Royal Prerogative of Mercy: fact sheet

What is the Royal prerogative of mercy?

The Royal prerogative of mercy is a broad discretionary power exercisable by the Governor acting on the advice of the Executive Council and the Attorney General. The purpose of the power is to temper the rigidity of the law by dispensing clemency in appropriate circumstances.

Strictly speaking there are no legal restrictions on the exercise of the power. The power is only exercised in rare and exceptional circumstances, where it is necessary in the public interest.

The exercise of the Royal prerogative of mercy is not a general avenue of appeal. Nor is it equivalent to an acquittal. Rather, the exercise of the power merely has the effect of relieving the effects of a conviction without displacing the conviction itself.

The exercise of the Royal prerogative of mercy can generally take one of four forms

1. a free pardon
2. commutation or a conditional pardon substituting one form of punishment for another
3. remission, reducing the amount of a sentence without changing its character
4. release on licence/early release to parole.

Each application, called a 'petition', is considered on its individual merits. There are no legal limits to the considerations that may be taken into account either for or against a petition. However, there must be compelling reasons to justify the Executive altering the effect of decisions of independent judicial officers who have heard and considered matters in accordance with the law.

Considerations supporting a petition

A petitioner must demonstrate rare and exceptional circumstances in order to justify interference with the decisions of independent judicial officers who have heard and considered matters in accordance with the law. As a general rule, the extraordinary circumstances in support of a petition should be those which have occurred after sentencing, as all matters prior to sentencing would have been properly considered by the court.

One consideration that may be significant is any post-sentence assistance that the petitioner has rendered to law enforcement authorities, particularly if it has been at their own peril.

It is also relevant if the petitioner can demonstrate the purposes of punishment have been satisfied, and that deterrence has been achieved. In this case, the petitioner must be able to demonstrate what was originally a just sentence is now highly disproportionate to the seriousness of the offence.

The petitioner may also raise compassionate grounds, including medical issues such as mental illness, developmental disability, or severe personal or financial hardship. These compassionate grounds must render the continuing imposition of the sentence severely disproportionate to the actual offence.

Considerations working against a petition

The first and foremost consideration against the exercise of the prerogative, is the principle of not interfering with the decisions of independent judicial officers who have fully considered matters in accordance with the law. This principle imposes a very high threshold, and only the most exceptional of circumstances would allow for the exercise of the Royal prerogative of mercy.

Also, as the prerogative is typically a mechanism of last resort, it will generally be required that any existing alternative pathways, such as any statutory reviews processes or mechanisms, must first be exhausted.

A lack of rehabilitative efforts made by the petitioner will weigh strongly against their petition. In addition, any rare and exceptional circumstances raised by the petitioner must be weighed against the need to protect public safety and deter unlawful conduct. Consideration is also given to the seriousness of the offence and the impact of an exercise of the Royal prerogative of mercy on any victims of the offence and the wider community.

Common petitions received by the Governor

The Royal prerogative of mercy is flexible and can adapt to meet new situations as they arise. However, the most common petitions received by the Governor include:

Pardon

The effect of a pardon is to remove a person from the consequences of a conviction, but without displacing the conviction itself. Successful petitions for pardons are rare, and pardons are only granted in the most extraordinary of circumstances.

Some examples of extraordinary circumstances in which pardons have been granted include wrongful convictions, where new methods of forensic evidence raise significant questions as to the petitioner's guilt, or where a third party confessed to the crime of which a petitioner was convicted.

Release on licence/Governor's parole orders

A release on licence was a form of the exercise of the Royal prerogative of mercy that allowed an offender serving a sentence of imprisonment to be released from gaol subject to conditions. However, this form of the Royal prerogative has been largely superseded. In 2017, amendments were made to allow the Governor to exercise the Royal prerogative of mercy by making an order for parole (see section 160AD of the *Crimes (Administration of Sentences) Act 1999*. If parole is granted, the offender

is released on parole and is subject to the supervision of Corrective Services NSW and the State Parole Authority.

It is also noted that there are other mechanisms for the early release of parole beyond section 160AD. For example, section 160 of the *Crimes (Administration of Sentences) Act 1999* provides that the State Parole Authority ('the Authority') may order the release of an offender on parole who is not otherwise eligible for release on parole if the offender is dying or if the Authority is satisfied that it is necessary to release the offender on parole because of exceptional extenuating circumstances. Applications under section 160 should be made to the Authority. The Attorney General will generally not consider a petition for the early release to parole under the Royal prerogative of mercy unless an application under section 160 has been made and refused by the Authority.

Remission of driving disqualifications

The most important principle that guides consideration of driving disqualification petitions is the concern for public safety. In this regard, there must be strong and compelling evidence of the petitioner's rehabilitation. However, while evidence of rehabilitation is necessary for a successful petition, it is insufficient to support a recommendation for remission. Further exceptional circumstances must exist, potentially relating to medical grounds, or severe financial and/or domestic hardship.

Remission of a driving disqualification is rare and is generally only granted if no other option is reasonably available. Reforms under the *Road Transport Act 2013* now also allow for individuals to apply to the Local Court for the removal of driving disqualification periods.

Generally speaking, the Attorney General will only consider a petition seeking the exercise of the Royal prerogative in relation an unexpired period of driving disqualification once an application has been made and refused by the Local Court. Further information about making applications under the *Road Transport Act 2013* provisions (to the Local Court) or through the exercise of the Royal prerogative of mercy can be found on the Department of Communities and Justice website.

Remission of fines

Successful petitions for remission of penalties on financial hardship and compassionate grounds are rare. Remission is generally only granted if no other option is reasonably available. Following the introduction of the *Fines Act 1996*, most applications for the remission (or 'writing off') of fines should be made to Revenue NSW for consideration in the first instance. The Commissioner of Fines Administration has the power, under section 101 of the *Fines Act 1996*, to 'write-off' any unpaid fines.

Further information about the remission of fines under the *Fines Act 1996* (to Revenue NSW) or through the exercise of the Royal prerogative of mercy can be found on the Department of Communities and Justice website.

The general process guiding the exercise of the Royal prerogative

1. The petitioner, or a person acting on their behalf, submits his or her written petition to the Governor of New South Wales, clearly setting out why the Royal prerogative of mercy should be exercised. All relevant material should be provided with the petition.
2. Government House refers the matter to the Attorney General to consider the petition. The Department of Communities and Justice assists the Attorney General in considering the petition. At this time, further information may be requested from the petitioner. The Department may, with the consent of the petitioner, seek to verify the information in the petition by making enquiries with other relevant bodies or agencies. This may include the police or the courts. **Apart from making these types of enquiries, the Attorney General has no power or role in investigating issues raised in a petition. The petitioner is required to provide the evidence in support of their petition.**
3. Where it is considered that there are other options available to a petitioner, for example, under a statutory scheme, the petitioner will be told that those avenues should be pursued. The Royal prerogative of mercy exists as a matter of last resort.
4. The Attorney General may seek legal advice in considering the petition.
5. After all relevant information and advice is received, the Attorney General will consider the material before making a recommendation to the Governor.
6. The Governor will then consider the Attorney General's recommendation and make a decision. The petitioner is then notified of the outcome.

What is involved in a review of a conviction or sentence?

Section 76 of the *Crimes (Appeal and Review) Act 2001* provides a mechanism for convictions or sentences to be reviewed. Under section 76, a person may petition the Governor to review his or her conviction or sentence. This kind of petition is not an incidence of the Governor's Royal prerogative of mercy. Rather, it is a statutory power.

It is noted that the Governor also possesses a broad discretion to refuse to consider a petition for review of a conviction or sentence. This may happen where it appears the petitioner's matter has been fully dealt with in the proceedings giving rise to their conviction or sentence, or where the matter has previously been dealt with under any review provision, or where the Governor is not satisfied there are any special facts or circumstances that justify the taking of further action.

Additional information on reviews can be found on the Department of Communities and Justice fact sheet entitled 'Review of convictions or sentences under the *Crimes (Appeal and Review) Act 2001*'.

Reporting on petitions

Since 2018, the Attorney General publishes an annual summary document of petitions for the exercise of the Royal prerogative of mercy and petitions for the review of a conviction or sentence under section 76 of the *Crimes (Appeal and Review) Act 2001*. The publication of a summary document aims to best address the balance of privacy and public interest concerns involved in the consideration of petitions, with ensuring and promoting open justice and transparency.

Details of both successful and unsuccessful petitions are published here:

https://www.dcj.nsw.gov.au/justice/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/release-of-information.html

Generally, and subject to the Attorney General's discretion to refuse to release information, the following information will be published

a. general information as to the nature of the offence for which the petitioner has sought review or the exercise of the Royal prerogative of mercy will be released.

b. the grounds on which the petitioner sought review or the exercise of the Royal prerogative of mercy will be released.

c. the outcome and date of decision.

In relation to unsuccessful petitions, identifying information, including the petitioner's name, or any specifics regarding the subject offending, will not be released. However, in relation to successful petitions, in addition to the above, the petitioner's name and brief reasons for the decision will be released.

Procedure

Where the Attorney General forms a preliminary view that the Governor of NSW ought to exercise the Royal prerogative of mercy, or that action should be taken under section 77(1) of *Crimes (Appeal and Review) Act 2001* in respect of a petition, the petitioner will be advised of the proposed information to be released in respect of the petition. The petitioner will be invited to comment on the release of information, or to withdraw the petition. However, the Attorney General has the ultimate discretion on what information is published.

Contacts

Government House

A petition to the Governor may be submitted via an online webform at **https://www.governor.nsw.gov.au/contact/** or sent to the following address:

Official Secretary to the Governor of New South Wales

Government House

Macquarie Street

SYDNEY NSW 2000

Department of Communities and Justice

A petition to the Attorney General may be sent via email to **AdvisingsandCommunityProtectionLegal@dcj.nsw.gov.au** or sent to the following address:

Advisings and Community Protection

Department of Communities and Justice (Legal Branch)

Locked Bag 5000

Parramatta NSW 2124

For further information

Further information about these processes is available on the Department of Communities and Justice website.

For related information about reviews and convictions of sentences, please see the **Review of convictions or sentences under the Crimes (Appeal and Review) Act 2001: fact sheet**.

DISCLAIMER: This fact sheet contains general information only, is not legal advice, and does not take into account individual circumstances. You should seek independent legal advice about your own particular circumstances. Neither the Attorney General nor the Department of Communities and Justice can provide legal advice.