SUPREME COURT OF QUEENSLAND

CITATION:	*Swan v Chief Executive, Department of Corrective Services* [2004] QCA 159
PARTIES:	**STEPHEN SWAN** (applicant/appellant) **v** **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent/respondent)
FILE NO/S:	Appeal No 8898 of 2003 SC No 865 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2004
JUDGES:	McMurdo P, White and Fryberg JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	CRIMINAL LAW – Probation, parole release on licence and remissions – Queensland – Eligibility - Whether s 21 of the *Corrective Services Regulation* 1989 applied to the appellant while he was on parole – Whether s 207B of the *Corrective Services Act* 1988 had the effect of disentitling the appellant to any further remissions - Meaning of 'eligibility for remission' in the *Corrective Services Act* 1988 – Whether appellant 'eligible for remission' for subsequent sentence under s 75 of the *Corrective Services Act* 2000 - Definition of 'period of imprisonment' in the *Corrective Services Act* 2000 *Corrective Services Act* 1988 (Qld), s 184, s 187, s 190, s 207B *Corrective Services Regulation* 1989 (Qld), s 21, s 28 *Corrective Services Act* 2000 (Qld), s 75, s 268A, s 268B *Corrective Services Amendment Act (No 2)* 2001 (Qld) *Penalties and Sentences Act* 1992 (Qld), s 4

Benson & Ors v Chief Executive, Department of Corrective Services [2001] QCA 303; CA No 5208 of 2001, 27 July 2001, distinguished
Lynde v Department of Corrective Services (2000) 116 A Crim R 430, considered
R v Bayliss [2002] QCA 135; CA No 310 of 2001, 12 April 2002, considered
R v Walton; ex parte A-G (Qld) [1997] QCA 411; CA No 338 of 1997, 18 November 1997, applied
Smith v Queensland Community Corrections Board [2002] 1 Qd R 448, followed
Tyler v Tullipan & Ors [2001] QSC 379; SC No 5787 of 2001, 10 October 2001, distinguished

COUNSEL: P E Smith for the appellant
A J MacSporran for the respondent

SOLICITORS: Lake Lawyers for the appellant
Crown Law for the respondent

[1] **McMURDO P:** In my judgment, the appeal should be dismissed with costs.

[2] I have had the benefit of reading the reasons for judgment of Fryberg J in which all the facts, relevant statutory provisions and issues are set out.

[3] As his Honour observes,[1] it is unnecessary in deciding this matter to determine whether the reasoning in *Lynde v Department of Corrective Services*[2] was correct. Nor am I presently persuaded that a right to apply for remission of a sentence is not "a right [or] privilege … accrued or incurred"[3] under the *Corrective Services Act* 1988 (Qld) and the *Corrective Services Regulation* 1989 (Qld): cf *Tyler v Tullipan & Ors*.[4] The difficulty for the appellant is that, accepting he had such a right or privilege as to remission of the 2000 sentence, it has been extinguished by s 268A *Corrective Services Act* 2000 (Qld): see *R v Bayliss*.[5]

[4] I agree with Fryberg J that the appeal should be dismissed with costs and otherwise with his reasons.

[5] **WHITE J:** I have read the reasons for judgment of Fryberg J and agree with his Honour's analysis of the Corrective Services legislation and the order which he proposes.

[6] **FRYBERG J:** The appellant, a prisoner, applied for review of "the conduct of the respondent order [*sic*] which the respondent through its servants and/or agents declined to grant the applicant remissions on his sentence." This appeal is brought against Mackenzie J's refusal of the application with costs.

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1 At para [20] of his reasons.
2 (2000) 116 A Crim R 430.
3 s 20(2)(c), *Acts Interpretation Act* 1954 (Qld).
4 [2001] QSC 379; SC No 5787 of 2001, 10 October 2001.
5 [2002] QCA 135; CA No 310 of 2001, 12 April 2002, [10].

[7] On 8 September 1993 the appellant was sentenced to imprisonment for seven years for drug trafficking. The sentencing judge recommended that he be eligible to be considered for parole after serving three years of that term. It does not appear from the record whether any declaration as to time spent in custody was made. On 21 October 1996 he was released on parole. He had then served 3 years and 42 days of the sentence. Approximately 3 years 10½ months of his term remained.

[8] On 21 April 1999 he committed one offence of possession of dangerous drugs (heroin, methylamphetamine and cannabis sativa) with a circumstance of aggravation (more than 2g of methylamphetamine) and a second offence of possession of methylamphetamine. He was arrested on that day, but was released on bail. Three months later, on 20 August, he committed a further offence of possession of methylamphetamine.

[9] He was convicted of the 1999 offences on 20 July 2000, after a four day trial. On the first count, he was sentenced to imprisonment for five years and, on the other two counts, to imprisonment for three years, those sentences to be concurrent with each other but cumulative upon the 1993 sentence. The trial judge recommended that he be eligible to be considered for parole after serving two years of the five year sentence. The appellant had (in respect of these offences only) been in custody for 72 days prior to 20 July 2000. The Court of Appeal subsequently reduced the sentence on the first count to imprisonment for three years and expressly made no recommendation regarding eligibility for parole. Whether that was correct is not an issue in the present appeal.[6]

[10] The judgment of the Court of Appeal was delivered on 19 October 2000, a little over a month before the commencement of s 207B of the *Corrective Services Act* 1988[7]. However, even if that section had been in force at the time of the appeal, it is most unlikely to have made any difference to the judgment. In determining the sentence to be imposed the Court expressly proceeded on the basis that the appellant "must serve the unexpired portion of [the 1993] sentence with no consideration for the time spent on parole." Unsurprisingly, the possibility of remissions was not a factor in the reasoning.

[11] On 22 August 2002, the appellant's solicitors (who described themselves as "Forest Lake Lawyers") wrote to the Director-General of the Department of Corrective Services asserting that by reason of the appellant's entitlement to remissions, the 1993 sentence expired in May 1998. That meant, it was said, that taking into account the 72 days pre-sentence custody, the sentence of three years imposed in 2000 would expire on 9 April 2003. The letter further requested that the appellant be granted remission of two years four months on the sentence of seven years. It was not suggested that the appellant was entitled to remission of the sentence of 2000.

[12] In her reply dated 11 September the Director-General wrote:

> "I understand you are asking for remission to be considered on your client's 7-year term of imprisonment that commenced on 8 September 1993. … [Your client's] conviction … led to the

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6 Compare *R v Doyle* [1996] 1 Qd R 407; *R v Coss* (1995) 78 A Crim R 551; *R v Stirling* [1996] QCA 342; *R v Riley* [1999] QCA 128.

7 See para [23].

> automatic forfeiture of his remission eligibility pursuant to section 28 of the *Corrective Services Regulations 1989* for the period between the commencement of his sentence and the date he was released to parole. … The subsequent introduction of section 207B of the *Corrective Services Act 1988* on 24 November 2000, extinguished your client's eligibility for remission on the balance of the 7-year term and the cumulative 3-year term."

That was the conduct referred to in para [6] above.

The appellant's submissions

[13] The appellant submitted:

(a) by reason of his entitlement to remissions the sentence imposed on 8 September 1993 expired by 8 May 1998, with the consequence that the sentences of three years imposed on 20 July 2000 expired not later than 20 July 2003;

(b) alternatively he remains entitled to have the discretion to grant remission of the first sentence under s 21 of the *Corrective Services Regulation* 1989 exercised, and because the only proper decision would be to allow the remission the same result ensues;

(c) on its proper construction s 207B of the *Corrective Services Act* 1988 does not apply to his situation so as to prevent these outcomes;

(d) further, he was or will be entitled to have that discretion exercised prior to the expiry of two thirds of the 2000 sentence;

(e) alternatively he was entitled to remission of the 2000 sentence under s 75 of the *Corrective Services Act* 2000.

Counsel expressly abandoned arguments that the Court should reconsider the decision in *Benson & Ors v Chief Executive, Department of Corrective Services*[8] and that s 207B is invalid under the doctrine in *Kable v Director of Public Prosecutions (NSW)*[9].

The expiry of the 1993 sentence

[14] The *Corrective Services Regulation* 1989 remained in force until its repeal by s 31 of the *Corrective Services Regulation* 2001. Sections 21 and 28 of the former regulation provided:

> "**21. General entitlement to remission.**
>
> **(1)** A prisoner serving a sentence of imprisonment of 2 months or longer and who is of good conduct and industry may, at the discretion of the Commission, and subject to the following provisions of this Part, be granted a remission of one-third of his sentence together with such other remission as is provided for in this Part.

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8 [2001] QCA 303.

9 (1996) 189 CLR 51.

> **(2)** For the purposes of this Part a prisoner is of good conduct and industry 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.
>
> **28. Forfeiture of remission where an offence is committed.**
>
> The Commission shall not grant remission in respect of any period of a sentence of imprisonment served by a prisoner before he commits any indictable offence or offence punishable on summary conviction. The prisoner may become eligible by good conduct and industry for remission on the balance of his original sentence."

[15] The appellant submitted that there was nothing on the face of s 21 which provided that it did not apply to a prisoner on parole. That being so, the appellant became entitled to remission of one-third of the 1993 sentence effective by 8 May 1998. Because this was before he committed the 1999 offences there was no scope for s 28 to operate.

[16] The appellant's submission faces formidable difficulties. First, the proposition that a prisoner on parole should have been granted remission is inconsistent with the reasons of Davies JA, with whom McPherson JA agreed, in *Smith v Queensland Community Corrections Board*[10]. His Honour rejected the contention that remission eligibility continues whilst a prisoner is on parole. He said, "Release on parole under Part 4 of the Act and remission pursuant to Part III of the Regulations appear to operate as alternative, mutually exclusive schemes for release from custody." That rejection played an important part in the ultimate decision in that case.

[17] Second, that proposition gives no weight to "serving" in s 21. It is true that, as counsel pointed out, s 184 of the *Corrective Services Act* 1988 provided that until the parole period had expired a prisoner was regarded as still being under sentence and as not having suffered the punishment to which he was sentenced. However, s 190 relevantly provided that upon the cancellation of a prisoner's parole, no part of the time between the prisoner's release on parole and his recommencing to serve the unexpired portion of his term of imprisonment should be regarded as time served in respect of that term. It is difficult to imagine how a prisoner could have resumed serving a sentence of imprisonment after a period of parole unless his parole had been cancelled.[11] In the context of s 21 that reinforces the natural meaning of "serving". It strongly suggests that s 21 had no application to a prisoner who was at large on parole.

[18] Third, the appellant's submission assumed that remission under s 21 had been granted. That was simply not the case. Not only that; for all that appears from the evidence the respondent (I use that term to refer to his predecessor and also to the authority empowered from time to time to exercise the power under s 21) did not

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10 [2002] 1 Qd R 448 at 451-2.

11 See *Corrective Services Act* 1988, s 182, s 187.

consider the question until the appellant's letter referred to in para [11] was received. Until then, the appellant had not sought to have the discretion exercised: he had not asked to be granted remission of his sentence.

[19] To overcome this difficulty counsel argued that the appellant had a right to have the discretion conferred by s 21 exercised regardless of whether he had sought its exercise. He relied upon the decision of Douglas J in *Lynde v Department of Corrective Services*[12]. In that case, his Honour apparently took the view that the appropriate authority was under an implied duty to consider granting remission under s 21 before the expiry of two-thirds of the prisoner's term of imprisonment. It does not appear from the report whether any request had been made for the exercise of the discretion under that section, but it appears unlikely on the facts. While I would agree with his Honour's view in a case where a request was made a reasonable time before the expiry of that period, I am not convinced that it is correct where no request was made. Nothing else cited to us supported such an interpretation although it might be argued that it gains some indirect support from s 83 of the *Corrective Services Act* 1988.

[20] It is unnecessary to express a concluded view on the last point. The other difficulties are insuperable. I am satisfied that s 21 had no application to the appellant while he was on parole. It follows that his term of imprisonment did not expire in May 1998. When by reason of his convictions on 20 July 2000, his parole was "ipso facto … cancelled" under s 187 of the *Corrective Services Act* 1988, he had approximately 3 years and 323 days of the 1993 sentence still to serve. That sentence would expire not later than approximately 7 June 2004. Because of s 28 of the *Corrective Services Regulation* 1989 remission could not have been granted in respect of the 3 years 42 days already served. It could, however, at the appropriate time, have been granted in respect of the outstanding balance of the sentence. Potentially it could have been granted not only under s 21 but also under ss 23, 24 and 25. Without being too precise about it, total remissions might have amounted to almost one and a half years. Therefore, viewed as at July 2000, the earliest date on which sentence could have expired was about the end of 2002. It would have been inappropriate for the respondent to have considered the question of remission until a little before that time.[13]

Remission of the 1993 sentence under s 21 in August-September 2002

[21] In considering the appellant's second and third submissions, I am prepared to assume in his favour that the letter referred to in para [11] was a sufficient request for the present exercise of the discretion under s 21; that the request was not premature; and that the response of 11 September constituted reviewable conduct.

[22] It is now settled that a prisoner of good conduct and industry had a legitimate expectation that he would be granted remission in accordance with s 21.[14] The evidence advanced by the appellant before the trial judge and to the respondent was that he was of good conduct and industry, and no contrary evidence was adduced. It may therefore provisionally be concluded that but for the legislative changes shortly

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12 (2000) 116 A Crim R 430.

13 *R v Riley* [1999] QCA 128 at 8.

14 *Felton v The Queensland Corrective Services Commission* [1994] 2 Qd R 490; *McCasker v The Queensland Corrective Services Commission* [1998] 2 Qd R 261.

to be mentioned, the respondent would have granted remission of his sentence to the appellant.

[23] On 24 November 2000, Royal assent was given to the *Corrective Services Act* 2000. Chapter 10 of that Act commenced on assent. The remaining provisions commenced on 1 July 2001. Chapter 10 was concerned with the amendment of the *Corrective Services Act* 1988. So far as it is presently relevant, it inserted a new provision, s 207B, into the latter Act. That section provided:

> "**(1)** This section applies to a prisoner who was, before the commencement of this section, or who is, after the commencement of this section –
>
> …
>
> (c) released on parole under an order made under section 165.
>
> …
>
> **(3)** If this section applies to the prisoner because of subsection (1)(b) or (c), the prisoner's eligibility for remission –
>
> (a) if the prisoner was released before the commencement of this section – is taken to have been extinguished when the prisoner was released; or
>
> (b) if the prisoner is released after the commencement of this section – is extinguished when the prisoner is released."

[24] The appellant was a person who answered the description in s (1)(c). That had the consequence under s (3)(a) that his "eligibility for remission … is taken to have been extinguished" when he was released on parole.

[25] "Eligibility for remission" as used in s 207B is not an expression whose meaning is free from doubt. It is not a defined term. "Remission" in that Act is not itself defined and may not bear its common-law meaning.[15] According to the Macquarie Dictionary "eligible" may mean either "fit or proper to be chosen" or "legally qualified to be elected or appointed". The prisoner was neither fit and proper, nor legally qualified to be chosen for or granted remission until shortly before the date when, if remission were granted, the prisoner would have been discharged.[16] In that sense the appellant was not eligible for remission on 24 November 2000, nor did he become eligible for remission before 1 July 2001 when s 207B was repealed (along with the rest of the *Corrective Services Act* 1988) by Chapter 8 of the *Corrective Services Act* 2000. The same result follows if "eligibility for remission" is taken to refer to a "right" to request a grant of remission. However those are not the only possible meanings for the expression.[17] In its context it might include an expectancy of remission or a future or contingent eligibility for remission.

[26] The respondent submitted that s 207B was clear in its terms and had the effect of disentitling the appellant to any further remissions. From what I have said already it will be evident that I reject the first limb of that submission. In support of the

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15 See *Smith v Queensland Community Corrections Board* [2002] 1 Qd R 448 per Thomas JA.

16 See note 13 above.

17 For one example of a different usage see the submission referred to by Davies JA in *Smith v Queensland Community Corrections Board* [2002] 1 Qd R 448 at 452.

second limb the respondent relied on *Benson & Ors v Chief Executive, Department of Corrective Services*[18]. The facts upon which that case was founded are not clearly set out in the *ex tempore* reasons for judgment. It seems that in some way the appellants were returned to confinement consequent upon an alteration of their records due to the section. That is certainly not the position in the present case, and it is difficult to see how the circumstances of the two cases compare.

[27] Counsel for the appellant submitted that this case was distinguishable from *Benson* because in that case no suggestion was made "that any of the appellants [was] in a position where [his or her] remissions position was required to be considered, and yet the section was passed before the determination was required to be made". The determination referred to was apparently one under s 21 of the *Corrective Services Regulation* 1989. If this were truly an accurate description of the position in *Benson* it would constitute to my mind a point of similarity, not a point of distinction. But the accuracy of the description cannot be demonstrated.

[28] The uncertainties surrounding the facts in *Benson* make it impossible to use it as the foundation for a finding that s 207B has the effect of disentitling the appellant to any further remissions. The decision is however relevant to one argument shortly to be referred to. As to the section itself, although it occupied an important part of the argument before us, the submissions did not focus squarely on the meaning of its words, particularly the expression "eligibility for remission". Because in my view this appeal can be decided on a different basis, I prefer to express no concluded opinion upon it.

[29] On 1 July 2001, the *Corrective Services Regulation* 2001 commenced. Section 21 of that Regulation repealed the *Corrective Services Regulation* 1989. On the same date s 75 of the *Corrective Services Act* 2000 commenced. That section conferred a new power to grant remission of sentence upon the respondent. From that date the respondent had no power to grant remission under s 21 of the repealed regulation.

[30] To avoid that outcome the appellant sought to rely upon the provisions of the *Acts Interpretation Act* 1954. Counsel cited *Tyler v Tullipan & Ors*[19] in support of what he described as a statement of principle that the applicant had a right or at least a privilege under the 1988 Act which was preserved by the *Acts Interpretation Act*. That case was concerned not with remission of sentence but with home detention; but that difference may be put to one side. The right or privilege identified by Atkinson J was "to have his application for home detention considered and determined and that the date on which he became eligible for home detention was 25 July 2001."[20] That is a decision on different facts from this case.[21] It does not assist the appellant because he had not made any request for remission prior to 1 July 2001, nor on any view could the respondent have been under a duty to consider remission (with or without a request) at that time. To have done so would have been premature. The appellant had no right or privilege to be preserved by the *Acts Interpretation Act.*

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18 [2001] QCA 303.

19 [2001] QSC 379.

20 Para [18].

21 Compare for example *Resort Management Services Ltd v Council of the Shire of Noosa* [1996] 2 Qd R 291.

[31] That is enough to dispose of the appellant's submission. However for the sake of completeness a further legislative intervention should be noticed. That intervention was the direct result of the decision in *Tyler v Tullipan & Ors*. Judgment in that case was delivered on 10 October 2001. On 13 November 2001 assent was given to the *Corrective Services Amendment Act (No 2)* 2001. As the Explanatory Notes made clear[22], the major purpose of that Act was to extinguish rights, privileges or expectations of the type found by Atkinson J to exist. The Act inserted new ss 268A and 268B into the *Corrective Services Act* 2000:

> **"268A All release to be dealt with under this Act**
>
> **(1)** This section applies to a prisoner sentenced for an offence committed before 1 July 2001, whether or not the prisoner was sentenced for the offence before 1 July 2001.
>
> **(2)** On and from 1 July 2001 –
>
> **(a)** chapters 2 and 5 are the only provisions under which the prisoner may be released before the end of the period of imprisonment to which the prisoner was sentenced; and
>
> **(b)** the only requirements for the granting of the release are the requirements that apply under this Act.
>
> **(3)** If, before 1 July 2001, the prisoner had any expectation to be able, after 1 July 2001, to be released before, or to be considered for a release taking effect before, the end of the period of imprisonment to which the prisoner was sentenced, the expectation is extinguished to the extent that the release is not provided for under subsection (2).
>
> **(4)** Subsections (2) and (3) apply in relation to an application made by the prisoner and dealt with on or after 1 July 2001 even if the application was made before 1 July 2001.
>
> …
>
> **(7)** In this section –
>
> "**expectation**" includes right, privilege, entitlement and eligibility.
>
> **268B Further provisions about transitional release circumstances**
>
> …
>
> **(3)** Subject to subsections (1) and (2) and without limiting section 268A, any requirement that may have existed after the repeal of the repealed *Corrective Services Act* 1988 and before the commencement of this section that a person be dealt with in a way inconsistent with section 135(2) is extinguished.

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22 [2001] *Queensland Acts* 3 *Explanatory Notes* 2441-3; see also the second reading speech by the Minister for Police and Corrective Services, *Hansard*, 30 October 2001, p 3134.

> **(4)** Section 268A and subsection (3) prevail to the extent they are inconsistent with the *Acts Interpretation Act* 1954, sections 20 and 20C(3), the *Criminal Code*, section 11(2), the *Penalties and Sentences Act* 1992, section 180(1) or any other law of similar effect.
>
> **(5)** In this section –
>
> "**expectation**" includes right, privilege, entitlement and eligibility.
>
> "**release instrument**" means an instrument under which a prisoner was released."

[32] In *R v Bayliss*[23] McMurdo P, with whom Muir and Philippides JJ agreed, said, "[Sections 268A and 268B] make plain that the 2000 Act covers the remission of sentences of prisoners, like the applicant, sentenced before 1 July 2001." The wording of the sections supports that dictum. They seem to confirm the view expressed above[24]. However they were not referred to by counsel before us and a contrary position is not unarguable[25]. It is unnecessary to rely upon them in the present appeal for the reason already stated.[26]

Remission of the 2000 sentences under s 21

[33] The appellant argued that he was entitled to challenge the respondent's refusal to grant remission in respect of the sentences imposed in 2000. That argument focused upon the penultimate sentence of the respondent's letter dated 11 September 2002[27]. However, the appellant had not sought any remission of the 2000 sentences. His solicitors' letter of 22 August was entirely devoted to the 1993 sentence. That was also the focus of the reply. I am not persuaded that the additional reference to the "cumulative 3-year term" was anything other than gratuitous information provided in an attempt to be helpful. I am not persuaded that it constituted conduct capable of being the subject of an application for judicial review. However, the appeal may be disposed of without deciding this point.

[34] There is another aspect of Forest Lake Lawyers' letter to which attention should be drawn. Its 2½ pages contained a number of submissions of law and a suggestion of unfairness to the defendant. The third last paragraph was as follows:

> "For additional authority in this area, we refer to:
>
> *Lynde v Chief Executive* *QSC No 1683/00*
> *Smith v QCCB* *QSC 396 No 8886/00*".

The letter also stated that the solicitors had an opinion from counsel, who had researched the case. No reference was made to the judgment of the Court of Appeal

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23 [2002] QCA 135 at para [10].

24 Para [30].

25 Neither the Explanatory Note nor the Minister's second reading speech suggests that the amendments were intended to cover remissions. They refer only to orders in the nature of post-prison community based release orders.

26 Paragraph [30].

27 Quoted in para [12] above.

in *Smith*, in which the decision at first instance cited by the solicitors was reversed, although that judgment had been delivered on 13 February 2001, some 18 months before the letter was written. It is a matter of concern that a serious submission of law made by solicitors to a public authority should contain such a potentially misleading omission.

[35] As to the appellant's fourth submission, there is little to add to what has already been said. The conduct sought to be reviewed occurred in September 2002. By that time s 21 of the *Corrective Services Regulation* 1989 had been repealed. For the reasons already given, the respondent was correct in refusing to grant remission under the section. That position will not change.

Remission of the 2000 sentence under s 75 of the *Corrective Services Act* 2000

[36] Section 75 of the *Corrective Services Act* 2000 provides:

> "**(1)** A prisoner is eligible for remission only if –
>
> (a) the prisoner is serving a term of imprisonment, as defined in this Act, imposed for an offence committed before the commencement of this section; and
>
> (b) the term of imprisonment is 2 months or more; and
>
> (c) during the prisoner's period of imprisonment, the prisoner has not been –
>
> …
>
> (iii) released on parole under an order made under the Corrective Services Act 1988, section 165; or
>
> …
>
> **(2)** Subject to subsections (3) and (4), the chief executive may grant remission of up to one-third of the term of imprisonment if satisfied–
>
> (a) that the prisoner's discharge does not pose an unacceptable risk to the community; and
>
> (b) that the prisoner has been of good conduct and industry; and
>
> (c) of anything else prescribed under a regulation."

No regulation has been made under s (2)(c).

[37] At the invitation of the Court, counsel addressed the question whether the appellant was entitled to remission of the 2000 sentence under that section. Without much enthusiasm counsel for the appellant submitted that, if the court concluded that the Act applied in the present case, the appellant would be entitled to remission of one-third of the sentence. For the respondent it was submitted that the appellant would not be eligible for remission because he was released on parole under s 165 of the *Corrective Services Act* 1988 during his period of imprisonment.

[38] The point turns upon the definition of "period of imprisonment". The dictionary in Schedule 3 of the Act incorporates by reference the definition of the same term in the *Penalties and Sentences Act* 1992. Section 4 of the latter Act states:

> "**period of imprisonment**" means the unbroken duration of imprisonment that an offender is to serve for 2 or more terms of imprisonment, whether –
>
> (a) ordered to be served concurrently or cumulatively; or

(b) imposed at the same time or different times;

and includes a term of imprisonment".

[39] That definition is similar although not identical to the definition of "term of imprisonment" contained in the *Corrective Services Act* 1988. The latter has been considered in some detail in *R v Walton; ex parte A-G (Qld)*[28] and *R v Pepper and Cornwell*[29]. In the former case Pincus JA, with whom the Chief Justice and McPherson JA agreed, said:

> "However, it is not very clear how one applies the definition of 'term of imprisonment' to which I have referred where there is no gap in the sentences, but a gap in custody. That can arise where there is an escape, as in *Barlow* (C.A. No 209 of 1994, judgment 24 May 1996) or work release, as in *Gipters* (C.A. No 25 of 1995, judgment 30 May 1995). In each of those cases, where there was a gap in custody, the definition of 'term of imprisonment' was applied to calculate the statutory parole date, despite the reference in the definition of 'term of imprisonment' to 'the unbroken period of imprisonment'. Although the point was not discussed in the cases I have mentioned, the definition was in my view correctly applied in them, because the test is not what imprisonment is actually served, but what imprisonment the person in question is 'liable to serve by virtue of a number of sentences …'. … But a difficulty, not dealt with in any case I have found, is whether in making the calculation to arrive at the defined 'term of imprisonment' one includes or excludes a period spent on parole. This is not a point of critical importance in the present case. It appears to me that the governing notion is liability to serve imprisonment, so that if the imprisonment ordered was discontinuously served because of parole or escape one ignores the gap, and takes into account the length of the ordered sentence."

[40] The suggestion that "the governing notion is *liability* to serve imprisonment, so that if the imprisonment ordered was discontinuously served because of parole or escape one ignores the gap, and takes into account the length of the ordered sentence" was considered in the judgment of the court in *Pepper and Cornwell*. There the court said, "Having reconsidered the matter, we adhere to that view." It may also be observed that this outcome is consistent with that in *Smith v Queensland Community Corrections Board*[30].

[41] "Liable" is not used in the definition in the *Penalties and Sentences Act* 1992. That is one of the differences between the definitions. In the present appeal neither party suggested that this or any other difference in wording constituted a point of distinction. I am content to proceed on this assumption.

[42] Using the term as so interpreted in this appeal means that the appellant's period of imprisonment began in 1993 and is continuing. It follows that his release on parole occurred during that period of imprisonment. Section 75 provides that he is eligible for remission only if that did not happen. Whatever "eligible for remission"

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28 [1997] QCA 411.
29 (1999) 104 A Crim R 135.
30 [2002] 1 Qd R 448.

precisely means, it is plain that the appellant could have no remission of the 2000 sentence under s 75.