

Submission: Review into Royal Prerogative of Mercy

The NSW Government is considering whether petitions for mercy and their outcomes should be made publicly available. As the Terms of Reference recognise, this issue requires balancing the principles of open justice and privacy. In this submission we argue that the fundamental principle of open justice has especially strong application to situations where the pardon is used to correct wrongful convictions. It is important that these errors be understood in order to achieve reforms to avoid future errors. While privacy considerations also need to be considered, particularly in the internet age, the outcome of this balancing exercise need not be all or nothing. The competing interests can be accommodated by establishing disclosure principles that distinguish between types of cases and between types of information.

Criminal justice and the prerogative of mercy

The *Fact Sheet* seeks to distinguish the exercise of the prerogative of mercy from the ordinary processes of criminal justice. It makes the point that mercy is an extraordinary discretionary intervention of the executive, and something different from judicial appeals and acquittals. However, while this is technically correct, it must be appreciated that the prerogative of mercy intervenes directly in the ordinary processes of justice – to remove or reduce the consequences of a conviction. The prerogative of mercy interacts very closely with the judicial administration of criminal justice. As a consequence, it may be appropriate for the principle of open justice to extend to at least some exercises of the prerogative of mercy.

The *Fact Sheet* states that a pardon is not ‘in any sense equivalent to an acquittal’. But this is an overstatement. While some pardons may operate by reference to non-legal considerations, many pardons are based on the grounds similar to those operating at appeal. All of the ‘extraordinary circumstances’ mentioned by the *Fact Sheet* as examples of cases where pardons have been granted resemble grounds for successful appeal: ‘wrongful convictions, where new methods of forensic evidence raise significant questions as to the petitioner’s guilt, or, in one circumstance, where a third party confessed to the crime of which a petitioner was convicted’. And while a pardon leaves the conviction in place, a pardon will often be followed by the petitioner’s application to the Court of Criminal Appeal for the quashing of the conviction under ss 84-85 *Crimes (Appeal and Review) Act 2001* (‘CARA’).

There is a further correspondence between the role of the Governor and the role of the court. An application for the Governor’s intervention may be viewed either as an application for the exercise of the prerogative of mercy or as an application for review of conviction: see CARA ss 76, 77(5). The latter power of review is a statutory power that is essentially shared by the Governor and the Supreme Court: compare CARA ss 76, 77 and ss 78, 79. While the Supreme Court, in such a case, would be acting administratively (not judicially), one of

the options open to both the Governor and the Supreme Court is to refer an appeal to the Court of Criminal Appeal: *CARA* ss 77(1)(b), 79(1)(b).

Open justice

Strictly speaking, the principle of open justice binds judicial power rather than executive power. In *Russell v Russell* (1976) 134 CLR 495, 520, Gibbs J observed:

It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted “publicly and in open view”. This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for “publicity is the authentic hall-mark of judicial as distinct from administrative procedure”.

However, special considerations apply to the prerogative of mercy, given its close alignment with the exercise of judicial power over criminal justice.

Chief Justice Spigelman, drawing on leading authorities, outlined the importance of open justice in the criminal law:

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner’. It is not enough to say that results alone will satiate the natural community desire for ‘satisfaction’. A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice’, and the appearance of justice can best be provided by allowing people to observe it. (*Richmond Newspapers Inc v Virginia*, 448 US 555, 571–2 (1980); quoted in Spigelman, ‘The Principle of Open Justice: A Comparative Perspective’ (2006) 29 *University of New South Wales Law Journal* 147, 155.)

A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the

administration of justice. It promotes the value of the rule of law. (*Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607; quoted by Spigelman at 156.)

While the benefits of openness are especially strong as regards the operations of the criminal justice system, they extend more widely. The notion of ‘open justice’ has its counterpart in the broader notion of ‘open government’, described by the NSW Information and Privacy Commission as ‘a collective right, a right enjoyed for the benefit of communities. This right provides the foundation upon which we as a fair and open society effectively uphold and actively participate in our system of democracy’:
<https://www.ipc.nsw.gov.au/open-government>. The *Government Information (Public Access) Act 2009*, s 12(2) provides examples of public interest benefits that may be enjoyed in the criminal justice context from disclosing exercises of the prerogative of mercy. Such disclosures would:

- ‘promote open discussion of public affairs’
- ‘enhance Government accountability’
- ‘contribute to positive and informed debate on issues of public importance’
- ‘ensure effective oversight of the expenditure of public funds’

Further, in some cases ‘[d]isclosure of the information could reasonably be expected to reveal or substantiate that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct’ (s 12).

Conversely, concealing exercises of the prerogative of mercy could carry corresponding costs to the public interest. To the extent that the exercise of the prerogative reverses or reduces the effects of court orders, failing to disclose exercises of the prerogative would undermine the principle of open justice as it applies to the criminal courts. The public record regarding the criminal courts would be left inaccurate. Hiding the errors could give a false impression of the relative infallibility of the criminal justice system, which may breed distrust, disrespect and cynicism if and when the error and its concealment is revealed.

Importantly, the failure to reveal the errors corrected through exercises of the prerogative of mercy can also hinder criminal justice reform. Decisionmakers, including institutions like the criminal justice system, learn from experience. In order to improve its performance, the criminal justice system needs feedback on its performance. Errors are particularly valuable in this regard. And the kinds of errors that are corrected through exercises of the prerogative of mercy may be particularly valuable. They are exceptional in a number of respects. They are errors that were not picked up on regular appeal. At the same time, the errors must be highly significant for the Governor to be persuaded belatedly to intervene, overriding the finality principle and the separation of powers. There may be a higher rate of factual (rather than purely legal) errors among these cases relative to corrections made on regular appeal. Of course, convictions overturned on subsequent referred appeals under Part 7 CARA have similar features, and generally will be made public. However, such late interventions are few in number and exercises of the prerogative of mercy provide valuable additional information on system performance.

In an effort to further understanding of criminal justice errors, Sydney University is currently funding the authors of this submission to establish WrongTrac, Australia's National Registry of Exonerations. In this connection, we are seeking information on wrongful convictions that have been the subject of pardons. Given that this data is crucial to understanding the effectiveness of the criminal justice system, and efforts to improve its performance, we believe Australian governments should provide this data. We would hope that proper records of this important data have been maintained so that it can be provided without the disproportionate consumption of resources. And we consider that privacy concerns do not provide sufficient reason to withhold this information.

Privacy

The *Fact Sheet* notes that, in determining whether exercises of the prerogative of mercy should be made public, the policy of open justice needs to be balanced against the privacy interests of petitioners. In the criminal justice sphere, the principle of open justice generally overrides privacy concerns. The same approach should extend to cases where the prerogative has operated by reference to criminal justice considerations – such as the correction of wrongful convictions. The *Fact Sheet* refers to the 'highly sensitive and personal nature of many petitions'. But many criminal cases are concerned with highly sensitive and personal material. Only in relatively few cases, and in limited respects, are these considerations viewed as justifying restrictions on the principles of open justice.

The *Government Information (Public Access) Act 2009*, s 6, creates a 'presumption in favour of the disclosure of government information unless there is an *overriding* public interest against disclosure' (emphasis added). 'Individual rights' appear as part of a long list of public interests against disclosure: s 14, Table, (3). And this item groups 'individual rights' with 'judicial processes and natural justice'. Judicial processes strongly favour openness. Section 14 provides that there is a 'public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects: (a) reveal an individual's personal information; (b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998*'. However, the 1998 Act does not affect the exercise by a court of its judicial functions: s 6. And nor should it justify a failure of disclosure of a pardon where that operates to correct a wrongful conviction in a similar way to a criminal appeal.

The principle of open justice does not operate in an absolute fashion. Courts may limit the release of information regarding proceedings under the *Court Suppression and Non-Publication Orders Act 2010*, for example, in order to 'avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature': s 8(1)(d). However, the 'court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice' (s 6). For a non-disclosure order under s 8(1)(e) it must be shown that the 'public interest [favouring non-disclosure] significantly outweighs the public interest in open justice'.

There are special cases. The identity of children involved in court proceedings are subject to strong protections: eg, *Children (Criminal Proceedings) Act 1987* s 15. Sexual assault complainants may receive similar protections: *Crimes Act 1900* s 578A. However, this

restriction on the release of information is limited to the identity of certain parties. While elements of such proceedings may be ordered to be held in camera (*Criminal Procedure Act 1986*, ss 291, 291A, 291B; *Children (Criminal Proceedings) Act 1987* s 10), the court's reasons are generally reported in the usual way (though with certain parties anonymised).

Disclosure principles for the prerogative of mercy

As argued above, the principle of open justice should operate strongly in the sphere of criminal justice. The proceedings of criminal courts should be open, and this openness should extend to exercises of the prerogative of mercy where exercised on the basis of traditional criminal justice considerations, in particular where a pardon is issued to correct a wrongful conviction. It is against the public interest for such errors to be hidden from view. Lack of openness may damage public confidence in the criminal justice system, and hinder law reform efforts to reduce the risk of wrongful convictions in the future.

The notion of open justice may apply less strongly where the prerogative of mercy is exercised on grounds unrelated to criminal justice, for example on compassionate grounds. Arguably, the Government should still be open about the use of the prerogative to interrupt the ordinary process of criminal justice, however, countervailing considerations may result in reduced disclosure.

It appears appropriate to draw this distinction between the use of the prerogative to correct errors of justice, and other uses. An example of the latter is where the prerogative is used to temper the law's usual operation where it operates harshly in a particular case. In the former case, the prerogative is performing a very similar function to an appeal and, just as appeal judgments are generally made public, so too should the reasons for the exercise of the prerogative. (Reasons should be given notwithstanding authority that they are not legally required in such cases: eg, *Von Einem v Griffin* (1998) 72 SASR 110; Sangha and Moles, 'Mercy or Right: Post-Appeal Petitions in Australia' (2012) 14 *Flinders Law Journal* 293).

In cases where the prerogative has been exercised for non-legal reasons, it may be enough for the Government to indicate in summary terms that the prerogative has been exercised, on what broad grounds, and to what effect. The identity of the petitioners and other details of the cases need not be disclosed.

In wrongful conviction cases, however, more detailed reasons should be given for the exercise of the prerogative, to enable the error to be understood, and facilitate the consideration of law reform addressing potential causes. This does not mean that petitions need be made public. While these should be kept on file and made available for legitimate criminal justice research, they need not be automatically accessible.

The question arises whether the identity of petitioners should be made public. One possibility is to follow the practice of anonymised court decision reports – revealing the necessary details of the case but without disclosing identities. At a minimum, this practice should be followed where pardons are issued in cases that were anonymised by the courts. The government may choose to anonymise cases more broadly. However, if this practice is

followed, it would be important to provide case citations of related cases, albeit without full case names, to facilitate legal research.

We acknowledge, with so much information stored indefinitely on the web in a readily searchable, accessible and reproducible form, that privacy rights require greater protection than historically. However, the 'right to be forgotten' is ordinarily raised in opposition to the commercial or puerile interests of web search engines, publishers and social media. The 'right to be forgotten' should not result in valuable information about the performance of the criminal justice system being erased or rendered undiscoverable. Other less drastic safeguards can be put in place, such as anonymising records, or preventing data appearing in searches by petitioners' names. This would allow the material to be found through other search terms (such as 'pardon' or 'wrongful conviction'). These are lesser protections, however, given the interests of enabling research designed to assist our understanding of wrongful convictions, and the fact that earlier decisions regarding the same case will, in most cases, already be online, this seems the right balance.

Whether or not the current review results in the adoption of changed policies towards the release of information regarding exercises of the prerogative, attention should be given to the *Criminal Records Act 1991*. This Act, in a sense, recognises the right to be forgotten in some cases. Section 3 provides: 'The primary object of this Act is to implement a scheme to limit the effect of a person's conviction for a relatively minor offence if the person completes a period of crime-free behaviour. On completion of the period, the conviction is to be regarded as spent and, subject to some exceptions, is not to form part of the person's criminal history'. Furthermore, under s 19, pardons and the convictions to which they relate (and quashed convictions) are, for some purposes, treated in the same way as spent convictions. In particular, under s 13, the unauthorised disclosure of information regarding the conviction or pardon is an offence. While this is subject to many exceptions, these do not extend to the release of information to the public or legal researchers. While it is difficult to imagine wrongful conviction research leading to prosecutions under this Act, this does appear a theoretical possibility. The scope of the s 13 offence needs reconsideration.

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WrongTrac: Australia's National Registry of Exonerations

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