



# **FINAL INVESTIGATION REPORT**

## **INVESTIGATION OF A COMPLAINT AGAINST CORRECTIVE SERVICES**

### **CALCULATION OF REMISSION**

**Complaint 700-0511023**

**Ombudsman Tasmania**

**28 June 2007**

## **INTRODUCTION**

A complaint was received from Mr C, a prisoner at Risdon Prison, on 17 November 2005. Mr C had been imprisoned for a period of fifteen (15) months with six (6) months suspended in May 2005. He faced court again in October 2005 and was found guilty on further charges and sentenced to another period of 8 months imprisonment. His initial letter of complaint stated that he had been told by prison authorities that he was not eligible for a grant of remission because of his still having been in prison when sentenced again. After making his complaint he was sentenced to a further one month imprisonment on 22 November 2005. The initial complaint was somewhat unclear so further clarification was sought from the Director of Prisons, Mr Graeme Barber, by way of preliminary enquiries. After some exchange of correspondence, the then Acting Ombudsman decided to move the complaint into investigation.

## **JURISDICTION**

The Ombudsman has jurisdiction to investigate any administrative action taken by or on behalf of a public authority. The Department of Justice, of which Corrective Services is a part, is a public authority as defined by section 3 of the *Ombudsman Act 1978*, as a State Service Agency is a public authority pursuant to section 4(a) of that Act. The action complained of was administrative action in the sense contemplated by section 12 of the *Ombudsman Act 1978*.

## **BACKGROUND**

A number of letters of complaint were received from Mr C over a period of months in which he disputed his earliest release date on the basis that he was entitled to remissions that were not granted to him. He claimed that he had originally been serving a sentence of 15 months imprisonment with 6 months suspended and that first sentence had finished on 2 September 2005. He claimed that he was due to be released on 3 September 2005 but because that day was a Saturday, he was not released. He stated that he was then remanded on new charges for which he was ultimately sentenced to a further 8 months to be served cumulatively with any current sentence. He believed that he was entitled to a remission of 3 months on his original sentence but had been told he was not eligible as he had been sentenced to a further period of imprisonment. He was then sentenced to a subsequent 1 month imprisonment on 22 November 2005 cumulative with any current term of imprisonment.

Mr C claimed that he had been told by Risdon Prison staff that he had still been serving his first sentence when he was sentenced to a further term of imprisonment and so remission was calculated on the cumulative period of all sentences served at the one time. Mr C expressed a view, apparently common amongst prisoners, that he was “entitled” to a 3 month remission on each sentence and since he had finished one sentence before being sentenced again, he should have been granted remission on that original sentence and the following sentence.

## INVESTIGATION

Preliminary enquiries were made of the Director of Prisons, Mr Graeme Barber, asking him to explain how Mr C's release date had been calculated.

The information provided by Mr Barber revealed that the complainant had been:

- Sentenced on 4 May 2005 to fifteen (15) months imprisonment with six (6) months suspended, backdated to 4 March 2005.
- On 3 October 2005 Mr C was sentenced to a further eight (8) months, cumulative with the sentence of imprisonment he was serving at that time.
- On 22 November 2005 he was sentenced to another one (1) month cumulative with his current sentence at the time.

Copies of Mr C's *Warrants of Commitment for Sentence of Imprisonment* were enclosed, which had handwritten calculations on them. A separate sheet with a table of calculations was also enclosed.

Mr Barber initially advised that: "As per advice from the Solicitor-General via the Ombudsman's Office last year, inmate C has received one remission of three (3) months in accordance with Section 90(2)(d) of the *Corrections Act 1997*. The calculation of remission is in accordance with Regulation 23(1) of the *Corrections Regulations 1998*".

Advice had been sought by the Ombudsman from the Solicitor-General in respect of a specific complaint in June 2002. At least part of this advice had been passed on to Corrective Services at that time and it seems it was to this advice that Mr Barber referred. After reviewing the legal advice, further enquiries were made of the Director of Prisons because the calculation of Mr C's possible remission did not seem to be in accordance with that earlier advice.

A response was received from the Assistant Director of Prisons, Mr Greg Partridge, which enclosed the previous correspondence and enclosures from Mr Barber and a statement that no error had been found in the calculations. A meeting was then held between Ombudsman representatives and the Director of Prisons in order to discuss the matter. No agreement was reached as to the correct approach, so the then Acting Ombudsman requested further advice in relation to the granting of remissions from the Solicitor-General.

Advice from Principal Crown Counsel at the Solicitor-General's Office was received on 30 March 2006 and it was then decided to investigate the matter pursuant to Division 3 of the *Ombudsman Act 1978*. The Acting Ombudsman issued notices to the complainant and the Department of Justice in accordance with Section 23 of the Act on 4 April 2006.

The Director of Prisons provided copies of all documents from Mr C's file and further correspondence. In that correspondence he noted that the "... Tasmania

Prison Service policy on remission is to consider remission on a total sentence (that is one remission per sentence only) and not for each part of that total sentence.” He also noted that he had advised Ombudsman Officers during their previous meeting that in Mr C’s particular case he “...used my decreation [sic] in not providing remission on the first sentence as Mr C had been remanded in custody on other matters. Therefore no release and remission letter was prepared or signed by me.” A request was made for a copy of the relevant remission policy and in a further letter Mr Barber confirmed that the Tasmanian Prison Service did not have such a written policy. He said that in accordance with the relevant legislation and regulations, it had been the practice to apply discretion and goodwill in granting remission. He said that this was done by granting 3 months remission to every eligible prisoner on the total of their sentences.

There was some further exchange of correspondence and then a further meeting with Mr Barber on 19 July 2006. At that meeting Mr Barber advised that Mr C had been released a few days previously as his remission had been recalculated. He also advised that he was preparing a policy document in relation to this issue and that he would provide the Ombudsman with a copy. Later that day Mr Barber emailed a copy of a draft *Policy for the Application of Remission to Custodial Sentences* (copy attached) and sought input from the Ombudsman’s Office.

Quite detailed comments were provided to Mr Barber and a number of fundamental concerns with the document were raised and are detailed later in this report. The comments clearly stated that aspects of the policy, as well as the previous approach to the granting of remissions, were not in conformity with the advice from the Office of the Solicitor-General and may be legally incorrect.

It was agreed at that time that, since Mr C already had been released, the issue was of little significance to him personally but remained of significance to existing and future prisoners. It was agreed that an Investigation Report would be provided to the Secretary of the Department of Justice making recommendations about the remission policy and remissions in general in accordance with the comments and feedback already provided to Mr Barber. The matter of the policy document was followed up with Mr Barber again in February 2007, but the policy remained in draft and had not been changed since it had first been provided to the Ombudsman in July 2006.

## **ANALYSIS**

The Director of Corrective Services has the power to grant remissions under s.86 of the *Corrections Act 1997* (the Act). The person holding the position of Director of Corrective Services was the Secretary of the Department of Justice, now the Deputy Secretary, and the power under s.86 (amongst other powers) has been delegated to the Director of Prisons, and hence to Mr Barber. As an aside, a copy of the instrument of delegation was requested and provided. This instrument had been executed by the then Secretary of the Department, Richard Bingham, and had not been updated since 2000. Whilst the delegation remains effective by force of s.8 of the *Administrative Arrangements Act 1990*, it would be best from the point of view of good administrative practice for all delegations to be reviewed and updated when a new Departmental Secretary is appointed.

By s.86 of the Act, any grant of remission is to occur pursuant to the *Corrections Regulations 1998* (the Regulations) which are regulations made under s.90(2)(d) of the Act. Regulation 23 deals with the granting of ordinary remission and reads as follows:

### **23. Remission**

(1) For the purpose of [section 86](#) of [the Act](#), a remission of the whole or any part of a prisoner's sentence is not to –

- (a) exceed 3 months if the period of imprisonment to which the remission relates is imposed after 1 JANUARY 1994; and
- (b) exceed one-third of the total period of imprisonment to which a prisoner is sentenced; and
- (c) operate so as to reduce the total period of imprisonment served by a prisoner to less than 3 months.

(2) Remission of sentence is not to be granted to a prisoner who is –

- (a) convicted of escape or attempted escape in respect of a period of imprisonment up to and including the day on which the escape or attempted escape was made; or
- (b) sentenced to a total period of imprisonment of 3 months or less.

(3) The Director is not to grant a remission of sentence to a prisoner if that remission would operate to reduce the total period of imprisonment served by the prisoner in respect of that sentence to a period that is shorter than any non-parole period specified in an order made in respect of that prisoner under section 17(2)(b) of the Sentencing Act 1997.

It may be that the use of the phrase “total period of imprisonment” used in r.23(1)(b) and r.23(2)(b) has encouraged prison authorities to take the view that, where a prisoner has been sentenced to several terms of imprisonment, remission is to be calculated on the basis of the total effective term of imprisonment. Advice from the Office of the Solicitor-General, received in both June 2002 and March 2006 however, was that the Director is authorised to grant remission of a prisoner's sentence, not a prisoner's term of imprisonment which may equate to the cumulative term of a number of sentences. Principal Crown Counsel, in his advice of 30 March 2006, put it as follows:

I am of the view that, for the purposes of s.86 of the Act, each individual term of imprisonment to which a prisoner has been sentenced for a crime or offence is to be regarded as the “prisoner's sentence”. This will be so whether only one term of imprisonment has been imposed, or several individual terms have been imposed at the same time and ordered to be served cumulatively.

This clearly indicated that the view held by the Director of Prisons, to consider remission on a total “sentence”, not each part of that total “sentence”, is therefore incorrect.

In the request for advice on the C complaint, the Office of the Solicitor-General was also asked to comment on the Director of Prison's policy that prisoners automatically receive remission unless there is poor behaviour or an infraction of the rules. Principal Crown Counsel suggested that such an approach suggested a misunderstanding of the nature of the Director's discretion and the circumstances in which it can be exercised.

It is not a matter of every prisoner being entitled to maximum remission, with less than the maximum, or no remission at all, being a punishment for bad conduct. Remission (or the exercise of a discretion by the Director to grant it) has to be earned by good conduct. There should be no presumption made by the Director (or anyone else) that, *prima facie*, every prisoner is entitled to maximum remission. S.90(2)(d) of the Act makes it clear that remission is to be an incentive to, or reward for, good conduct and is not to be granted according to some fixed formula based on the length of the initial sentence, which may involve no exercise of a discretion at all.

Principal Crown Counsel also noted that he could see no particular reason for the Director not to consider the exercise of his discretion with respect to a prisoner serving a sentence, but subject to a remand in custody on another matter.

A copy of the advice provided by Principal Crown Counsel has been given to the Director of Prisons.

It was clear from the calculations provided, as well as the various letters from the Director of Prisons, that he had been interpreting the Regulations to mean that he could only grant remission once in respect of a prisoner's term of imprisonment, not in respect of each sentence. After discussions in relation to this issue, and in relation to Mr C's case in particular, remission was then calculated on the two eligible sentences that Mr C had been serving (i.e. those sentences of more than 3 months imprisonment in accordance with r.23(2)(b)) giving him an earliest release date of 12 June 2006. The Ombudsman was advised on 19 July 2006 that Mr C had been released on 13 July 2006, having been remanded in custody until 10 July 2006 on further charges. The outcome of the hearing into those charges was not provided, but presumably he was not sentenced to a further custodial sentence. No explanation was given as to why he was released three days after his *Warrant of Remand In Custody on Adjournment* expired.

Comments on the draft remission policy were requested by Mr Barber and provided by the Office of the Ombudsman. A number of concerns about the draft policy were raised and suggestions made to Mr Barber. These were as follows and are quoted from the document:

- The draft policy appears to be the same policy as the one that has been applied previously, with the only change being that the new policy applies to an "eligible sentence" as opposed to the misapprehension that it applied to a term of imprisonment.

- Remission should always have been applied to “eligible sentences” as opposed to terms of imprisonment *in toto*. Previous exercises of the discretion appear to have been exercised contrary to the intention and meaning of the statutory framework. It is inappropriate therefore to provide in the new policy that the correct application of the delegated authority is not retrospective and is only to apply to sentences handed down after 1 August 2006. Good administrative practice would in fact suggest a review of all current custodial sentences in order to identify any other prisoners who have not been considered by the Director for remission due to the misapprehension that only one period of remission could be granted for each term of imprisonment.
- The policy outlines the way that remission will be granted automatically to each eligible sentence. This misunderstands the nature of the discretion as explained in advice from Principal Crown Counsel.
- Relevant legal principles dictate that a public official exercising discretionary powers must do so for a proper purpose (within the scope of and for the purpose for which the power was given), consider only relevant and not irrelevant considerations, and give proper consideration to the merits of each particular case and not apply policy inflexibly. A public official cannot improperly fetter their own discretion by, for example, adopting a policy that prescribes decision-making in certain circumstances. The new policy potentially does all these things.
- It is suggested that the Director of Prisons seeks legal advice on these issues and also seeks assistance with the drafting of a policy that is compliant with the obligations under the *Corrections Act 1997* and related regulations. The draft document is unacceptable in its current form for the reasons outlined above.

Concerns were also raised with Mr Barber about what was not included in the draft policy. For example, there is no clear process set out as to how a prisoner’s behaviour while in Risdon might affect the decision to grant full or partial remission and no guidance as to the interaction between the prison disciplinary process and the granting of remissions.

There are no criteria set out in the draft policy to indicate what are the relevant things to consider when making a decision as to a grant of remission. One would assume that there are staff members who provide advice and recommendations to the Director of Prisons with regard to remissions. To assist with fair and consistent decision-making, it would seem sensible that relevant considerations are identified so that staff advising the Director are aware of what constitutes a relevant factor and to ensure that they are applying a consistent standard when making recommendations.

Although Regulation 23 of the *Corrections Regulations 1998* is set out in the draft policy, there is no discussion or guidance as to how a grant of remission is calculated in order to comply with the requirements set out in Regulation 23. It would seem reasonable that the final policy should outline the application of r.23

and possibly provide some examples of its application to particular sentences of differing lengths.

These comments were provided to the Director of Prisons by way of letter dated 20 July 2006 and as outlined above, when an update was sought on 8 February 2007, the policy remained in draft form and was unchanged since the comments were provided. The Director advised that he intended to incorporate the policy into a Director's Standing Order.

## CONCLUSION

There was some difficulty experienced when investigating this complaint due to the inadequacy of records kept in relation to the calculation of Mr C's remission. It was reasonably clear from the outset that Mr Barber's interpretation of the Act and Regulations was not in accordance with advice received from the Solicitor-General in 2002. Further advice specific to this complaint confirmed this and I am of the view that the Director's administrative actions in relation to his initial consideration of whether to grant Mr C remission were based wholly or partly on a mistake of law (s.28(1)(f) *Ombudsman Act 1978*). It seems that the use of the phrase "total period of imprisonment" used in r.23(1)(b) and r.23(2)(b) has encouraged prison authorities to take the view that, where a prisoner has been sentenced to several terms of imprisonment, remission is to be calculated on the basis of the total effective term of imprisonment. The Director of Prisons has now recognised that remission may be granted in respect of each individual sentence, not a term of imprisonment, and has drafted a policy in this respect.

The Director had also expressed a view that a grant of remission would not be considered when a prisoner had been remanded in custody on other matters while serving an existing sentence, as had happened in Mr C's case. Advice from Principal Crown Counsel suggests that there is no impediment to considering remission in these circumstances. The draft policy document does not address this particular issue.

Automatically applying maximum remission to every eligible sentence and "loss" of remission for poor conduct reflects a misunderstanding of the nature of the discretion and the circumstances in which it can be exercised. The draft policy enshrines this misunderstanding.

For the reasons outlined above, I consider that the draft policy developed by the Director of Prisons in July 2006 is legally unsound. I am also surprised that the draft policy has not been changed since my officers drew attention to the deficiencies in the document shortly after it was drafted. Given that the whole issue affects the liberty of the subject, this situation is highly unsatisfactory.

Acting under s 28(2) of the *Ombudsman Act*, I recommend to the Secretary of the Department of Justice, as the principal officer of the Department responsible for the administration of the *Corrections Act*, that she take steps forthwith to ensure that the following action is taken -

1. The implementation of an immediate review, to establish whether there are any currently serving prisoners who should be considered for remission, but who have not been so considered because of the erroneous application of Regulation 23 of the *Corrections Regulations*.
2. The preparation of a policy on the granting of remissions which complies with the *Corrections Act* and *Corrections Regulations*, and is otherwise compliant with law.
3. The submission of the policy to the Office of the Solicitor-General for confirmation that it complies with the law, before it is adopted.

Acting under s28(4) of the *Ombudsman Act*, I request that the Secretary notify me, within 8 weeks of the date of this report, of the steps which have been taken or are proposed to be taken to give effect to these recommendations.

*Simon Allston*

**Simon Allston**  
**Ombudsman**

28 June 2007

# TASMANIA PRISON SERVICE



## POLICY FOR THE APPLICATION OF REMISSION TO CUSTODIAL SENTENCES

Issued: 1<sup>ST</sup> AUGUST 2006

**GRAEME BARBER  
DIRECTOR OF PRISONS**

## Background

Regulation 23 of the Correctional Regulations gives the Director of Prisons the power to grant remission to prisoners on sentences according to the following:

23. (1) For the purpose of section 86 of the Corrections Act, a remission of the whole or any part of a prisoner's sentence is not to –
- (a) Exceed 3 months if the period of imprisonment to which the remission relates is imposed after 1 January 1994; and
  - (b) Exceed one-third of the total period of imprisonment to which a prisoner is sentenced; and
  - (c) Operate so as to reduce the total period of imprisonment served by a prisoner to less than 3 months.
- (2) Remission of sentence is not to be granted to a prisoner who is -
- (a) Convicted of escape or attempted escape in respect of a period of imprisonment up to and including the day on which the escape or attempted escape was made; or
  - (b) Sentenced to a total period of imprisonment of 3 months or less.
- (3) The Director is not to grant a remission of sentence to a prisoner if that remission would operate to reduce the total period of imprisonment served by the prisoner in respect of that sentence to a period that is shorter than any non-parole period specified in an order made in respect of that prisoner under section 17(2)(b) of the Sentencing Act 1997.

It has been the practice of the prisoner services to automatically grant remissions on an eligible sentence per inmate. Should the inmate commit an offence or act warranting punishment the Director then revokes an amount of remission he deems fit to the action committed.

## **New Policy**

In line with the Regulations which allow for the granting of remission on a per sentence basis, not an episode of imprisonment, remission will now be applied to all eligible sentences.

This Policy will give further incentives for inmates to participate in positive behaviour, as the reward, (less time in prison) is significant.

As with previous remission it will be applied automatically to each applicable sentence.

Particular attention should be taken of Section 2 paragraph (b) Regulations in that sentences are to be treated individually and not added together for the purposes of attracting remission.

An inmates behaviour is continuously monitored and any infraction of the rules reported. Often these incidents result in a less of remission and therefore this mechanism provides the check and balance on a prisoner justifiably obtaining remission.

This policy is not retrospective and is to apply to all sentences handed down from the 1<sup>st</sup> August 2006.