A RIGHT TO

Laurie Cullinan

Will 'truth in sentencing' solve Queensland's problems with remissions?

Remissions, a well-established part of the Australian correctional system, are essentially 'time off for good behaviour'. They are a reward which the correctional authorities use to maintain discipline and to prevent overcrowding in prisons.

A number of cases concerning remissions have come before the Queensland Supreme Court in the past two years. The results favoured the prisoner applicants, but have not been as far-reaching as the Prisoners' Legal Service in Brisbane had hoped. They have raised fundamental questions about a prisoner's right to remissions and the ongoing operation of Queensland's remission system in the face of national trends towards 'Truth in Sentencing'.

Is the remission system effective and beneficial, or does it simply cause more headaches than it's worth? And what of the alternatives to remissions? In recent years, New South Wales and Victoria have abolished remissions and replaced them with 'Truth in Sentencing'. Is this Queensland's future, or will the State continue to follow Australian penal tradition?

Historical context

In 1870 prison governors were given the power to remit prisoners in whole or in part. The British Government pressured governors to economise, which led them to create a reward system. It was called 'the ticket of leave incentive' which was given to prisoners if they displayed good behaviour.[1] The system allowed men to work on the roads, thereby earning their own living to feed and clothe themselves. This was not only a cost reduction measure for government, but it also improved the conduct of the prisoners. It paved the way for what we now call remissions. Early penal history saw remissions being both granted and taken away by legislation. This history makes it evident that when remissions were no longer granted, a great deal of tension arose within the prisoner population, leading to attempts at escape and mass revolts.

The legislation

In Queensland, remissions are governed by the Corrective Services Regulations Part III, 1990. Regulation 21 states that where the sentence is two months or longer a prisoner may, at the discretion of the Commission, be granted remission of one-third of his/her sentence if during such time he/she has been of good conduct and industry. Sub-section (2) of Regulation 21, further defines good conduct and industry as follows:

> If he –
>
> (a) complies with all relevant requirements to which he is subject; and
>
> (b) displays a readiness to assist in maintaining order and a willingness and genuine desire to maintain steady industry in every employment or work which may be required of him . . .

Regulation 23 also provides for prisoners to be awarded further remissions, based on overtask marks. These are awarded for work performed in excess of his/her normal job description, carrying out an important task or 'displaying above-average application to trade work'.

Laurie Cullinan is a solicitor with the Prisoners' Legal Service in Brisbane.

Prisoners forfeit all or part of their remissions if they have received seven days lock-up in the detention unit on three or more separate occasions and generally have not been of good conduct and industry (Regulation 27). If an offence is committed during incarceration then all remissions earned up to the date of the offence are forfeited (Regulation 28).

The challenges

Since 1992 both the Queensland Supreme Court and Court of Appeal have handed down decisions which have defined the process of the remissions system in Queensland.

The first challenge was that of *The Queen v The Queensland Corrective Services Commission Ex Parte: Dennis Melvin Fritz* (1992) 59 A Crim R 132. The applicant was convicted of rape and incest and sentenced to nine and four years respectively, to be served concurrently. Evidence showed that on induction into the prison system, the applicant was told that if he worked hard and displayed good behaviour while incarcerated, he would be granted one-third remission off his sentence. The applicant's behaviour was exemplary. He had also been awarded a number of overtask marks. Despite his excellent prison record, the Queensland Corrective Services Commission (QCSC) decided not to grant him remissions after taking into consideration the nature of his offences and his previous convictions. The applicant brought an application seeking a writ of *certiorari* and *mandamus* to quash the decision of the QCSC, arguing that he had been denied procedural fairness and that the decision had been based on irrelevant considerations.

The QCSC submitted to the Court that its discretion under Regulation 21 was 'unfettered'. The Court did not accept this and held that its discretion was confined to considering only those matters which are legally relevant to the exercise of the power. The Court went on to say that the structure and language of Part III of the Regulations suggested that the granting of one-third remission is standard practice for a well-behaved prisoner. The Court also held that the prisoner had had a legitimate expectation that he would be granted remissions if he was of 'good conduct and industry'. He was therefore entitled to procedural fairness if a decision was to be made to the contrary. The Court of Appeal therefore declared that as the respondent failed to accord procedural fairness to the applicant before making the decision, its decision was invalid.

The Court criticised the drafting of the *Corrective Services Act* and Regulations and commented on the considerable difficulties which can arise in their interpretation. Recognising the importance of remissions to both prisoners and the community, it suggested that the legislation be more clearly expressed to eliminate confusion.

The QCSC responded to the decision by making Commission's Rule No. 99 setting out its policy and procedure for considering remissions. The Rule provides among other things a set of criteria for the Commission to consider, including the prisoner's rehabilitative efforts, program participation and whether the prisoner has applied for supervised release (i.e parole). It was an obvious attempt by the Commission to find power to refuse remissions in cases even where the prisoner had demonstrated good conduct and industry.

This attempt failed with the second case, that of *Felton v Queensland Corrective Services Commission* (unreported, Supreme Court, Brisbane, No. 1047 of 1992). The applicant was again a sex offender. He was sentenced to ten years imprisonment on 25 March 1986 for one count of rape. As in the case of *Fritz*, on induction the applicant was interviewed by a number of Prison Department staff and was told of his 'full-time' release date, namely 30 November 1992. He was also told he would be discharged earlier 'if you behave yourself and work'. The applicant produced evidence that at no time was he notified of any requirement to engage in rehabilitative programs to be eligible for parole. His behaviour in prison was excellent.

In January 1991 the applicant applied for parole and was refused on the basis that the Community Corrections Board required him to participate in the Sex Offenders Treatment Program. The applicant did not want to enrol in the course, but did so after he was told that he might lose his remissions if he refused. He did not complete the 12-month program as he felt it was lowering his self-esteem and required behaviour contrary to his religious beliefs. He particularly objected to the masturbatory group therapy module. The module focused on masturbatory satiation and required the participants to masturbate while having a non-deviant fantasy until ejaculation occurred. Participants were then required to continue masturbating but this time verbalising a small segment of a deviant fantasy over and over again, for close to an hour.

The applicant's conduct had been generally good and industrious apart from three minor breaches of prison discipline. He was allowed periodic 24-hour leaves of absence to participate in community projects such as public speaking in schools and with street kids. When the issue of remissions arose, the General Manager reported his good conduct to the Commission but did not recommend the remissions be granted as he claimed the prisoner had not addressed his offending behaviour. The Commission refused to grant remissions on the basis that the applicant 'had not adequately addressed his sexual offending behaviour'; and 'should not be released into the community unless under community corrections supervision'.

The Court held that the Board took into account irrelevant considerations and gave undue weight to irrelevant matters. His Honour Mr Justice Williams said (at p.25):

> There was no sufficient evidence justifying the making of a decision based on the ground that he had not adequately addressed his sexual offending behaviour. The only evidence on which that is based is the fact that the applicant did not complete the Sex Offenders Treatment Program, but it is clear from other evidence that mere failure to complete the program is not ordinarily regarded as detrimental to the prisoner's entitlement to remission.

Not unlike the comments made by the Court of Appeal in *Fritz's* case, the Supreme Court also drew attention to the faults in the Queensland remission system, and commented (at p.23):

> If it is considered there are faults in the remission system, or that it yet not be fully implemented, then it is for the legislature to repeal or amend those provisions. Whilst the regulations stand then they must be fully implemented by the respondent.

Thus, as long as the legislation only requires a prisoner to be of 'good conduct and industry' while incarcerated, those who satisfy the requirement *must* be granted their remissions. If the QCSC wishes only to release people under supervision such as parole, or requires prisoners to address their offending behaviour before being granted remissions, then the legislation will have to be amended accordingly. Until such time, it must act within the boundaries of the legislation.

The Commission's attempts to rectify this problem by creating Rule 99 proved unsuccessful as it is the Regulations which limit its power. The Court held that both Rules and also Ministerial Guidelines on Remissions could not be given any valid scope of operation in so far as they are inconsistent with the legislation, as it now stands. The only solution to the QCSC's problem is for it to either repeal or amend these, not to create inconsistent and subordinate legislation.

Shortly after the decision in *Felton's* case, the QCSC revoked Rule 99 and Queenland is again left with only Part III of the Regulations governing remissions.

Pending litigation

One might expect that two major Court battles within the space of 12 months would have ironed out most of the problems concerning the interpretation of the remissions provisions. However, another remissions issue has arisen, causing the Prisoners' Legal Service to yet again take issue with the Queensland Corrective Services Commission. Now the issue of concern is whether a prisoner is entitled to be considered for remissions when he/she has been charged with an offence while incarcerated. Regulation 28 provides for refusal of remissions where a prisoner 'commits any indictable offence or offence punishable on summary conviction'. The QCSC interprets this to mean that the discretion under Regulation 21 to grant remissions cannot be exercised while a charge of this nature is outstanding against a prisoner.

The QCSC's approach flies in the face of 'The Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment' (a United Nations Project, adopted by Australia) which clearly states in Principle 36:

> A detained person suspected of or charged with a criminal offence *shall be presumed innocent and shall be treated as such until proved guilty* according to law in a public trial at which he has had all the guarantees necessary for his defence.

The Standard Minimum Rules for the Treatment of Prisoners (another United Nations project, adopted by Australia) also provides in Rule 84(2): 'Unconvicted prisoners are presumed to be innocent and shall be treated as such'. These, of course, simply reflect a long-established common law principle, which it appears the QCSC does not accept. An application of a prisoner who has been denied his remissions on the basis that he is facing further charges is at present before the Supreme Court for determination.

Is truth in sentencing an alternative?

New South Wales

In 1989 New South Wales replaced its remission system with 'truth in sentencing'. The legislation requires the judiciary to set a minimum sentence and to then add one-third of that sentence as the possible parole period. A considerable onus has been placed on the judiciary to reduce head sentences so that a sudden increase in sentences does not lead to overcrowding. In one sense this seems to go against the idea of 'truth in sentencing', which leads one to ask whether it is working in New South Wales?[2]

The evidence does not suggest that it is. The problems which have been identified include:

Overcrowding of prisons: In 1989 Daniel Breznak asked '[w]hether in future, judges and magistrates will take into consideration the absence of remissions when setting an appropriate minimum term of imprisonment?'[3] Section 5 of the *Sentencing Act 1989* (NSW) seeks to prevent this from actually occurring by requiring the judiciary first to set the minimum sentence and then add the additional term of one-third of the minimum sentence. Sentences therefore cannot be adjusted so that the actual time incarcerated is no longer than that which would have been served if remissions were still in place. Minimum sentences must be accepted by the community as a punishment 'fit for the crime'. It follows that prisoners are serving much longer periods in a correctional centre than in the past. As predicted, this has led to overcrowding in New South Wales prisons.

Increased government expenditure: Overcrowding inevitably leads to greater expenditure as further accommodation must be built. Since 1989 the Government in New South Wales has funded the construction of three new prisons at St Windsor, Junee and Lithgow.

Increased number of prisoner informants resulting from prisoners becoming more dependent on favours from prison authorities:[4] This changes the make-up of the prison population because the system must accommodate an increase in the number of prisoners on protection. Once an inmate has 'dogged' (informed) on another prisoner it is difficult for that person to survive in 'mainstream' as 'dogs' are subject to constant harassment and assault by fellow prisoners. Housing protection prisoners is more troublesome and expensive as they need to be kept separate from mainstream prisoners and can be moved only under the escort of a correctional officer.

Victoria

In 1991 Victoria also replaced remissions with 'truth in sentencing'. With hindsight that New South Wales did not enjoy, Victoria drafted its legislation with knowledge of the problems experienced by New South Wales. Its legislation clearly set out its underlying intentions and philosophies. To avoid the potential problems of overcrowding and increased expenditure, Victoria included s.10 in its *Sentencing Act 1991*. It provides that the abolition of remissions should not lengthen time spent in prison, therefore creating an implied duty of the judiciary to take note of the loss of remissions when handing down sentence. But having apparently tackled the potential problem of overcrowding and overspending, Victoria increased its maximum penalties, producing confusion as the judiciary tried to maintain 'truth in sentencing' while at the same time administering s.10 of the Act.[5]

The future in Queensland

The 1988 Kennedy Report provided the blueprint for reform of the Queensland prison system. Kennedy addressed remissions and found the system to be unworkable when 'the worst of thugs with a history of violence who are refused parole need to wait only a relatively short period between half sentence and the two-thirds remission period to be released'.

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made. The proposed rights recognise the primacy of these issues. They are not just the subject of separate recommendations by EARC (except for abortion) and they combine satisfactorily with other rights – they are not necessarily solely women's rights but may be expressed by other individuals. This is also true of at least one other right recognised by the EARC proposal, the right to childcare.

As highlighted earlier, women's continuing role as primary carers of children, the 'tyranny of reproductive responsibility', has hindered women's access to full participation in social, political and economic systems. EARC recommended that the proposed Bill of Rights include a right to childcare for parents or other persons responsible for the care and control of children. The right is unenforceable, and is restricted to the right of 'reasonable access to adequate childcare facilities'. In recommending a right to childcare EARC's stated rationale was to provide women with:

> ... enhanced opportunities for participating more fully in society and therefore exercising individuals' rights. Society can only benefit from enhanced participation by women in all areas, and the Commission believes that the State has a responsibility to ensure that women can exercise their rights. One of the ways in which the State can achieve this is by providing mechanisms that increase women's opportunities. Access to adequate childcare is one method ...[at 332]

Conclusion

Although the EARC measures are still somewhat restricted they are nonetheless one of the first positive attempts to widen the rights and freedoms net. While many may argue that this is still tokenism or that there is no place for this kind of approach, there is a recognised need and desire in the community for exactly this examination. The EARC public submission process gathered information from many private individuals and from various groups and organisations. Some of the concerns and proposals raised were used to assist in the formulation of these proposed clauses of the Bill. The evidence from submissions was particularly useful for determining not only the level of support for these issues, but also for the need to address them.

It should also be recognised that this is one of the first human rights proposals that has formally recognised issues related to women's rights in this manner, and certainly the first in this country. If the Queensland Government were to enact the EARC proposal then there would be hope for future recognition, perhaps enforceable, of such rights. There is still a need for further reformulation of our conception and expression of rights and freedoms. The Queensland experience, if it occurs, will provide a useful example of the way in which these rights are exercised and may provide illumination for the future.

The EARC proposal is worthy of both criticism and praise. Whatever happens is likely to be inadequate but will certainly generate some debate, despite the EARC proposal having been subject to disappointingly little discussion to date. It is to be hoped that further opportunity for examination of women's rights and human rights occurs at that time.

References

1. Charlesworth, H, 'Has the United Nations Forgotten the Rights of Women?', *AFCOA Human Rights Day Lecture*, Melbourne, 10.12.92, p.2.
2. Burrows, N., 'International Law and Human Rights: The Case of Women's Rights', in Campbell, T., Goldberg, D., McLean, S. and Mullen, T. (eds), *Human Rights: From Rhetoric to Reality*, Basil Blackwell, Oxford, 1986, p.92.

'A right to remissions?'

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The current trend in Queensland has been to encourage prisoners to take parole. More and more inmates are being refused their remissions on the grounds that they are 'a risk to the community', even though this is not a prerequisite for remissions as one needs only to be of 'good conduct and industry'. Originally introduced as an incentive and reward for obedient and compliant behaviour, it appears that remissions changed from a reward system to another form of punishment for the prisoner.

The Queensland Public Sector Management Commission recently conducted a review of the QCSC. In its own submission to the Review Committee the QCSC acknowledged problems with the remissions system and suggested it be abolished. Queensland must be very careful if it elects to travel down the path of 'truth in sentencing' to ensure that it does not create the same problems that New South Wales and Victoria are now dealing with.

Queensland is very much in the box seat, being able to learn from both the New South Wales and Victorian experiences. If the Queensland Government ever elects to walk down the 'truth in sentencing' path, it will need to ensure the following, if the system is to be at all workable:

- There must be an express legislative provision that the judiciary take the abolition of remissions into account when passing sentence. A provision similar to Victoria's s.10 of the *Sentencing Act 1991* should be sufficient and will help control prison overcrowding. Queensland is at present experiencing a housing problem and is planning to increase the bed capacities in some centres. If remissions are abolished without proper provisions in place to contain the number incarcerated, Queensland's correctional expenditure will be stretched to inappropriate limits.
- The general community must be educated on the philosophies underlying 'truth in sentencing'. This must include information concerning the counter-productiveness of long term sentences, and the need for alternatives, particularly community-based supervision. Educating the community will alleviate any negative attacks on the government and judiciary which may arise from the passing of lesser sentences.

References

1. See for the history of remissions Chan, J.B.L., 'Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release', (1990) 13(2) *UNSW LJ* 393.
2. See for a general discussion of truth in sentencing in New South Wales: Chan, J.B.L., 'The New South Wales Sentencing Act 1989: Where Does Truth Lie?', 1990 (14) *Crim.LJ* 249; Brown, D., 'Sentencing Changes: What Truth?', (1989) 14(4) *Legal Service Bulletin* 161.
3. Breznak, D., 'Truth in Sentencing: New Legislation Analysed', (1989) 27(7) *NSW LSJ* 48.
4. See Duffy, B., 'An Unholy Alliance', (1990) 15(3) *Legal Service Bulletin* 134.
5. See for a general discussion of truth in sentencing in Victoria: Freiberg, A., 'Legislation Comment: Truth in Sentencing? The Abolition of Remissions in Victoria: Sentencing Act 1991 (Vic)', (1992) (16) *Crim.LJ* 165; Freckelton, I. and Thacker, A., 'The New Sentencing Package: Part 1', (1991) 65(11) *LIJ* (Vic) 1032.