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Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring

Jack Beck*

The Correctional Association of New York ("CA") has been continuously monitoring conditions within New York State prisons since 1846, based upon legislation that authorizes the CA to visit the state prisons and report to the legislature and the public on conditions it observes. However, as a result of several legislative measures enacted in the past two years—laws proposed and/or strongly supported by the CA and criminal justice reform advocates—other state agencies are now also required to monitor aspects of medical, mental health, and substance abuse services in the state prisons. This is a significant change for the Department of Correctional Services ("DOCS" or the "Department"), which oversees nearly 60,000 inmates in New York's sixty-eight facilities and has had significant autonomy in how it provides services to its inmate population. These laws create new opportunities for the CA to effect change in the state prisons, and requires the CA to develop new relationships with other state agencies concerned with prison conditions.

Part I of this article will summarize the unique legislative measure that provides the CA with the authority to assess conditions and practices within New York's prisons and to advocate for improvements in prison conditions and the care of state inmates. It will identify the limitations and restrictions that the CA encounters in performing these duties. Part II will present the new legislative measures that require other state agencies to monitor specific components of prison services, and will describe how these laws will alter the role of the CA in investigating conditions and advocating for change.

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Part I: The Correctional Association of New York and Prison Monitoring

A. *Components of an Effective Prison Monitoring Agency*

A number of components are crucial to the operation of any outside organization that monitors and evaluates prison conditions, and fosters systemic change:

> ► The monitoring organization must determine its primary mission: should it provide individual advocacy to inmates, should it focus on working for systemic improvements, or should it engage in a mix of both activities? In addition, is it an advisor to the corrections department solely, or is its work product for a much larger audience? These decisions about program design will determine the relevance and importance of each of the elements described below.
>
> ► Ideally, the monitoring organization should have a substantial degree of independence both from the corrections department being assessed and from other institutions or funding sources that might compromise its ability to report freely on its observations and recommendations.
>
> ► The monitoring organization must have access to information. Such information should include not only prison policies and protocols but, more importantly, documents and data from the corrections department and other agencies that help the monitors assess actual prison practices. The organization must have unfettered access to individuals who live or work inside the facility it is monitoring, and ideally should have the ability to conduct conversations with staff and inmates in private settings and to keep communications with these individuals confidential.
>
> ► The monitoring organization should make its observations, findings, and conclusions available to public officials, including those outside the

> corrections department, as well as to the general public. Moreover, the organization should interact with advocates, as well as currently and formerly incarcerated individuals and their families, both to receive information and to educate and/or organize those interested in reforming the prison system.
>
> ► The monitoring organization should have a dialogue with corrections administrators about the monitoring process and its observations and recommendations. This work should include an exchange between the monitoring organization and the corrections department, both prior to finalizing its report to eliminate errors and reduce areas of disagreement and after the report to review and monitor the department's corrective plans.
>
> ► The organization should have the ability to advocate for changes in policy and practices with public officials outside the prison system and the general public, particularly in instances when recommended remedies require action by governmental entities other than the corrections department.

The CA model has been successful in fostering reform within New York's prison system because it has most of these components.

The following describes the current CA monitoring process. It also provides an analysis of why the CA has had a positive impact on the corrections system and what more can be done to enhance its effectiveness.

B. *Correctional Association: Background*

The CA is one of only two independent organizations in the United States with legislative authority to visit prisons and report on conditions of confinement. Since 1846, the CA has carried out this special legislative mandate to keep policymakers and the public informed about conditions of confinement that affect both inmates and corrections staff. As

an independent citizens' organization, it is dedicated to involving the public in prison monitoring and advocacy. The Prison Visiting Project ("PVP," or the "Project") and the Women in Prison Project of the CA are responsible for performing this monitoring function in both the male and female facilities.[1] One of the CA's central goals is to be an instrument for systemic change within the prisons by monitoring correctional policies and practices, developing proposals to make conditions more humane, educating the public, and pressing the prison administration, the state executive, legislative officials, and the public to take action. Because the CA critiques what is happening inside prisons and reveals deficiencies and problems, it acts as the public's eyes and conscience with regard to prison issues in the state.

Broadly defined, the monitoring work of the CA includes: (1) visiting state correctional facilities on a regular basis and issuing detailed reports of findings and recommendations to state corrections officials, state legislators, and the public; (2) preparing and distributing in-depth studies on critical corrections topics, which include findings and practical recommendations for improvements; (3) advocating for reform at public hearings, in meetings with state agency personnel and elected officials at local and national conferences and in discussions with the media; and (4) helping raise the visibility of corrections-related issues through publishing research reports and gaining media attention, posting fact sheets and prison reports on the CA website[2], and making presentations at community forums and academic and professional conferences.

C. *Current CA Activities*

1. Prison Visits

The New York State Department of Correctional Services confines approximately 60,081inmates in 68 facilities

1. PVP monitors conditions within the sixty-two male prisons in New York and is directed by the author of this article. The CA's Women in Prison Project performs a similar function for the seven female state prisons.

2. The Correctional Association of New York, http://www.correctionalassociation.org (last visited Feb. 12, 2010).

throughout the state, roughly 2,579 women and 57,502 men.[3] The Prison Visiting Project conducts monitoring visits to six to ten prisons each year and the Women in Prison Project visits all the female institutions. These visits take the form of field research: full-day, on-site assessments during which members of the CA Visiting Committee, typically five to eight people on each visit, branch out to all corners of the prison, including housing areas, the recreational yard, the medical clinic, mental health units, program areas, and disciplinary segregation units. The Visiting Committee consists of a diverse group of CA staff and board members, medical and psychiatric professionals, formerly incarcerated people, advocates, and concerned individuals. Throughout the day, the Visiting Committee interviews inmates using a standardized survey and holds meetings with the facility's administrative team, the Inmate Liaison Committee (a leadership group elected to voice the concerns of prisoners), corrections officers and civilian staff.

2. Data Collection

The CA also collects data about each facility it visits, providing the CA with more detailed information about staffing, programs, services, unusual incidents, and disciplinary processes. The CA gathers this information through a multi-question survey submitted to the facility superintendent prior to each visit. This data enables the CA to analyze systemic conditions, compare different prisons with similar inmate populations, identify model programs and areas in need of reform, and make informed decisions about future projects and priorities.

3. Report of Prison Visits and *State of the Prisons* Report

After each visit, the CA issues a detailed report including findings and recommendations based on information gathered during the visit. A draft of this report is sent to the

3. DEP'T OF CORR. SERVS., UNDER CUSTODY REPORT: PROFILE OF INMATE POPULATION UNDER CUSTODY AS OF JANUARY 1, 2009, at 2 (2009), *available at* http://www.docs.state.ny.us/Research/Reports/2009/UnderCustody_Report_2009.pdf.

superintendent and DOCS officials; following their review, a conference call is held with the facility executive staff and the CA to discuss the findings and recommendations. This dialogue is intended to allow the prison authorities to identify any erroneous information in the report, to supplement the information provided during the visit, including changes since the visit, and to discuss the CA's recommendations both in terms of the feasibility of the CA proposals and any alternative measures DOCS officials may suggest to accomplish the stated goals. After revisions to the report are made following this conference call, a final report is issued and distributed to a larger group of policymakers, inmates, and members of the public, and is available on the CA website.

Periodically, the CA issues a *State of the Prisons* report, which contains an overview analysis of the entire state prison system and includes a summary of each of the prison visits conducted during the reporting period.[4] The *State of the Prisons* reports are used to articulate recommendations for systemic improvements in prison conditions and practices, as well as to present specific information on each prison visit.

4. Inmate Correspondence

PVP receives letters from approximately 100 to 150 inmates each month requesting information or assistance and providing the Project with information about prison conditions. This correspondence directs CA staff to prison-specific and/or system-wide issues and ensures that the CA is aware of conditions at prisons that it may not be able to visit regularly.

5. Studies of Specific Prison Issues

In addition to the CA's monitoring of overall prison conditions, PVP performs multi-year studies of critical issues concerning New York prisons, resulting in detailed reports that analyze the accomplishments and deficiencies that the Project

4. *See, e.g.*, CORR. ASS'N OF N.Y., STATE OF THE PRISONS 2002-2003: CONDITIONS OF CONFINEMENT IN 14 NEW YORK STATE CORRECTIONAL FACILITIES (2005), *available at* http://www.correctionalassociation.org/publications/download/pvp/State_of_prisons_02-03.pdf.

has observed and that identify recommendations to improve prison conditions, policies, and practices. At present, PVP is performing a multi-year study evaluating how DOCS provides services to inmates with substance abuse histories. In addition, the Project issued a report about prison healthcare in 2009,[5] a report on the treatment of inmates with mental illness in 2004,[6] and a study on disciplinary segregation in 2003.[7]

As part of these studies, the Project conducts focused visits to the prisons, compiling detailed surveys of the prison population and conducting interviews with relevant prison staff and the prison executive team. In addition, through the state Freedom of Information Law (FOIL),[8] the Project obtains systemic data about the prison population and the issues being investigated. Finally, the CA periodically visits facilities outside the state to identify model programs that could be replicated in New York.

These studies result in detailed reports containing CA findings and recommendations. The CA distributes the reports to correctional officials, policymakers, and the public. It conducts outreach and garners media attention to raise public awareness and advocate for reform.

6. Education and Advocacy

The CA believes it is essential to publicize its findings and recommendations, educate public officials, the press, and the public, promote the effective programs it has found, and advocate for the correction of deficiencies in the prison system. Part of its public education is to bring ordinary citizens into the

5. CORR. ASS'N OF N.Y., HEALTHCARE IN NEW YORK PRISONS 2004-2007 (2009), *available at* http://www.correctionalassociation.org/publications/download/pvp/issue_reports/Healthcare_Report_2004-07.pdf.

6. CORR. ASS'N OF N.Y., MENTAL HEALTH IN THE HOUSE OF CORRECTIONS: A STUDY OF MENTAL HEALTH CARE IN NEW YORK STATE PRISONS (2004), *available at* http://www.correctionalassociation.org/publications/download/pvp/issue_reports/Mental-Health.pdf.

7. CORR. ASS'N OF N.Y., LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS (2003), *available at* http://www.correctionalassociation.org/publications/download/pvp/issue_reports/lockdown-new-york_report.pdf.

8. N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 2008).

prison during the CA visiting process so they can learn and tell others what the prison experience really involves. The CA also has regular contact with legislative officials in order to report its observations and to inform those officials about its work in pursuit of effecting change. The CA has ongoing relationships with the press, not only when it issues reports, but as a regular function of its educational role, and it encourages editorial boards to endorse CA recommendations. The CA staff also makes presentations in many public forums focusing on prison issues and participates in national and regional prison conferences and in professional organizations. These activities enable the CA to move beyond a limited group of state policymakers to raise crucial prison issues affecting inmates, their communities and the general public.

But education is not sufficient to produce reform. Consequently, the CA undertakes several initiatives to promote its recommendations and develop meaningful remedial measures. For example, the CA staff plays active roles in several statewide coalitions of advocates, formerly incarcerated individuals, and their families working for systemic improvements. The CA has been instrumental in drafting and promoting the adoption of legislation to address prison problems. It has also advocated for the allocation of state funding to provide necessary services in the prisons and to create pilot projects that demonstrate the effectiveness of model prison programs. Staff members also present testimony before legislative hearings and assist legislators in developing a record to justify the modification of policies and practices within the prisons.

D. *Analysis of the Correctional Association's Visiting Project to Monitor Prison Safety*

1. Overview

With the aforementioned description of the PVP as background, it is possible to perform an analysis of the strengths and weaknesses of a private organization as the model for investigating prison conditions and in fostering remedial action to address deficiencies.

The CA has had a positive impact on DOCS policies and

practices because it has compiled and presented compelling information and analyses to prison officials, the legislature, other policymakers, and the public, and because it has been relentless in pursuing implementation of its recommendations. Prison reform is a slow and frustrating process, which requires patience and fortitude. Because of the CA's independence, it can fairly and aggressively report its observations and can advocate for best practices. Although its statutory authority provides independence, the law does not grant the CA any power to require change. Rather, only through the persuasiveness of its information and the effectiveness of its presentations can the CA influence DOCS to modify its policies and practices. However, the more forcefully the CA advocates for change, the more difficult it is to have a congenial and cooperative relationship with the Department.

The CA also maintains a very strong relationship with the legislature, and it often assists legislators interested in improving the treatment of inmates in identifying pressing issues, compiling data to support legislative action, and fashioning appropriate legislative remedies. The CA has been successful in garnering significant press and editorial support for its proposals. Through these efforts, it has been an important force in improving DOCS practices. For example, after a CA report on the treatment of inmates with mental illness, advocacy efforts by the CA and other interested organizations and pending litigation concerning prison mental health services, the governor proposed, and the legislature approved, a $13 million program to augment mental health services for state inmates and eventually enacted a law to enhance services for inmates with mental illness confined in disciplinary housing.

To assess why the CA has been successful, it is useful to examine in greater detail each of the elements identified earlier as essential components of an effective outside monitor: organization's mission; organization's independence; access to information; publication of findings and recommendations; interactions between the prison system and the organization; and advocacy by the monitoring organization.

2. Mission of the Monitoring Organization

The first step is to define the role of the outside monitoring organization. At least four potential models are available. One is an advisory panel to a corrections department, which would likely include outside experts who may draft and/or review department policies. In addition, an advisory panel could undertake a limited investigative role in assessing practices and/or might provide the department with feedback from the community concerning outsider perceptions about problems within the prisons. Although useful, an advisory panel has limited ability to address more controversial problems such as prison safety and violence.

A second model is a monitoring board that reports solely to the department and is akin to an external quality assurance ("QA") committee. This type of body could have a more significant impact on department practices than an advisory board because QA assessments focus on what is actually occurring at an institution and the fidelity of the prison staff's conduct to official policy. However, the activities of a QA committee can be limited both in terms of what it can review and, more importantly, what actions it can take to foster change. The work product of QA committees is generally confidential, and it is entirely up to the corrections department to decide what issues to examine and what actions, if any, it will take to address the identified problems. Moreover, there is usually very limited input into the QA process by outside agencies and individuals. Given the already closed nature of prisons, it is unlikely that such a role would be effective in reforming practices that corrections departments are reluctant to change.

A third model is one in which the outside organization acts as an ombudsman for prisoner complaints. The role of this entity is to investigate specific inmate complaints and to advocate on an inmate's behalf for corrective action. Such a role is extremely useful to the inmates who are served and is important in addressing egregious situations, particularly in systems where the inmate grievance program is ineffectual. However, individual actions can easily overwhelm an organization attempting to serve a prison population of thousands of inmates, leaving few resources to address

systemic problems. In addition, focusing on individual complaints generally limits an organization's ability to collect and evaluate system-wide data and prepare comprehensive reports that evaluate systemic problems and propose remedial measures. Individual advocacy for inmates is sorely needed, but such advocacy often does not foster systemic reform.

The fourth model is one similar to that employed by the CA. It involves a monitoring process intended to analyze overall department policies and identify model practices and areas for reform. The collection of information and the analysis of data are directed toward assessing the frequency of a practice and whether mistreatment of inmates or failure to provide services is the result of (1) formal or informal prison policies and procedures or inadequate resources, or (2) an aberrant situation caused by individual staff misconduct, nonfeasance or neglect. It is equally important to recognize systems and programs that are working well, both to acknowledge individuals performing their jobs effectively and to urge the corrections department to replicate effective policies and programs throughout the corrections system.

3. Independence of the Monitoring Organization

The CA has a great deal of autonomy and is not subject to significant limitations by DOCS or any state entity. The CA's Board of Directors is self-appointed and includes prominent citizens, lawyers, advocates, formerly incarcerated individuals, individuals associated with community-based organizations serving formerly incarcerated individuals and academics. Only ten percent of the CA's funding comes from state monies. In the monitoring process, the CA is free to determine what it considers to be best practices and to advocate for reforms it believes are advisable and feasible. Although the CA looks to national and international standards concerning correctional practices, it is not mandated to assess the prisons based upon any specific set of criteria. Although it regularly reports to the legislature, the legislative bodies do not dictate the CA's agenda or limit its findings and recommendations. The CA greatly values its independence, which substantially contributes to its ability to advocate for difficult, but necessary, reforms in the criminal justice system.

Some observers believe that it would not be feasible in today's political climate to replicate the CA statute. Accepting that assessment, however, does not mean that other models could not be adopted that could serve a similar function. One model could be an independent review board that is constituted to investigate and report to the legislature and the public on specific prison issues. For example, such an entity could be created to look at healthcare or mental health care, or investigate prison violence.[9]

Alternatively, it might be possible to have a review committee appointed by government officials, with an executive board comprised of appointees by both majority and minority members of the legislature, and by the executive branch. The important issue would be to ensure that the executive appointees do not morph the committee—intentionally or not—into an arm of the prison administration. One mechanism that would help such a review committee maintain its independence is a designation in the authorizing statute that representatives of specific outside agencies must be voting members of the committee, such as representatives of legal services organizations, independent health organizations, non-profit organizations, treatment providers, social service organizations, or religious organizations. If the reviewing entity consists primarily of government appointees, it is essential that the committee be required to hear public input, during both the investigative process and the reporting period.

4. Access to Information and Transparency of Prison Policies and Practices

In order to effectively critique a correctional system, it is important for an outside monitoring organization to gain comprehensive and reliable information about the policies and practices within the prisons. This is often a difficult task because prisons are generally closed institutions that outside individuals or organizations can rarely penetrate.

9. An example of a limited review panel is Florida's Correctional Medical Authority, established to review healthcare in Florida's prisons and to give independent advice to the governor, legislature and corrections department.

The CA has been successful because it has unique access to the prisons. The CA Visiting Committee can go anywhere in the prisons and speak to inmates and staff where they live and work. It is particularly important during the course of CA visits that Visiting Committee members speak to inmates who have not necessarily contacted advocates to raise concerns on their own. Litigators and outside advocates often obtain a somewhat limited view of a prison because they are primarily dealing with individuals who are motivated and capable of reaching outside the prison walls to raise complaints and advocate for themselves. The experience of the CA is that many inmates do not have the resources, information, or skills necessary to advocate for themselves, and many are afraid of the consequences of raising complaints. Since silence does not necessarily indicate a lack of problems, it is important that a reviewing organization be able to determine the experiences of this "silent" inmate majority. The CA surveys of inmates reveal significant problems that inmates have come to accept as standard practices, which they often feel powerless to change.

The act of speaking to inmates during a tour, however, can expose them to some risks. The CA prison visits are monitored by security staff and personnel from DOCS central office. Although it is not common, some security personnel have listened intently to conversations between CA visitors and inmates, and since prison officials can identify the inmates with whom CA visitors converse, there is the possibility that prison staff could retaliate against these inmates. Although the CA has received only a few reports of inmates being harassed for having contact with the organization, the intimidating environment can result in self-censorship. The CA attempts to insulate inmates from retaliation by speaking to as many inmates as possible and by presenting its findings based upon all inmates' comments, without identifying specific sources of information. For extremely sensitive information, the CA sometimes conducts confidential interviews in the visiting room used by legal counsel. These legal visits are difficult to arrange and would severely restrict the breadth of contacts if the CA used them for most inmate interactions. A reviewing organization must be sensitive to the risks to which cooperating inmates may be exposed and it must be prepared

to react forcefully when any individual is adversely affected. Ideally, a reviewing entity should have the authority to conduct confidential interviews with inmates.

In obtaining information from inmates, standardized survey instruments have been useful in assessing conditions and practices. These allow the CA to compare information from different facilities and to assess whether inmates' reports are systemic or anecdotal. For example, the Prison Visiting Project has compiled 3,265 surveys from inmates about general prison conditions and the inmates' experiences at 22 prisons. The CA has also obtained several thousand more inmate surveys focused on specific prison practices and programs.

Speaking to front-line corrections staff is also a crucial component of the visiting process. The Visiting Committee attempts to meet with union representatives in a focus group setting during each prison visit. These meetings can be very informative, revealing the staff's perceptions of the facility and the obstacles they encounter in doing their jobs. During the tour of the program and service areas, CA visitors interview staff about their jobs, obtaining additional data and gaining their perspectives about the effectiveness of their programs.

The prison visits are invaluable in assessing conditions, but access to additional information, particularly from DOCS data and departmental records and documents, is also necessary to assess whether systemic deficiencies exist and to place the individual observations made during visits in the context of the entire system. This can be a cumbersome and time-consuming task because the CA does not have a right to all relevant Department documents and data.

In order to obtain information about the operation of the Department, the CA seeks general information about DOCS pursuant to the state's FOIL and requests specific data about each prison in an approximately 100-question survey provided to a prison before each visit. Both of these efforts, however, are somewhat limited. Although the Department has been cooperative in responding to most data requests, it is under no obligation to do so, and sometimes the CA has experienced delays in receiving DOCS responses and occasionally the Department has refused to provide certain information.

Though gathering data informally has been mostly successful, responses to CA FOIL requests are often delayed

and sometimes incomplete. Specifically, long delays have occurred before receiving documents in response to requests for system-wide information. Moreover, pursuant to FOIL, many items that are requested can be withheld, particularly in the prison context. Most freedom of information laws exempt documents that are part of a pending investigation. In addition, many documents may contain information that state officials categorize as subject to privacy protections, such as medical information about inmate and staff injuries, inmate records, or disciplinary actions against staff. These records can be withheld if the requesting authority does not have a release from the individuals involved. This can make it effectively impossible to look at systemic data. The result is that FOIL is an inefficient and, at times, ineffective tool to access some of this information.

But even if an outside organization has enhanced access to corrections department records, the data needed to assess prison practices may not be available because the prison administration does not record the information or does not store it in a manner that allows for effective retrieval. For example, many prison systems designate the types of use of force that must be documented. The threshold for such documentation may not include many incidents where inmates were in fact subjected to force, particularly if no significant injury occurred. More importantly, much of the most useful information about inmates and staff is buried in individual inmate and staff records. The corrections department can assert that it is unable to retrieve such information without reviewing thousands, and possibly hundreds of thousands, of documents. Few courts would require such a review of documents to extract this information. Corrections departments can effectively insulate themselves from scrutiny by failing to summarize information or keep logs, computer records, or some system of recordkeeping to identify those involved in misconduct or those adversely affected by prison conditions.

To overcome these obstacles to departmental records, legislation creating an outside monitor should include the unfettered right of access to all departmental records, logs, and data. Privacy concerns could be addressed by limiting the publication of identifying data in the monitor's reports. Efforts

should be made on a national basis, or in the states through legislation, requiring prison administrations to keep systemic data on issues such as the following: medical procedures; provisions of mental health care; incidents of self-harm; suicides; homicides; natural deaths; use-of-force incidents in the prisons; inmate and staff injuries; allegations of staff misconduct, particularly concerning interactions with inmates; litigation concerning staff misconduct; and staff and inmate disciplinary actions.

The CA's efforts to reveal prison practices through the visits process and to compile data from the Department to evaluate systemic conditions are designed to make what happens in the prisons more transparent. Corrections departments on their own could share with the legislature and the public more data about prison conditions and practices, but without greater public will to demand these facts, monitoring agents may be the only source for such information.

5. Publication of CA Findings and Recommendations

As was the case with the Abu Ghraib scandal, remedial action often only happens when the misdeeds that have occurred inside our penal institutions are made public.[10] If the graphic and disturbing photographs of mistreatment of the Iraqi prisoners had not been revealed, it is unlikely that any investigation or corrective action would ever have occurred.

The incarcerated population has almost no political power, and inmates' families often come from poor, disenfranchised communities that have limited influence on state politics. Corrections departments are also unlikely to unilaterally implement reform measures, especially given the substantial financial burden that housing inmates places on states. Moreover, since many prisons are located in isolated communities that depend on the facilities for jobs, employees have little incentive to reveal improper practices.

10. In 2003, Iraqi prisoners held at a United States prison near Baghdad were systemically abused and tortured by U.S. forces. The abuse was undeniable because photographs and videos taken by soldiers were eventually displayed in the press and on television. Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42, *available at* http://www.newyorker.com/archive/2004/05/10/040510fa_fact.

Consequently, there is no political power, institutional pressure, or natural public constituency to advocate for improvement in prison conditions when they are needed. Given this dearth of power, it is crucial that outside monitoring agencies publish and publicly promote their findings and recommendations. Such publications are a necessary, but not sufficient, means to hold correctional departments accountable. Along with publications, monitoring agencies must educate policymakers and the public about what is happening in our prisons and help frame the debate about what is appropriate when confining individuals.

Corrective action to improve prison conditions will often require more than the efforts made by corrections departments themselves. Increased resources are frequently necessary to address prison problems. For example, low salaries, insufficient staff coverage, and the lack of educational and vocational programs all contribute to prison violence. In order to obtain these enhanced resources, a clear record of need must be developed to justify these additional expenditures. It often falls to individuals outside the prison system to make this case, because the prison authorities are reluctant to admit that their department is not adequately meeting the needs of the inmate population.

In the past, litigation often served the role of publicizing prison deficiencies. With the advent of the Prison Litigation Reform Act,[11] it has become more difficult for lawsuits to successfully challenge inadequate prison practices. In addition, the constitutional standards imposed by the courts are often far below the well-designed and effective correctional practices that prison advocates would urge corrections departments to implement. Monitoring agencies are free to promote best practices in the prisons even if constitutional violations do not exist.

It is crucial that a monitoring organization's reports are fair and unbiased in discussing prisons and in presenting findings and recommendations. The purpose should not be to only detect failures, but also to note successes and acknowledge

11. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 801, 110 Stat. 1321, 1321-66 (1996) (codified as amended in scattered titles of the U.S.C.). *See also* Appropriate Remedies with Respect to Prison Conditions, 18 U.S.C. § 3626 (2006).

progress in addressing previously identified problems. The voices of inmates should always be included, as should the views and opinions of staff and prison executives. The credibility of the monitor will always be tested, and it is critical that the organization is able to fully support its conclusions and demonstrate that it is equally prepared to listen to, and present, the staff's views.

6. Corrections Department Accountability and Interactions Between the Department and a Monitoring Organization

Reporting is only the first step in the corrective process. The ideal scenario is to have the corrections department review the findings and recommendations of the monitor, and then initiate a process to address the monitor's concerns, offering the corrections department the opportunity to determine how best to remedy the situation. The optimal process for communication and cooperation between the monitor and the corrections department should have three components:

- ► a dialogue between the monitor and the corrections department in which the monitor's preliminary findings and recommendations are discussed to permit clarification or correction of facts, to identify remedial measures the department is already doing or is willing to undertake, and to facilitate modification of the monitor's findings and conclusions accordingly;
- ► after the issuance of the monitor's report, an investigation by the corrections department of facts the department contends are in dispute, and the development of the department's written corrective plan to address deficiencies or improve practices to be shared with the monitor;
- ► a re-evaluation process by the monitor after the corrections department has had an opportunity to address the problems to determine whether the department has implemented its corrective plan and to assess whether that plan adequately addresses the concerns raised in the initial report.

For several years, the CA did not have a cooperative relationship with DOCS and thus was unable to have an effective dialogue about its monitoring activities. The Department had refused to comment on CA reports, which were sent to DOCS prior to their publication, to enter into any discussions with the CA about its findings and recommendations after the reports were issued, or to share with the CA what actions, if any, it intended to take to address the issues raised in the CA reports.

However, with a change in the governor and DOCS commissioner in 2006, the relationship between the Department and the CA has substantially changed. During the past three years, the CA has held a series of substantive meetings with the DOCS Commissioner and his executive team and has implemented a process for dialogue between the Department and the CA about prison and issue-related reports. This process has resulted in an improved exchange of information and has facilitated a sharing of views and proposals about several correctional issues such as healthcare, mental health services, substance abuse treatment, and treatment of female inmates.

It is predictable, however, that many corrections departments will not voluntarily undertake steps to discuss with outside agencies adverse findings and share with them any plans to address deficiencies. Therefore, authorizing legislation creating a monitoring entity should require a corrections department to respond to the entity's monitoring reports in a substantive fashion, to develop corrective plans, and to engage in ongoing communication with the entity about its progress in implementing those plans. Such a requirement does not oblige the department to accept the findings and conclusions of the monitoring organization. Rather, it mandates that the department articulate its position on the validity of the findings, and where the department cannot dispute that a problem exists, develop a remedial plan.

The publication of a corrective plan would provide the monitoring entity with a blueprint of the areas it should assess when evaluating whether the department has effectively instituted measures to remedy problems. Such a process is commonplace in any quality improvement program and should

be replicated within the correctional context.

Finally, the CA is planning to implement a process to assess conditions at prisons recently visited by a CA Visiting Committee and to determine whether policies and practices have been altered following the issuance of a CA prison report. Specifically, the CA will be seeking specific information from the prison administration and surveys of the current inmate population approximately one year after the publication of a prison report to determine whether problems and concerns identified in the original report are still present and whether remedial measures have been undertaken to address these issues. This follow-up monitoring is crucial to determine both the effectiveness of the CA's efforts and to hold prison officials accountable for problems extant in their facilities. It will also be useful in analyzing the feasibility of CA proposed remedies and help the organization evaluate approaches to improving prison conditions and fostering program development.

7. CA Advocacy Efforts

Once the CA issues a report, it undertakes efforts to promote its proposals, including educating policymakers and the public, contacting media, urging policymakers to take legislative action, and participating in criminal justice-related coalitions. While many members of advocacy organizations speak about personal experience or the specific problems they have encountered in their jobs, the CA brings comprehensive information to contextualize anecdotes and add credibility to shared goals. The CA's ability to gather and analyze systemic data empowers individuals, organizations, and coalitions working for criminal justice reform.

Although the strategies employed by the CA alone can prompt reform, the most effective way to spur change in the correctional system is through collaborations between multiple agencies, each with its own methods and tactics, on a single issue. The previously cited example of enhanced prison mental health services represents such a confluence of forces. The $13 million of additional resources was likely the result of the combination of the CA's reports on mental health care and disciplinary confinement, litigation filed against DOCS focused on inadequate mental health care for inmates, and vigorous

lobbying, public education and media work by a statewide coalition called Mental Health Alternatives to Solitary Confinement. It is difficult to imagine such results being achieved without this perfect storm of pressure and coordinated activity from multiple sources.

The CA recognizes there is a tension between (1) publicizing findings that are negative, issuing recommendations for changes in policy and advocating for improvements in prison conditions, and (2) maintaining an open dialogue with a corrections department about what occurs inside the prisons and what can be done to improve conditions. These purposes can be reconciled if a monitoring organization is rigorous in its investigative process to seek input from all elements of the prison community, remains committed to presenting the facts fairly and completely, acknowledges when the department has been successful in providing effective care for inmates or in improving conditions, and continues to seek opportunities to discuss with prison officials their concerns about the system. The CA thus makes it a priority to carry out each of the aforementioned activities.

Part II: New Legislative Measures Mandating Prison Oversight

Three different laws enacted in 2008 and 2009 have introduced new oversight of DOCS prison operations for specific prison services—mental health care, substance abuse treatment and healthcare in the state prisons. In each case, other state agencies are now required to evaluate aspects of these services and/or develop guidelines that determine how the Department treats its inmate population. As a result of these legislative measures, the CA has been working with, or will attempt to engage, these new monitoring state agencies to: (1) assist them in developing their monitoring functions; (2) provide information to them about current practices in the facilities; and (3) review and evaluate the results of their monitoring activities. These laws present new opportunities for the CA to investigate prison practices and effect change in prison conditions, while also altering the relationship of the CA with DOCS, the legislature, and these state agencies. This section will briefly summarize these laws and analyze their impact on CA prison oversight.

A. *SHU Exclusion Law: Mental Health Services for Inmates in Disciplinary Confinement*

Mental health care is provided in New York prisons by staff from the Office of Mental Health ("OMH"), which provides out-patient and in-patient services in the state prisons. More than 8,600 inmates are on the OMH caseload, and nearly 3,000 of these individuals suffer from serious mental illness. Although OMH provides the treatment to inmates with mental illness, OMH services are given in residential mental health units jointly operated by DOCS and OMH, and many inmates with serious mental illness remain in the general prison population, where no mental health staffs are generally present. Unfortunately, many inmates with mental illness have difficulty coping in the highly regulated prison environment. Consequently, they frequently are found to violate prison rules, resulting in their placement in disciplinary confinement. Although inmates currently receiving mental health services in the prison represent fourteen percent of the inmate population, in some prison disciplinary units, up to half or more of the inmates require mental health care.

The CA regularly visits prison units in which mental health services are provided, meets with DOCS and OMH staff about the needs of inmates with mental illness, collects data about the conditions and services affecting these inmates, and documents its findings and recommendations in published reports. These reports are shared with both DOCS and the OMH forensic unit staff and are provided to the legislature and the public. In 2004, the CA issued a comprehensive report, *Mental Health in the House of Corrections*, detailing the many difficulties inmates with mental illness were experiencing in the state prisons and recommending greater oversight of the care being provided to this vulnerable population, including legislation to prohibit the placement of inmates with mental illness in disciplinary confinement.[12]

In January 2008, the SHU Exclusion Law[13] was enacted,

12. CORR. ASS'N OF N.Y., *supra* note 6.

13. SHU Exclusion Law of 2008, 2008 N.Y. Laws 1, (codified as amended at N.Y. CORRECT. LAW §§ 137 (McKinney 2003 & Supp. 2010), 401-a (McKinney 2008 & Supp. 2010) and N.Y. MENTAL HYG. LAW § 45 (McKinney

which mandates that, unless exceptional circumstances exist, any inmate with serious mental illness cannot be placed in a disciplinary confinement unit, known as a Special Housing Unit ("SHU") in DOCS, for more than 30 days.[14] The law further provides that these diverted inmates must be sent to a Residential Mental Health Treatment Unit ("RMHTU") in the prisons where the patient will receive four hours of therapy five days per week.[15] The law requires appropriate screening of inmates admitted to disciplinary confinement to determine if they meet the criteria for diversion, defines the procedures to be employed in evaluating the inmates for diversion and treatment, specifies how prison authorities may restrict services and conditions in the RMHTU, and limits the use of sanctions such as additional disciplinary confinement and the imposition of a restricted diet for disciplinary inmates with serious mental illness. The substantive provisions of the SHU Exclusion Law providing for the diversion of inmates to the RMHTU and the other protections provided to disciplinary inmates with serious mental illness will not fully go into effect until July 1, 2011.[16]

In addition, as part of this legislation, the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities ("CQC") is designated as the agency "responsible for monitoring the quality of mental health care provided to inmates" pursuant to article forty-five of the Mental Hygiene Law.[17] "The commission [CQC] shall have direct and immediate access to all areas where state prisoners are housed, and to clinical and department records relating to inmates' clinical conditions. The commission shall maintain the confidentiality of all patient-specific information."[18] In addition, the law states that CQC "shall monitor the quality of

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2006 & Supp. 2010)).

14. N.Y. CORRECT. LAW § 137(6)(d)(i).

15. SHU Exclusion Law of 2008, sec. 2, § 21, 2008 N.Y. Laws 1.

16. Section 8 of the Law provides that its substantive provisions would take effect two years after the DOCS Commissioner certified that the first residential mental health unit was completed and ready to receive inmates, but no later than July 1, 2011. SHU Exclusion Law of 2008, § 8(a), 2008 N.Y. Laws 8. Since no certification has been made to date, the July 2011 effective date is controlling.

17. N.Y. CORRECT. LAW § 401-a(1).

18. *Id.*

care in residential mental health treatment programs and shall ensure compliance with" the requirements of Sections 137 and 401 of the Corrections Law, which incorporate the substantive provisions of the SHU Exclusion Law described above.[19] Finally, the law specifies that in July 2011, CQC should appoint an advisory committee consisting of mental health experts and advocates, as well as family members of formerly incarcerated individuals.[20] The law did not delay the implementation of the provisions concerning CQC's monitoring functions; therefore, CQC has initiated its monitoring activities.

It should be emphasized that although the substantive protections provided in the SHU Exclusion Law only refer to inmates with serious mental illness who are at risk for placement in disciplinary confinement, the scope of CQC is broader. It is authorized to "[m]onitor and make recommendations regarding the quality of care provided to inmates with serious mental illness, including those who are in a residential mental health treatment unit or segregated confinement in facilities operated" by DOCS and to monitor compliance with the SHU Exclusion Law protections.[21] This language provides CQC with the authority to evaluate the care for all inmates with serious mental illness, whether or not they are in disciplinary confinement or the RMHTU.

Since CQC started to work on prison mental health care, it has made substantial efforts to engage the mental health advocacy community, including the CA. CQC has conducted a series of meetings with a coalition of these advocates, Mental Health Alternatives to Solitary Confinement ("MHASC"), which was instrumental in proposing and supporting the SHU Exclusion Law. The CA is one of the founding members of MHASC and continues to be actively engaged with the group. During these meetings and in subsequent conversations with CQC, the CA has provided CQC with information about the CA auditing process, has presented observations and findings about conditions in prison mental health treatment units, and has discussed with the agency what tasks it should consider

19. *Id.* § 401-a(2).
20. *Id.* § 401-a(3).
21. N.Y. MENTAL HYG. LAW § 45.07(z) (McKinney 2006 & Supp. 2010).

prioritizing in its efforts to monitor mental health care for state inmates. Except for a CQC review of mental health services provided to an inmate who died while in the custody of DOCS, CQC has not issued any reports of its monitoring function. Once these reports are available, the CA will review them and provide the agency with the CA's comments and recommendations.

The introduction of CQC has expanded the role the CA must play in advocating for inmates with mental illness. Given CQC's broad powers to monitor prison conditions and treatment of inmates with mental illness and its expertise on mental health issues, it is likely that in determining whether the agencies are providing appropriate care to the prison population affected by the SHU Exclusion Law, DOCS, OMH, and the legislature will be focusing on CQC's assessments of conditions and practices in the prisons. The CA will continue o issue independent reports on the conditions in state prisons affecting inmates with mental illness, both to (1) inform DOCS, OMH, and the legislature about CA findings and recommendations, and (2) provide information to CQC, which may influence its monitoring activities and its findings concerning care at the prisons visited by the CA. It will be difficult, however, for the CA to pursue recommendations for changes or improvements in the care of inmates with mental illness if its proposed measures are contrary to findings and recommendations made by CQC. Therefore, it will be crucial for the CA to be engaged with CQC both prior to and during its investigative process and when CQC proposes remedial measures for deficiencies it finds at a prison. Finally, the CA will closely follow the activities of CQC to ensure that its monitoring reports assessing mental health services and compliance with the new law are both comprehensive and accurate.

CQC's efforts have the potential to significantly improve the care for inmates with mental illness both because the agency has broad access to all facilities and records and because the public reporting of its observations and findings will increase the transparency of prison practices and enhance the accountability of the prison mental health care system. It is commendable that CQC is seeking information and input from agencies and individuals outside DOCS and OMH.

Although the advocates are pleased with these initial contacts, this activity does not ensure that CQC will be successful in monitoring mental health services in the prison. CQC is still subject to limitations of funding by the state budget and to potential political pressure from the executive if it determines that DOCS and/or OMH are in non-compliance with the new law. Therefore, it is essential that CQC be held accountable by outside agencies to ensure that it is appropriately executing its authority. Since the CA has greater independence from influence by state officials than CQC and has extensive access to the prisons to verify CQC's observations and findings, it is crucial that the CA assess the effectiveness of this new monitoring process to ensure that it reveals program deficiencies and that remedial measures are promptly implemented to rectify identified problems.

B. *Prison Substance Abuse Treatment and the Office of Alcoholism and Substance Abuse Services—Rockefeller Drug Law Reform*

In 1973, New York promulgated draconian criminal sanctions for the possession and sale of illegal substances, resulting in the massive incarceration of individuals involved in the use and sale of drugs in the state. These criminal laws are known as the Rockefeller Drug Laws, named after the then-governor Nelson Rockefeller who advocated their adoption. The most significant effects of these laws were to (1) mandate very long prison sentences for possession or sale of specific quantities of drugs, and (2) remove from the courts discretion to divert individuals with substance abuse problems to treatment rather than prison or to reduce their sentences based upon an assessment of their involvement in criminal activity and the nexus between their behavior and their abuse or dependency on drugs. As of January 1, 2008, there were over 13,400 drug offenders incarcerated in New York State prisons: 905 were women (33% of the total female prison population) and 12,520 were men (21% of the total male population).[22]

22. DROP THE ROCK, THE CAMPAIGN TO REPEAL THE ROCKEFELLER DRUG LAWS (2008), *available at* http://droptherock.ipower.com/wp-

For many years, the CA has been trying to repeal these laws because they are unfair, discriminatory, and ineffective in reducing substance abuse and drug-related crime in our communities. In April 2009, Governor David Paterson signed legislation that significantly reformed the Rockefeller Drug Laws by restoring discretion to the courts to divert some individuals from prison to community-based treatment, reducing the sentences for some offenses, authorizing a limited number of individuals already incarcerated to seek reductions in their current sentences from the court, and including funds for community-based treatment programs for those diverted from the criminal justice system.[23]

In addition, this reform to the Rockefeller Drug Laws mandates that the New York State Office of Alcoholism and Substance Abuse Services ("OASAS") monitor prison-based, substance abuse treatment programs, develop guidelines for the operation of these programs, and release an annual report assessing the effectiveness of such programs.[24] Prior to this provision, OASAS did not monitor any prison-based treatment

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content/uploads/2008/09/dtr_fact_sheet_2008.pdf.

23. On April 7, 2009, the drug law reform bill was signed into law, as part of the budget legislation for 2009-2010. *See* Act of April 7, 2009, 2009 N.Y. Laws 56.

24. New York Mental Hygiene Law section 19.07(h) provides:

> The office of alcoholism and substance abuse services shall monitor programs providing care and treatment to inmates in correctional facilities operated by the department of correctional services who have a history of alcohol or substance abuse or dependence. The office shall also develop guidelines for the operation of alcohol and substance abuse treatment programs in such correctional facilities in order to ensure that such programs sufficiently meet the needs of inmates with a history of alcohol or substance abuse or dependence and promote the successful transition to treatment in the community upon release. No later than the first day of December each year, the office shall submit a report regarding the adequacy and effectiveness of alcohol and substance abuse treatment programs operated by the department of correctional services to the governor, the temporary president of the senate, the speaker of the assembly, the chairman of the senate committee on crime victims, crime and correction, and the chairman of the assembly committee on correction.

N.Y. MENTAL HYG. LAW § 19.07(h) (McKinney 2006 & Supp. 2010).

programs except for two existing facilities: (1) Willard Drug Treatment Center, a 90-day intense treatment readiness program at a facility operated jointly by DOCS and the Division of Parole primarily designed for technical parole violators; and (2) Edgecombe Correctional Facility, a recently created 30-day treatment readiness program for parole violators.

DOCS operates numerous drug treatment programs in its prisons, in addition to the Willard and Edgecombe program, in order to offer treatment to the large percentage of its population who have a substance abuse history. As part of its reception process, DOCS attempts to identify inmates who have history of a substance abuse and then offers substance abuse treatment programs to each of these inmates while they are in custody. In its most recent analysis, DOCS estimates that approximately eighty-three percent of its population consists of identified substance abusers which DOCS believes could benefit from substance abuse treatment.[25] Sixty-one of the sixty-eight state correctional facilities operate 119 substance abuse treatment programs of various types. The Division of Criminal Justice Services ("DCJS") reported that 28,602 state inmates had participated in a prison substance abuse treatment program in 2008, and 25,032 inmates received substance abuse counseling through DOCS in 2007.[26] As of December 31, 2006, 9,842 inmates were enrolled in a DOCS treatment program.[27] According to the DCJS 2008 Crimestat Report, seventy-eight percent of inmates being released from prison who had an identified substance abuse problem had completed or were enrolled in substance abuse counseling

25. N.Y. DEP'T OF CORR. SERVS., HUB SYSTEM: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2008, at 54 (2008), *available at* http://www.docs.state.ny.us/Research/Reports/2008/Hub_Report_2008.pdf.

26. N.Y. DIV. OF CRIMINAL JUSTICE SERVS., 2007 CRIMESTAT REPORT 53 (3d ed. 2008), *available at* http://www.criminaljustice.state.ny.us/pio/annualreport/2007crimestatreport.pdf; N.Y. DIV. OF CRIMINAL JUSTICE SERVS., 2008 CRIMESTAT REPORT 52 (4th ed. 2009), *available at* http://criminaljustice.state.ny.us/pio/annualreport/2008crimestatreport.pdf [hereinafter 2008 CRIMESTAT REPORT].

27. N.Y. DIV. OF CRIMINAL JUSTICE SERVS., 2006 CRIMESTAT REPORT 47 (3d ed. 2008), *available at* http://www.criminaljustice.state.ny.us/pio/annualreport/2006crimestatreport2-9-07.pdf.

program prior to their release. This percentage was 75% in 2007, 77% in 2006, and had changed very little from the 79% in 2004 and 2005.[28]

In 2007, the CA initiated a multi-year study to assess how DOCS cares for inmates it determines have a substance abuse history and might benefit from a prison-based treatment program. During this study, which will be completed later this year, the CA visited 22 prisons and observed more than 40 different treatment programs with approximately 5,400 program participants, representing more than 50% of all DOCS treatment beds. As part of this project, the CA obtained detailed surveys from 1,160 inmates in treatment at these facilities and an additional 1,130 surveys from inmates who were waiting for treatment or who had been in treatment at other prisons. The CA had focus group meetings with substance abuse treatment staff at each prison and discussions with the prison administrators about how they deal with inmates with substance abuse treatment histories. The CA also interviewed formerly incarcerated individuals who have returned home about their prison experiences with treatment and has spoken with community-based treatment providers about their impressions of how prepared formerly incarcerated individuals are for community-based treatment after participating in a prison-based treatment program. Finally, the CA is investigating model practices in other states and will collect data on these programs to compare to practices in New York. The CA has assembled an advisory committee for this study, which includes experts in the field of substance abuse treatment and individuals involved in providing treatment to incarcerated and formerly incarcerated individuals in the state. This advisory committee has been invaluable in assisting the CA in its study design and in developing recommendations that will be included in its upcoming report on this issue.

The CA strongly supports the involvement of OASAS in prison-based treatment because this state agency has the expertise to evaluate the quality of treatment in the prisons and develop guidelines that are comparable to standards and practices employed in the community. Given the CA's focus on substance abuse treatment in the prisons, it can provide

28. 2008 CRIMESTAT REPORT, *supra* note 23, at 54.

OASAS with detailed information about the current practices and potential modifications to the program to enhance services. The use of an advisory committee enhances the CA's ability to present to DOCS and OASAS meaningful proposals for changes to DOCS practices.

Although OASAS has just begun its engagement with prison-based treatment other than at Willard and Edgecombe, the CA is encouraged by its initial communications with OASAS. The first meeting involved the CA providing an overview of its study of prison-based treatment and preliminary observations, and OASAS summarizing its plans for monitoring the prisons and the issues it intends to address during its initial evaluation.

Given OASAS' legislative authorization to monitor prison-based treatment programs and to develop guidelines for their operation, it is essential that the CA engage with OASAS both in terms of its monitoring activities and in OASAS' efforts to establish guidelines for the program. The CA could assist OASAS in three ways: (1) as a source of information about practices in the prisons; (2) as an ally with the legislature and the executive to support the allocation of adequate funds and resources to OASAS to perform its monitoring and oversight duties; and (3) as a resource for expertise on potential modifications/enhancements to the current prison-based policies and practices to assist OASAS in its efforts to develop guidelines. In addition, the CA will continue its efforts to monitor treatment practices in the prisons and, consequently, will be evaluating whether the OASAS monitoring activities are comprehensive and consistent with the observations the CA has made during its visiting process.

C. *Prison Medical Care and New York State Department of Health Oversight of HIV and Hepatitis C Care*

The state prison population suffers from extremely high rates of infection from HIV and hepatitis C ("HCV"). Based upon state Department of Health ("DOH") studies of newly admitted inmates, there were an estimated 4,000 state inmates with HIV in custody in 2007, an infection rate of six percent for

incarcerated men and twelve percent for incarcerated women.[29] New York prisons remain the epicenter of this disease within the U.S. prison system, representing nearly twenty percent of all HIV-infected state inmates in the country.[30] DOCS is one of the largest providers of HIV services in New York State. New York State prisons also have an estimated 8,400 inmates infected with hepatitis C, and many others suffering from other chronic diseases such as hypertension (6,500), diabetes (2,500) and asthma (9,000).[31]

The CA has closely monitored prison healthcare for several years, providing detailed reports on the medical care system at every prison it visits. In 2009, the CA documented its observations and recommendations about DOCS's medical care system in its report: *Healthcare in New York Prison, 2004-2007*.[32] The report concluded that although significant progress has been made in several aspects of the prison healthcare system, problems persist with access to, and the quality of, medical care in state prisons. Concerning HIV-infected inmates, DOCS is aware of less than half of the estimated HIV-infected prison population. Access to infectious disease specialists varies widely throughout the Department, and some prisons have substantially fewer resources to assist HIV-infected inmates with support while incarcerated or with discharge planning for when they leave prison.

Based upon DOH studies of the inmate population, approximately twelve percent of male inmates and nineteen percent of female inmates are infected with hepatitis C, rates higher than those for HIV-infected inmates and rates eight to ten times higher than the HCV-infection rate in the community.[33] DOCS has improved its ability to diagnose HCV-

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29. CORR. ASS'N OF N.Y., HEALTHCARE IN NEW YORK PRISONS 2004-2007, *supra* note 5, at 31.

30. LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HIV IN PRISONS, 2006, at tbl. 1 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/hivp/2006/tables/hivp06t01.cfm.

31. CORR. ASS'N OF N.Y., HEALTHCARE IN NEW YORK PRISONS 2004-2007, *supra* note 5, at 30, 55.

32. *Id.*

33. *Id.* at 46; Gregory L. Armstrong et al., *The Prevalence of Hepatitis C Virus Infection in the United States, 1999 through 2002*, 144 ANNALS OF INTERNAL MEDICINE 705 (2006), *available at* http://www.annals.org/content/144/10/705.full. The Center for Disease Control estimates that 1.3% to 1.9% of the U.S. population were ever infected

infected inmates and has increased the number of HCV-infected inmates receiving treatment. However, some prisons are far less aggressive in their efforts to evaluate these patients for therapy, resulting in treatment rates that are one-tenth the rates in prisons providing more effective care. Overall, the report concluded that there is no consistent practice of care and that efforts are needed to have adequate medical staffing and other resources at all prisons and to standardize the care provided chronically infected inmates comparable to the care available in the community.

For several years, the CA has supported the proposition that the state Department of Health should monitor healthcare in the prisons, as it does for medical care in the rest of the state pursuant to Article 28 of the Public Health Law.[34] DOH has resisted this effort, even though in 1988 and 1992 DOH performed audits of several state prisons and found significant problems in care. Finally this year, both houses of the state legislature passed a provision to require DOH to monitor the care of inmates with HIV and/or hepatitis C in state prisons and local jails (A.903 (Gottfried), S.3842 (Duane)).[35] Governor Patterson signed the measure, despite objections from both DOCS and DOH, on September 16, 2009.[36]

The new law provides in subsection 26 of Section 206 of the Public Health Law:

> The commissioner [of DOH] is hereby authorized and directed to review any policy or practice instituted in facilities operated by the department of correctional services regarding

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with HCV. CENTER FOR DISEASE CONTROL, DISEASE BURDEN FROM VIRAL HEPATITIS A, B, AND C IN THE UNITED STATES, *available at* http://www.cdc.gov/hepatitis/PDFs/disease_burden.pdf.

34. N.Y. PUB. HEALTH LAW § 2801(1) (McKinney 2007). This section defines "hospital" for the purpose of DOH oversight under Article 28 of the Public Health Law. In 2009, bills were introduced in both houses of the state legislature to alter this definition to explicitly include correctional facilities during the last legislative session but these bills were not voted upon in either house. *See* ASS'N OF THE BAR OF THE CITY OF N.Y., REPORT ON LEGISLATION BY THE CORRECTIONS COMMITTEE (2009), *available at* http://www.nycbar.org/pdf/report/HealthCare_Prisons_Corrections_Report062409.pdf.

35. Assem. 903, 232d Leg. (N.Y. 2009).

36. N.Y. PUB. HEALTH LAW § 206(26) (McKinney 2010).

human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS), and hepatitis C (HCV) including the prevention of the transmission of HIV and HCV and the treatment of AIDS, HIV and HCV among inmates. Such review shall be performed annually and shall focus on whether such HIV, AIDS or HCV policy or practice is consistent with current, generally accepted medical standards and procedures used to prevent the transmission of HIV and HCV and to treat AIDS, HIV and HCV among the general public. In performing such reviews, in order to determine the quality and adequacy of care and treatment provided, department personnel are authorized to enter correctional facilities and inspect policy and procedure manuals and medical protocols, interview health services providers and inmate-patients, review medical grievances, and inspect a representative sample of medical records of inmates known to be infected with HIV or HCV or have AIDS. Prior to initiating a review of a correctional system, the commissioner shall inform the public, including patients, their families and patient advocates, of the scheduled review and invite them to provide the commissioner with relevant information. Upon the completion of such review, the department shall, in writing, approve such policy or practice as instituted in facilities operated by the department of correctional services or, based on specific, written recommendations, direct the department of correctional services to prepare and implement a corrective plan to address deficiencies in areas where such policy or practice fails to conform to current, generally accepted medical standards and procedures. The commissioner shall monitor the implementation of such corrective plans and shall conduct such further reviews as the commissioner deems necessary to ensure that identified deficiencies in HIV, AIDS and HCV policies and practices are

> corrected. All written reports pertaining to reviews provided for in this subdivision shall be maintained, under such conditions as the commissioner shall prescribe, as public information available for public inspection.[37]

Given the recent enactment of the law, the CA has not had an opportunity to discuss the implementation of the measure with DOH officials. The CA will attempt to engage those responsible for implementation of the law within DOH in a dialogue about: (1) how DOH will monitor the prisons; (2) how it will invite public participation in the monitoring process; (3) how the mechanism for public review of the agency's findings will operate; and (4) how the outside agencies such as the CA can access DOH's findings and the prisons' responses if there is a determination that a corrective plan is necessary. The CA will also attempt to provide assistance to DOH in developing its protocols and in determining the issues it will address during its monitoring activities.

D. *Analysis of the CA Role in Prison Monitoring When Other State Agencies Exercise Some Oversight Responsibility*

The CA has been an advocate for the three legislative measures described herein because the laws require state agencies with expertise to assess existing prison conditions and practices in the provision of the complex services associated with healthcare, mental health services, and substance abuse treatment, subjects about which DOCS has limited expertise and which traditionally have been given less priority than DOCS's primary mission to maintain custody and control of its inmate population. While DOCS administration can rightfully assert they are not in a position to second-guess their medical staff, mental health providers, or substance abuse counselors, the monitoring agencies can make professional assessments about the quality of care being provided, findings that will be made public and require corrective action if found to be

37. *Id.* The law also specifies that DOH shall perform the same reviews for local correctional facilities, but implementation of the jail-based monitoring is delayed for two years after the law is enacted. *Id.*

contrary to community standards. Consequently, these laws provide an opportunity for: (1) the actual practices in prison to be more transparent; (2) prison policies and practices to become comparable to care in the community; (3) DOCS and OMH to be held accountable for the care being provided; and (4) meaningful remedial plans to be developed and implemented when deficiencies are noted.

Another potential ancillary benefit from these laws is that requiring the attention to prison conditions of agencies primarily responsible for care in the community for health, mental health, and substance abuse services may lead to improved connections between community-based providers and prison treatment providers. With the current focus both nationally and in New York on enhanced re-entry services, the involvement of OASAS and DOH in prison services opens many more possibilities for better coordination of care and facilitation of direct contact and better communication between providers in the prisons and community providers who inevitably treat the formerly incarcerated population.

There are risks, however, associated with this new paradigm that could impede change. The three monitoring entities—CQC, OASAS, and DOH—are all state agencies under the direction of the governor. They are dependent upon funding provided by the executive in its budget and are potentially vulnerable to political pressure from their sister agencies or the executive if a monitoring agency's findings and recommendations could embarrass the administration or subject the state to significantly enhanced costs to implement any remedial plan. Unfettered access to records and information is not clear in each law, and the agencies' ability to assess conditions and practices will be severely limited if they are not provided with sufficient staff to perform the arduous monitoring tasks at more than sixty state prisons and, in the case of DOH, more than fifty jail facilities throughout the state. Currently, these agencies have limited experience in the prisons and it will be difficult for them to penetrate these cultures, which are generally resistant to outside inspection and dialogue. When these agencies issue their reports, it is inevitable that DOCS, OMH, the governor, and the legislature will give great weight to their findings and recommendations. If these monitoring agencies conclude that practices are

adequate, even though problems still exist at the prisons, outside agencies such as the CA will have a very difficult task convincing governmental officials to take action. Although the monitoring agencies will not be the sole decision maker concerning the adequacy of care in the prison, their power to influence those determinations will be substantial.

Given the potential for significant improvements in prison practices, while remaining justifiably concerned that the process could be compromised, the CA will have to enhance its activities to not only monitor the prisons, but also evaluate the effectiveness of the new monitoring processes. These laws alter the relationship of the CA to the primary providers of these services, both DOCS and OMH, in the case of mental health care. DOCS and OMH will no longer be the sole arbiters of what policies and practices will be employed in the prisons, and to varying degrees, those policies will be influenced or even determined by the monitoring state agencies. DOCS and OMH may deflect CA requests for change, asserting that they are bound by the determinations of the monitoring agencies, thereby delaying their response to identified problems and avoiding their obligations to provide competent care. The CA and the legislature should insist that the monitoring activities in these legislative measures do not relieve DOCS and OMH from providing care comparable to community standards but are intended to assist them in identifying problematic areas and providing expertise in how to address noted deficiencies. The CA will press DOCS and OMH to respond directly to CA findings about practices in the prisons, but it must be recognized that in some situations, these agencies may not be able to implement some of the CA recommendations without the agreement of the monitoring agencies.

Consequently, the CA must engage the monitoring agencies both by informing them of CA findings and recommendations and by advocating with those agencies for implementation of corrective plans that will adequately address deficiencies in care revealed in the CA's monitoring work. In doing so, however, it is crucial that the CA not be seen as an adversary by the monitoring agencies. The CA and these agencies have much in common in terms of assessing fairly and accurately the actual practices in the prisons and developing feasible measures to correct identified deficiencies.

The CA's long history and experience can be valuable assets to agencies that are new to monitoring prison conditions. The CA can assist the monitoring agencies in identifying problematic practices by alerting them to areas that the agencies may want to investigate, incidents that may exhibit systemic flaws, and individuals the agencies may seek to interview. The CA's work product will in no way substitute for the monitoring agencies' independent assessment, but it can help focus and facilitate the monitoring agencies' investigative process. In addition, the CA can suggest measures to improve practices that are feasible and cost-efficient. In order to support comprehensive and effective monitoring, the CA will be an ally in seeking adequate funding for these monitoring agencies, which will need resources to perform their tasks. Finally, the CA can advocate with the executive and legislature for any remedial measures proposed by the monitoring agencies that may require significant expenditure of state funds, supporting their conclusions and endorsing their recommendations.

The CA has been effective in part because it is independent of state government. It can publicize facts that may be disturbing to government officials and the public about the mistreatment of incarcerated individuals who often are held in low esteem and even vilified. The CA has recommended improved treatment despite the limited political power inmates and their families have with lawmakers and the general populace. While doing all it can to assist the monitoring agencies in their investigative processes and supporting their findings and recommendations where appropriate, the CA will also have to maintain its independence from these agencies so that it can fairly assess the effectiveness of the monitoring process in identifying and correcting problems in the prisons. The new laws hold great promise for change, but how that process is employed in revealing deficiencies and correcting problems will ultimately determine whether this promise is realized.

Conclusion

The unique legislative authority granted the CA, and its long history of monitoring prison conditions and practices, gives the organization a unique perspective on how outside

monitoring can have a significant positive impact on a corrections system. Given the generally closed nature of correctional institutions and the lack of political or public mechanisms to make these institutions accountable, it often falls on non-governmental organizations such as the CA to be society's camera and report on what is actually happening inside prison walls. New York's new legislative measures place the state in the forefront of efforts to expand the transparency of prison practices and to enhance the accountability of prison administrators. They also increase the potential for evidence-based practices and community standards of care to be applied to the treatment of inmates. It is far too early to judge the effectiveness of this new paradigm, but this legislative scheme holds much promise. With assistance from the CA, efforts by these monitoring agencies could result in improving essential services and demonstrating to the nation that partnerships between corrections and state agencies overseeing professional services can be effective and in the public's interest.

Improving the treatment of inmates—by vigorous oversight and greater accountability for the administration of our correctional systems—is long overdue. In too many cases, incarcerated individuals are returned to society less able to function effectively than when they entered our prisons. This is a lost opportunity to educate, treat, and rehabilitate individuals who need assistance. When we effectively care for individuals inside our prisons, they are better able to function in the community and less likely to return to the prison. However, improving care in the prisons not only helps the incarcerated population but is also crucial for the public's health and well-being. Reducing disease, and effectively treating chronic medical conditions, mental illness, and substance abuse in our correctional facilities, is not only a moral imperative, it is also fiscally responsible and a critical step in moving toward a more effective prison system and a safer society.