

Respecting rights in Canadian prisons: an Ombudsman's perspective on key challenges facing Canadian federal corrections

**Address by Mr Howard Sapers, Correctional Investigator of Canada at
the House of Lords, 17th April 2013**

What an honour it is to deliver this address in the House of Lords. Thank you for the invitation to share some reflections about the state of corrections in Canada from my perspective as Correctional Investigator, a role that most closely resembles your Prisons and Probation Ombudsman.

Many thanks to Baroness Stern for suggesting and graciously hosting this session and to the Chief Inspector of Prisons, Mr. Nick Hardwick, for assuming the duties of Chair. I am delighted to be here.

I propose to share some thoughts about why I think it is important for us to be concerned about the well-being of those deprived of their liberty. I will draw on the use and purpose of incarceration in a free and democratic society to ask some questions about who we incarcerate, for what crimes, for how long and why. I will conclude with a few observations about safe and humane treatment of prisoners and the need for oversight in the context of increasing reliance on imprisonment in response to social misconduct.

I do not presume to think that what I have to say this afternoon applies easily or equally to the prison experience here in the United Kingdom. I have tremendous respect for HM Prison Service, the National Offender Management System and the independent inspectorate and ombudsman offices that oversee them. My comments and observations are about my own country, and I look forward to the exchange of views and inevitable clarifications to follow in the question and answer period.

My job as Correctional Investigator is to help resolve maladministration in federal correctional practice. I serve as an Ombudsman for federally sentenced offenders, those serving sentences of two years or more in Canadian penitentiaries. My Office conducts independent investigations into problems of offenders related to decisions, recommendations, acts or omissions of the Correctional Service of Canada.

In my capacity as Correctional Investigator, I am independent of the Correctional Service and the Minister of Public Safety. My staff has full access to all documents, facilities and staff under the control of the Commissioner of Corrections. We are not advocates – we do not take sides when investigating offender complaints against the Correctional Service. The Office is an impartial, independent investigative oversight body.

In our work, my Office looks for compliance, fairness and legality, much in the same way as your Prisons and Probation Ombudsman functions. Although I have no formal inspectorate powers *per se*, staff visits to penitentiaries include special attention paid to living conditions, access to programs and institutional activities in key areas such as healthcare units and segregation ranges. As the Chief Inspector might agree, this aspect of my Office's work goes to judging the "mood" or "culture" of an institution.

I am often asked why Canada needs a Correctional Investigator, why inmates need a prison Ombudsman, or, indeed, why anyone should care about how inmates are treated. Why should we be concerned about the well-being of those behind bars? After all, convicted and sentenced criminals are in prison for a reason. They have hurt people – and they are being punished.

These are fair questions even if the answers appear self-evident to me. I have a standard response about accountability and legality, but what I really want to do is challenge the thinking behind the questions. I feel like asking in return: "Why Care? Why care about the rule of law and being fair; about hope and human dignity? Can you imagine what our society would be like if we didn't care and prisons were left to operate without scrutiny? Perhaps the real question should be: "why don't we care more"?

Not everything my office responds to is equally serious. Some offender complaints to my Office are minor or may appear trivial but that doesn't mean that they lack meaning. Solving small problems makes us legitimate. It helps establish and build trust, rapport and credibility. Being willing and able to resolve minor issues paves the way to dealing with significant or systemic matters of concern – access to physical and mental health care, preventing deaths in custody, or investigating the rise of prison self-injury incidents for example. My staff tries to find ways to resolve problems at the lowest level possible. We do "sweat the small stuff" in the hope that big problems may be avoided or at least mitigated.

A young Winston Churchill once famously observed that the "the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." What Churchill said so eloquently in 1910, Fyodor Dostoyevsky had captured succinctly in his 1862 novel, *The House of the Dead* when he wrote: "The degree of civilization in a society can be judged by entering its prisons." Dostoyevsky knew of what he spoke – he spent four years exiled to hard labour in a Siberian prison camp.

These are weighty words, imbued with historical and political significance, but what does contemporary prison practice tell us about society? What is the mood and temper in our prisons today, and what does it say about our values and our nations? The answers to questions about the who and why of imprisonment surely reveal something important about ourselves and our expectations of the criminal justice system.

My early employment included a stint with the John Howard Society in Canada. The Society takes its name and inspiration from the 18th century British prison and hospital reformer. Howard's 1777 *The State of Prisons* helped to launch the modern penitentiary.

As a thought experiment, I wonder what John Howard might have to say were he to walk the ranges and inspect the segregation units of Canada's Kingston Penitentiary, a maximum security facility that first opened its doors in 1835, one of the oldest prisons in continuous use in the Western world. For that matter, what would he remark today after visiting Wormwood Scrubs or Strangeways? Who and what would he find inside?

Let me start by stating the obvious – the face of corrections is changing. In Canada, the federal offender population is now older, more addicted, more mentally ill and more culturally and ethnically diverse than ever before. Visible minorities, women and Aboriginal people are entering correctional facilities in record numbers in my country. Indeed, if not for these groups, the federal inmate population would have peaked at around 14,000 a number of years ago.

The offender population is growing older, sicker and more infirm behind bars. One in five federal inmates are aged 50 or older. One in three of the federal inmate population is serving a life sentence, and some will die in prison in less than dignified conditions. Over 1/3 of inmates are identified at admission as requiring some form of psychiatric or psychological service or follow-up. 23% of the inmate population is Aboriginal, despite comprising just 4% of the general Canadian population. 9% of inmates are Black Canadians, almost triple their representation rates in general society.

In the last 5 years, the number of federally incarcerated women has increased by almost 40%. In the 10 year period between 2002 and 2012, the number of Aboriginal women in federal custody has grown a staggering 93%. One in three federally sentenced women is now of Aboriginal ancestry. My Office estimates that Aboriginal adults are incarcerated at a rate that is 10 times greater than non-Aboriginal Canadians.

Prisons now hold the single largest population of the mentally ill in Canada. This is not unique. Prisons around the world are becoming the asylums of the 21st century. Inmate populations also have high rates of brain injury and learning disability. The average level of educational attainment upon admission to a federal penitentiary is Grade 8. Addiction or substance abuse plagues 80% of offenders and 2/3 of offenders were intoxicated when they committed their index offence. 31% of the inmate population is a carrier of Hepatitis C; 5% are HIV positive. Close to 70% of federally sentenced women report histories of sexual abuse and 86% have been physically abused at some point in their life.

In Canada, our jails and prisons are increasingly crowded. 21% of the inmate population is "double-bunked," that is, two inmates housed in a cell designed for only one. More offenders are being sentenced to federal custody and more are spending longer behind bars before gaining conditional release (or reaching license), creating a stacking effect.

As prisons become more crowded, they also become more violent and volatile places. Inmate assaults and injuries are up. The use of segregation is increasing, as are use of force interventions. Half of all use of force interventions last year involved the use of pepper spray. Exceptional searches, lockdowns and staff refusals to work on health or safety grounds remain high. A recent survey reported that staff found their prisons to be a “toxic” work environment.

Preventable and premature deaths in custody continue to remain a concern in Canadian penitentiaries. Prison suicide rates are anywhere between 5 and 7 times higher than general Canadian society. The number and prevalence of prison self-injury incidents has tripled in the last five years. The most prolific self-harmers continue to be female, particularly Aboriginal, although male self-injury rates are also climbing. In 2011-12, Aboriginal offenders accounted for 45% of all self-injury incidents in federal custody.

On these issues, one difference between Canada and the United Kingdom is that they seem to have captured more Parliamentary and public interest in your country than mine. For example, though I have lobbied for a Canadian equivalent to the Ministerial Board on Deaths in Custody, the idea has not yet gained much traction. I continue to be impressed with the Board’s work and that of the Independent Advisory Panel. I would like to acknowledge the mentorship that Lord Harris, Chair of the Advisory Panel, has provided to me. Meantime, the tragic circumstances contributing to preventable deaths in Canadian jails and prisons continue to be responded to episodically rather than systematically.

With the increasing pressures and demands on the system, it is not surprising that correctional costs continue to rise. In Canada, it costs an average of \$110,000 per year (or about 70,000 pounds) to imprison a federal male inmate and nearly double that to hold a federally sentenced woman offender in maximum security. The Correctional Service is in the midst of the largest expansion of the prison estate in my country’s history, adding 2,700 new or renovated cells to over 30 existing penitentiaries. The annual budget for federal corrections now exceeds \$2.6 billion, the equivalent of approximately 1.7 billion pounds, an increase of nearly 40% in the past five years.

Annual expenditures for prison health care are now more than \$200 million. Unlike here where the National Health Service has taken charge of prison health, the Correctional Service of Canada remains responsible for providing essential physical and mental health care at huge risk and expense, and often generating conflict between health and security-centred perspectives on inmate welfare.

The tensions of providing adequate and appropriate health care in a prison setting are increasing. Penitentiaries were never meant to be hospitals, but an increasing number of inmates are in fact patients.

The Canadian federal government has been very clear about its “law and order” agenda. In recent years, this has meant a series of policy and legislative reforms – including, but not limited to, increasing some maximum penalties, expanding the use of mandatory minimums, the tightening or abolition of some conditional release provisions and longer

waiting periods for pardons, now referred to as “criminal record suspensions.” Taken together these changes have contributed to a 9% increase to the in-custody population in the last two years.

It is a bit of a paradox that the use of incarceration at the federal level is increasing at the same time that crime rates, including violent crime, are falling. Overall spending on the Canadian justice system rose 23% between 2002 and 2012. During that same period, Canada’s crime rate fell by exactly the same proportion.

With rising incarceration rates and more offenders spending more time behind bars, there is little evidence that our judicial system has gone “soft,” just as there is little evidence that our streets have become unsafe. Overall, Canadians enjoy a peaceful society and they expect their impartial justice system to identify the guilty and protect the innocent. They want their system to be fair, firm and effective. After more than 30 years in this business, I have never met anyone who wants offenders to get away with murder, or anything else.

It is recognized, in fact demanded, that some offenders will be incarcerated as a consequence for their actions. That said, society is best served if that consequence supports, rather than undermines, social cohesion. That’s why prison, which at its root means the temporary removal from society, is to be used sparingly and as a last resort. Given that most offenders will eventually be released, the focus must continue to be on the safe, gradual and timely return of offenders to the community.

To have the most positive effect, conditions of confinement must reflect social norms and values the best they can and prepare offenders to not only be responsible, but also respectful of rights. This means viewing corrections through a human rights lens. An essential means of demonstrating the importance of rights is to model them – show respect for the rights of others. We expect such behaviour from those who work inside our penitentiaries. This is fundamental to prisons having any potential to be constructive. As I remind Parliamentarians in Canada from time to time, prison is not about making good inmates, but rather about assisting them to become good citizens.

Andrew Coyle, founding director of the International Centre for Prison Studies here in London and a former prison Governor himself, once wrote: “the number of people in prison in any country is a matter of social and political choice. It is not a matter of crime; it is not a matter of crime rates; it is actually a matter of the public and government making a choice. How many of your citizens do you wish to send to prison? It really is as blunt as that.” As the good professor would remind us, “the difference in imprisonment rates comes from the way society chooses to deal with those who are at its margins.”

When substance abuse, poverty, vulnerability, social exclusion, addiction and mental illness get entangled in the criminal justice system, the results are predictably poor. Prisons should never become the default response to our social ills.

It seems to me that lower, not higher incarceration rates are far more appropriate measures in judging a mature, balanced, safe and civilized society. As Canada's experience with its Aboriginal people demonstrates, high incarceration rates can often signify failures in other government programs and policies.

By their nature, prisons are largely closed to public view. In such a system, the potential for abuse by correctional authorities is very real. Historically, there can be no doubt that this operating environment has masked unfairness, inequity and even brutality. The history of corrections in my country is certainly marked by alternating periods of crisis followed by reform. Along the way, outside intervention by the courts and Parliament, independent oversight and external review have been necessary to ensure progress and answerability.

My Office in fact was created out of the violence and unrest that plagued Canada's prisons in the early 1970s. The Office's mandate reflects the idea, grounded in a harsh and turbulent reality, that inmates need an independent and impartial means to resolve their complaints. External oversight is necessary in the maintenance of a safe, humane and accountable correctional system.

There are sound reasons why the rule of law follows an offender into prisons, why legality does not end at the prison gate. Even while deprived of his or her liberty, the prisoner is still a citizen. Canada's correctional law puts it this way: "offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted."

Imprisonment does of course limit liberty and place certain restrictions on freedom of association, expression and assembly, but it does not mean the total or absolute forfeiture of rights. Prisoners maintain the right to be treated with legality, dignity and respect. They have the right to safety and security of the person, the right to be treated humanely and be free from torture, degrading or inhuman punishment. It is important that our correctional authorities be held to account to ensure rights and liberties are minimally impaired. Correctional practices, like the democracies behind them, require transparency and accountability.

Reflecting on more than 25 years spent imprisoned for "crimes against the state," Nelson Mandela once observed: "It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

When we consider those groups and individuals who occupy our prisons today, independent oversight becomes more, not less, necessary. There is a duty of care that the state assumes when it chooses incarceration over other penalties.

When the state incarcerates on behalf of its citizens, all members of society are implicated in decisions about who goes to prison, for how long and how they will be

treated. Corrections is part of a contract that binds citizens to the state and helps define the limits of both authority and compassion.

As we recognize the authority of the state to punish, we must be careful that this authority results in more than simple retribution. Being aware of who is imprisoned and remembering what it is we hope to accomplish through their sentence are central to a just justice system. Constraints must exist on a society's ability to punish so that this authority is not abused. From classic Roman law, we are taught the norm that there should be no punishment outside the law. Independent prison oversight can help us live up to this ideal. Bearing witness to how we treat crime and criminals remains the unfailing test of our shared civilization.

Thank you once again for inviting me and for your gracious presence here this afternoon.