Pace Law Review

Volume 30
Issue 5 *Fall 2010*
Opening Up a Closed World: A Sourcebook on Prison Oversight

Article 16

September 2010

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Recommended Citation
Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 Pace L. Rev. 1625 (2010)
Available at: http://digitalcommons.pace.edu/plr/vol30/iss5/16

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Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission

Jamie Fellner*

With the enactment of the Prison Rape Elimination Act of 2003 ("PREA"), Congress simultaneously acknowledged the significance of sexual abuse by staff and prisoners in correctional facilities as well as the duty of public officials to protect incarcerated individuals from it.[1] Among other provisions, PREA authorized the creation of the National Prison Rape Elimination Commission ("the Commission"). I had the honor and responsibility of serving as one of the commissioners.[2]

PREA charged the Commission with studying and reporting its findings on the causes and consequences of sexual abuse in confinement, and with developing standards for its prevention, detection, response, and monitoring. To satisfy its mandate, the Commission convened public hearings and expert committees, thoroughly reviewed the relevant literature, submitted draft standards for public comment, and through this lengthy process of consultation and study, drew on the knowledge, experiences, and insights of countless corrections leaders, survivors of sexual abuse, health care providers, researchers, legal experts, advocates, and academics. The Commission presented its final report and proposed standards on June 23, 2009 to the President, Congress, the Attorney General, the Secretary of Health and Human Services, and

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1. 42 U.S.C. §§ 15601-15609 (2006).

2. *Id.* § 15606. The law authorized nine commissioners.. One of the commissioners resigned, leaving eight who served until the Commission sunsetted on August 23, 2009, as required by statute. *Id.* § 15606(m).

other federal and state officials.[3] The four volumes of standards include detailed prescriptions for corrections and detention administrators, including training and hiring policies for corrections staff, incident investigation and reporting protocols, access to treatment and mental health services, and requirements for disciplinary action against perpetrators.

Under PREA, the Attorney General must promulgate national prison rape standards by June 23, 2010.[4] These standards will be immediately binding on federal detention facilities.[5] State officials must certify their compliance with the standards or lose five percent of their federal corrections-related funding.[6] The Commission views the standards it has proposed to the Attorney General as a blueprint for lasting change. They are as urgently needed in 2010 as in 2003 when PREA became law. Sexual abuse of incarcerated men and women remains a persistent human rights violation with devastating consequences for victims as well as for the integrity of correctional institutions.

The Commission's report contains nine findings on the scope and seriousness of the problem of sexual abuse. Our analysis also substantiates the need for each of the standards governing policies and practices that the Commission proposes for adult prisons and jails, facilities with immigration detainees, juvenile facilities, community corrections, and lockups.

In crafting its standards, one of the Commission's overarching considerations was the importance of greater transparency of correctional agencies' sexual abuse data and their efforts to address prison rape. The Commission is convinced that such transparency will aid in the elimination of prison sexual abuse and improve public trust and confidence in corrections. It gathered voluminous information on internal and external monitoring mechanisms and held a public hearing

3. *See* NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT, (2009), *available at* http://www.cybercemetery.unt.edu/archive/nprec/20090820155502/http://nprec.us/files/pdfs/NPREC_FinalReport.PDF.

4. 42 U.S.C. § 15067(a)(1).

5. *Id.* § 15607(b).

6. *Id.* § 15607(c)(2)(A).

on oversight mechanisms.[7] The final standards require

7. The following individuals testified before the Commission in New Orleans: Charles C. Foti, Jr., Louisiana Attorney General; James Carter, Councilmember, New Orleans City Council Chair, Criminal Justice Committee; Major Marty Dufrene, Corrections Department Head Lafourche Parish Sheriff's Office (Thibodeaux, L.A.); Sandi Matheson, Director of the State Office of Victim/Witness Assistance of the New Hampshire Attorney General's Office; Gina Womack, Co-Director, Families and Friends of Louisiana's Incarcerated Children ("FFLIC"); Norris Henderson, Soros Justice Fellow and Co-Director for Safe Streets Strong Communities; Robert B. Greifinger, M.D., Correctional Health Care Policy and Quality Management Consultant and Professor (Adjunct) of Health and Criminal Justice at John Jay College of Criminal Justice (New York, N.Y.); Jim DeGroot, Ph.D., Director of Mental Health, Georgia Department of Corrections; Jennifer Pierce-Weeks, RN, SANE-A, SANE-P, President-Elect, International Association of Forensic Nurses and Forensic Nurse Examiner, Memorial Hospital (Colorado Springs, Colo.); Lannette Linthicum, M.D., FACP, Medical Director, Texas Department of Criminal Justice; Ben Raimer, M.D., Vice President and CEO, Community Health Services, University of Texas Medical Branch; Professor, Pediatrics, Family Medicine and Preventive Medicine (Galveston, Tex.); Mike Puisis, D.O., Consultant, former Medical Director at the New Mexico Department of Corrections and the Cook County Jail; Editor, Clinical Practice in Correctional Medicine (Chicago, Ill.); Art Beeler, Warden, Federal Correctional Complex (Butner, N.C.); Wendy Still, Associate Director of Female Offender Program & Services, California Department of Corrections and Rehabilitation (Sacramento, Cal.); Lynn Sander, M.D., NCCHC Representative and former Medical Director of Denver Sheriff's Department Medical Program; Immediate Past-President, Society of Correctional Physicians (Denver, Colo.); Carrie Hill, Attorney, Corrections Law and Criminal Justice Consultant; Editor, Corrections Managers' Report (Maple Grove, Minn.); Carrie Abner, Research Associate, American Probation & Parole Association (Lexington, Ky.); Thomas Beauclair, Deputy Director, National Institute of Corrections (Washington, D.C.); Denise Robinson, President, Alvis House and Past-President, International Community Corrections Association (Columbus, Ohio); Barbara Broderick, Director, Adult Probation, Maricopa County Pretrial and Probation (Phoenix, Ariz.); Anadora Moss, President of The Moss Group and NIC PREA/Moss Group Project Director (Washington, D.C.); Antonio Booker, Director, Adult Residential Services, Johnson County Department of Corrections (New Century, Kan.); Jacqueline Kotkin, Field Services Executive, Probation and Parole, Vermont Department of Corrections (Waterbury, Vt.); Eugenie Powers, Director, Probation and Parole, Louisiana Department of Public Safety and Correction (Baton Rouge, L.A.); Marlin Gusman, Orleans Parish Criminal Sheriff; Michele Deitch, Professor (Adjunct), The University of Texas at Austin, LBJ School of Public Affairs (Austin, Tex.); Doug Dretke, Executive Director, Correctional Management Institute of Texas, Sam Houston University (Hunstville, Tex.); Robert L. Green, Warden, Montgomery County Correctional Facility, Montgomery County Department of Correction and Rehabilitation (Boyds, Md.); Theodis Beck, Secretary, North Carolina Department of Correction and President, Association of State Correctional Administrators (Raleigh, N.C.); Matthew Cate, Inspector General, Office of the Inspector General, California Rehabilitation Oversight Board

mutually reinforcing mechanisms of internal and external accountability and oversight because both are essential to prison safety. This essay will briefly review those accountability standards and the Commission's rationale for them.[8]

I. Prison Management and Sexual Abuse

Prison rape is not an inevitable feature of confinement. While isolated and random acts of abuse—sexual or otherwise—can never be completely prevented, Congress enacted PREA when it realized tens of thousands of prisoners were victims of sexual violence each year because officials had not instituted basic measures to protect them.

Prior to the passage of PREA, Human Rights Watch, Amnesty International, Just Detention International (formerly called Stop Prisoner Rape), and other organizations and individuals had documented the failure of correctional leaders to take prison sexual abuse seriously: basic prevention measures were lacking, complaints of rape were not investigated, victims who reported rape often suffered retaliation by the perpetrators or their allies, and perpetrators were rarely prosecuted. Prisoners who sought protection from past or potential abusers confronted indifference and sometimes even staff complicity. Officials displayed little interest in understanding the nature or prevalence of the sexual abuse that occurred in their facilities, or in adopting measures to stop it.[9] As I stated in the Human Rights Watch

(Sacramento, Cal.); Will Harrell, Ombudsman, Office of Independent Ombudsman, Texas Youth Commission (Austin, Tex.); Jack Beck, Director, Prison Visiting Project, Correctional Association of New York (New York, N.Y.); Margo Schlanger, Professor of Law, Washington University in St. Louis School of Law; Director, Civil Rights Litigation Clearinghouse (St. Louis, Mo.). *See* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 245-49.

8. In order to present the Commission's thinking, in this essay I draw liberally, but without citation, from the text of the report and the discussion that accompanies each standard.

9. *See, e.g.*, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), http://www.hrw.org/legacy/reports/1996/Us1.htm (last visited Mar. 16, 2010); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) http://www.hrw.org/legacy/reports/2001/prison/report.html (last visited Mar.

press release announcing the release of the Commission's report and standards, "The history of prison rape is a history of officials who denied the problem existed, tolerated it, or thought nothing could be done to stop it."[10] Prison rape flourished where leadership was not committed to the safety of prisoners, including their safety from sexual violence, and where officials failed to create or maintain institutional cultures marked top to bottom by a commitment to prisoner safety. The relative indifference to prisoner safety from sexual abuse was reflected in, among other things, the absence of adequate internal prison rape monitoring measures and external oversight.

The Commission's fourth finding states: "Few correctional facilities are subject to the kind of rigorous internal monitoring and external oversight that would reveal why abuse occurs and how to prevent it. Dramatic reductions in sexual abuse depend on both."[11] The finding reflects considerable evidence that the paucity of internal and external accountability measures contributes to prison rape.

In public institutions, as in private, mutually reinforcing mechanisms of internal monitoring and external oversight are essential to ensuring optimum performance as well as public accountability. Prisons are no exception. In his testimony before the Commission, Doug Dretke, former Director of the Correctional Institutional Division of the Texas Department of Criminal Justice, quoted from John DiIulio's influential book, *Governing Prisons*: "[P]rison managers must be subject to a vigorous system of internal and external controls on their behavior."[12]

16, 2010); AMNESTY INT'L, "NOT PART OF MY SENTENCE" VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY (1999) http://www.amnesty.org/en/library/asset/AMR51/001/1999/en/ab8c7840-e363-11dd-937f-a170d47c4a8d/amr510011999en.html (last visited Mar. 16, 2010).

10. Press Release, Human Rights Watch, US: Prevent Prison Rape (June 23, 2009), *available at* http://www.hrw.org/en/news/2009/06/23/us-prevent-prison-rape.

11. *See* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 82.

12. *Internal Oversight: Institutional Accountability for Eliminating Sexual Violence, Public Hearing Before the Nat'l Prison Rape Elimination Comm'n*, New Orleans, La. (Dec. 6, 2007) (statement of Doug Dretke, former Dir. of the Corr. Inst. Div. of the Tex. Dep't of Criminal Justice), *available at* http://www.cybercemetery.unt.edu/archive/nprec/20090820160908/http://nprec.us/docs3/Dretke%20Testimony.pdf [hereinafter Dretke] (quoting JOHN

Based on its research, the Commission concludes:

> [Corrections administrators] need robust mechanisms and systems to monitor their facilities, identify problems, and implement reforms. They need to apply that discipline internally and to accept it from outside. The very nature of [correctional environments] demands that the government and the public have multiple means to watch over them and intervene when both institutions and individuals are at risk.[13]

Reflecting this conclusion, the Standards developed by the Commission contain numerous internal and external monitoring and accountability mechanisms, as described below.

II. Internal Monitoring

As Doug Dretke aptly noted, "[i]nternal accountability begins with knowing what is actually occurring within a prison facility."[14] Yet prison rape has long been underreported—inmates have been reluctant to tell staff of past or prospective abuse because of a sense of futility, fear of retaliation or further attacks, not wanting to be subjected to harsh or hostile "protective custody conditions," and a general distrust of prison officials. The Commission found solid basis for inmate concerns—all too often, in the past, nothing was done about a report of rape, officers were dismissive or mocking and failed to pass the information to appropriate officials, and retaliation or further abuse was a strong possibility. The Commission found that "[m]any victims cannot safely and easily report sexual abuse, and those who speak out often do so to no avail."[15] The Commission recognizes that officials need to create correctional environments in which prisoners feel safe reporting sexual

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DIIULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT 242 (1990)).

13. *See* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 97.

14. Dretke, *supra* note 12.

15. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 100.

abuse and confident that the allegations will be investigated. Standard RE-1 requires facilities to provide "multiple internal ways for inmates to report easily, privately, and securely sexual abuse, retaliation by other inmates or staff for reporting sexual abuse, and staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse."[16] Standard OR-5 specifically requires the agency to "protect[ ] all inmates and staff who report sexual abuse or cooperate with sexual abuse investigations from retaliation by other inmates or staff."[17] Because inmates may not want to report directly, Standard RE-4 requires facilities to receive and investigate third-party reports of sexual abuse.[18] Pursuant to Standard

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16. *Id.* at 102.
17. *Id.* at 218.

> The agency protects all inmates and staff who report sexual abuse or cooperate with sexual abuse investigations from retaliation by other inmates or staff. The agency employs multiple protection measures, including housing changes or transfers for inmate victims or abusers, removal of alleged staff or inmate abusers from contact with victims, and emotional support services for inmates or staff who fear retaliation for reporting sexual abuse or cooperating with investigations. The agency monitors the conduct and/or treatment of inmates or staff who have reported sexual abuse or cooperated with investigations, including any inmate disciplinary reports, housing, or program changes, for at least 90 days following their report or cooperation to see if there are changes that may suggest possible retaliation by inmates or staff. The agency discusses any changes with the appropriate inmate or staff member as part of its efforts to determine if retaliation is taking place and, when confirmed, immediately takes steps to protect the inmate or staff member.

Id.

18. *Id.* at 217.

> The facility receives and investigates all third-party reports of sexual abuse (IN-1). At the conclusion of the investigation, the facility notifies in writing the third-party individual who reported the abuse and the inmate named in the third-party report of the outcome of the investigation. The facility distributes publicly information on how to report sexual abuse on behalf of an inmate.

Id.

OR-1:

> All staff members are required "to report immediately and according to agency policy any knowledge, suspicion, or information they receive regarding an incident of sexual abuse that occurred in an institutional setting; retaliation against inmates or staff who reported abuse; and any staff neglect or violation of responsibilities that may have contributed to an incident of sexual abuse retaliation."[19]

Under the standards, reports of abuse will also trigger prescribed medical and mental health responses and investigations.[20] The Commission's standards also require two

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19. *Id.* The Standard also requires staff to limit dissemination of such information to those who need to know and it includes medical and mental health practitioners as staff required to report:

> Apart from reporting to designated supervisors or officials, staff must not reveal any information related to a sexual abuse report to anyone other than those who need to know, as specified in agency policy, to make treatment, investigation, and other security and management decisions. Unless otherwise precluded by Federal, State, or local law, medical and mental health practitioners are required to report sexual abuse and must inform inmates of their duty to report at the initiation of services. If the victim is under the age of 18 or considered a vulnerable adult under a State or local vulnerable persons statute, the facility head must report the allegation to the designated State or local services agency under applicable mandatory reporting laws.

Id.

20. *Id.* at 219.

> Victims of sexual abuse have timely, unimpeded access to emergency medical treatment and crisis intervention services, the nature and scope of which are determined by medical and mental health practitioners according to their professional judgment. Treatment services must be provided free of charge to the victim and regardless of whether the victim names the abuser. If no qualified medical or mental health practitioners are on duty at the time a report of recent abuse is made, security staff first responders take preliminary steps to protect the victim (OR-

levels of review for reports of abuse: one in response to each individual incident and the other a periodic review based on aggregated data.

Standard DC-1 requires correctional facilities to treat every report of sexual abuse as a critical incident that is examined by "a team of upper management officials, with input from line supervisors, investigators, and medical/mental health practitioners."[21] Although such reviews are widely recognized as a best practice when inmates attack another, they are rarely instituted for incidents of rape.

The most effective prevention efforts are targeted interventions that reflect where, when, and under what conditions sexual abuse occurs, as well as how staff members respond. Incident reviews following every report of sexual abuse (except where the allegation was determined to have been unfounded) can provide that knowledge. By reviewing all the facts and circumstances surrounding an incident and the quality of the facility's response, officials can spot problems and take steps to correct them. A critical incident review may

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> 3) and immediately notify the appropriate medical and mental health practitioners.

Id.

21. *Id.*

> The facility treats all instances of sexual abuse as critical incidents to be examined by a team of upper management officials, with input from line supervisors, investigators, and medical/mental health practitioners. The review team evaluates each incident of sexual abuse to identify any policy, training, or other issues related to the incident that indicate a need to change policy or practice to better prevent, detect, and/or respond to incidents of sexual abuse. The review team also considers whether incidents were motivated by racial or other group dynamics at the facility. When incidents are determined to be motivated by racial or other group dynamics, upper management officials immediately notify the agency head and begin taking steps to rectify those underlying problems. The sexual abuse incident review takes place at the conclusion of every sexual abuse investigation, unless the allegation was determined to be unfounded. The review team prepares a report of its findings and recommendations for improvement and submits it to the facility head.

Id.

reveal, for example, a dangerous, unmonitored area of a facility, or slow responses by frontline staff. Such reviews will also reveal what is working well, for example, reporting mechanisms or collection of forensic evidence. Standard DC-1 specifically requires the review team to consider "whether incidents were motivated by racial or other group dynamics at the facility. Where incidents are determined to be motivated by racial or other group dynamics, upper management officials immediately notify the agency head and begin taking steps to rectify those underlying problems."[22] Research suggests that racial dynamics may play a role in inmate on inmate sexual abuse. The Commission wants to be sure that facility officials are vigilant and alert to the role that such dynamics may play, and that where racial tensions are present, they act to address those tensions rather than limit their focus to the specifics of the incident of abuse.

Standard DC-2 requires correctional agencies to collect accurate uniform data for every reported incident of sexual abuse and, at least annually, to aggregate it.[23] The Commission recognizes the value of some measure of uniform data across agencies but seeks to avoid creating an overly cumbersome or impractical data collection instrument. Its solution is to require agencies to collect data that, at a minimum, will enable them to answer all of the questions on the most recent Bureau of Justice Statistics ("BJS") Survey on Sexual Violence. But, it also suggests to agencies that additional data might prove useful for their own purposes of

22. *Id.*
23. *Id.*

> The agency collects accurate, uniform data for every reported incident of sexual abuse using a standardized instrument and set of definitions. The agency aggregates the incident-based sexual abuse data at least annually. The incident-based data collected includes, at a minimum, the data necessary to answer all questions from the most recent version of the BJS Survey on Sexual Violence. Data are obtained from multiple sources, including reports, investigation files, and sexual abuse incident reviews. The agency also obtains incident-based and aggregated data from every facility with which it contracts for the confinement of its inmates.

Id.

self-analysis and monitoring. In Appendix C to the Standards, the Commission presents a list of data items that goes beyond what the BJS survey requires. The Commission believes that if the data identified in Appendix C were, in fact, collected for each incident of sexual abuse, agencies would be greatly assisted in their ability to identify patterns of abuse and possible remedies.

The aggregated data will provide a picture of trends and patterns among reported incidents both at individual facilities and within the agency as a whole. But the potential of the aggregated data will be lost if no one actually studies and acts on it. The Commission's research suggests that, all too frequently, agencies did not gather the data that would enable them to understand patterns and trends with regard to sexual abuse, but that even if they did have the data, they did not analyze it to exploit its potential to guide their work. Standard DC-3, "Data review of corrective action," was created to ensure this did not happen. It states, in part:

> The agency reviews, analyzes, and uses all sexual abuse data, including incident-based and aggregated data, to assess and improve the effectiveness of its sexual abuse prevention, detection, and response policies, practices, and training. Using these data, the agency identifies problem areas, including any racial dynamics underpinning patterns of sexual abuse, takes corrective action on an ongoing basis, and, at least annually, prepares a report of its findings and corrective actions for each facility as well as the agency as a whole. The annual report also includes a comparison of the current year's data and corrective actions with those from prior years and provides an assessment of the agency's progress in addressing sexual abuse.[24]

As Former Secretary of the North Carolina Department of Correction, Theodis Beck, told the Commission, "We can't make a dent in this problem if we don't have a full understanding of

24. *Id.*

what is really going on inside our facilities. . . . With accurate data in hand, our final step is to critically examine our actions and our outcomes."[25] Equipped with the knowledge generated by its data review, corrections officials can determine what needs to be known to better keep inmates safe. The reviews provide administrators with the opportunity to identify policies or practices that may contribute to, or fail to prevent, sexual abuse. They should generate information administrators need to make efficient use of limited resources, deploy staff wisely, safely manage high-risk areas, and develop more effective policies and procedures. The requirement that agencies compare current data with the prior years' data forces agencies to assess their progress, or lack thereof. The comparisons may validate the success of preventive measures that were newly implemented, or may reveal that certain problems have resisted improvement and that redoubled effort is required. For example, the agency may discover that allegations of abuse in a particular unit decreased after cameras were installed, or it may discover that a higher number of allegations of abuse during the night shift have persisted over time, warranting focused remediation.

Under Standard DC-3, the agency head is required to approve the annual report. This requirement underscores to the agency head, and thus to the agency and the public, the importance of compliance with PREA standards.

III. External Oversight

Professor Michele Deitch, an expert in prison oversight mechanisms, emphasized in her testimony to the Commission that external oversight "is a means of achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and humane prisons

25. *Special Topics in Preventing and Responding to Prison Rape: Medical and Mental Health Care; Community Corrections Settings and Oversight, Public Hearing Before the Nat'l Prison Rape Elimination Comm'n*, New Orleans, La. 4 (Dec. 6, 2007) (statement of Theodis Beck, Sec'y, N.C. Dep't of Corr. & President, Ass'n of State Corr. Adm'rs), *available at* http://www.cybercemetery.unt.edu/archive/nprec/20090820160914/http://nprec.us/docs3
/T%20Beck%20Final.pdf.

and jails."[26] Indeed, because of the closed nature of prisons, public oversight may be even more important than for many other public institutions. The Commission understands that even the most rigorous internal monitoring cannot replace the value of opening up correctional facilities to review by outsiders. It agrees with Deitch that internal accountability measures and external scrutiny "go hand-in-hand, and neither is a replacement for the other."[27]

The Commission reviewed forms of external oversight that vary widely in scope, function, and authority—for example, ombudsmen, legislative committees, inspectors general, boards of correction, and other entities. It also learned that few correctional systems in the United States, whether federal, state, local or private, are subject to an oversight body with most, much less all, of the fundamental characteristics that experts agree are essential for effective external oversight.[28] Such characteristics include independence from the correctional agency being scrutinized, unfettered and confidential access to facilities, prisoners, staff and documents, and adequate resources.[29] The Commission does not create a standard specifying the creation of a particular oversight body because it lacks the statutory authority to prescribe policies for federal, state, or local governments apart from those for correctional agencies. The Commission does, however, endorse the 2008 American Bar Association ("ABA") resolution regarding oversight.

The ABA resolution urges 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

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26. *Prison Oversight and Systems of Accountability, Public Hearing Before the Nat'l Prison Rape Elimination Comm'n*, New Orleans, La. 2-3 (Dec. 6, 2007) (statement of Michele Deitch, Adjunct Professor of Pub. Policy, Lyndon B. Johnson Sch. of Pub. Affairs, Univ. of Tex. at Austin), *available at* http://www.cybercemetery.unt.edu/archive/nprec/20090820160902/http://nprec.us/docs3/Deitch%20Testimony.pdf.

27. *Id.* at 3.

28. *See id.* at 7-8, 18.

29. *Id.* at 2-3; STEPHEN J. SALTZBURG, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 2-3 (2008), *available at* http://www.abanet.org/crimjust/policy/prisonoversight.pdf.

detention facilities operating within their jurisdiction."[30] The Commission notes in its report that "although the [ABA] resolution does not impose a particular model of external oversight, its [ ] requirements capture the characteristics that experts and practitioners generally agree are necessary to achieve true accountability and transparency."[31] Perhaps most important is the requirement that the person or entity overseeing corrections operates independently of any public or private entity that could compromise or corrupt its work. The Commission believes that if independence and other key requirements enumerated in the ABA resolution are met, external oversight will be strong and everyone's interests will be served, including those of corrections administrators who depend on educated legislatures and the public to support significant reform in the facilities they manage. The Commission urges "governments to act quickly to create forms of external oversight strong enough to make all correctional facilities more transparent, accountable, and, ultimately, safe."[32]

IV. Audits

To ensure independent external scrutiny of agencies' implementation of the PREA standards, the Commission recommends periodic audits. Standard AU-1 requires audits in all correctional facilities to measure compliance with the standards:

> The public agency ensures that all of its facilities, including contract facilities, are audited to measure compliance with the PREA standards. Audits must be conducted at least every three years by independent and qualified auditors. The public or contracted agency allows the auditor to enter and tour facilities, review documents, and interview staff and inmates, as

30. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 90 (quoting SALTZBURG, *supra* note 29, at 1).

31. *Id.* at 90.

32. *Id.* at 91.

> deemed appropriate by the auditor, to conduct comprehensive audits. The public agency ensures that the report of the auditor's findings and the public or contracted agency's plan for corrective action (DC-3) are published on the appropriate agency's Web site if it has one or are otherwise made readily available to the public.[33]

Many prisons and jails are already subject to audits, having voluntarily agreed, for example, to seek accreditation from the American Correctional Association ("ACA"). ACA accreditation requires review of a facility's documentation to determine if its policies and practices comply with ACA standards, which include a number of standards addressing prison rape. Valuable as these accreditation audits are, they do not fulfill the Commission's vision of what is needed under PREA. The ACA audits are voluntary, and only a small percent of all detention facilities are accredited. The results of audits are not public: they are the property of each jurisdiction to publish or not, and few do. In addition, the ACA standards are less comprehensive than the Commission's standards, with respect to the measures necessary to prevent and respond to sexual abuse.

The Commission believes the audits required by Standard AU-1 are crucial to the success of PREA. They will allow agencies, legislative bodies, and the public to learn whether facilities are complying with the PREA standards. They can be a resource for the Attorney General in determining whether states are meeting their statutory responsibilities. They will provide the agency with objective feedback on its performance by skilled reviewers, thereby helping the agency understand if deficiencies exist in its policies and practices and providing a basis for developing corrective steps.

But, if audits are to serve these purposes effectively, they must meet certain criteria, as reflected in the Standard AU-1 and the definition of auditor developed by the Commission.[34]

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33. *Id.* at 219.

34. The Commission defines auditor as:

> An individual or entity that the jurisdiction employs or retains by contract to perform audits. An auditor may also

The Commission seeks both to promote the integrity and value of the audit process and to provide appropriate flexibility to the facilities and agencies regarding the identity of the auditor.

Audits must be conducted periodically. The three year requirement in the standard was chosen to ensure sufficient frequency to be meaningful, without being so frequent (for example, annually) as to be onerous. The requirement of independence is intended to help protect the audit process from biased or compromised investigations or findings. The individual or team of individuals conducting the audit cannot be employed by the correctional agency or have a current direct reporting relationship to the head of the agency being audited, but may be a staff or contract worker hired by the jurisdiction or authorized by law, regulation, or the judiciary to perform audits. The auditors must be prequalified by the U.S. Department of Justice to ensure a certain level of competence as well as uniformity in the auditing process across the nation. The Commission recommends that the National Institute of Corrections design and develop a national training program for auditors.[35] The requirements of qualifications along with independence are intended to ensure the individuals or teams conducting the audits have the skills and objectivity necessary to identify and gather the data that must be analyzed and to employ sound professional judgment when analyzing the data. The requirement of unfettered access to all parts of the facility as well as all documents, staff, and prisoners is self-explanatory—without such access the auditors would not be able to obtain the comprehensive information needed to ensure an accurate, reliable audit.

> be authorized by law, regulation, or the judiciary to perform audits; however, an auditor cannot be an agency employee. An auditor is able and prequalified by the U.S. Department of Justice to perform audits competently and without bias. Prequalification does not require prior employment with any particular agency.

National Prison Rape Elimination Commission—Publications—Standards—Adult Prisons and Jails: Glossary, http://www.cybercemetery.unt.edu/archive/nprec/20090820155246/http://nprec.us/publication/standards/adult_prisons_and_jails/glossary.php (last visited Mar. 24, 2010).

35. *See* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 238.

V. The Role of the Public

It is axiomatic that prison walls not only keep prisoners in, they keep the public out. Most Americans have little understanding of what goes on in U.S. prisons. The public lacks the information to know how well or poorly they are doing their job because correctional agencies tend not to operate their facilities in an open and transparent way. The Commission believes the public has a right and a responsibility to know what is going on in correctional institutions operated in its name; therefore, our standards require agencies to make available to the public extensive data relevant to sexual abuse. Each agency must publish its annual reports (Standard DC-3),[36] aggregated sexual abuse data (Standard DC-4),[37] auditors' findings and plans for corrective action (Standard AU-1) on the agency's web site if it has one, or otherwise make the material readily available to the public, for example, through paper copies.[38] The transparency achieved by giving this information to the public can enhance community confidence in the steps agencies are taking to prevent sexual abuse and can generate public support for providing an agency with the resources it needs to prevent abuse more effectively.

VI. Role of the Courts

The Commission is acutely aware of the importance of the courts in protecting prisoners' right to be free of "cruel and unusual punishment,"[39] including freedom from sexual abuse. While courts cannot replace internal monitoring, audits, and entities charged with external oversight, society depends on them when other modes of oversight fail or are lacking

36. *Id.* at 219.

37. *Id.*

38. To respect legitimate privacy interests, Standard DC-4 requires the agency to remove all personal identifiers from the aggregated sexual abuse data before it is made publicly available. The Commission does not require agencies to make incident-based data available to the public. But it recommends that with regard to such data agencies balance privacy interests against the public interest in safe correctional institutions by establishing a non-burdensome process to allow researchers, academics, journalists, and others access to it. *Id.*

39. U.S. CONST. amend. VIII.

altogether. Professor Margo Schlanger, a national authority on prison litigation, testified to the Commission regarding the enormous beneficial impact court orders have had on U.S. jails and prisons. Beyond the reforms that courts usher in, their scrutiny of abuse elicits attention from the public and reaction from lawmakers in ways that no other forms of oversight accomplish. Indeed, corrections officials themselves told the Commission that litigation helps them acquire the resources they need to protect prisoners.

The Commission received testimony and reviewed research regarding the ways in which the Prison Litigation Reform Act of 1996 ("PLRA") has made it harder for prisoners to obtain judicial protection of their rights.[40] Although sponsors of the PLRA claim the law was never intended to block meritorious claims,[41] it is clear to the Commission that the PLRA requirements block access to the courts for many victims of sexual abuse and weaken the power of the courts to protect them. Of particular concern to the Commission are two PLRA provisions: the requirement to exhaust administrative remedies as a precondition to filing a suit and the limitation of damages to cases in which there was physical injury.[42]

The PLRA does not itself establish specific grievance and appeals processes, but leaves it to agencies to set their own requirements, which typically include filling out specific complaint forms within specific time frames and moving through several levels of appeal.[43] Any mistakes, such as using an incorrect form or missing a deadline even by a day, may forever bar an incarcerated person access to the courts. Of course, the more convoluted or technical the requirements, the more likely prisoners will fail to satisfy them. There is ample evidence before the Commission that many prisoners, in fact, have their claims dismissed simply because they fail to satisfy

40. *See* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 92-95.

41. Deborah M. Golden, *The Prison Litigation Reform Act—A Proposal for Closing the Loophole for Rapists*, AM. CONST. SOC'Y FOR L. & POLICY, June 6, 2006, http://www.acslaw.org/files/Golden-%20Prison%20Litigation%20Reform%20Act%20-%20June%202006%20-%20Advance%20Vol%201.pdf.

42. Prison Litigation Reform Act of 1996, 42 U.S.C. §§ 1997e(a), (e) (2006).

43. *Id.* § 1997e(a). *See also* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 93.

all the requirements for exhausting their administrative remedies.[44] The Commission is mindful that victims of sexual abuse may be particularly vulnerable to having their claims dismissed for this reason because the trauma of sexual abuse and fear of retaliation often prevent them from reporting the incident almost immediately after it occurs as specified by many agency policies.

The Commission's response is Standard RE-2, which requires agencies to adopt policies by which an inmate is deemed to have exhausted his or her administrative remedies no later than ninety days after a report of sexual abuse is made and regardless of the time that has elapsed between the abuse and the report.[45] While it is possible that an agency may not complete its investigation into the report within ninety days, the Commission concludes that ninety days is ample time within which it can act to protect the inmate and to demonstrate its efforts to conduct a thorough investigation for the purposes of defending against a lawsuit. Standard RE-2 thus responds to an agency's legitimate interest in having a reasonable opportunity to respond to an inmate's complaint before having to defend itself in court. But it also reflects the Commission's recognition that PREA's goals are undercut when victims of prison rape are deemed to have forfeited their ability to seek judicial redress for abuse because they do not report the

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44. For a particularly poignant example of this, see NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 3, at 93-94.

45. *Id.* at 217.

> Under agency policy, an inmate has exhausted his or her administrative remedies with regard to a claim of sexual abuse either (1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office) or (2) when 90 days have passed since the report was made, whichever occurs sooner. A report of sexual abuse triggers the 90-day exhaustion period regardless of the length of time that has passed between the abuse and the report. An inmate seeking immediate protection from imminent sexual abuse will be deemed to have exhausted his or her administrative remedies 48 hours after notifying any agency staff member of his or her need for protection.

Id.

abuse within a set time frame after it occurs. The standard also recognizes that there may be urgent, emergency situations when an inmate seeks an immediate injunction from the court to provide protection from imminent harm. In such cases, the standard requires an exception to the ninety day waiting period.

The Commission is also troubled by the PLRA requirement that plaintiffs prove physical injury to receive compensatory damages. That requirement fails to take into account the very real emotional and psychological injuries that often follow sexual assault, and it has been perversely interpreted by at least a few courts that concluded sexual assault alone does not constitute a "physical injury."[46] The Commission is convinced that victims of sexual abuse are being denied remedies because they cannot prove physical injury. It recommends that Congress amend the physical injury requirement in the PLRA as well as the administrative exhaustion provision to remove barriers to the courts for victims of sexual abuse.

Conclusion

The Commissioners understand that good, even great, policies are for naught if not translated into practice. Good intentions and even committed leadership may be necessary conditions for change, but they are not enough. For prison rape to be eliminated, correctional agencies must be subject to mechanisms that ensure accountability. The Commission is convinced that accountability will be promoted best by mandatory internal processes to capture and measure progress, external independent oversight to ensure objective, impartial assessments, and transparency, so the public itself can stay abreast of what is being done in its name.

Although the Commission's mandate is limited to prison sexual abuse, Commissioners share a belief that many of the proposed prison rape standards also present a guide for best practices that could readily be extended beyond sexual abuse. Internal accountability measures, external oversight, and transparency applied to the general treatment of prisoners and

46. *See, e.g.*, Hancock v. Payne, No. 21751, 2006 WL at *3 (S.D. Miss. 2006).

the conditions of their confinement will promote better managed prisons in which all prisoners' rights are safeguarded and their dignity respected.

The Commission's work has now ended, and it is up to the Attorney General to oversee the enactment and implementation of rape elimination standards. Obviously, I hope he relies heavily on our work. If adopted, the standards we carefully researched and developed over several years would end prison rape. A just society that respects and protects human rights should accept nothing less.