

**AMERICAN BAR ASSOCIATION**

**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to develop comprehensive plans to ensure that the public is informed about the operations of all correctional and detention facilities (facilities for the confinement of individuals for alleged or adjudicated crimes or delinquent acts) within their jurisdiction and that those facilities are accountable to the public.

FURTHER RESOLVED, That the American Bar Association urges federal, state, and territorial governments to establish public entities that are independent of any correctional agency to regularly monitor and report publicly on the conditions in all prisons, jails, and other adult and juvenile correctional and detention facilities operating within their jurisdiction.

FURTHER RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to ensure that these monitoring entities meet the appended “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities.”

FURTHER RESOLVED, That the American Bar Association recommends that the federal government:

- (1) Provide technical assistance and training to facilitate the establishment of monitoring entities that meet the “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities.”
- (2) Require that jurisdictions receiving federal funds for correctional or detention facilities ensure that the facilities are monitored by at least one entity meeting these requirements.
- (3) Develop common definitions for the collection and reporting of key performance data by correctional and detention facilities.

## REPORT

In 1987, Supreme Court Justice Brennan made the following observations about prisoners and the world in which they live: “Prisoners are persons whom most of us would rather not think about. Banished from everyday sight, they exist in a shadow world that only dimly enters our awareness. They are members of a ‘total institution’ that controls their daily existence in a way that few of us can imagine . . .” *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 354 (1987) (Brennan, J., dissenting). Justice Brennan’s observations apply equally today. Prisoners still live in a netherworld with which few of us are familiar. While at times a horrific problem or scandal in a correctional facility or facilities, such as the sexual abuse of inmates, attracts headlines, the public is mostly oblivious about conditions in prisons, jails, and other correctional and detention facilities, even those within their own communities.

While the inner workings and conditions of correctional and detention facilities largely are insulated from the public eye, they need not be. As is true with public schools and other governmental entities, the operations of correctional and detention facilities can be transparent and accountable to the public they serve. And, for a number of reasons, they should be.

First, the public identification of significant problems in correctional conditions and operations can and should lead to the rectification of those problems, resulting in correctional and detention facilities that are safer, operated in conformance with the Constitution, other laws, and best correctional practices, and equipped to better prepare inmates for a successful reentry into society. Second, through the objective observations of an entity that is wholly independent of the facility being inspected, potential problems that have been overlooked at the facility can be detected, preventing them from becoming major problems for correctional officials. Third, external oversight of correctional operations and the problem solving that it catalyzes can be a cost-effective and proactive means to potentially avert lawsuits challenging the legality of conditions of confinement or the treatment of prisoners. Fourth, the factual findings of the monitoring entity can substantiate the need for funds requested by correctional administrators. And finally, the revelation by a monitoring entity of what is and is not happening behind prison walls can lead to better-informed decisions about a jurisdiction’s sentencing and correctional policies.

At a conference on prison oversight in 2006, 115 of the world’s top experts on correctional oversight convened at the University of Texas to discuss a variety of domestic and international oversight models. *See* 1 OPENING UP A CLOSED WORLD: WHAT CONSTITUTES EFFECTIVE PRISON OVERSIGHT?: CONFERENCE PROCEEDINGS (Michele Deitch, ed., The University of Texas at Austin, forthcoming 2008)<sup>1</sup> The conference revealed that correctional oversight by an independent entity whose findings are disseminated to the public is a relative rarity in the

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<sup>1</sup> Videos of the conference sessions are available at <http://www.utexas.edu/lbj/prisonconference/video.php>.

United States, although some such monitoring does occur in this country, such as that conducted at the federal level by the Inspector General of the United States Department of Justice. (For other examples of monitoring bodies in the United States, see *infra* note 2.) By contrast, prisons in all of the countries (over forty-five) that are members of the European Union are subject to independent monitoring by the European Committee for the Prevention of Torture (CPT). Michele Deitch, *Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience*, THE STATE OF CORRECTIONS: PROCEEDINGS OF THE 2005 AMERICAN CORRECTIONAL ASSOCIATION ANNUAL CONFERENCES 147-48 (2006). The diverse group of stakeholders represented at the conference – correctional administrators, judges, human-rights advocates, policymakers, representatives of prison monitoring bodies, and scholars – reached a consensus about the value of, and need for, expanded external oversight of prisons and jails in the United States. See Michele Deitch, *Conference Report: Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, XVIII CORRECTIONAL L. REP. 22 (Aug./Sept. 2006).

### **I. Comprehensive Oversight Plans That Include Monitoring by Independent, Public Entities**

The American Bar Association is calling on federal, state, local, and territorial governments to develop comprehensive plans to make the operations of their correctional and detention facilities more transparent and accountable to the public. The facilities on which this resolution focuses are those, both public and private, in which individuals are confined for alleged or adjudicated crimes or delinquent acts, whether or not immigrants are also confined in them. Prisons, jails, police lockups, juvenile detention facilities, and juvenile training schools are examples of such facilities. But while this resolution solely concerns facilities within criminal- and juvenile-justice systems, the public's interest in transparency and accountability obviously transcends those systems, extending to other types of facilities, such as mental-health institutions and immigration facilities, in which individuals are confined involuntarily.

As a first step towards injecting more transparency and accountability into the operations of correctional and detention facilities, the ABA is urging federal, state, and territorial governments to establish public entities, independent of any correctional agency, to regularly monitor and publicly report on conditions in prisons, jails, and other correctional and detention facilities for adults and juveniles in their jurisdictions. Other countries, such as Great Britain, already utilize such independent monitoring entities, and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recognizes their value. But the comprehensive oversight for which the ABA is advocating entails more than external monitoring by an independent entity. Examples of other components or potential components of a comprehensive oversight plan include: monitoring by citizens' groups, accreditation, legislative oversight, media access, and special mechanisms for the prosecution of crimes committed by correctional staff. The attentive monitoring by correctional officials of the implementation of their contracts with private correctional facilities is another example of a way to supplement the external monitoring for which this resolution calls. All of these

oversight processes and tools can complement, though not supplant, the external monitoring that is the focal point of this resolution.

It bears emphasizing that the external monitoring that is the focus of this resolution is not intended to replace, and should not replace, the internal mechanisms that correctional administrators can and should set up to evaluate correctional operations and programs. Internal evaluation is vital to the efficient and effective functioning of correctional facilities. But external monitoring can bring accountability and transparency to correctional facilities and, in turn, improve their functioning in ways that internal evaluation mechanisms simply cannot.

In order for the work of the monitoring entities to be marked by the professionalism, expertise, and insulation from cronyism that are essential to the fulfillment of their objectives, they should be established at the state and federal levels. At the same time, it is essential that local officials be informed in a timely fashion of the monitoring entity's findings about jails, juvenile detention centers, or other facilities in their community, that they respond promptly to correct noted deficiencies in those facilities, and that they are vigilant in ensuring that the monitoring of conditions in their local facilities is thorough, accurate, and effective. Periodic assessments of confinement conditions conducted by local bodies themselves may be one means of achieving the latter objective and of bringing added transparency and accountability to local correctional and detention facilities.

## **II. Key Requirements for Effective Monitoring**

The resolution specifies certain key requirements that must be met in order for the goals of correctional monitoring to be realized. The reason many of these requirements need to be met is readily apparent, but several warrant elaboration:

Requirement #1: In order for monitoring assessments and evaluations to be objective and undistorted by inappropriate pressures, the monitoring entity must be wholly independent of the correctional agency that is operating or utilizing the facility being inspected. The monitoring entity, for example, should not be under the correctional agency's authority or supervision and should not be dependent on the agency for funding, space, staff support, or the meeting of other operational needs.

Requirement #2: Each monitoring entity must be adequately funded and staffed, allotted the resources necessary to ensure that inspections occur regularly, that monitoring teams are well-trained and large enough to perform their work well, and that there is sufficient time to prepare thorough and timely reports that achieve the objectives of external oversight. Since budgetary constraints and cutbacks can be used to hamper the work of the monitoring entity and even retaliate against it for the candor of its findings, mechanisms must be in place to protect the entity's funding and independence. An example of one possible such mechanism is the set allocation of a fixed percent of the correctional budget to fund the monitoring entity rather than having it subject to the vagaries and political pressures that can attend *ad hoc* appropriations.

Requirement #3: The requirements that the head of the monitoring entity be appointed for a fixed term by an elected official, be confirmed by a legislative body, and be subject to removal only for just cause also are designed to preserve the independence of the monitoring entity. Depending on the jurisdiction's preferences and needs, the monitoring entity may be headed by either an individual or a board.

Requirements #8 and 9: External oversight works best – is more effective, efficient, and less costly – when the monitoring process is collaborative, cooperative, and collegial, rather than adversarial. Consequently, correctional and other governmental officials should not only be authorized, but also required, to cooperate fully and promptly with the monitoring entity. In turn, the monitoring entity should strive to work collaboratively and constructively with correctional administrators, the legislature, and others who have the authority or capacity to ameliorate problems in monitored facilities. But the monitoring entity must be careful to ensure that it is not co-opted by correctional officials– that its independence and the need for accuracy and rigor in its fact-finding are preserved and not compromised as it works closely with correctional and other governmental officials.

Requirements # 10, 11, 12, 13, and 14: One of the keys to full and accurate reporting of conditions in a correctional facility is granting the monitoring entity broad and unhindered access to the facility, correctional personnel, and inmates, as well as records bearing on the facility's operations and conditions. There are monitoring prototypes already in place that exemplify this kind of unimpeded access to the information needed to ascertain and verify the true state of conditions in a correctional facility.<sup>2</sup> Of course, even the broad access to information accorded the monitoring entity may be subject to certain limited confidentiality requirements, such as those that apply to private medical information.

Because the monitoring entity's efforts to collect accurate information about a correctional facility may be stymied by the fear of line staff, inmates, and others that they may be retaliated against for their forthright disclosures, procedures must be in place to enable facility administrators, line staff, inmates, and others to communicate confidentially with the monitoring entity about the facility. In addition, it is essential that

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<sup>2</sup> For examples of external-monitoring entities with this level of access to facilities, see *Prison Oversight and Systems of Accountability: National Prison Rape Elimination Commission Hearing* (Dec. 6, 2007) (statement of Michele Deitch), available at <http://www.nprec.us/docs3/Deitch%20Testimony.pdf>. (citing, among other oversight bodies, the Inspector General of the United States Department of Justice, the California Inspector General, the Ohio Correctional Institutions Inspection Committee, the Texas Youth Commission's Office of the Independent Ombudsman, the Correctional Association of New York, the New York City Board of Correction, the British Prison Inspectorate, the European Committee for the Prevention of Torture (CPT), and the British Independent Monitoring Boards).

adequate safeguards be established to protect those who communicate with the monitoring entity from retaliation or threats of retaliation for those comments.

Finally, because obstructionism, a “code of silence,” and layers of secrecy may surround correctional operations and conditions, the monitoring entity must be vested with the authority to subpoena witnesses and documents. But if correctional officials and the monitoring entity build a collaborative relationship, this power to subpoena witnesses and documents can be exercised sparingly and may not need to be utilized at all.

Requirement #16: The reports disseminated by a monitoring entity should review and assess a facility’s policies, processes, programs, and practices objectively and accurately. Since a monitoring report is supposed to provide an objective account of correctional conditions and operations, it typically will include positive as well as negative findings. But if the impetus for the preparation and issuance of a special report is some discrete problem, such as reported excessive use of force by staff, the report may not include any positive findings.

The significance of some facts that a monitoring report discloses about a correctional or detention facility may not be readily apparent without some benchmark against which to measure those facts. Legal requirements are one example of a benchmark that should be utilized by the monitoring entity when reviewing and assessing a facility’s conditions and the treatment of its inmates. Constitutional and statutory requirements, as well as obligations under human-rights or other treaties signed by the United States and ratified by Congress, are examples of the legal requirements to be considered during the assessment process.

What are considered “best correctional practices” also provide helpful and illuminating criteria for evaluating a facility’s operations, conditions, programs, and services. This resolution reserves the question of how to define the “best correctional practices” and certain other objective criteria to be utilized when assessing a facility’s performance. Professional standards, such as those developed by the American Bar Association, American Correctional Association, and National Commission on Correctional Health Care, may provide a helpful starting point for jurisdictions determining what assessment criteria to apply when monitoring correctional facilities. But at this point in time, according jurisdictions flexibility to explore and pilot different ways of defining “best correctional practices” and other assessment criteria seems advisable as this country begins to utilize, on a widespread basis, systematic, external monitoring of correctional and detention facilities by independent, public entities to promote transparency and accountability as national norms.

This resolution confirms that the purpose of monitoring reports is not simply to inform the public and policymakers about conditions of confinement. The reports also should be designed and disseminated to prompt change -- the timely implementation of corrective measures to eliminate the problems monitoring reports have revealed. Consequently, when possible, monitoring reports should pinpoint the reasons for a noted deficiency, particularly when actions need to be taken by individuals or entities other than

correctional officials to cure the deficiency. For example, if a county jail is unable to attract or retain enough correctional officers because it pays them so little, a monitoring report needs to denote the reason for the staffing shortage so that the county board can take the necessary follow-up actions.

Requirement #17. To meet its informational and problem-solving purposes, the monitoring entity's report about a facility must be readily available to the public, including accessibility through the Internet. Occasionally, however, the monitoring entity may decide that, due to privacy or security requirements, it should not disclose a portion of its report to the general public. For example, the monitoring entity appropriately may refrain from disclosing information to the public, such as the presence of a hole in a prison's perimeter fence, which will jeopardize institutional security.

In addition to being disseminated to the public, the monitoring report should be distributed to the media, the legislature, and the jurisdiction's top elected official. But while copies of the report must be provided to legislative and executive officials to ensure that appropriate actions are taken to rectify problems identified in the report, its dissemination and distribution must not be conditioned on the assent of any governmental official or entity outside the monitoring body, such as the governor, state legislature, or county board.

Requirements #18 and 19. There are several steps that jurisdictions can take to guard against the risk that monitoring reports become meaningless pieces of paper, largely ignored by correctional and other officials. First, facility administrators should be required to respond publicly to the reports and to develop and implement in a timely way action plans to correct identified problems. Since the solving of problems sometimes or often will require the involvement of other executive officials, the legislature, the county board, or others, these other individuals and entities may need to play an integral role in the development and implementation of a viable action plan.

Second, facility administrators should report to the public twice a year, recounting the progress that has been made in implementing the action plan. To conserve time and resources, once administrators have reported that a problem has been remedied, progress reports need not address it further unless the monitoring entity determines that the problem has not abated or has reoccurred.

Third, the jurisdiction needs to vest some administrative entity with the authority to enforce the above requirements so that problems identified in a monitoring report are addressed and resolved with dispatch. The monitoring entity need not be the body performing this enforcement function.

Finally until a problem highlighted in a monitoring report is resolved, the monitoring entity should continue to assess and report on the problem and the progress made in solving it. As part of this ongoing assessment, the monitoring entity should pinpoint and report on the reason or reasons why a problem persists. In order to meet

these responsibilities, the monitoring entity may need to conduct special follow-up inspections.

Requirement #20. The premise of the ABA’s resolution is that the operations of correctional and detention facilities should be more transparent and accountable to the public. These same principles of transparency and accountability apply to monitoring entities as well. Consequently, states and the federal government should adopt safeguards to ensure that their monitoring entities are meeting their designated purposes and performing their functions well. One of the adopted safeguards should require the monitoring entity to publish an annual report of its activities and findings. This report should be accessible through the Internet and distributed to the media, the legislature, and the jurisdiction’s top elected official.

### **III. The Federal Role**

The federal government can and should play a central role in furthering the goals of making this nation’s prisons, jails, and other correctional and detention facilities more transparent and accountable to the public. First, the federal government should provide technical assistance and training to the states to facilitate their establishment of effective monitoring processes and the development of a professional corps of correctional monitors.

Second, the federal government should condition its funding of correctional and detention facilities in states on their compliance with the “Key Requirements for the Effective Monitoring of Correctional and Detention Facilities” set forth in this resolution. The federal government understandably can and should be reluctant to funnel federal funds to correctional and detention facilities that rebuff efforts to make them transparent and accountable, no longer hidden from the public’s and the federal government’s view.

Finally, the federal government should develop common definitions for the collection and reporting of key performance data by correctional and detention facilities. These common definitions, such as the definition of what constitutes an assault on an inmate or “overcrowding,” will facilitate the reporting and understanding of the true conditions in the facilities being monitored and will enable the conditions in a facility to be compared more meaningfully with those in other facilities. In short, the promulgation of these definitions, in conjunction with the other prescribed steps to be undertaken by the federal government, will promote the transparency and accountability goals of correctional oversight. The realization of these goals in turn will help to ensure that correctional officials operate, and have the resources to operate, correctional and detention facilities in conformance with legal requirements and best correctional practices.

## KEY REQUIREMENTS FOR THE EFFECTIVE MONITORING OF CORRECTIONAL AND DETENTION FACILITIES

1. The monitoring entity is independent of the agency operating or utilizing the correctional or detention facility.
2. The monitoring entity is adequately funded and staffed.
3. The head of the monitoring entity is appointed for a fixed term by an elected official, is subject to confirmation by a legislative body, and can be removed only for just cause.
4. Inspection teams have the expertise, training, and requisite number of people to meet the monitoring entity's purposes.
5. The monitoring entity has the duty to conduct regular inspections of the facility, as well as the authority to examine, and issue reports on, a particular problem at one or more facilities.
6. The monitoring entity is authorized to inspect or examine all aspects of a facility's operations and conditions including, but 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; inmate grievance processes; substance-abuse treatment; educational, vocational, and other programming; and reentry planning.
7. The monitoring entity uses an array of means to gather and substantiate facts, including observations, interviews, surveys, document and record reviews, video and tape recordings, reports, statistics, and performance-based outcome measures.
8. Facility and other governmental officials are authorized and required to cooperate fully and promptly with the monitoring entity.
9. To the greatest extent possible consistent with the monitoring entity's purposes, the monitoring entity works collaboratively and constructively with administrators, legislators, and others to improve the facility's operations and conditions.
10. The monitoring entity has the authority to conduct both scheduled and unannounced inspections of any part or all of the facility at any time. The entity must adopt procedures to ensure that unannounced inspections are conducted in a reasonable manner.
11. The monitoring entity has the authority to obtain and inspect any and all records, including inmate and personnel records, bearing on the facility's operations or conditions.
12. The monitoring entity has the authority to conduct confidential interviews with any

person, including line staff and inmates, concerning the facility's operations and conditions; to hold public hearings; to subpoena witnesses and documents; and to require that witnesses testify under oath.

13. Procedures are in place to enable facility administrators, line staff, inmates, and others to transmit information confidentially to the monitoring entity about the facility's operations and conditions.

14. Adequate safeguards are in place to protect individuals who transmit information to the monitoring entity from retaliation and threats of retaliation.

15. Facility administrators are provided the opportunity to review monitoring reports and provide feedback about them to the monitoring entity before their dissemination to the public, but the release of the reports is not subject to approval from outside the monitoring entity.

16. Monitoring reports apply legal requirements, best correctional practices, and other criteria to objectively and accurately review and assess a facility's policies, procedures, programs, and practices; identify systemic problems and the reasons for them; and proffer possible solutions to those problems.

17. Subject to reasonable privacy and security requirements as determined by the monitoring entity, the monitoring entity's reports are public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.

18. Facility administrators are required to respond publicly to monitoring reports; to develop and implement in a timely fashion action plans to rectify problems identified in those reports; and to inform the public semi-annually of their progress in implementing these action plans. The jurisdiction vests an administrative entity with the authority to redress noncompliance with these requirements.

19. The monitoring entity continues to assess and report on previously identified problems and the progress made in resolving them until the problems are resolved.

20. The jurisdiction adopts safeguards to ensure that the monitoring entity is meeting its designated purposes, including a requirement that it publish an annual report of its findings and activities that is public, accessible through the Internet, and distributed to the media, the jurisdiction's legislative body, and its top elected official.

Respectfully submitted,

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