions on male duties in women’s prisons, and United States courts have upheld such restrictions as lawful. Of those responding to AI’s

³¹ Corrections Compendium, “Female Offenders: As Their Numbers Grow, So Does the Need for Gender-Specific Programming,” March 1998. The following states did not provide data on the male-female composition of their prison staff: Alaska, Arizona, Georgia, Illinois, Iowa, Maryland, Michigan, New York, North Dakota, South Dakota; the Federal Bureau of Prisons also did not respond. Another survey of prisons as at 31 December 1997 reported that in state-operated facilities, female staff filled on average 55% of custody positions, ranging from 18–97%. In none of the institutions is there a custody staff made up entirely of women: US Department of Justice National Institute of Corrections Information Center, “Current Issues in the Operation of Women’s Prisons,” National Institute of Corrections, Colorado, September 1998.

³² Rules 53 (2) and 53 (3), Standard Minimum Rules for the Treatment of Prisoners.

³³ Principle 5(2), Body of Principles for the Protection of All Persons Under Any Form of Detention.”

survey, only Tennessee and the Federal Bureau of Prisons noted that they do not impose some kind of restriction. However, AI's review of the policies provided revealed that many states impose very limited restrictions, such as prohibiting same-sex strip searches. Only some have more expansive restrictions, which may include prohibition of male staff from working in female housing areas and/or in female bathrooms and showers.

Given that the use of male guards in women's correctional facilities is prevalent, the policies regulating their conduct and procedures to protect the female inmates are essential. This section presents relevant policies, procedures and practices. Amnesty International is aware that removal of male staff in correctional institutions will not ensure that inmates are not abused, sexually or otherwise. Women staff members may also abuse their power to intimidate women inmates by using intrusive pat-down searches and other sexually based power violations. Similarly, ending sexual abuse will not stop other potential forms of torture or cruel, inhumane and degrading treatment that prisoners often face.

The categories under this heading are the following:

Is the current department of corrections policy on custodial sexual misconduct language explicit?

Amnesty International holds that sexual abuse, exploitation and intimidation of inmates by staff and contractors should be expressly prohibited.

The National Institute of Corrections suggests that to ensure a clear stance on staff sexual misconduct, departments of corrections should have policies that clearly define, prohibit and specify penalties for the full range of sexual misconduct involving staff and inmates. Defining a no-tolerance stance toward staff sexual misconduct in a department's own administrative policies is an important signal and administrative tool.³⁴

The introduction of such comprehensive and specific policies is relatively recent in many state departments of corrections, and existing policies are likely to be revised in the next two to three years to comply with emerging federal standards under PREA. Amnesty International urges states to use this opportunity to ensure that these policies deal with custodial misconduct in a clear and comprehensive way. Explicit language is important. If this is not the case, euphemisms may cloud the actual intent of the policy and may ultimately prevent adequate disciplinary action from being taken.³⁵

Allows cross-gender pat-down search in practice

³⁴ US Department of Justice National Institute of Corrections Information Center, "Sexual Misconduct in Prisons: Law, Agency Response, and Prevention," National Institute of Corrections, Colorado, November 1996, and US Department of Justice National Institute of Corrections Information Center, "Sexual Misconduct in Prisons: Law, Remedies, and Incidence," National Institute of Corrections, Colorado, May 2000.

³⁵ Special Rapporteur on violence against women, its causes and consequences Ms. Radhika Coomaraswamy, "Report of the mission to the United States of America on the issue of violence against women in state and federal prisons," Commission on Human Rights, 55th Session, E/CN.4/1999/68/Add.2, January 4 1999, part IV, page 10 and part V page 16-17.

Pat-down searches or pat frisks mean the searching of women who are dressed but which require some contact with a woman's breasts as well as the genital area. In the state of Washington, a court decided that such searches of women by men amounted to cruel and unusual punishment, in violation of the US Constitution.³⁶ The United Nations Human Rights Committee has stated that to ensure the protection of the dignity of a person who is being searched by a state official, a body search should be conducted only by someone of the same sex.³⁷

Amnesty International is concerned that such an intrusive procedure may be traumatizing for women in custody, in particular for the many women who have been subjected to prior sexual abuse. Amnesty International recommends that such searches be performed only by guards of the same sex. As mentioned above, this in and of itself does not guarantee that a correctional staff member will not abuse his or her position of power. All staff, male and female, regardless of the sex of the inmate they are searching, should be monitored and their behavior subject to review.

What is the percentage of female officers in relation to male officers?

This information was provided by state correctional departments in response to the survey request from Amnesty International. Some departments responded with statistics for all correctional staff; in others they gave statistics for women's facilities only, making comparisons difficult. Amnesty International has included all information provided under this heading for the use of local advocates and activists.

Restrictions on the duties of male guards

This section presents information on whether there are policies to protect female inmates by restricting male guards to certain duties and areas of the prisons.

Amnesty International recommended in "*Not part of my sentence*" that male staff who provide professional services in female facilities should always be accompanied by female officers. Amnesty International is concerned that allowing male staff to have certain duties, such as working night shifts unaccompanied by female officers, may lead to situations that lend themselves to abuse and misconduct. Amnesty International also believes that male staff should not be permitted to conduct invasive searches (such as strip searches) on women, that allowing men to perform these tasks is inherently abusive, and that it may contribute to creation of an environment that fails to deter custodial sexual misconduct.

Staff training on sexual misconduct

Amnesty International noted in "*Not part of my sentence*" that all staff should be informed that sexual contact between staff and women serving their sentences is prohibited, that victims have a right to complain if they are abused, and that staff have a duty to report knowledge of an inmate who has been abused.

³⁶ *Jordan v Gardner*, 986 F.2d (9th Cir., 1993).

³⁷ General Comment 16 to Article 17 of the ICCPR, "Compilation of General Comment and General Recommendations Adopted by Human Rights Treaty Bodies," UN Document HRI/GEN/Rev.3, 15 August 1997.

The National Institute of Corrections also suggests that the elements of a comprehensive approach to preventing staff sexual misconduct include a staff training program that presents clear information on applicable laws, agency policies and penalties for violating both the policy and applicable state laws.³⁸ The federal government is expected to adopt national standards for training under PREA, though this is unlikely before 2007.

Amnesty International is concerned that though most departments reported that they provide training, the content of that training and its effectiveness may vary. Furthermore, six states do not provide ongoing in-service training, which should be mandatory for all staff: Alaska, California, Delaware, Florida, Hawaii, Mississippi, and New Mexico. Amnesty International believes that other key modalities of whether training is effective include the level of senior staff participation; inclusion of training goals in performance reviews; sensitivity training on issues relating to women who have suffered sexual abuse; and training on identifying and acting upon situations of suspected abuse and misconduct.

Training should provide tools and skills necessary to avoid inappropriate situations and relationships. It is also important to ensure that the training is not provided only for new hires but for all staff at regular intervals. While training is an essential component of the regime to prevent custodial sexual misconduct, proper supervision and leadership must reinforce these efforts if they are to be effective.

Informing inmates of agency policies on sexual misconduct

Amnesty International recommended in *“Not part of my sentence”* that all inmates should be informed that sexual contact between custodial staff (and contractors) and women serving their sentences is prohibited and that they have a right to complain if they are mistreated.

The National Institute of Corrections suggests that the elements of a comprehensive approach to preventing staff sexual misconduct include the means for providing inmates with basic information about sexual misconduct, applicable laws, agency policies and penalties.³⁹

Policies and Procedures—Guiding Official Response

As mentioned above, international law guarantees victims of human rights violations, including women in custody who are victims of sexual misconduct, a right to a remedy

³⁸ US Department of Justice National Institute of Corrections Information Center, “Sexual Misconduct in Prisons: Law, Agency Response, and Prevention,” National Institute of Corrections, Colorado, November 1996. and US Department of Justice National Institute of Corrections Information Center, “Sexual Misconduct in Prisons: Law, Remedies, and Incidence,” National Institute of Corrections, Colorado, May 2000.

³⁹ US Department of Justice National Institute of Corrections Information Center, “Sexual Misconduct in Prisons: Law, Agency Response, and Prevention,” National Institute of Corrections, Colorado, November 1996, and US Department of Justice National Institute of Corrections Information Center, “Sexual Misconduct in Prisons: Law, Remedies, and Incidence,” National Institute of Corrections, Colorado, May 2000.

for the violations they have suffered.⁴⁰ Even if there are strong laws in place to prevent custodial sexual misconduct, it is equally important for states and correctional departments to have policies in place to ensure that when incidents do occur, they can respond appropriately. This is essential to ensure that victims receive appropriate care as well as justice, that perpetrators are held accountable and that would-be perpetrators know that there may be consequences for their actions. The UN Human Rights Committee, the Committee Against Torture, and regional human rights bodies have all found that states must conduct a prompt, thorough, effective and independent investigation into allegations of human rights violations such as custodial sexual misconduct.⁴¹

However, AI is concerned by reports of continuing impunity for perpetrators of custodial sexual misconduct. Reports to AI and other organizations indicate that custodial sexual misconduct often goes unpunished or results merely in a transfer or quiet termination despite laws criminalizing it. This is underscored by statistics provided by BJS indicating that of 539 staff implicated in 508 substantiated incidents of sexual misconduct in 2004, only 36% were referred for prosecution, though custodial sexual misconduct is a criminal offense in most states. Of the remainder, 55% were discharged and 9% were disciplined but not discharged.⁴² According to a 2005 report on the Federal Bureau of Prisons by the Office of the Inspector General (OIG), the majority of sexual abuse cases investigated by the OIG do not result in prosecution. Between fiscal year 2000 and 2004, the OIG presented 163 custodial sexual abuse cases for prosecution. Of those cases, 45% were accepted for prosecution, 40% of which resulted in convictions and 4% of which were pending at the time of the report.⁴³ Reports in individual states have also found similar problems:

A Florida reporter reviewed 468 inmate complaints by women from 1998 through 2003, and found that about half of these—236—involved allegations of sexual contact. While many of these reportedly were difficult to prove and were therefore dismissed, six cases of sexual penetration were substantiated. This led to the firing of four workers, and the resignation of two others. However, the conduct described allegedly would meet Florida's statute prohibiting sexual contact with an inmate, a third-degree felony.⁴⁴

Amnesty International was able to perform a closer review of policies covering official response to sexual assault submitted to the organization, and these often indicated a lack of focus on and understanding of custodial sexual misconduct and were either generic in

⁴⁰ International Covenant on Civil and Political Rights, Article 2 (3). General Comment 20, referring to article 7 prohibiting torture and cruel treatment or punishment and specifically mentioning people deprived of their liberty, adds that, "Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective."

⁴¹ See, e.g., *Velasques Rodrigues v. Honduras* (IACtHR) para. 174; *Assenov v. Bulgaria* (ECtHR) para. 102; *Hajrizi Dzemajl v. Yugoslavia* (CAT) para. 9.4; *Sadik Onder v. Turkey* (ECtHR) para. 42.

⁴² BJS report, page 9.

⁴³ Office of the Inspector General, *Deterring Staff Sexual Abuse of Federal Inmates*, U.S. Department of Justice, April 2005.

⁴⁴ *Department Must Be Vigilant Defending Female Prisoners*, The Tampa Tribune, 07/15/04.

nature or focused on inmate-on-inmate sexual assault. Though inmate sexual assault is an extremely important issue, it is different in nature, and both prevention and response must be tailored specifically to the crime in question. For example, actions taken to prevent retaliation should vary based on whether the perpetrator is another inmate or a member of staff. Furthermore, policies should provide for investigation and potential prosecution, even if the accused staff member resigns. AI believes shortcomings in policies and procedures contribute to the failure by authorities to provide adequate and timely remedies for victims of custodial sexual misconduct.

Amnesty International encourages all states to develop policies and procedures tailored to custodial sexual misconduct in order to adequately address the problem. Systems must be in place to facilitate reporting by victims. States must ensure that victims receive proper medical and mental health care as well as ongoing counseling as needed. There must be prompt, effective and impartial investigations, followed by prosecution if appropriate. AI notes that in some cases, existing policies and procedures were reportedly ignored, leading to shoddy or biased investigations.⁴⁵ This is why it is essential that there be centralized tracking of such allegations and incidents as well as independent oversight over correctional departments' handling of the incidents.

This section presents information submitted by correctional departments in response to a survey sent in July 2005. The questions in this section of the survey were designed to gauge the extent to which states and correctional departments fulfill these requirements.

Is medical help available for the victim of alleged sexual abuse?

All correctional facilities must provide essential healthcare services for women in their custody. Immediate medical assistance should be offered to victims of custodial sexual misconduct so that victims can be tested for sexually transmitted diseases or other health consequences of the abuse. Amnesty International is concerned that correctional staff may not inform victims of sexual abuse that they are entitled to care, depending on the extent to which physical damage is evident and when the victim makes a report.

Are immediate mental health services available for the victim of alleged sexual abuse?

Being subjected to sexual abuse, exploitation and intimidation by correctional staff can be traumatic for women serving their sentence. The problem is enhanced by the fact that a significant percentage of women in prison have been victims of sexual abuse prior to incarceration, which can exacerbate trauma. It is essential to ensure that mental health services are available immediately to assess the victim's mental health and to determine what treatment may be necessary. Amnesty International fears that correctional staff may not inform victims of sexual abuse that they are entitled to care.

⁴⁵ See for example, Melvin Claxton, Ronald J. Hansen and Norman Sinclair, *State fumbles sexual misconduct probe: Corrections Dept. ignored information, witnesses involving a deputy warden*, Detroit News, 05/22/05. The report indicates that when the initial investigation of custodial sexual misconduct were found "unfounded" after the prison investigator closed the case within a week, without interviewing the accused staff member and several potential witnesses, the inmate was confined to her cell for seven days for lying.

Is counseling available for the victim of alleged sexual abuse?

After the initial mental health intervention, it is also crucial for victims to have access to ongoing counseling if the mental health professionals find this necessary and if a victim feels she needs counseling.

Is a rape kit taken?

Rape kits have become a standard tool to ensure that evidence of sexual assault (including DNA evidence) is preserved. Amnesty International believes that rape kits should be taken whenever a woman reports custodial sexual misconduct within 72 hours. A rape kit should be administered by a trained and impartial sexual assault nurse examiner or a doctor.

Special procedures for investigating allegations of sexual misconduct

Amnesty International appeals to all departments of corrections to ensure that allegations of sexual abuse are treated in a prompt and effective manner, and with appropriate sensitivity and thoroughness. Such complaints are often very difficult to make, both for personal reasons, as is the case with sexual assault victims outside of prisons, and for the reasons outlined above: fear of retaliation, fear of segregation and difficulty of proving an allegation.

Amnesty International welcomes the initiatives of some states that are aimed at handling complaints about sexual abuse. Amnesty International supports the development of independent review mechanisms and ways for inmates to report abuse that allow for anonymity and protection from retaliation. However, Amnesty International notes that many such mechanisms were developed to respond to inmate-on-inmate sexual assault. Though an important issue, there are differences between such cases and cases of custodial sexual misconduct; Amnesty International believes it is necessary to develop specific procedures designed to investigate sexual abuse by correctional staff.

Is there a system for reporting allegations of custodial sexual misconduct within the department of corrections?

In order to overcome the reluctance of victims to report sexual abuse by correctional staff, it is essential to develop clear and accessible reporting systems that do not place the victim at risk of retaliation. It is equally important for inmates to know what these systems are. It is important for there to be multiple channels for reporting to ensure that victims do not have to report the incident to someone who makes them uncomfortable and/or unsafe. Fear of retaliation may make it difficult for staff to report to fellow officers or a supervisor. Amnesty International believes the most appropriate solution is to provide the opportunity to report to an independent office external to the department of corrections, see below.

Is there a system for reporting allegations of custodial sexual misconduct directly to a body external to the DOC?

Amnesty International believes there must be channels for victims to report abuse to an external body (i.e., outside the department of corrections). Given the nature of custodial

sexual misconduct and the close ties likely to exist among correctional staff, victims will inevitably be uncomfortable reporting abuse within the department of corrections.

Is the investigation external? If there is an external investigation, how is it triggered?

As mentioned above, the UN Human Rights Committee, the Committee Against Torture, and regional human rights bodies have all found that states must conduct independent investigations of allegations of human rights violations such as custodial sexual misconduct.⁴⁶ International courts have found that investigations cannot be deemed impartial and independent if they are carried out by the same organization that is alleged to be responsible for the violation.⁴⁷

According to statistics published by the Bureau of Justice Statistics pursuant to the PREA, "... Responsibility for investigating allegations of staff sexual misconduct was left to the prison authorities in 22 systems (43%), jail authorities in 166 local jails (41%)."⁴⁸ Amnesty International believes that the most effective safeguard to obtaining a fair, prompt and impartial investigation is for these functions to be undertaken by outside agencies and investigators. AI recognizes that individuals employed by correctional departments may be scrupulous in their efforts to conduct an impartial investigation. However, there are inherent conflicts of interest: Since correctional departments rarely want custodial sexual misconduct to be publicized, alleged perpetrators may be in a position to influence the investigation, and there is often a presumption within correctional departments that inmates are lying or trying to obtain something. Providing for an external investigation may also help protect victims from retaliation and can boost confidence in the process. Amnesty International believes that all allegations of custodial sexual misconduct that may meet the level of a crime should be referred for external investigation and that impartial prosecutorial staff, not correctional staff, should decide whether prosecution is warranted.

This section lists states that provide for external investigations and how such investigations are triggered.

Are special measures taken to shield alleged victims from retaliation?

Amnesty International is concerned that authorities do not always take sufficient measures to shield victims of custodial sexual misconduct from retaliation. This is especially crucial when their alleged abuser continues to work in the facility, though retaliation can also come from other staff or even other inmates. These measures could include discipline and removal of the alleged abuser and separation of the victim from the abuser.

Most departments told AI that they take measures to shield victims from retaliation. While AI was not able to comprehensively review policies of correctional departments in order to assess the issue nationwide, the organization is concerned that in the few cases

⁴⁶ See, e.g. Velasques Rodrigues v. Honduras (IACtHR) para. 174; Assenov v. Bulgaria (ECtHR) para. 102; Hajrizi Dzemajl v. Yugoslavia (CAT) para. 9.4; Sadik Onder v. Turkey (ECtHR) para. 42.

⁴⁷ Velasques Rodrigues v. Honduras (IACtHR) paras. 179-181.

⁴⁸ BJS report, page 6.

where AI was able to review policies provided, these measures often appear to be designed with inmate-on-inmate sexual assault in mind or do not adequately cover retaliation in a csm situation, while others involve placing women in solitary confinement (see below).

If so, do the measures include solitary confinement or lockdown of the inmate?

Amnesty International is particularly concerned that in practical terms, corrections staff may deem solitary confinement or lockdown of the victim to be the easiest way to shield her from retaliation. However, these measures are usually used as a disciplinary action and may have the effect of punishing the victim, since isolation poses significant risks to an individual's wellbeing.

Is there an independent body, such as a corrections ombudsman, with independent oversight of correctional facilities and the DOC?

Amnesty International believes that independent oversight mechanisms are crucial to ensure proper and impartial response to custodial sexual misconduct. Ombudsmen have been successful in a variety of contexts in the United States—for example, some states have ombudsmen for juveniles or attached to the state legislature.

The success of these programs depends on their authority to pursue remedies and the availability of adequate resources. In addition to responding to individual complaints, they should be mandated to review correctional policies and practices. Staff should be trained to specifically identify and investigate issues arising from bias on the basis of prisoner's identity, including gender, race, ethnicity, sexual orientation, gender identity or expression and disability, since these factors may single out an individual for abuse, hinder her access to remedies and heighten the risk of retaliatory action in cases where abuse is reported. Furthermore, programs should ensure transparency by providing reports to the legislature, the governor and the public.

Some of the existing ombudsmen focus exclusively on corrections, while others include corrections within broader mandates. Only some of them respond to individual complaints. Officials from several other states, including Kentucky, have made public statements indicating that they are also considering establishing independent ombudsmen. In California, the 2005 Sexual Abuse in Detention Elimination Act created an ombudsperson office specifically to address sexual abuse in custody. Amnesty International is disappointed to note that Kansas, Michigan and Minnesota created but subsequently abolished ombudsmen offices.

In addition, five states (Alabama, Arizona, Mississippi, Ohio and Tennessee) have oversight committees or auditors in the state legislature, which may perform limited oversight functions and can make recommendations.

Is there a system in place to track investigations, indictments and convictions for custodial sexual misconduct?

Amnesty International strongly urges states to put systems in place to track allegations of custodial sexual misconduct through investigation and, if relevant, punishment. To date,

few states have centralized tracking systems that address Amnesty International's concerns. However, as noted, PREA has mandated the BJS to track statistics and conduct detailed research. The Bureau of Justice Statistics has already issued its first report and is in the process of refining its methodology to ensure more comprehensive data collection and analysis. It is also exploring ways to identify unreported cases of staff sexual misconduct and staff sexual harassment. The federal government is also in the process of developing national standards for data collection and statistical tracking under PREA and will likely require states to meet these standards starting in 2007.

Proposed Legislation 2005-06

The final section is a survey of proposed bills in the states, in the District of Columbia and on the national level. We have included information on bill sponsors, status of the bill and a short description of the legislation. This information is only included in states that, as of December 2005, had relevant legislation pending.

II. Pregnancy in Custody

Amnesty International's report "*Not part of my sentence*" indicated that jails and prisons use restraints on women as a matter of course, regardless of whether a woman has a history of violence (which only a minority have), and regardless of whether she has ever absconded or attempted to escape (which few women have).⁴⁹ As a matter of course, restraints are often also applied to women who are pregnant, in labor and are delivering their baby, as well as immediately following giving birth.⁵⁰ Amnesty International considers the routine use of restraints on pregnant women, and particularly on women in labor, a cruel, inhuman and degrading practice that seldom has any justification in terms of security concerns. Amnesty International is concerned that the shackling of women who are about to give birth endangers the women and their children, as described by physician Patricia Garcia:

Women in labor need to be mobile so that they can assume various positions as needed and so they can quickly be moved to an operating room. Having the woman in shackles compromises the ability to manipulate her legs into the proper position for necessary treatment. The mother and baby's health could be compromised if there were complications during delivery, such as hemorrhage or decrease in fetal heart tones. If there were a need for a C-section (caesarian delivery), the mother needs to be moved to an operating room immediately, and a delay of even five minutes could result in permanent brain damage for the baby. The use of restraints creates a hazardous situation for the mother and the baby,

⁴⁹ Amnesty International, "*Not part of my sentence*" : Violations of the Human Rights of Women in Custody," AI Index: AMR 51/01/99, Amnesty International, March 1999.

⁵⁰ In May 2000, Amnesty International reported to the United Nations Committee Against Torture that it remains common for restraints to be used on pregnant women prisoners when they are transported to and kept at the hospital, regardless of their security status. Amnesty International, "United States of America. A Briefing for the UN Committee Against Torture," May 2000, Page 18.

compromises the mother's ability postpartum to care for her baby and keeps her from being able to breast feed.⁵¹

According to the Bureau of Justice Statistics, 5% of women are pregnant at the time of admission to state prisons, and 6% are pregnant at the time of admission to local jails.⁵² There are no statistics on how many women become pregnant while in prison.

Legal and Policy Framework

Amnesty International considers the routine use of restraints on pregnant women, and particularly on women in labor, a cruel, inhuman and degrading practice in contravention of the Convention Against Torture (Article 16) and the ICCPR (article 7). The US has ratified both CAT and ICCPR.

Using restraints such as belly chains and leg irons on pregnant women is in direct violation of international standards, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners:

Chains or irons shall not be used as restraints. Other instruments of restraints shall not be used except in the following circumstances:

- (a) as a precaution against escape during a transfer;
- (b) on medical grounds by direction of the medical officer;
- (c) by order of the director, if other methods of control fail, in order to prevent a prisoner from injuring himself or others or from damaging property.

(Instruments of restraint) must not be applied for any longer time than is strictly necessary.⁵³

Only two states, Illinois and California, have legislation regulating this issue. In this session there is a bill before the New York State Senate and House of Representatives that would ensure the protection of pregnant women in custody against such dangerous and abusive practices.

In the last few years a few state departments of corrections have begun to regulate this practice, and some now explicitly take the health of the pregnant woman and her pregnancy into account in deciding whether to use restraints and what kind. However, many state departments of corrections appear not to have written policies specifying proper treatment of pregnant women, including prohibiting restraints except for specific and rare circumstances. Amnesty International believes that there is no sound reason for authorities to routinely shackle women in labor or who have just given birth, particularly as most are already under armed guard. The use of restraints in such circumstances is

⁵¹ Dr Garcia is an obstetrician and gynecologist at Northwestern University's Prentice Women's Hospital; her statement was provided to Amnesty International by Chicago Legal Aid to Incarcerated Mothers, December 1998, and was printed in "*Not part of my sentence*": Violations of the Human Rights of Women in Custody," AI Index: AMR 51/01/99, Amnesty International, March 1999.

⁵² Greenfield, Lawrence A., *Women Offenders*, Washington DC, Bureau of Justice Statistics, Office of Justice Programs, December 1999, (Revised 10/03/00).

⁵³ Rule 33, United Nations Standard Minimum Rules for the Treatment of Prisoners.

cruel and degrading treatment that violates international standards, which state that restraints should be imposed only when “strictly necessary.” There is an urgent need for all authorities to take action to ensure that the rights of pregnant women and the health of their children are protected.

The categories in this section are the following:

Pregnancy: Statute

Legislation banning shackling in the third trimester or during labor
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Only two states (Illinois and California) have an actual law in place that addresses shackling and restraints applied on pregnant women. Amnesty International considers such legislation a powerful and visible signal to correctional facilities and urges legislative bodies across the nation to introduce such measures.

Pregnancy: Policies, Procedures and Practices

In the absence of legislation to protect the rights of pregnant women, Amnesty International believes that a state’s express considerations of what would constitute humane and proper treatment of pregnant inmates is essential to ensure their wellbeing in prisons and jails. Amnesty International urges all correctional departments to develop clear written policies and procedures to guide practice.

Amnesty International believes that departments of corrections must develop specific policies on custody of pregnant inmates that are sensitive to their unique health issues and will help ensure that pregnant women are not routinely restrained in the same manner as other prisoners, which may pose undue health risks for the mother and fetus or infant. Amnesty International recommends that jails and prisons adopt policies on the use of restraints that prohibit their use on pregnant women when they are being transported, when they are in the hospital awaiting delivery, and while they are in labor. Policies should also prohibit their use on women who have just given birth.

Nineteen state correctional departments told AI that they weigh medical concerns against security considerations in deciding whether to use restraints on pregnant women and what kind of restraints to use. This may not always protect pregnant women from abuse, depending on the weight given each of the factors. Amnesty International believes department policies should clearly state that restraints should not be utilized on pregnant women in the third trimester, during labor or delivery or during recovery.

Use of restraints in third trimester

Restraints during transport

Restraints during labor

This report lists the policies concerning these issues in each state and notes whether no policy regulates the restraining of pregnant women, thereby leaving the question up to the individual correctional officers. It also notes whether departments of corrections limit the use of certain types of restraints, such as belly chains, leg irons or handcuffs behind the back during pregnancy. Finally, this section notes whether departments of corrections

informed Amnesty International that they take medical advice into account before deciding to use restraints.

Officer in delivery room

This section notes whether guards are present in the delivery room and whether there are any policies as to their gender. Amnesty International believes that unless there are specific security concerns, an officer, preferably female, should be placed outside the door of the delivery room in order to respect the privacy and dignity of the woman giving birth. Such a measure would seem adequate in terms of security for the majority of all women, in particular while giving birth.

Pregnancy—Reported Incidents of Shackling

In instances in which Amnesty International has received reports on shackling of inmates that were not reported in “*Not part of my sentence*”, they are included under this heading. It is important to note that the scarcity of reported cases of such abuse may reflect the mindset of the women who are being shackled while giving birth rather than the incidence of such cases. Women in custody are routinely shackled and often do not make complaints about practices that they see as inherent factors of incarceration.