

President's Task Force on 21st Century Policing
Office of Community Oriented Policing Services
U.S. Department of Justice
145 N Street, N.E. 11th Floor
Washington, DC 20530

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Policy and Oversight | LGBT Experiences of Policing

The following submission is made on behalf of the undersigned LGBT organizations and organizations advocating on behalf of People Living With HIV (PLWH), and offers recommendations for policing policy and oversight specific to the experiences of lesbian, gay, bisexual, transgender, Two Spirit, gender nonconforming, queer and questioning (LGBTQ) people.

INTRODUCTION

As highlighted in a report recently published by the NAACP, in addition to experiencing many of the same forms of racial profiling and race and poverty-based discriminatory policing practices as other members of Black communities and communities of color, American Indian and Alaska Native peoples, homeless and low-income communities, and immigrants, LGBTQ people of color experience gender and sexuality-specific forms of racial profiling and police brutality.ⁱ LGBTQ people, particularly LGBTQ youth and people of color, also experience pervasive profiling and discriminatory treatment by local, state and federal law enforcement agents based on actual or perceived sexual orientation, gender, gender identity or expression, or HIV status.ⁱⁱ

Over the past decade, the National Coalition of Anti-Violence Programs (NCAVP) has found that law enforcement agents have consistently been among the top three categories of perpetrators of homophobic or transphobic violence against LGBTQ people reported to anti-violence organizations.ⁱⁱⁱ In a recent national survey of LGBTQ people conducted by Lambda Legal, a quarter of respondents who had in-person contact with police reported at least one type of misconduct or harassment, including profiling, false arrests, verbal or physical assault, or sexual harassment or assault. LGBTQ people of color, LGBTQ youth, low-income LGBTQ people, and transgender people were much more likely to report an experience of at least one type of police misconduct or harassment.^{iv} The National Transgender Discrimination Survey, conducted by the National LGBTQ Task Force and National Center for Transgender Equality, found 22% of transgender people who interacted with police report harassment, 6% report physical assault, and 2% report sexual assault by police officers.^v Across the country, non-heterosexual youth are more likely to be stopped by the police and experience greater criminal justice sanctions not explained by greater involvement in violating the law.^{vi} Additionally, LGBTQ people of color have been found to be five times more likely to be asked about their immigration status by law enforcement than white survey respondents.^{vii} Investigations of local police departments in New Orleans and Puerto Rico by the U.S. Department of Justice have documented patterns and practices of profiling and discriminatory policing of LGBTQ people,^{viii} and a number of local organizations have documented department-specific patterns and practices.^{ix}

For more information about LGBTQ people's experiences of profiling and discriminatory policing, please consult *A Roadmap for Change: Federal Policy Recommendations to Address*

Criminalization of LGBT People and People Living With HIV, co-authored by the Center for American Progress, the Center for Gender and Sexuality Law at Columbia University, the Center for HIV Law and Policy, and Streetwise and Safe (SAS), available at: <http://web.law.columbia.edu/gender-sexuality/roadmap-change>, as well as the **January 9, 2014 submission of Streetwise and Safe (SAS) to the Taskforce.**

Based on these documented patterns and practices, gender and sexuality-specific forms of racial profiling and discriminatory policing requiring specific policy reforms include:

- Homophobic and transphobic verbal harassment and abuse by law enforcement officers;
- Profiling and discriminatory enforcement of prostitution-related and lewd conduct offenses, including citation of possession or presence of condoms as evidence of intent to engage in prostitution-related or lewd conduct offenses;
- Failure to respect individuals' gender identity and expression when addressing members of the public, arrest processing, searches, and placement in police custody;
- Sexual harassment and assault by law enforcement officers;
- Unconstitutional and unlawful searches to assign gender, and more invasive and intrusive searches of transgender and gender nonconforming people than non transgender people;
- Dangerous placement and cruel, inhuman and degrading treatment in police custody.

RECOMMENDATIONS

A. *Civil Rights Enforcement*

1) **Pass, effectively implement, and enforce LGBTQ-inclusive anti-profiling measures**

- The Administration should immediately **expand the protections of the Guidance for Federal Law Enforcement Agencies** issued by the U.S. Department of Justice in December 2014 to reach all federal and federally funded law enforcement activities, including and especially those that target Muslim, Arab, Sikh and South Asian communities and take place at our borders, which until recently were closed to LGBTQ immigrants and people living with HIV (PLWH).
- Local law enforcement agencies should be required, as a condition of receipt of federal funding, consistent with Title VI of the Civil Rights Act of 1964, to **adopt, effectively implement, and enforce prohibitions against profiling consistent with the Guidance for Federal Law Enforcement Agencies on the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation and Gender Identity** issued by the U.S. Department of Justice in December 2014. State and local profiling bans should incorporate an **independent enforcement mechanism** accessible to members of the public.
- The Administration should work with Congress toward the passage of an **End Racial Profiling Act that includes protections against profiling on the basis of gender, sexual orientation, and gender identity.**

2) **End discriminatory policing of homeless people and low-income communities**

One in four LGBTQ youth will be pushed out or kicked out of their homes at some point, and a disproportionate number of homeless youth identify as LGBTQ.^x LGBTQ youth and adults are thus disproportionately impacted by policing practices targeting homeless people, public housing residents, and low-income communities.

- The U.S. Department of Justice should **issue guidance to state and local governments** on the constitutionality and cost-effectiveness of adoption and enforcement of ordinances criminalizing ordinary life-sustaining activities in public spaces;
- The U.S. Department of Justice should incorporate **investigation of civil rights abuses of homeless people** as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.

3) End the use of condoms as evidence of all prostitution-related crimes

Police and prosecutors' use of the mere possession or presence of condoms as evidence of any prostitution-related offense acts as a powerful disincentive to carrying, distributing and sharing condoms among populations at high risk of police profiling and discriminatory policing such as LGBTQ youth of color, who are also at high risk of HIV and other sexually transmitted infections.^{xi} It also encourages people engaged in trafficking of people in the sex trades to deny access to condoms to people they are exploiting – placing trafficking victims at even greater risk.^{xii}

- The Administration should, consistent with the recommendation of the Presidential Advisory Commission on HIV/AIDS, **issue and publicize guidance to federal, state and local law enforcement agencies condemning the reliance on mere possession or presence of condoms as evidence of intent to engage in criminal activity**, and encourage agencies to adopt policies prohibiting this practice.

4) Establish nationwide standards for treatment of LGBTQ people in police custody

In the absence of policies prohibiting discrimination based on sexual orientation and gender identity and clear policies governing the determination of gender for the purposes of arrest processing and protection of LGBTQ people in police custody, LGBTQ people in the custody of local law enforcement, including in police lock-ups, all too often experience unlawful, unnecessary and humiliating searches to assign gender, homophobic and transphobic discrimination and abuse, and unsafe placement.^{xiii} In particular, searches conducted by police officers on the street or in police detention facilities for the purposes of assigning a gender to detainees based on anatomical features—or simply to ogle or humiliate transgender and gender nonconforming arrestees—are both constitutionally prohibited and widespread.^{xiv}

- In consultation with groups who have successfully advocated for local policies, the U.S. Department of Justice should **develop and promulgate national standards for local law enforcement agencies relating to placement, searches, and interactions with transgender and gender non-conforming individuals** consistent with the provisions of consent decrees entered into with the New Orleans Police Department and the Puerto Rico Police Department, and make adoption of policies consistent with the guidance a condition of receipt of federal funding.
- The Department of Justice should amend the Prison Rape Elimination Act (PREA) regulations to include an explicit prohibition on searches for the sole purpose of determining genital characteristics in police lock-ups, regardless of whether conducted as part of a broader medical examination, and regardless of whether genital characteristics are known.^{xv}

5) End Sexual Harassment and Assault by Law Enforcement Officers

As documented by Amnesty International, the International Association of Chiefs of Police (IACP), the Cato Institute, and independent researchers, sexual harassment and assault by law enforcement officers is an often invisible but pervasive practice requiring the immediate adoption and effective enforcement of policies, training, oversight and disciplinary practices.^{xvi} LGBTQ people, and particularly lesbian and transgender women, are targeted for this gender-specific form of police brutality.^{xvii}

- Federal law enforcement agencies should **adopt policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents** which are consistent with the recommendations of the International Association of Chiefs of Police.
- The U.S. Department of Justice should condition federal funding to local law enforcement agencies on adoption of policies aimed at documenting, preventing, and addressing sexual harassment, abuse, and assault by local law enforcement agents which are consistent with the recommendations of the IACP.
- The U.S. Department of Justice should **aggressively pursue enforcement of existing PREA standards for police lock-ups.**
- The U.S. Department of Justice should issue a clarification that the definition of “lock-ups” contained in the PREA regulations includes police cars and other temporary locations of police detention.
- The U.S. Department of Justice should initiate new rulemaking pursuant to PREA that would more closely harmonize the PREA provisions pertaining to police lockups with those pertaining to adult jails and prisons, including augmenting provisions related to access to victim advocates, response planning, training and education, and screening for risk of sexual victimization and abusiveness, to police lock-ups.

Additionally, the undersigned organizations endorse in principle the national demands issued by Ferguson Action, available at: <http://cdn.fergusonaction.com/wp-content/uploads/2014/11/demands.pdf>

B. *Civilian Oversight*

Independent and vigorous civilian oversight is essential to effective enforcement of changes to policing policies. Additionally, civilian oversight bodies must be representative of and responsive to the experiences of communities directly impacted by discriminatory policing.

- Civilian oversight bodies made up of representatives from communities directly impacted by discriminatory policing, including youth, women, and LGBTQ communities, similar to those established under federal consent decrees with Seattle and Cincinnati, should be established and vested with substantial authority, including subpoena power and independent disciplinary authority.
- Civilian oversight bodies should be charged with regularly analyzing data on a range of police department practices to determine if there are disparities based on race, age, gender, gender identity, or sexual orientation in enforcement practices and provided with sufficient resources to

do so. Information relating to sexual orientation and gender identity of complainants must be collected on a voluntary and anonymous basis, after informed consent, and analyzed separately from any identifying information regarding the complainant.

- Investigators assigned to civilian oversight bodies must be trained by community-based organizations with expertise in police interactions between LGBTQ people and police and working with survivors of sexual assault.
- Complaint mechanisms should be fully accessible to all members of communities directly impacted by discriminatory policing practices. Community-based organizations should be empowered to accept complaints and investigators should be required to travel to meet with complainants at locations accessible to them.
- Individuals should be offered the opportunity to file complaints anonymously in order to ensure that individuals can do so without fear of retaliation or further abuse. Oversight bodies should accept and vigorously investigate complaints filed by third parties and organizations on behalf of individuals.
- Statements made in the context of filing a complaint of police misconduct should be inadmissible in criminal proceedings. Alternatively, the time limits for filing complaints of police misconduct should extend at least 6 months beyond the termination of any criminal prosecution relating to the incident in question.

C. Data Collection

To protect the privacy and dignity of people with whom they come in contact, law enforcement agents should never be charged with mandatory data collection relating to sexual orientation or gender identity during police interactions or while LGBTQ people are in custody. This policy is distinct from and does not affect voluntary provision of information relating to sexual orientation or gender identity to ensure safer placements in police custody. Questions concerning mistreatment of LGBTQ and gender-nonconforming people by law enforcement officers should be added to the Bureau of Justice Statistics Police Contact Survey and the Office of Victims of Crime National Intimate Partner and Sexual Violence Survey.

D. Body Worn Cameras

In order to protect the privacy and dignity of LGBTQ people, law enforcement agencies adopting the use of body worn cameras should develop, in consultation with affected communities, publicly available policies on their use, including strong safeguards with respect to consent, tampering, and access to recordings.

Endorsed by:

American Civil Liberties Union
Audre Lorde Project
Best Practices Policy Project
Black and Pink
Branching Seedz of Resistance
BreakOUT!
Brooklyn Movement Center
CAAAV (Organizing Asian Communities)

Center for HIV Law and Policy
Center on Race, Crime and Justice,
John Jay College of Criminal Justice
Communities United for Police Reform
Colorado Anti-Violence Program
Community United Against Violence (CUAV)
DC Trans Coalition
DeColores Queer Orange County

DRUM - South Asian Organizing Center
El/La Para TransLatinas
Equity Project
FIERCE
Gays and Lesbians Opposing Violence
Gender Justice LA
Global Action Project
GSA Network
HIPS (Helping Individual Prostitutes Survive)
Jacksonville Area Sexual Minority Youth
Network (JASMYN)
Justice Committee
Lambda Legal
Legal Aid Society
(Criminal, Civil and Juvenile Practices)
Malcolm X Grassroots Movement
Missouri GSA Network

National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition of Anti-Violence Programs
National LGBTQ Task Force
National Queer Asian Pacific Islander
Alliance
New York City Anti-Violence Project
OUT Now
Picture the Homeless
Providence Youth Student Movement
Sisterlove, Inc.
Streetwise and Safe (SAS)
Third Wave Fund
Transgender Law Center
VOCAL-NY
Young Women United

ⁱ National Association for the Advancement of Colored People, *Born Suspect: Stop-and-Frisk Abuses &*

ⁱⁱ Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, *Queer (In)Justice: The Criminalization of LGBT People in the United States* (Boston: Beacon Press, 2011); Kathryn E. W. Himmelstein and Hannah Brückner, “Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study,” *Pediatrics* 127 (1) (2011): 49-57 (non-heterosexual youth more likely to be stopped by the police and experience greater criminal justice sanctions not explained by greater involvement in violating the law or engaging in transgressive behavior); Brett G. Stoudt, Michelle Fine, and Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y.L. Sch. L. Rev. 1331 (2011) (LGB youth are more likely to experience negative verbal, physical, and legal contact with the police, and more than twice as likely to experience negative sexual contact in preceding six months); Amnesty International, *Stonewalled: Police Abuse and Misconduct Against LGBT People in the United States* (Washington: Amnesty International, 2005), available at <http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf>.

ⁱⁱⁱ National Coalition of Anti-Violence Programs, *Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities in the United States in 2010*, (New York: National Coalition of Anti-Violence Programs, 2011), available at http://www.avp.org/storage/documents/Reports/2011_NCAVP_HV_Reports.pdf.

^{iv} Lambda Legal, *Protected and Served? Survey of LGBT/HIV Contact with Police, Courts, Prisons, and Security* (2014), available at www.lambdalegal.org/protectedandserved.

^v Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

^{vi} Himmelstein, *supra* note ii.

^{vii} Lambda Legal, *supra* note iv.

^{viii} U.S. Department of Justice, Civil Rights Division, *Investigation of the New Orleans Police Department*, March 16, 2011; U.S Department of Justice, Civil Rights Division, *Investigation of the Puerto Rico Police Department*, September 5, 2011.

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- ^{ix} BreakOUT!, *We Deserve Better!* (2014), available at: <http://www.youthbreakout.org/sites/g/files/g189161/f/201410/WE%20DESERVE%20BETTER%20REP%20ORT.pdf>; Make the Road New York, *Transgressive Policing: Police Abuse of LGBTQ Communities of Color in Jackson Heights*, (New York: Make the Road, 2012), available at http://www.maketheroad.org/pix_reports/MRNY_Transgressive_Policing_Full_Report_10.23.12B.pdf; Frank H. Galvan and Mohsen Bazargen, *Interactions of Latina Transgender Women with Law Enforcement* (Los Angeles: Bienestar, 2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf>;
- ^x Nico Sifra Quintana, Josh Rosenthal, and Jeff Krehely, *On the Streets: The Federal Response to Gay and Transgender Homeless Youth*, Center for American Progress (2010). (LGBT youth make up 5-7% of the youth population but 40% of the homeless youth population).
- ^{xi} Human Rights Watch, *Sex Workers at Risk: Condoms as Evidence of Prostitution in Four U.S. Cities*, (2012) available at http://www.hrw.org/sites/default/files/reports/us0712ForUpload_1.pdf; Acacia Shields, *Criminalizing Condoms: How Policing Practices Put Sex Workers at IV Services at Risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe* (New York: Open Society Foundations, 2012), available at <http://www.opensocietyfoundations.org/reports/criminalizing-condoms>; PROS Network and Leigh Tomppert, *Public Health Crisis: The Impact of Using Condoms as Evidence of Prostitution in New York City*, (New York: PROS Network and Sex Workers Project, 2012), available at <http://sexworkersproject.org/downloads/2012/20120417-public-health-crisis.pdf>;
- ^{xii} Florrie Burke (founder of national Freedom Network and recipient of the inaugural Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons from President Barack Obama), *Forced Into Prostitution and Denied a Lifeline*, Huffington Post May 15, 2013, available at: http://www.huffingtonpost.com/florrie-burke/forced-into-prostitution-_b_3279937.html
- ^{xiii} National Prison Rape Elimination Commission, “National Prison Rape Elimination Commission Report” (2011), available at http://static.nicic.gov/UserShared/2013-03-29_nprec_finalreport.pdf; Mogul et al., *supra* note ii; Amnesty International, *supra* note ii.
- ^{xiv} Amnesty International, *supra* note ii; Alex Coolman, Lamar Glover, and Kara Gotsch, *Still in Danger: The Ongoing Threat of Sexual Violence against Transgender Prisoners* (Los Angeles and Washington: Stop Prisoner Rape and ACLU National Prison Project, 2005), available at <http://www.justdetention.org/pdf/stillindanger.pdf>.
- ^{xv} Invasive and degrading genital searches conducted by law enforcement as “gender checks” are unfortunately commonplace. Amnesty International, *supra* at note ii. The current language in PREA, which prohibits such searches “unless part of a broader medical examination” leaves too much discretion as to what constitutes a “broader medical examination,” given the ongoing problem of harassing and assaultive genital searching of LGBT detainees.
- ^{xvi} Stinson, Philip M.; Liederbach, John; Brewer, Steven L.; and Mathna, Brooke E., *Police sexual misconduct: A national scale study of arrested officers* (2014), Criminal Justice Faculty Publications. Paper 30, http://scholarworks.bgsu.edu/crim_just_pub/30; International Association of Chiefs of Police, *Addressing Sexual Offenses and Misconduct by Law Enforcement Officers: An Executive Guide* (Virginia: International Association of Chiefs of Police, 2011), available at: <http://www.theiacp.org/Portals/0/pdfs/AddressingSexualOffensesandMisconductbyLawEnforcementExecutiveGuide.pdf>; Cato Institute, *National Police Misconduct Reporting Project Annual Report (2010)*, available at: <http://www.policemisconduct.net/statistics/2010-annual-report>; Samuel Walker and Dawn Irlbeck, *Driving While Female*, Police Professionalism Initiative, University of Omaha (2012), available at: <http://samuelwalker.net/wp-content/uploads/2010/06/dwf2002.pdf>.
- ^{xvii} Amnesty International, *supra* note ii; *see also* National LGBTQ Task Force, *supra* note ii.