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Précis Paper

The Royal Prerogative of Mercy

A discussion of the royal prerogative of mercy, including: its history, the application process, the process of assessing an application and the factors taken into account, the legal effect of the exercise of the prerogative, and the current review of the prerogative.

Discussion Includes

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Précis Paper

The Royal Prerogative of Mercy

1. **In this edition of BenchTV, the Hon. Mark Raymond Speakman, SC MP (Attorney-General, NSW) and Lidia (Lida) Kaban (Executive Director, General Counsel – Department of Justice, NSW) discuss the royal prerogative of mercy, including: its history, the application process, the process of assessing an application and the factors taken into account, the legal effect of the exercise of the prerogative, and the current review of the prerogative.**

What is the royal prerogative of mercy?

2. **The royal prerogative of mercy is an ancient prerogative, now exercised by the Governor on the advice of the Executive Council, and in particular, the Attorney-General.**

3. **The aim of the prerogative is to temper what could be the undue rigidity of the law.**

4. **The prerogative is only exercised in exceptional circumstances and the number of applications is fairly small. For example, in 2017, there were only 10 applications for free release in New South Wales, and of these, only one was granted. Also in 2017, there were 26 applications for remission of driver disqualificational sanctions, of which only 8 were granted.**

5. **These figures may be compared with the approximately 125,000 defendants in 2017 who were found guilty of at least one offence, and the 230,000 drivers in 2017 who were subject to some kind of driver sanction.**

6. **The Road Transport Act 2013 (NSW) was amended in 2017 to create a statutory regime for remission of driver sanctions in appropriate circumstances. Therefore, it may well be that the number of applications for exercise of the royal prerogative in relation to drivers will near zero in the future.**

What factors are taken into account when considering an application for the exercise of the prerogative?

7. **Generally, exceptional circumstances have been demonstrated in successful applications for the prerogative. This is because decision-makers start from the premise that judicial decision-making should not be interfered with.**

8. Typically, post-sentence factors will be the most important in granting an application for the favourable exercise of the prerogative.

Examples of the exercise of the prerogative

9. Cases of the favourable exercise of the prerogative typically involve post-sentence factors, such as, for example: where the person seeking the favourable exercise of the prerogative has given authorities post-sentence assistance in catching another criminal, at their peril; or, where a person lives in a remote location with very poor transport, or has severe personal, financial, or medical issues such that, unless there is a favourable exercise of the prerogative, their family, employment, or medical circumstances could be severely affected. This might be particularly so in a driver disqualification case.

10. Another situation where the favourable exercise of the prerogative might be warranted is where societal attitudes have changed. This may be the case where somebody has been convicted decades ago of something that these days would not be considered an offence or be prosecuted, they may have lived law-abiding lives since then, and are valued members of the community.

Examples of situations where exercise of the prerogative would not be entertained

11. There are a number of factors which might lead to non-exercise of the prerogative.

12. First and foremost is the independence of the judiciary and the principle of non-interference with the decisions of independent judicial officers and juries reached following a thorough criminal law process.

13. A second factor is where the defendant has not been rehabilitated, or where there are low prospects of rehabilitation.

14. Other factors are: the seriousness of the offence, and the general impact that granting mercy would have on the victim and the community generally.

Origins of the royal prerogative of mercy

15. The royal prerogative of mercy has its origins in the English common law, which recognised that the monarchs had the power to issue clemency pardons to their constituency.

16. The prerogative dates back to Edward the Confessor, who reigned from 1042–1066, and was used by the monarchs for various discretionary reasons they may have had.

17. The prerogative derives from William Blackstone's analysis in the 1773 edition of his *Commentaries on the Laws of England: in four books* (Oxford, Clarendon Press, 5th ed, 1773).

Other forms of post-conviction relief available today

18. Under s 77 of the *Crimes Appeal and Review Act 2001* (NSW), the Governor has the power to order inquiry in respect of an application for review of conviction and sentence.

19. Further, the Attorney-General has the power to refer a case to the Court of Criminal Appeal of New South Wales, or to request that the Court give an opinion on any point relating to a case.

20. Section 114 of the *Crimes (Appeal and Review) Act 2001* (NSW) preserves the royal prerogative of mercy by making clear that nothing in the Act limits or affects the prerogative.

How did the English royal prerogative of mercy arrive in Australia?

21. The royal prerogative of mercy arrived in Australia with the British when they colonised the Australian continent, bringing with them the law that was applicable in Britain at the time, which subsequently became the common law of Australia. Part of the law that they brought over was the royal prerogative of the monarchs, which has since been retained in Australia.

How has permission to exercise the prerogative evolved in Australia?

22. Though the prerogative came to Australia as a common law prerogative of the monarch, there have been subsequent changes to it as a result of legislation, especially with the passing of the *Australia Act 1986* (UK) and the *Australia Act 1986* (Cth).

What is the legal effect of granting the royal prerogative of mercy?

23. Granting the royal prerogative of mercy can partially or completely relieve the petitioner of the effect of their conviction.

24. Though the grant of the prerogative does not actually displace the conviction, it means that the petitioner does not have to disclose the existence of the conviction to anyone, with the exception of a few circumstances.

25. Section 19 of the *Criminal Records Act 1991* (NSW) applies to a successful petition for the grant of the prerogative: "Division 1 of Part 3 applies to and in respect of a quashed conviction and a pardon … in the same way as it applies to and in respect of a spent conviction".

26. Section 84(3) of the *Crimes (Appeal and Review) Act 2001* (NSW) entitles a successful petitioner to make an application to have their conviction quashed.

Release on licence

27. A release on licence is very rarely granted. It would only be granted in exceptional circumstances because it is not within the power of the Executive to interfere with what has been determined by the courts. However, there are circumstances where it may be appropriate for consideration to be given to a licence application, such as where a prisoner has given information to law enforcement authorities about a crime about to be committed, proceedings that have occurred, or unsolved crimes.

28. In these circumstances, the factors that would be considered in determining whether a petition for a release on licence will be successful include: the nature of the assistance provided to the authorities, as well as the timeliness, value, and truthfulness of the information provided.

Consequences of breach of a licence condition

29. If a licence condition is breached, the inmate will be returned to custody, provided the breach has been found to have been proven. This means that they would serve the remainder of their sentence in custody, and if they also committed another crime, there would then be proceedings in respect of that crime as well.

What is the process of applying for the exercise of the royal prerogative of mercy?

30. The process is a straightforward one and there is no set form that must be followed.

31. All the petitioner must do is write, or have a legal representative or someone in close proximity to them write on his or her behalf, why they believe that the petitioner's circumstances are such that the prerogative should be exercised.

32. The application must make it clear that the petitioner is seeking exercise of the prerogative, and provide any relevant supporting evidence. If sufficient information has not been provided, the petitioner may be requested to provide additional information.

33. Once the application is received, the material contained in it is considered and tested to ensure that it has some veracity. If, for example, the petitioner is seeking a release on licence, the relevant authorities (the police, DPP, etc) would be contacted to ensure that the information the petitioner is alleging is actually factual, important, and critical.

34. There would also need to be other factors that are extraordinary to displace what the courts have imposed, as exercise of the prerogative is not something that is meted out lightly.

<u>The role of the Crown Solicitor in assessing an application for exercise of the prerogative</u>

35. The role of the Crown Solicitor in this situation is to provide information as to their legal position and whether or not there are reasons to consider the application favourably. In essence, the Crown Solicitor must provide the Attorney-General with the most fulsome advice possible to enable him to make a determination as to whether or not there are any merits to the application progressing.

<u>The role of the Attorney-General in assessing an application for exercise of the prerogative</u>

36. For every application for exercise of the prerogative, the Attorney-General receives a brief, which is commonly accompanied by advice from the Crown Solicitor.

37. The Attorney-General will go through the brief, consider the arguments for and against the exercise of the prerogative, and formulate a recommendation for the Governor.

38. Whether the Attorney-General will accept the information in a brief as is, or request additional inquiries, is dependent on the complexity of the matter. It may be apparent that some applications are without merit, while others require more consideration, in which further legal advice or analysis may be sought.

39. Typically, the Attorney-General will follow the advice received by the Crown Solicitor, but there will be occasions where that advice will be questioned or the Attorney-General may form a different view of the matter.

<u>What happens at Government House?</u>

40. Executive Council, typically comprising the Governor and two Ministers, meets at Government House every Wednesday, and consider instruments (which may include proclamations, the making of regulations, appointments, and the exercise of the royal prerogative of mercy) to approve that week.

41. In the case of the prerogative, when signed, it will either be declined or exercised favourably.

Current review of the royal prerogative of mercy

42. Historically, the decision-making process involved in deciding whether to exercise the royal prerogative of mercy has not had a great deal of transparency, as the process is, theoretically, the exercise of a non-judicial power.

43. Although in Australia, the principle of open justice dictates that judicial decisions, sentencing, convictions, etc, are transparent and open to public viewing, the exercise of the royal prerogative of mercy has not had this transparency because it is treated as an executive power.

44. There are arguments for and against transparency in deciding whether or not to exercise the prerogative.

45. In favour of transparency, there is the argument that the decision whether or not to exercise the prerogative is akin to a judicial decision, and as such, reasons for the decision should be given, and that confidence in the administration justice requires open justice and transparency.

46. On the other hand, there are good reasons not to have that openness – for example, where someone is seeking the exercise of the prerogative because he or she has provided assistance to the police in a criminal investigation, and their safety would be placed at risk if their identity were disclosed.

47. There may also be privacy considerations, such as where people are seeking to rely on extenuating medical or personal circumstances for the exercise of the prerogative. Here, privacy issues suggest non-disclosure of the process to the general public.

48. In the current review of the prerogative, how to balance these competing considerations is being looked at – people's interest in accountability and open

decision-making on the one hand, and ensuring privacy, safety, and other important personal protections on the other.

BIOGRAPHY

The Hon. Mark Raymon Speakman, SC MP

Attorney-General - NSW

Mark Speakman was appointed Attorney-General for NSW in 2017. As First Law Officer of the State, Mark oversees the administration of almost 200 Acts of Parliament, the most of any minister in the NSW Government. Mark was the Minister for the Environment, Minister for Heritage, and Assistant Minister for Planning from April 2015 to January 2017. He was previously Parliamentary Secretary for Treasury, Parliamentary Secretary for Tertiary Education and Skills, and Chair of the Joint Committee on the Independent Commission Against Corruption. He holds a Masters in Laws from Cambridge University and degrees in law and economics from Sydney University.

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Lidia (Lida) Kaban is the Executive Director, General Counsel in the Office of the General Counsel, Department of Justice (NSW). In this role, she is responsible for leading a diverse team dealing with a myriad of issues relating to the Attorney-General's Division, Corrective Services NSW, Juvenile Justice, Veteran's Affairs, and matters relating to the Justice Cluster as they arise.

BIBLIOGRAPHY

Legislation

Australia Act 1986 **(Cth)**

Australia Act 1986 **(UK)**

Crimes (Appeal and Review) Act 2001 **(NSW)**

Criminal Records Act 1991 **(NSW)**

Road Transport Act 2013 **(NSW)**

Other

William Blackstone, *Commentaries on the Laws of England: in four books* (Oxford, Clarendon Press, 5th ed, 1773)