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The Honorable Richard Durbin, Chairman
Senate Judiciary Subcommittee on the Constitution,
Civil Rights and Human Rights
224 Dirkson Senate Office Building
Washington, D.C. 20510
Via email to: Nicholas_Deml@judiciary-dem.senate.gov

Statement of the National Center for Lesbian Rights
Before the United State Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety
Consequences (June 19, 2012)

Dear Chairman Durbin, Ranking Member Graham, and members of the subcommittee:

The National Center for Lesbian Rights (NCLR) is grateful for this opportunity to submit testimony on the human rights and public safety concerns posed by the use of solitary confinement in U.S. prisons, jails, and detention centers. As a national organization committed to advancing the rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families, NCLR is aware of the devastating impact that solitary confinement has on the mental health of prisoners. LGBT prisoners and detainees are particularly vulnerable to abuses, including serious physical and psychological risks, resulting from overreliance and abuse of solitary confinement.

NCLR has received numerous complaints from LGBT people held in solitary confinement and we write today to bring some of those stories to your attention. We very much appreciate your efforts to shine a light on this extremely important human rights issue and the June 19, 2012 hearing is a vital step in the effort to stem the overuse and abuse of solitary confinement in U.S. correctional and detention facilities.

Introduction

Survivors of sexual abuse in detention who are placed in solitary confinement (sometimes referred to as administrative segregation or protective custody) tend to suffer significant distress. The same is true for prisoners who are placed in solitary confinement simply because they are perceived to be vulnerable to sexual abuse, whether because they identify as LGBT, are gender nonconforming, or for other reasons. In recognition of the severely negative impact of solitary confinement on these prisoner populations, some corrections systems have sought to limit its use. However, significant work still needs to be done to create detention environments nationwide where staff is willing and able to keep survivors and other vulnerable prisoners safe from abuse

without having to place them in restrictive, punitive housing that has been shown to be detrimental to their mental health.

This statement provides an overview of the ways that LGBT prisoners are particularly impacted by the use of solitary confinement, with an emphasis on the use of solitary confinement for survivors of sexual assault, for vulnerable prisoners, and as punishment for being associated with a disfavored group. NCLR recommends that solitary confinement not be used for this population, except in the most extreme circumstances, and that when it is used, it is used for the shortest possible time (with frequent administrative reviews of the placement) and that prisoners be provided substantial access to programming, exercise, and work and educational opportunities on par with the general population.

Solitary Confinement Is Punitive

Segregation and isolation are usually reserved for prisoners with particularly egregious disciplinary issues. In all material respects, conditions in administrative segregation and protective custody are the same as those in disciplinary segregation. Examining a challenge to administrative segregation, the Supreme Court noted: “The reasons for placing one inmate in administrative and another in punitive segregation may be different, and the periods of confinement may vary, but the Court properly assumes for purposes of this case that the conditions in the two types of confinement are substantially identical.”¹

Segregation typically confines prisoners to their cells for all but approximately one hour per day of exercise and one or two showers per week.² Other prisoner privileges such as using the library, interacting with other prisoners socially, and accessing laundry facilities are extremely limited or denied to prisoners in administrative segregation or isolation.³ Prisoners are also deprived of communal dining, as well as work and educational opportunities. The 7th Circuit has held that “prisoners confined in protective custody have no right of equal access to the same vocational, academic and rehabilitation programs as those in the general prison population.”⁴

In addition to losing vocational, academic, and rehabilitative programming when in solitary confinement, some prisoners also face limited access to medical care when housed away from the general population. S.L., a gay prisoner living with AIDS in a New York facility faced death threats from other prisoners in the general population because the guards informed the prisoners that he was gay and HIV-positive.⁵ When he was moved to solitary confinement for his

¹ *Hewitt v. Helms*, 459 U.S. 460, 479-480 (U.S. 1983) (internal quotation marks omitted).

² *See, e.g., Ally Windsor Howell, A Comparison of the Treatment of Transgender Persons in the Criminal Justice Systems of Ontario, Canada, New York, and California*, 28 *BUFF. PUB. INT. L.J.* 133, 192 (2010).

³ *Id.*

⁴ *Meriwether v. Faulkner*, 821 F.2d 408, 416-17 (7th Cir. 1987) (*citing* *French v. Owens* 777 F.2d 1250, 1256 (7th Cir. 1985)).

⁵ Letter from S.L., received 2/27/2012.

protection from dangers posed by other prisoners, he stopped receiving necessary HIV medication.⁶

In *Tates v. Blanas*, Sacramento County Jail’s administrative policy of housing transgender prisoners in “total separation” or “T-sep” came to light.⁷ The Jail “automatically classifies all biologically male transgender inmates as T-sep, regardless of their behavior, criminal history, whether they pose a danger to others, or any other characteristic. . . . [T]here is no possibility that the Jail will change their classification.”⁸ The court in *Tates* found that “T-sep inmates are . . . forbidden to have any contact with other inmates or even to be in the same room as them. . . . T-sep inmates are subject to many burdens and restrictions not shared by other inmates.”⁹ After discussing safety considerations weighted against the overwhelming evidence of harm caused by isolation, the court found that classifying prisoners solely on the basis of their transgender status was inappropriate.¹⁰

Regardless of what it is called, solitary confinement is punitive by default. As such, involuntary solitary confinement aimed at protecting the safety of a prisoner must be used only as a last resort. This type of restrictive housing results in a loss of services and programs, leaves prisoners with little or no access to outside support, and cuts them off from human interactions essential for mental health.

Use of Solitary Confinement for Survivors of Sexual Abuse

Sexual abuse survivors placed in solitary confinement in the aftermath of an assault tend to suffer significant distress, including fear, anxiety, and heightened trauma. In addition to these negative health consequences, the extreme sense of isolation survivors experience in solitary confinement often makes them less likely to file a formal complaint of the abuse or to cooperate with an investigation.

When solitary confinement must be used to protect a survivor of abuse from further attacks, it should be used for as short a period as possible and with substantial protections in place. Strict time limits should be placed on how long a survivor can be housed in such punitive housing. The need for continued solitary confinement should also be reviewed on a regular basis (preferably every 15 days), and a survivor should be moved to less restrictive housing as soon as possible. To minimize the negative health consequences of solitary confinement, corrections officials should provide the survivor with appropriate health care services, access to programs and services, and contact with a rape crisis provider.

⁶⁶ *Id.*

⁷ Not Reported in F.Supp.2d, 2003 WL 23864868 at *3 (E.D.Cal. 2003).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 4, 11.

The Department of Justice’s (DOJ) recently released Prison Rape Elimination Act (PREA) standards meet some, but not all, of these conditions.¹¹ The PREA standards call on corrections officials to provide survivors with access to services and programs and to move these prisoners to less restrictive housing as soon as possible.¹² The standards also mandate the provision of emergency and follow-up medical and mental health care, including contact with support services.¹³ However, the standards do not place strong enough limits on the time a survivor may involuntarily be placed in solitary confinement. The PREA standards generally limit involuntary solitary confinement for survivors to 30 days.¹⁴ A more appropriate time limit is 72 hours. The standards do call for ongoing, regularly scheduled reviews of whether a survivor should be kept in solitary confinement beyond 30 days. However, this review is only required to take place once every 30 days.¹⁵ A more appropriate review schedule would be every 10 days.

Use of Solitary Confinement for Vulnerable Prisoners

Like survivors of sexual abuse in detention, prisoners who are LGBT or seen as vulnerable to sexual abuse are frequently placed in solitary confinement, ostensibly for their own protection. Such punitive housing assignments are inappropriate. Keeping prisoners safe is one of the most basic responsibilities of corrections officials. They must be able to ensure the safety of all prisoners without resorting to involuntary solitary confinement of those who are the most vulnerable to abuse. This includes prisoners who are lesbian, gay, bisexual, transgender, intersex, and/or gender non-conforming and those who are perceived as such regardless of their identity. Too often, prisoners with disabilities, younger or older prisoners, and other prisoners targeted for violence are similarly warehoused in solitary confinement.

A transgender prisoner in a Texas facility explained that she believed “[a]bout 90% of the [transgender] girls in here . . . are in segregation. I expect that, before too long, I will be in there too.”¹⁶

In some cases, corrections professionals believe that solitary confinement is in the best interest of the vulnerable prisoners. In other cases, however, officials rely on such housing as a quick fix, not taking into consideration the serious harm caused by solitary confinement. In so doing, they tend to allow unsafe conditions in the rest of a facility to continue unchallenged, making the facility more dangerous for everyone, prisoners and staff alike.

When Krystal, a transgender girl in Louisiana, was 13 or 14, the bullying and violence became so bad in her juvenile detention facility that staff placed her in protective custody, where she

¹¹ The Prison Rape Elimination Act Standards available at www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf (last viewed on June 11, 2012).

¹² *Id.* As an example, see the relevant adult jail and prison standard at 115.43.

¹³ *Id.* at 115.53, 115.83, and 115.83.

¹⁴ *Id.* at 115.68 (referencing 115.43).

¹⁵ *Id.*

¹⁶ STOP PRISONER RAPE & ACLU NATIONAL PRISON PROJECT, *STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONER*, 5 (2005), available at <http://www.spr.org/pdf/stillindanger.pdf>.

remained for a month.¹⁷ But even after the abuse that she endured in the dorm, including finding urine and saliva in her shoes, lockdown was so painful that she requested to be returned to the dorm.¹⁸ “Sending LGBT victims of violence into isolation, instead of punishing their attackers, is common practice across the country, even though . . . the American Psychological Association opposes it.”¹⁹

A gay man in Attica was unexpectedly transferred into a two-person cell with a homophobic cellmate.²⁰ He refused to sign a waiver indicating that he would remain with that cellmate and was transferred into the Special Housing Unit for thirty days.²¹ After he had finished those thirty-days, he was again assigned to double-bunk with a homophobic cellmate and was placed in Special Housing for an additional 45 days when he refused to sign the waiver.²² With three years remaining on his sentence, he believed that he would be in the Special Housing Unit until his release because guards were unwilling to find safe housing for him in the general population.²³

J.T., a transgender woman faced sexual abuse, harassment, and discrimination due to her gender identity while in prison.²⁴ Despite her repeated requests to be moved away from a dangerous cellmate, no action was taken to protect her in the general population.²⁵ She found herself with no other option than to request administrative segregation.²⁶ The facility likely lists her administrative segregation as “voluntary” despite the failure of the prison guards to acknowledge or investigate her earlier requests for safer housing.

In *Meriwether v. Faulkner*, the 7th Circuit applied its precedential standard that prisoners in administrative segregation are not entitled to the same access to programs to a transgender woman who was at high risk of sexual assault in the general population and who challenged the prospect of spending the entirety of her thirty-five-year sentence in segregation.²⁷ The court found it “troubling to extend that holding” to a prisoner who, through no misconduct, “is required to serve a thirty-five-year sentence in segregation.”²⁸ Ultimately, the court left Meriwether’s housing determination to the wardens, because the court thought there was likely no “feasible alternative” to housing Meriwether in administrative segregation to prevent continued sexual assault in the general population.²⁹

¹⁷ Daniel Redman, *I Was Scared to Sleep: LGBT Youth Face Violence Behind Bars*, *The Nation* (June 21, 2010) <http://www.thenation.com/article/36488/i-was-scared-sleep-lgbt-youth-face-violence-behind-bars>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Letter from S.K., received 1/30/2012.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Letter from J.T., mailed 5/21/2012.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 821 F.2d at 416-17.

²⁸ *Id.*

²⁹ *Id.* at 417.

Every effort must be made to create institutions in which involuntary solitary confinement is used only as a last resort. To achieve this goal, the policies and culture of confinement facilities must prioritize creating safe, dignified housing for everyone—including sexual abuse survivors and others who are vulnerable to sexual abuse. When solitary confinement is used as a last resort, the need for continued solitary confinement should be reviewed on a regular basis (preferably every 10 days), and a vulnerable prisoner should be moved to less restrictive housing as soon as possible. To minimize the negative health consequences of solitary confinement, corrections officials should provide prisoners in solitary confinement access to appropriate health care services, programs, activities, exercise time, and services.

Use of Solitary Confinement as Punishment

Many survivors of sexual abuse in detention and vulnerable prisoners are subjected to involuntary solitary confinement as a de facto punishment. In far too many cases, however, prisoner rape survivors who report their abuse are placed in solitary confinement as retaliation for “making trouble.” Likewise, many corrections officials use solitary confinement to express animus toward certain prisoner populations. This is particularly true for prisoners who are lesbian, gay, bisexual, transgender, intersex, and/or gender non-conforming and prisoners whose criminal history is particularly disfavored (such as prisoners convicted of child sexual abuse).

This type of abusive use of solitary confinement must be taken as seriously as any other form of harm inflicted on a prisoner. The perpetrators of such abuse must be held accountable and prosecuted to the fullest extent under the law. Significant pressure should be put on the Department of Justice, state attorneys general, and local district attorneys to investigate and prosecute abusive use of solitary confinement in facilities under their jurisdictions.

A.D. was 17-years-old when he was adjudicated for second-degree robbery and committed to the California Youth Authority (CYA).³⁰ Even though he was never accused of or charged with a sex offense, CYA automatically placed him in a sex offender unit solely because he was bisexual.³¹ Because A.D. lived in the sex offender unit and was known to be gay, other wards expected that he would service them sexually. This was exacerbated by staff who called him homophobic names, made sexualized references toward him in front of the other wards, and refused to take any steps to protect him from sexual harassment and assault. Whenever A.D. refused to comply with sexual demands made by other residents, the other residents physically attacked him.³² On one occasion when A.D. defended himself, facility staff responded by placing him in solitary confinement.³³ In a particularly severe assault, another youth slashed A.D. in the face with a razor blade, creating a wound that required hundreds of stitches to close and will leave him permanently scarred.³⁴ After this attack, staff placed A.D. in solitary confinement while he

³⁰ Katayoon Majd, et al, *Hidden Injustice: Lesbian, Gay, Bisexual, and Transgender Youth in Juvenile Courts*, 127 (2009).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

recovered and then prohibited him from leaving his unit for the remaining six months of his confinement.³⁵ A six-month confinement in isolation for a 17-year old drastically limits the rehabilitative measures that juvenile detention is designed to provide. Additionally, A.D.'s experience of both sexual assault and isolation was avoidable had staff not exacerbated the situation themselves.

One transgender girl incarcerated in a New York male juvenile jail was strip searched and told to remove her women's underwear and discard it.³⁶ She removed her underwear but refused to discard it because it was only pair of gender-appropriate underwear she possessed.³⁷ Upon that refusal, she was told to face the wall.³⁸ She was then beaten by four prison officials, verbally harassed, and placed in 24-hour lock down.³⁹

Prisoners who advocate in favor of safer prisons and improved conditions are also punished for their efforts. R.W., a bisexual man who has served 25 years of a 40 years-to-life sentence in a California prison has tried to bring attention to the dangers transgender women and gay men face in confinement.⁴⁰ He has been placed in administrative segregation for these efforts several times.⁴¹

The procedural safeguards of frequent reevaluation of solitary confinement should apply to disciplinary segregation as well. Increasing the frequency of these evaluations will help ensure that discipline is appropriate to the misconduct, that it is not abusively applied to disfavored groups, and that it is not imposed unjustly at the expense of prisoners' mental health.

Use of Solitary Confinement in Immigration Detention Facilities

Through NCLR's immigration and asylum work, we also frequently encounter LGBT detainees in U.S. Immigration and Customs Enforcement (ICE) facilities. Many of those people seek asylum in this country based on persecution and physical violence, including sexual violence that they have suffered in their home countries on the basis of their sexuality or gender identity. In our experience, LGBT detainees, and particularly detainees who are transgender, are frequently placed in solitary confinement for months on end while they await decisions in their asylum or deportation cases. Such placements are devastating to the medical and mental health of those detainees. Immigration detention is not supposed to be a form of punishment—many people held in ICE facilities are asylum seekers fleeing desperate conditions, as well as older adults, people with failing health, and family members of U.S. citizens. Yet these detainees are subjected to conditions on par with the harshest conditions found in correctional institutions. It is essential

³⁵ *Id.*

³⁶ Letter from S.B, mailed 6/3/2011.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Letters from R.W, received 6/22/2011, 8/25/2011, and 3/22/2012.

⁴¹ Letter from R.W., received 3/22/2012.

that all of the protections against the abusive use of solitary confinement be extended to detainees in ICE facilities as well.

Solitary Confinement Drains Resources

Inappropriate or abusive use of solitary confinement drains vital funds that could be used much more effectively. In a 2009 report, the California Inspector General estimated that, based on needs for increased staffing and greater physical space, the annual costs per prisoner in administrative segregation average at least \$14,600 more than the annual costs per prisoner in general population.⁴² The California Inspector General concluded that the overuse of solitary confinement cost the California Department of Corrections and Rehabilitation nearly \$11 million every year.⁴³

Looking at the problem on a national level, estimates indicate that housing prisoners in solitary confinement or supermax isolation costs between 145% and 200% of the cost of housing a prisoner in the general population.⁴⁴ “[K]eeping an inmate in a supermax prison costs roughly \$50,000 per year compared with \$20,000 per year for inmates kept in the general population.”⁴⁵ Despite the increased cost of solitary confinement and its documented overuse, the number of people housed in solitary confinement is increasing. Though precise figures are unavailable, in 2000, approximately 60,000 prisoners (4.4% of the total prison population of the U.S.) were subjected to solitary confinement.⁴⁶ In 2005, a Bureau of Justice Statistics census reported there were 81,622 people held in restrictive housing.⁴⁷

These figures do not take into account the cost of building and maintaining prisons designed to house prisoners in single cells. “Basic economics demonstrates that maintaining these prisons below their population capacities increases [the] cost differential even further.”⁴⁸ This perverse incentive encourages prison administrators to expend funds on solitary confinement where isolation is unnecessary for staff or prisoner safety. For example, one year after a supermax prison opened in Wisconsin, “the number of inmates in solitary confinement was three times

⁴² California Office of the Inspector General, Management of the California Department of Corrections and Rehabilitation’s Administrative Segregation Population (2009), available at <http://www.oig.ca.gov/media/reports/BOA/reviews/Management%20of%20the%20California%20Department%20of%20Corrections%20and%20Rehabilitation's%20Administrative%20Segregation%20Unit%20Population.pdf> (last visited June 11, 2012).

⁴³ *Ibid*

⁴⁴ An Urban Institute study found that, in Ohio, “it costs \$149 per day to house a supermax prisoner, \$101 per day to house a maximum-security prisoner and \$63 per day to house the average nonsupermax prisoner;” and in Texas “ad seg [administrative segregation] units cost an average of \$61.63 per prisoner per day in 2002—45 percent more than general population units’ average cost of \$42.46 per prisoner per day” http://www.urban.org/UploadedPDF/411326_supermax_prisons.pdf

⁴⁵ Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 14 (2006).

⁴⁶ *Id.* at 3.

⁴⁷ Angela Browne, et al., *Prisons Within Prisons: The Use of Segregation in the United States*, 24 FED. SENTENCING REP. 46 (2011).

⁴⁸ Hresko, *supra* note 48 at 14-15.

what it had been before, even though the criteria for solitary confinement use had remained the same.”⁴⁹

Corrections administrators often cite cost as one reason why facilities are not made as safe as possible. However, funds spent on inappropriate and abusive use of solitary confinement could be used to establish and implement basic policies and procedures aimed at preventing sexual abuse and other forms of violence. Such reinvestment of scarce resources would lead to all around safer, better run confinement facilities. It would also prevent the negative health consequences among prisoners who are placed inappropriately in solitary confinement. Corrections administrators should be encouraged to begin shifting expenditures in this direction as soon as possible and should utilize various correctional experts, including James Austin,⁵⁰ who has assisted prison facilities to successfully do this.

Conclusion

With strong leadership, effective policies, and sound prison practices, prison officials can provide survivors of sexual abuse and vulnerable prisoners with safe housing that is far less restrictive than solitary confinement. Achieving this goal would fundamentally transform the culture within a facility to the benefit of everyone—prisoners, staff, and ultimately the communities to which almost all prisoners eventually return. Notable steps have been taken in this direction but much more work is required to severely restrict the use of solitary confinement, to review that use frequently and on a regular basis, and to ensure extensive programming for prisoners who are housed in solitary confinement in extreme cases.

We again thank the committee for their work on this urgent human rights and mental health issue.

Sincerely,



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National Center for Lesbian Rights

⁴⁹ *Id.* at 15.

⁵⁰ James Austin is the President of JFA Institute, a non-profit corrections consulting firm that works in partnership with federal, state and local government agencies to implement more effective criminal justice policies. He has served as an expert or consultant to various federal courts and correctional systems throughout the United States, including as an expert in the recent California prison overcrowding case that went to the United States Supreme Court.