

Royal prerogative of mercy

Factsheet

March 2021

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 take one of three forms:

1. A free pardon;
2. Commutation or a conditional pardon substituting one form of punishment for another; or
3. Remission, reducing the amount of a sentence without changing its character.

As the exercise of the Royal prerogative of mercy is a decision of the Governor acting on the advice of the Executive Council, the decision is not subject to the same public scrutiny as proceedings in open court. The information involved in petitions may be

of a highly sensitive or personal nature and its release would not be appropriate.

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.

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 interfering 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 may be significant 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 may 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 may 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. As the prerogative is typically a mechanism of last resort, the existence of alternative pathways, such as statutory appeals, will generally be a consideration that works against a petition.

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 victim and the community.

The Royal prerogative of mercy is flexible and can adapt to meet new situations as they arise.

The three most common types of petitions received by the Governor are:

1. Pardon/Release on licence/Governor's parole orders

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.

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 when in 2017, amendments were made to allow the Governor to exercise the Royal prerogative or mercy by making an order for parole. If granted, the offender is released on parole and is subject to the supervision of Corrective Services NSW and the State Parole Authority.

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.

2. Remission of driving disqualifications

The most important principle that guides consideration of driving disqualification petitions is the concern for public safety. In this regard, attention must first be given to evidence of the petitioner's rehabilitation. 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. These reforms have not completely displaced petitions made under the Royal prerogative of mercy, though it has decreased the number of matters significantly.

3. 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 are referred to the State Debt Recovery Office (SDRO) for consideration. The SDRO has the power, under section 101 of the Act, to 'write-off' any unpaid fines.

The general process guiding the exercise of the Royal prerogative is:

1. The petitioner or a person acting on their behalf submits their petition in writing clearly setting out why the Royal prerogative of mercy should be exercised in their matter. All relevant material should be provided with the petition.
2. Where there are other options available, the petitioner will be told they should pursue alternative action. The Royal prerogative of mercy exists as a matter of last resort.
3. Further information may be requested from the petitioner, or any other relevant body/agency, which may include, the police or the courts, to verify matters raised in the petition. Apart from making these types of inquiries, 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.
4. The Attorney General may seek legal advice from Crown law officers.
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 Applicant is then notified of the outcome.

Following a review of the procedures involved in the exercise of the Royal prerogative of mercy undertaken in 2018, the Attorney General decided to release an annual summary document on the Department of Communities and Justice website 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*. Details of both successful and unsuccessful petitions are published here:

www.justice.nsw.gov.au/lrb/Pages/release-of-information-relating-to-the-royal-prerogative-of-mercy.aspx

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

A petition to the Governor to review a conviction or sentence is not an incidence of the Governor's Royal prerogative of mercy. Rather, it is a statutory power embodied in section 76 of the *Crimes (Appeal and Review) Act 2001*.

In order for the Governor to review an individual's conviction or sentence, the individual must petition the Governor in writing, clearly setting out the reasons in support of their petition. The considerations and requirements governing a review are set out in section 77 of the *Crimes (Appeal and Review) Act 2001*. A successful petitioner must provide material that raises a doubt or question as to:

1. the petitioner's guilt;
2. the mitigating circumstances in the case;
3. any part of the evidence in the case.

Should the petitioner successfully provide such material, the Governor may refer the matter to a judicial officer for an inquiry into the petitioner's conviction or sentence. Alternatively, the Attorney General can refer the matter to the Court of Criminal Appeal.

The Governor also possesses a broad discretion to refuse to consider a petition for review of a conviction or sentence. Circumstances which may enliven this discretion include 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.

For more information visit:

www.justice.nsw.gov.au/lrb/Pages/release-of-information-relating-to-the-royal-prerogative-of-mercy.aspx