



February 17, 2017

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The 49 undersigned national, state, and local criminal justice, civil rights, human rights, women's rights, disability rights, immigrants' rights, LGBTQ, faith-based, and open government organizations are writing in response to the Department of Justice's (DOJ) December 19, 2016, proposed implementation of the Death in Custody Reporting Act (DCRA).¹ We appreciate DOJ's continued efforts to perfect the guidance it provides states, law enforcement, and other stakeholders on DCRA compliance. DCRA was enacted more than two years ago, on December 18, 2014, so we welcome the data that DCRA compliance will produce. If properly implemented, DCRA could yield the most accurate federal numbers on deaths in custody, disaggregated by race, ethnicity and other decedent demographics, to date.

DCRA: Arrest-Related Deaths

In earlier correspondence around DCRA and arrest-related deaths, many of the undersigned organizations expressed concerns with DOJ's August 4, 2016 proposal for DCRA compliance.² That proposal shifted the burden to collect data on arrest-related deaths from states to DOJ, with DOJ conducting an initial open-source review of media and other public reports. The proposal also did not discuss federal law enforcement compliance; provide a clear definition for the term "custody;" or describe penalties for noncompliance.³ We are pleased to see that our concerns have been addressed in the December 19th notice, as well as other DOJ statements.

¹ Death in Custody Reporting Act of 2013, Pub. L. No. 113-242, 128 Stat. 2860 (Dec. 18, 2014) (codified at 42 U.S.C § 13727 (2014)) available at <https://www.congress.gov/113/plaws/publ242/PLAW-113publ242.pdf> [hereinafter Death in Custody Reporting Act of 2013].

² Coalition Letter to Attorney General Loretta Lynch, et al., *Re: Proposed Implementation of Deaths In Custody Reporting Act (DICRA)*, (Oct. 3, 2016) available at https://www.aclu.org/sites/default/files/field_document/dicra_coalition_comments_0.pdf.

³ *Id.*

We thank DOJ for clarifying states' obligation to first collect and provide DOJ with information about arrest-related deaths based on "official government records, documents, or personnel."⁴ The proposal requires DOJ to supplement and cross-check the information submitted by states with its open-source review summaries, to which states must also respond with further information. As we expressed in earlier correspondence, DCRA requires states to affirmatively report its data, rather than DOJ bear the responsibility for initial data collection from states. This process responds to statutory requirements and ensures DOJ receives the most accurate, complete, and reliable information. Furthermore, as we predicted in earlier correspondence, it is unlikely that national media attention and resources will remain focused on policing indefinitely. The Guardian's *The Counted*, which documented fatal police encounters in 2015 and 2016, is not currently collecting and reporting this data for 2017.

Second, we expect to see federal law enforcement compliance with DCRA based on earlier commitments from DOJ. Federal law enforcement compliance with DCRA began with Fiscal Year 2016, which ended September 30, 2016.⁵ Former Attorney General Lynch issued guidance in October 2016⁶ to federal law enforcement agencies on their reporting obligations under DCRA, so they should be well positioned to produce data on deaths in custody from October 1, 2015 through September 30, 2016.

Third, we commend DOJ for articulating a broad interpretation of the circumstances under which deaths must be reported under DCRA.⁷ The guidelines properly capture the scenarios under which deaths in custody should be reported to DOJ. As a result, we expect that deaths like those of Eric Garner and Tamir Rice will now be required to be submitted to the federal government.⁸

Fourth, we generally support the compliance program described by the guidelines whereby the Attorney General may, at his or her discretion, draw down up to 10 percent of states' Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) funding for states that do not comply with DCRA, a penalty that is prescribed by the law. However, the guidelines propose limitless use of a "pre-penalty" option, which allows the 10 percent penalty against Byrne JAG funds to be redirected to support DCRA compliance.⁹ Though we believe states should be given an opportunity to use its Byrne JAG funding to comply with DCRA, it is not productive to set no outer limit to the number of times a state may choose the "pre-penalty" option. We propose states be permitted to utilize the "pre-penalty" option no more than three consecutive fiscal years, at which point the compliance plan should set a process for withholding Byrne-JAG funding. We believe three years provides ample opportunity for states to meet their federal reporting obligation under DCRA.

⁴ Department of Justice, Agency Information Collection Activities; Proposed Collection Comments Requested; New Collection: Death in Custody Reporting Act Collection, 81 Fed. Reg. 91948 (Dec. 19, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30396.pdf> [hereinafter Proposed Collection Comments].

⁵ See Death in Custody Reporting Act of 2013, *supra* note 1.

⁶ Memorandum from Loretta Lynch, Attorney General, Department of Justice, to Heads Executive Departments and Agencies, et al. (Oct. 15, 2016), *available at* https://www.bjsard.org/documentation/AG_DCRA_federal_memo.pdf (discussing the Death in Custody Reporting Act).

⁷ See Proposed Collection Comments, *supra* note 4.

⁸ See John Swaine & Oliver Laughland, *Eric Garner and Tamir Rice among those missing from FBI record of police killings*, THE GUARDIAN, Oct. 1, 2015, *available at* <http://www.theguardian.com/us-news/2015/oct/15/fbi-record-police-killings-tamir-rice-eric-garner>.

⁹ See Proposed Collection Comments, *supra* note 4.

And lastly, we applaud DOJ's desire to provide transparency around DCRA implementation and compliance. As the proposal indicates, "DOJ will release certain information to the public each fiscal year, including the state plans, the number of deaths reported for each agency and facility, and data and circumstances surrounding those deaths."¹⁰

DCRA: Correctional Facility Deaths

The December 19th proposal also touches on DCRA compliance on deaths that occurred while the decedent was in the custody of local jails, state prisons, and other correctional facilities. Specifically, DOJ intends DCRA compliance to capture those who die "under the jurisdiction or supervision of a law enforcement agency or correctional or detention facility but located elsewhere, such as special jail facilities (e.g., medical/treatment/release centers, halfway houses, or work farms), or in transit."¹¹ This definition can be read as excluding any deaths that occur at a non-correctional or detention facility, like a public or private hospital or medical facility to which seriously ill prisoners and detainees are often sent to die. It is critical to capture these deaths. This definition must be clarified.

The reporting requirements for deaths in correctional facilities can also be improved. Incident reports, while requiring "the law enforcement or correctional agency involved"¹² should also require the name of the private prison or private health care contractor, if applicable. Incident reports require the "manner of death," but they should also require the cause of death, which will provide greater context to the circumstances surrounding the death in custody. Additionally, reporting requirements for deaths in correctional facilities should include time in custody; the housing assignment where the death occurred (segregation, isolation, restricted housing, etc.); and a brief medical history summary consistent with privacy laws (a review of medical charts or intake assessments), which include information on whether a decedent ever stayed overnight in a medical facility since admission or experienced serious mental illness and/or intellectual and physical disabilities.

We also appreciate DOJ's effort to provide transparency and evidence-based policy development around correctional deaths through DCRA compliance. However, DOJ should articulate what information will be disclosed to the public.

Thank you for your attention to this matter. We also respectfully request a meeting with you to discuss this matter further. If you have any questions or comments, please feel free to contact Kanya Bennett, Legislative Counsel with the ACLU, phone: (202) 715-0808 or email: kbennett@aclu.org or Sakira Cook, Counsel with The Leadership Conference on Civil and Human Rights, phone: (202) 263-2894 or email: cook@civilrights.org or Monique Dixon, Deputy Policy Director and Senior Counsel with the NAACP Legal Defense and Educational Fund, Inc., phone: (202) 216-5564 or email: mdixon@naacpldf.org.

Sincerely,

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

African American Ministers In Action (AAMIA)
American Association of University Women (AAUW)
American Civil Liberties Union
Amnesty International USA
Andrew Goodman Foundation
Bill of Rights Defense Committee/ Defending Dissent Foundation
Black and Pink
Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)
The Constitution Project
Council on American-Islamic Relations (CAIR)
CURE
Disability Rights Education & Defense Fund
Drug Policy Alliance
Florida Legal Services
Friends Committee on National Legislation
Georgia Latino Alliance for Human Rights
Global Justice Institute
Human Rights Defense Center
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Legal Resource Center
Justice Strategies
Kino Border Initiative
LatinoJustice PRLDEF
The Leadership Conference on Civil and Human Rights
Metropolitan Community Churches
NAACP
NAACP Legal Defense and Educational Fund, Inc.
National African American Drug Policy Coalition
National Association of Criminal Defense Lawyers (NACDL)
National Collaborative for Health Equity
National Council of Churches
National Council of Jewish Women
National Disability Rights Network
National Immigration Law Center
National Organization for Women
OneAmerica (Washington State)
OpenTheGovernment.org
Prison Policy Initiative
Project South
Reformed Church of Highland Park
Sharon Baptist Head Start
Society of Professional Journalists
South Asian Americans Leading Together (SAALT)
Southern Border Communities Coalition

StoptheDrugWar.org

Sunlight Foundation

T'ruah: The Rabbinic Call for Human Rights

Wilco Justice Alliance

The Woodhull Freedom Foundation