

## PART XI: ACCOUNTABILITY AND OVERSIGHT

### General Commentary

This Part incorporates current thinking about the most effective way to oversee prisons and jails. While litigation, and particularly implementation of court decrees, is the form of external oversight most familiar to lawyers, it is a last resort rather than a routine method of ensuring the protection of prisoners. (This is especially true since the enactment of the PLRA, with its many limitations on courts' equitable authority.<sup>433</sup>) Injunctive orders are important, but all correctional facilities should have several layers of accountability, whereby entities internal and external to the correctional agency are responsible for routine monitoring of conditions in prisons, for the investigation and prosecution of allegations of mistreatment of prisoners, and for handling prisoner grievances. Standard 23-11.1 begins by covering effective internal accountability measures, calling upon corrections officials to take steps to enhance their agencies' transparency and to improve compliance with their own policies and procedures. The remaining Standards in the Part set out a number of external oversight sources. Standard 23-11.5 conceptualizes media access to jails and prisons as an accountability method.

This Part, more than any other in these standards, is geared to the infrastructure rather than the substance of constitutional compliance. It aims to "shape the institutions of government" to facilitate protection of constitutional and legal rights. *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

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433. See commentary to Standard 23-9.3; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006); James J. Stephan, *Census of State and Federal Correctional Facilities, 2005*, at app. tbl.6 (Bureau of Justice Statistics, Oct. 2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf>.

## **Standard 23-11.1 Internal accountability**

(a) A correctional agency should establish an independent internal audit unit to conduct regular performance auditing and to advise correctional administrators on compliance with established performance indicators, standards, policies, and other internal controls.

(b) A correctional agency should designate an internal unit, answerable to the head of the agency, to be responsible for investigating allegations of serious staff misconduct, including misconduct against prisoners, and for referring appropriate cases for administrative disciplinary measures or criminal prosecution.

(c) If a correctional agency contracts for provision of any services or programs, it should ensure that the contract requires the provider to comply with these Standards, including Standard 23-9.1 governing grievances. The agency should implement a system to monitor compliance with the contract, and to hold the contracted provider accountable for any deficiencies.

(d) Correctional administrators and officials should seek accreditation of their facilities and certification of staff from national organizations whose standards reflect best practices in corrections or in correctional sub-specialties.

(e) Correctional administrators and officials should regularly review use of force reports, serious incident reports, and grievances, and take any necessary remedial action to address systemic problems.

(f) Correctional administrators should routinely collect, analyze, and publish statistical information on agency operations including security incidents, sexual assaults, prisoner grievances, uses of force, health and safety, spending on programs and services, program participation and outcomes, staffing, and employee discipline.

(g) Correctional administrators and officials should evaluate short and long-term outcomes of programs provided to prisoners and, where permitted by applicable law, should make the evaluations and any underlying aggregated data available upon request to researchers, investigators, and media representatives.

(h) Correctional agencies should work together to develop uniform national definitions and methods of defining, collecting, and reporting accurate and complete data.

(i) Governmental authorities should not exempt correctional agencies from their jurisdiction's Administrative Procedure Act, Freedom of Information Act, or Public Records Act.

### *Cross References*

ABA, TREATMENT OF PRISONER STANDARDS, 23-5.6(i) (use of force, investigation and reporting), 23-6.7 (quality improvement), 23-9.1 (grievance procedures), 23-10.5 (privately operated correctional facilities)

### *Related Standards and ABA Resolutions*

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standards 23-7.2 (regulation of correctional institutions), 23-7.3 (administrative oversight)

ABA, RESOLUTIONS, 101C (Aug. 1993) (correctional accreditation), 113C (Aug. 1999) (national commission on sentencing, corrections and re-entry)

ACA, JAIL STANDARDS, 4-ALDF-7D-01 and 7D-02 (quality improvement practices)

ACA, PRISON STANDARDS, 4-4036 (independent audit)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, §§ 8 (quarterly reporting), 9 (internal quality assessment/improvement), 48 (quality assessment)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.A (information systems), II.B.A (internal quality improvement)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶¶ 64-67 (program evaluation)

### *Commentary*

The first step in bringing transparency and accountability into the operations of a correctional agency is through internal assessment, investigation, reporting, and problem-solving measures undertaken by the agency itself. This Standard prescribes methods through which correctional agencies should self-monitor. The problems identified through this self-monitoring and the corrective measures taken in response to deficiencies unearthed during this monitoring can improve a correctional agency's performance, make correctional operations and programs more cost-effective, and prevent small problems from becoming major problems.

Most of the internal accountability measures required by this Standard are prevalent throughout the United States and can feasibly be implemented in all jurisdictions, including localities operating small jails.<sup>434</sup> It bears noting, however, that the information gathering, analyses of the information and data collected, and dissemination of information collected through internal accountability processes will be for naught if correctional and other governmental authorities fail to take the steps needed to remedy problems identified during these internal review processes.

*Subdivisions (a) & (b):* The audits required under subdivision (a) should cover key facets of the operations of the correctional agency and the operations of, and conditions in, the correctional facilities for which the agency is responsible. Examples of areas on which these audits should focus include, but are not limited to: staff recruitment, training, supervision, and discipline; inmate deaths; medical and mental-health care; use of force; inmate violence; conditions of confinement; inmate disciplinary processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.<sup>435</sup> The audits should also evaluate the efficacy of, and problems in, various reporting mechanisms, such as the grievance system for prisoners. These reporting mechanisms, if well structured and well run, can be powerful tools for identifying and rectifying problems involving individual prisoners and staff as well as systemic problems.

A primary function of the audits described in subdivision (a) is to discern whether defined policies, procedures, standards, and other internal controls are being followed in practice. By contrast, the internal review process that is the focus of subdivision (b) entails the investigation of specific allegations of serious misconduct by staff, such as excessive force used on a prisoner. The unit responsible for audits under subdivision (a) can be the same or a different unit than that responsible for investigations under subdivision (b), but correctional administrators should ensure that neither function is neglected in favor of the other.

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434. For examples of a range of internal accountability measures adopted by one prison system – that overseen by the Texas Department of Criminal Justice, see Carl Reynolds, *Effective Self-Monitoring of Correctional Conditions*, 24 PACE L. REV. 769 (2004).

435. The external monitoring and inspection required by Standard 23-11.3 would also focus on these areas, among others. See AM. BAR ASS'N, RESOLUTION 104B (2008) (prison oversight), available at [http://www2.americanbar.org/sdl/Documents/2008\\_AM\\_104B.pdf](http://www2.americanbar.org/sdl/Documents/2008_AM_104B.pdf).

*Subdivision (c):* When a correctional agency contracts with another entity to provide services or programs, such as medical care or educational programming to prisoners, the agency still retains the responsibility of ensuring that the services and programs are of high quality and comport with the ABA Standards as well as policies, performance indicators, and other criteria identified by the agency. To fulfill this responsibility, the contract with the provider should require that the provider comply with these Standards. In addition, the correctional agency should monitor compliance with the contract, utilizing the monitoring mechanisms set forth in Standard 23-10.5(g). Finally, when monitoring by the correctional agency reveals deficiencies in the services or programs delivered under the contract, the agency must ensure that these deficiencies are rectified with dispatch or must take other appropriate steps to hold the provider accountable for these deficiencies, such as terminating the contract with the provider.

*Subdivision (d):* This subdivision requires that correctional facilities be accredited and their staff certified by national organizations whose standards reflect best practices in corrections or correctional sub-specialties, such as correctional healthcare. Accreditation and certification constitute a form of peer review by outsiders who are experts in corrections.

The certification of correctional staff can enhance their ability to perform their jobs well, help to ensure that there have been no significant gaps in their training, and infuse the corrections field with an ethos of professionalism. Accreditation also can have many additional benefits. For example, problems in correctional operations or conditions that were not identified through internal review processes or have not been remedied adequately can be spotted by those who are not a part of the correctional agency and are less inured to the status quo. And the desire to secure accreditation or a high accreditation score can spur correctional agencies to resolve problems identified in preparation for, or during, the accreditation audit.

The accreditation of a correctional facility does not obviate the need for the external monitoring by an independent governmental agency required by Standard 23-11.3. Accreditation audit reports and findings rendered at accreditation hearings currently are not made public. Therefore, accreditation does not meet the need for transparency in the operation of correctional facilities. In addition, the dependence of correctional accrediting bodies on accreditation fees paid by correctional facilities potentially can compromise the objectivity of accreditation-related

decisions.<sup>436</sup> And there typically are long intervals between accreditation audits, limiting their ability to catalyze the resolution of problems early on.<sup>437</sup>

Despite its limitations, accreditation is the only mechanism already in place nationwide that offers some form of external monitoring for all types of correctional facilities, including small jails. In addition, accreditation can complement the work of the independent monitoring entity required by Standard 23-11.3, serving as a valuable check on the reliability of that entity's findings.

*Subdivision (e):* This provision requires prison officials to review grievances along with use of force reports and serious incident reports to obtain important information about how their prisons are functioning. Sometimes such a requirement is imposed by a court, see, e.g., *Skinner v. Uphoff*, 234 F. Supp. 2d 1208 (D. Wyo. 2002) (requiring implementation of effective review processes for prisoner-on-prisoner assaults, to enable defendant officials to prevent future harm). But in any event, it is a mainstay of sound correctional management. See commentary to Standard 23-9.1.

*Subdivisions (f) & (h):* The Association of State Correctional Administrators has spent years developing a performance-based measures system, to enable correctional administrators to better assess their own facilities in comparison with others, and change over time. These measures could be a central component of compliance with these subdivisions. See Association of State Correctional Administrators, Performance-Based Measures System Resource Manual (November 2009), available at <http://nicic.gov/Library/021116>. The development of uniform definitions for key performance data collected and reported by correctional authorities will facilitate their understanding, and the public's understanding, of the true conditions in a correctional facility.

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436. For a discussion of this problem as well as of some of the benefits that can accrue from accreditation, see Lynn S. Branham, *Accrediting the Accreditors: A New Paradigm for Correctional Oversight*, 30 *PACE L. REV.* 1656 (2010).

437. The Commission on Accreditation for Corrections, which operates under the auspices of the American Correctional Association, currently is the only national entity in the United States that accredits entire correctional facilities, such as prisons and jails. *Id.* at 1658. The accreditation award lasts for three years, and an accredited facility generally is not reaudited until it applies for reaccreditation. Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 61, 109 (2007).

At present, for example, correctional authorities define what constitutes an “assault” by an inmate in a number of different ways. Variations in assault statistics at various correctional facilities may simply reflect these definitional distinctions rather than differences in the level of violence at those facilities.

*Subdivision (g):* Through data collection and analysis, correctional authorities can better assess the performance of certain correctional operations and programs, and determine what facets of their operations need to be improved. They also can identify what is working well and then replicate effective policies, procedures, practices, and programs at other facilities. And correctional authorities can fine-tune the rehabilitative programs established for prisoners under Standard 23-8.2 so that they better meet their purposes.<sup>438</sup>

*Subdivision (i):* Correctional agencies should be subject to statutes in their jurisdictions designed to promote procedural fairness, transparency, and accountability. The Model State Administrative Procedure Act provides for emergency regulation in appropriate circumstances. See MSAPA § 3-108(a).

## **Standard 23-11.2 External regulation and investigation**

**(a) Independent governmental bodies responsible for such matters as fire safety, sanitation, environmental quality, food safety, education, and health should regulate, inspect, and enforce regulations in a correctional facility. A correctional facility should be subject to the same enforcement penalties and procedures, including abatement procedures for noncompliance, as are applicable to other institutions.**

**(b) Governmental authorities should authorize and fund an official or officials independent of each correctional agency to investigate the acts of correctional authorities, allegations of mistreatment of prisoners, and complaints about conditions in correctional facilities, including complaints by prisoners, their families, and members of the community, and to refer appropriate cases for administrative disciplinary measures or criminal prosecutions.**

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<sup>438</sup>. For several resources discussing such evidence-based programs and policies, see *supra* note 276.

(c) When federal or state law authorizes a governmental or non-governmental agency or organization to conduct an investigation relating to a correctional facility, correctional officials should allow that agency or organization convenient and complete access to the facility and should cooperate fully in the investigation.

(d) When a prisoner dies, correctional officials should promptly notify the jurisdiction's medical examiner of the death and its circumstances; the medical examiner should decide whether an autopsy should be conducted. Where authorized by law, a correctional official should also be permitted to order an autopsy.

(e) Correctional officials should encourage and accommodate visits by judges and lawmakers and by members of faith-based groups, the business community, institutions of higher learning, and other groups interested in correctional issues.

### *Cross References*

ABA, TREATMENT OF PRISONER STANDARDS, 23-3.4(a) (healthful food, sanitation), 23-6.6(c) (adequate facilities, equipment, and resources, licensing standards), 23-7.4 (prisoner organizations), 23-8.4(c) (work programs, health and safety), 23-8.5 (visiting), 23-11.3 (external monitoring and inspection)

### *Related Standards*

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13 (maintenance of institutions)

ACA, JAIL STANDARDS, 4-ALDF-1A-01 through 1A-03 (sanitation), 1A-06 (physical plant), 1A-07 (water supply), 4-ALDF-1C-07 (fire safety), 4-ALDF-4A-11 (food service facilities), 4-ALDF-4D-23 (inmate death) and 4D-25 (health care and quarterly meetings)

ACA, PRISON STANDARDS, 4-4123 (building codes), 4-4124 (fire codes), 4-4321 (health and safety regulations), 4-4329 (sanitation inspections), 4-4425 (offender's death)

AM. ASS'N FOR CORR. PSYCHOL., STANDARDS, § 10 (quality assessment/improvement oversight)

AM. PUB. HEALTH ASS'N, CORRECTIONS STANDARDS, II.B.V (external audits)

CORR. ED. ASS'N, PERFORMANCE STANDARDS, ¶¶ 65 (external program evaluation)



## Commentary

*Subdivision (a):* Certain particularly important facets of a correctional facility's operations, notably those affecting health and safety and those affecting educational programming for prisoners, should be subject to regulation and inspection by independent governmental entities with relevant regulatory expertise. For example, the state entity responsible for promulgating and enforcing fire-safety regulations in the state should develop and enforce regulations to promote fire safety in the state's prisons.

External regulatory entities should enforce their regulations with the same rigor in correctional settings as the public expects and deserves in other contexts. In fact, health and safety regulations should be implemented with particular rigor in prisons and jails, where the risks tend to be enhanced. The housing of prisoners in close quarters, for example, can facilitate the spread of potentially lethal infectious diseases.<sup>439</sup> In case of fire, prisoners' confinement in cells increases the risk of injury or death, both for prisoners and firefighting personnel.

*Subdivision (b):* This subdivision contemplates designating an official, not part of a traditional law enforcement agency, to investigate allegations of serious staff misconduct, abuses of prisoners, and poor prison conditions. These investigations often will be instigated by a referral from the agency's internal investigative office described in Standard 23-11.1(b), but also may result from complaints from prisoners, their families, and members of the community. This official should be able to clear or support the allegations. An Inspector General with authority independent of the correctional agency would be one method of compliance.<sup>440</sup>

The subdivision does not regulate how the official it requires should open criminal, civil, or disciplinary proceedings. One method would be to give the official independent authority to conduct disciplinary

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439. See THEODORE M. HAMMETT & LYNNE HARROLD, U.S. DEP'T OF JUSTICE, TUBERCULOSIS IN CORRECTIONAL FACILITIES 4 (1994) (recounting how tuberculosis swept through New York prisons from 1990 through 1992, killing thirty-six prisoners and one correctional officer).

440. In California, the Inspector General has been vested with the responsibility to perform the functions described above. For more information about the Inspector General, see *About Us*, OFFICE OF THE INSPECTOR GENERAL, <http://www.oig.ca.gov> (last visited May 27, 2011). In the federal system, the Justice Department's Inspector General performs this function.

proceedings and criminal and civil rights prosecutions; another might be to require the official to refer such cases back to the correctional agency or to local law enforcement, as appropriate. For the international law version of this subdivision, see UN Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, Principle 29, available at [http://www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_01.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_01.pdf).<sup>441</sup>

*Subdivision (c):* This subdivision's requirement of cooperation for authorized investigations of correctional facilities relates to statutes such as the Civil Rights of Institutionalized Persons Act<sup>442</sup> ("CRIPA"), and the federal "protection and advocacy" statutes.<sup>443</sup> Although CRIPA authorizes the Department of Justice to investigate violations of the civil rights of prisoners, and gives the Department subpoena power in this connection,<sup>444</sup> at least one court has held that it does not empower the Department to conduct site inspections if the relevant state or local officials do not consent.<sup>445</sup> The protection and advocacy statutes authorize independent, federally-funded legal services providers known as Protection and Advocacy (P&A) organizations to monitor, investigate, and pursue administrative or legal remedies to protect the federal rights of prisoners with mental illness or mental retardation, but occasionally

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441. 1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.

2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. GAOR 43rd Sess., Supp. No. 49, U.N. Doc. A/43/49, Principle 29 (Dec. 9, 1988).

442. 42 U.S.C. §§ 1997 *et seq.*

443. See Developmental Disabilities and Bill of Rights Act, 42 U.S.C. §§ 15001-115; Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. §§ 10801-10807; and Protection and Advocacy of Individual Rights Act, 29 U.S.C. § 794e.

444. See 42 U.S.C. § 1997a-1 (2006).

445. *United States v. Michigan*, 868 F. Supp. 890 (W.D. Mich. 1994). (Other courts have found somewhat broader access rights. *United States v. County of San Diego*, 1991 WL 642768 (S.D. Cal., July 22, 1991) (CRIPA preempts state confidentiality laws relating to juveniles); *United States v. County of Los Angeles*, 635 F. Supp. 588 (C.D. Cal. 1986) (same).)

facilities subject to such investigation contest P&A access.<sup>446</sup> Subdivision (c) takes the position that access is key to implementing statutes like these, and therefore generally useful in securing constitutional conditions.

*Subdivision (d):* Because prisoners are vulnerable to abuse and neglect that can culminate in their death, the jurisdiction's medical examiner should be notified whenever a prisoner dies. The medical examiner should have the authority to order an autopsy even over the objection of correctional officials. Correctional officials may also have authority to order an autopsy, and may do so if only to avoid discipline and security problems that can ensue when prisoners believe that a prisoner's death is attributable to staff malfeasance.

*Subdivision (e):* Prison visits can and should inform decision-making by governmental authorities. They can help judges and lawmakers understand the impact of sentencing laws and sentencing decisions, the challenges prisoners face in adapting to life inside and then outside prison, the difficulties confronting correctional authorities performing their jobs, and how additional resources would help them do so. Similarly, giving students and academic researchers expanded access to correctional facilities has important reciprocal benefits, catalyzing public support for correctional reforms and the resources necessary to effectuate them.

Encouraging other groups interested in correctional issues to visit prisons and jails can also help to meet the needs of prisoners. Faith-based groups, for example, can provide prisoners opportunities for spiritual growth, and mentors upon reentry. Members of the business community who visit prisons may be encouraged to provide prisoners jobs upon their release. Media access is important enough to have its own separate section, Standard 11.5.

The heightened public awareness resulting from prison and jail visits will result in improvements in conditions and operations. As Chief Justice Warren Burger once aptly noted: "A visit to most prisons will make you a zealot for prison reform."<sup>447</sup>

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446. See, e.g., *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996); *Mississippi Protection & Advocacy System, Inc. v. Cotten*, 929 F.2d 1054, 1058-59 (5th Cir. 1991) ("The state cannot satisfy the requirements of [the Act] by establishing a protection and advocacy system which has this authority in theory, but then taking action which prevents the system from exercising that authority.").

447. *Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974) (internal quotations omitted).

### **Standard 23-11.3 External monitoring and inspection**

(a) Governmental authorities should authorize and fund a governmental agency independent of each jurisdiction's correctional agency to conduct regular monitoring and inspection of the correctional facilities in that jurisdiction and to issue timely public reports about conditions and practices in those facilities. This agency, which should be permitted to be the same entity responsible for investigations conducted pursuant to Standard 23-11.2(b), should anticipate and detect systemic problems affecting prisoners, monitor issues of continuing concern, identify best practices within facilities, and make recommendations for improvement.

(b) Monitoring teams should possess expertise in a wide variety of disciplines relevant to correctional agencies. They should receive authority to:

- (i) examine every part of every facility;
- (ii) visit without prior notice;
- (iii) conduct confidential interviews with prisoners and staff; and
- (iv) review all records, except that special procedures may be implemented for highly confidential information.

(c) A correctional agency should be required to respond in a public document to the findings of the monitoring agency, to develop an action plan to address identified problems, and to periodically document compliance with recommendations or explain noncompliance; however, if security requires, the public document should be permitted to be supplemented by a confidential one.

(d) The monitoring agency should continue to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.

#### *Cross References*

ABA, TREATMENT OF PRISONER STANDARDS, 23-11.2 (external regulation and investigation)

#### *Related Standards and ABA Resolutions*

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.13 (maintenance of institutions)

ABA, RESOLUTIONS, 107 (Aug. 2002) (blueprint for corrections), 104B (Aug. 2008) (prison oversight),

### Commentary

*Subdivision (a):* The United States is one of only a few Western countries without a comprehensive mechanism for the routine inspection and monitoring of all places of confinement. Such entities are required by a variety of international treaty instruments, including the Optional Protocol to the Convention Against Torture.<sup>448</sup> Independent inspection entities take many different forms, from stand-alone executive branch agencies, to legislative bodies, to non-governmental organizations, to name just a few.<sup>449</sup> The Standard provides that there should be a body outside the correctional agency that performs the oversight function, and that it should be a governmental entity to ensure accountability, but it does not otherwise take a position as to which structure is most appropriate or effective. The inspection entity should not depend upon the correctional agency for funding, staffing, office space, or anything that might compromise its objectivity.

Non-governmental monitoring bodies with authority to inspect correctional facilities can provide a valuable supplement to the government entity required by this Standard. The best-known U.S. non-governmental oversight body is the Correctional Association of New York's Prison Visiting Project, which has had legislative authority to inspect prisons and submit reports to the Legislature since 1846.<sup>450</sup> The Pennsylvania Prison Society also has statutory authority to visit prisons, and has been conducting inspections through its network of volunteer visitors since 1787. Similarly, the John Howard Association of Illinois has had informal authority to inspect prisons and jails in that state for over 40 years.<sup>451</sup>

External oversight can take a variety of forms, but the details in the Standard are the minimum necessary to ensure that a monitoring entity does meaningful work. A similar conclusion was reached by the

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448. See Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, 2375 U.N.T.S. 237, available at <http://www2.ohchr.org/english/law/cat-one.htm>.

449. See Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010).

450. *Id.* at 1874-75.

451. *Id.* at 1815-16.

Commission on Safety and Abuse in America's Prisons, which highlighted oversight issues in its 2006 report. See also ABA resolution 104B, 2008 Annual Meeting (prison oversight), available at [http://www2.americanbar.org/sdl/Documents/2008\\_AM\\_104B.pdf](http://www2.americanbar.org/sdl/Documents/2008_AM_104B.pdf). The ABA resolution details the key requirements that are necessary for effectiveness in an oversight body, and should be consulted for a fuller picture of the structure of these monitoring entities.<sup>452</sup>

It is particularly important for the monitoring entity to focus on systemic problems affecting prisoners. While there are many issues that can be monitored in a government agency, financial audits and other performance reviews that deal with management concerns are to be distinguished from inspections that go to the heart of conditions and operations directly affecting the treatment of prisoners. Moreover, the inspection entity should be concerned primarily with identifying systemic and recurring problems, as opposed to addressing individual concerns of prisoners. Individual concerns are best handled through the auspices of an Ombudsman or an effective grievance system. See Standard 23-9.1. Importantly, the inspection body's work is intended to be preventative in nature, anticipating problems that could affect prisoners.

By reporting on best practices, the inspection agency can identify positive aspects of correctional operations as well as areas of concern. This also allows the monitoring body to foster a collaborative relationship with the correctional agency, which is conducive to implementation of the monitor's recommendations.<sup>453</sup>

*Subdivision (b):* The staff of the inspection agency should be knowledgeable about correctional systems, sensitive to the challenges faced by managers and staff, and aware of the relevant legal requirements, including civil rights law. This subdivision requires that independent monitors have appropriate "expertise in a wide variety of disciplines relevant to correctional agencies." It does not, however, require that monitoring teams be made up exclusively of persons with corrections backgrounds. Jurisdictions could choose to set out more detailed requirements, perhaps mandating the inclusion of experts on security, classification, sanitation, health care, or others. Lawyers (few of whom had past employment in

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452. See also Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291 (2010).

453. Silvia Casale, *The Importance of Dialogue and Co-operation in Prison Oversight*, 30 PACE L. REV. 1490 (2010).

a corrections agency) have proved useful members of such teams, in the Department of Justice's CRIPA investigations and in the ABA's partnership with Immigration and Customs Enforcement (ICE), to implement national immigration detention standards. See [http://www.abanet.org/publicserv/immigration/detention\\_standards.shtml](http://www.abanet.org/publicserv/immigration/detention_standards.shtml).

Unannounced inspections are a routine and critical element of the monitoring process for every well-respected inspection entity.<sup>454</sup> The details of visits should be consistent with security. For example, the requirement that the monitoring agency be allowed to visit without prior notice, in subdivision (b)(ii), does not preclude a very brief wait where security demands it, for example in the middle of a prisoner count. Nevertheless, security concerns do not provide a justification for disallowing unannounced inspections, nor do rationales related to convenience of correctional staff.

*Subdivision (c):* The requirement that the correctional agency be required to respond publicly to the inspector's reports is intended to guard against the risk that monitoring reports are ignored by the agency, thus making the inspection effort a meaningless enterprise. See ABA resolution 104B, page 7, 2008 Annual Meeting (prison oversight), available at [http://www2.americanbar.org/sdl/Documents/2008\\_AM\\_104B.pdf](http://www2.americanbar.org/sdl/Documents/2008_AM_104B.pdf).

## **Standard 23-11.4 Legislative oversight and accountability**

**(a) Governmental authorities should enact legislation to implement and fund compliance with these Standards.**

**(b) Legislative bodies should exercise vigorous oversight of corrections, including conducting regular hearings and visits. Correctional authorities should allow legislators who sit on correctional oversight committees to speak privately with staff and prisoners.**

**(c) Each state legislature should establish an authority to promulgate and enforce standards applicable to jails and local detention facilities in the state.**

**(d) Governmental authorities should prepare a financial and correctional impact statement to accompany any proposed criminal**

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454. See, e.g., Anne Owers, *Submission to Vera Commission*, 22 WASH. U. J.L. & POL'Y 231, 233 (2006).

**justice legislation that would affect the size, demographics, or requirements of the jurisdiction's prison and jail populations, and should periodically assess the extent to which criminal justice legislation is achieving positive results.**

### *Cross References*

ABA, TREATMENT OF PRISONER STANDARDS, 23-1.1(j) (general principles governing imprisonment, funding), 23-2.4(c) (special classification issues, governmental authorities and single cells), 23-3.1(b) (physical plant and environmental conditions), 23-10.2 (personnel policy and practice)

### *Related Standards and ABA Resolutions*

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-7.4 (legislative responsibilities)

ABA, RESOLUTIONS (text in Appendix), (115A Feb. 1990) (prison and jail impact statements), 120B (Aug. 1995) (correctional impact statement), 107 (Aug. 2002) (blueprint for corrections)

ACA, PRISON STANDARDS, 4-4019 (public information)

### *Commentary*

*Subdivisions (a) and (b):* The laws governing the correctional agency should ensure that correctional facilities are operated safely and that prisoners are treated humanely, and that sufficient funds are appropriated for this purpose. Legislative bodies can and should play an active oversight role in bringing transparency and accountability to the operation of correctional facilities. Whether the pertinent legislative body overseeing corrections is a congressional committee, a state legislative committee, a county-board committee, or some other entity, the oversight committee should monitor a correctional agency's compliance with these Standards. In addition, the committee should determine whether additional funds are needed to bring the agency and correctional facilities in the jurisdiction into compliance with the legal requirements and best correctional practices embodied in these Standards. Finally, the committee should take the necessary steps to ensure that the legislative body appropriates the funds needed to secure this compliance. In



particular, funds should be provided to prepare prisoners for reentry into their communities.

This legislative oversight function should go beyond the receipt of information transmitted by correctional authorities in reports and at hearings, to include visits to the correctional facilities over which they have oversight responsibility. During those visits, the legislators must be afforded the opportunity to meet privately with staff and prisoners. These confidential interviews may lead to further inquiries into operational or policy issues about which the legislature and the public should be aware. The work of the Ohio Correctional Institutional Inspection Committee exemplifies such amplified legislative oversight. This committee, which is established by law and includes members from both houses of the legislature, routinely monitors conditions at correctional facilities in the state. With the assistance of legislative staff, the committee inspects facilities, issues reports, and evaluates correctional programs and grievance procedures.<sup>455</sup>

*Subdivision (c):* The state-level enforceable jail standards suggested here are operational standards, much more detailed than these ABA Standards, and subject to inspection and enforcement. Twenty-eight states currently have such jail standards, usually mandatory standards promulgated by a state agency; an additional five states have non-mandatory standards promulgated by the state sheriffs' association. This leaves more than a few states with no jail standards at all (of course, no jail standards are necessary if a state has no jails, as in, for example, Rhode Island). Like this subdivision, a recent National Institute of Corrections publication urged "sheriffs, jail administrators, funding authorities, state legislators, local and state criminal justice administrators, executive branch officials/policymakers, county counsels, state attorneys general, and other policymakers who have a stake in the safe, efficient, and constitutional operation of local jails" to adopt and implement state-level jail standards. As this publication explains, "Jail standards play a key role in translating constitutional and statutory provisions into operational practice," and their provisions extend "from the broadest level down to specific details of jail functions and activities."<sup>456</sup>

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455. OHIO REV. CODE ANN. § 103.73 (West 2010).

456. See Mark D. Martin, *Jail Standards and Inspection Programs: Resource and Implementation Guide* (Nat'l Inst. of Corr., Apr. 2007), available at <http://nicic.org/DOWNLOADS/PDF/Library/022180.pdf>.

*Subdivision (d)*: This subdivision addresses one of the endemic problems plaguing corrections: the enactment of laws without consideration of their adverse effect on the ability of correctional facilities to operate in conformance with legal requirements and best correctional practices. A classic example of such a law is one imposing mandatory prison sentences without also providing the funding necessary to handle the influx of additional prisoners. Another example is a statute requiring confinement of juveniles in adult correctional facilities without providing funds for the specially trained staff, upgraded security, and programming needed for these youthful offenders.

Before legislative bodies enact laws affecting the size, demographics, or requirements of prison or jail populations, they should prepare and take into account financial and correctional impact statements delineating the potential adverse consequences of enacting that legislation. Examples of such adverse impacts are crowding, prisoner idleness due to lack of programming, and strains on prison security. The impact statements should identify steps necessary to avert the adverse consequences identified as potentially ensuing from the proposed legislation, including the appropriation of additional funds and offsetting population reduction measures. Providing legislators with financial and correctional impact statements can help them to understand the consequences of enacting particular legislation, and to take steps to avoid unduly burdening correctional operations and conditions.

### **Standard 23-11.5 Media access to correctional facilities and prisoners**

(a) Correctional administrators should develop agency media access policies and make them readily available to the public in written form. Correctional authorities should generally accommodate professionally accredited journalists who request permission to visit a facility or a prisoner, and should provide a process for expeditious appeal if a request is denied.

(b) Prisoners should have the right to refuse requests for interviews and should be notified of that right and given an opportunity to consult with counsel, if they have counsel, prior to an interview.

(c) Correctional authorities should allow professionally accredited journalists reasonable use of notebooks, writing implements, video and still cameras, and audio recorders.

**(d) The time, place, and manner of media visits should be reasonably regulated to preserve the privacy and dignity of prisoners and the security and order of the facility.**

**(e) Correctional authorities should not retaliate against a prisoner for that prisoner's lawful communication with a member of the media.**

### *Cross References*

ABA, TREATMENT OF PRISONER STANDARDS, 23-7.5 (communication and expression), 23-8.5 (visiting), 23-8.6 (written communications), 23-11.2(e) (external regulation and investigation, visits by outside groups)

### *Related Standards*

ABA, LEGAL STATUS OF PRISONERS STANDARDS (2d. ed. superseded), Standard 23-6.4 (group and media visits)

ACA, PRISON STANDARDS, 4-4022 (media access), 4-4279 (access to media)

### *Commentary*

*Subdivision (a):* Affording members of the media access to correctional facilities is a means of bringing transparency and accountability into the operations of those facilities. Through media reports, the public can be informed about problems that plague a correctional facility, conditions within it, the effectiveness of correctional programs in the facility, and the extent to which incarceration is facilitating or impeding prisoners' adherence to a crime-free lifestyle upon their release from the facility. Additionally, these media reports can highlight the need for operational changes or the allocation of more resources to make the correctional facility safer, more humane, and in conformance with what are considered "best practices" in the field of corrections.

Under this Standard, professionally accredited journalists receive a greater right of access to correctional facilities than that possessed by the general public under Standard 23-11.2(e), though both groups have greater access rights under these new Standards than the Constitution

requires.<sup>457</sup> A “professionally accredited journalist” is intended to mean a journalist who works for, or is under contract to, a newspaper, magazine, wire service, book publisher, or radio or television program or station, or who, through press passes issued by a governmental or police agency, or through similar convincing means, can demonstrate that he or she is a bona fide journalist engaged in the gathering of information for distribution to the public.

*Subdivisions (b) & (d):* The broad media access to prisons envisioned by this Standard is not unfettered. First, correctional authorities can and should adopt regulations that delimit the time, place, and manner of media visits. These regulations serve the important mission of protecting prisoners’ privacy and dignity, ensuring, for example, that prisoners are not photographed or filmed while unclothed.<sup>458</sup> Regulations defining the time, place, and manner of media visits may also be needed to safeguard security and order within the correctional facility. But care must be taken to ensure that the interests in transparency and governmental accountability served by affording the media access to correctional facilities are not undermined by these regulations.

A second limitation on the media’s access to prisons is that prisoners can refuse a request to be interviewed. They must be apprised of this right of refusal and be afforded the opportunity to confer with counsel, if they have an attorney, before deciding whether to agree to an interview. This right of refusal and the attendant safeguards designed to protect that right are designed to preserve prisoners’ dignity. In addition, these protections will help prisoners avoid making disclosures unwillingly that bear on litigation in which they are or will be involved.

*Subdivision (c):* In order to perform the vital function of informing the public about correctional operations and conditions, journalists need to be able to use the basic tools of their profession, including notebooks, writing implements, video and still cameras, and audio recorders. As noted above, however, correctional authorities can and should adopt

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457. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 833-35 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (holding that the freedom of the press protected by the First Amendment does not accord members of the media a broader right of access to prisons than correctional officials afford the public).

458. As Chief Justice Burger observed in *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978), “Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however ‘educational’ the process may be for others.”

and enforce reasonable regulations to protect prisoners' privacy and dignity and to preserve security and order within the facility.<sup>459</sup>

*Subdivision (e):* The informational needs and interests furthered by affording members of the media broad access to prisons cannot be met if correctional authorities retaliate against prisoners for their lawful communications with media representatives. Such retaliation therefore must be prohibited, and these prohibitions strictly enforced. But expelling a prisoner from a witness-protection program if the prisoner has violated its rules barring media contact does not constitute retaliation under this subdivision.

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459. Cf. *Demery v. Arpaio*, 378 F.3d 1020, 1031 (9th Cir. 2004) (concluding that use of webcams to stream live images of pretrial detainees worldwide while they were being photographed, fingerprinted, frisked, and confined in the jail's holding area "turn[ed] pretrial detainees into the unwilling objects of the latest reality show" and violated due process).