Mercy in the time of COVID-19

By Rory Pettit

COVID-19 has brought swift change to both the legal profession and the institutions and people that the profession serves. Of those, the changes to the criminal justice system, and the incarcerated, have been considerably acute. Those in custody face heightened risks: social distancing and self-isolation are impossible, spaces are confined, and numbers are high. Prisoners effectively sit without choice or remedy in the very situation medical professionals tell us to avoid. While the urgency of the pandemic appears to be subsiding for the moment, it could turn quickly; and if it does, it could well happen in a custodial environment.

COVID-19 in prison

There are good reasons for these concerns. First, disease transmission is much higher in prison. The World Health Organisation recently observed that '[p]eople deprived of their liberty … are likely to be more vulnerable to the coronavirus disease (COVID-19) outbreak than the general population because

of the confined conditions in which they live together for long periods of time'.[1] In prisons overseas, COVID-19 has been spreading at a disturbing rate: as of June 3, the four biggest clusters of known infections in the United States were all linked to correctional centres.

Second, the incarcerated are statistically more vulnerable. The Australian Medical Association has identified that Australian inmates have 'far greater needs than the general population with high levels of mental illness, chronic and communicable diseases, injury, poor dental health and disability'.[2] 'Older prisoners' are defined as being 50 years or older, with a recent expert opinion remarking that this threshold is 'an appropriate gauge for 'old age' in prison as research suggests a 10-year differential between the overall health of prisoners and that of the general population'.[3]

Prisoners overseas are being released in vast numbers through a variety of legal means. For criminal defence lawyers in Australia, there is a need to get creative, which has already happened through some conventional avenues: defence practitioners have been adducing evidence of the risks COVID-19 poses in custody in both bail applications and sentence hearings (see, for example, *Rakielbakhour v DPP* [2020] NSWSC 323). Yet outside of these avenues, one notably unconventional option has been neglected – a petition to the Governor of NSW for exercise of the Royal prerogative of mercy.

History and nature of power

The prerogative of mercy is one of the prerogative powers of the Crown (as the head of state) and can be traced back to the 1688 Bill of Rights. Lord Denning once defined a prerogative power as 'a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision'.[4]

However, the mercy prerogative defies simple legal definition. This is due in part to its historical application in a wide variety of jurisdictions, but also to the different actions that can be taken in its name. Though defined at its core to be 'a right or power to pardon an offender, belonging to the sovereign',[5] the power in NSW allows, at the least, for the remission (essentially, reduction) of a sentence as well as a full pardon.[6]

For historical reasons the prerogative of mercy in NSW vests in the Governor of NSW in his or her personal capacity. Ultimately, its role is to provide for an executive 'fix' – for moral reasons ultimately rooted in the common good – to those rare but unjust scenarios for which the law provides no relief. NSW courts have also recognised the moral and extra-curial nature of the prerogative. In *Anastasiou v R* [2010] NSWCCA 100 at [37], Justice Rothman remarked:

> '[S]ympathy is not the test that this Court must apply. The Court must apply principle. … [S]ympathy is the province of the Executive Government, either through the Parole Authority or the grant of mercy; not by the grant of appeal'.

Though embodied in the Governor, an exercise of the prerogative is not a manifestation of their individual will. Rather, the Governor, as representative of the head of state comes to 'stand in for the whole: Parliament, but also, symbolically, the entire tradition or the continuity and protection of a quest for the good in our shared political and civic life'.[7] Possibly with the same goals in mind, the NSW Government recently enacted a change of policy generally requiring the publication of all petitions for the prerogative.

The prerogative of mercy is recognisably political in nature (in the sense of being an executive discretion exercised with the interests of the body politic in mind), and it follows that its use should represent the principles seen to inhere in the collective. It falls to the Governor to identify those principles and exercise them accordingly. As put by former Governor-General Peter Cosgrove, the role requires a person in such a position to 'reflect the community to itself'.[8]

The prerogative's political nature distinguishes it from other types of petitions seeking review of convictions and sentences under NSW statute. Such statutory review is mostly enabled under Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) (*CARA*). While these statutory petitions are also made to the Governor (per, e.g., s 76) *CARA* requires that all such petitions necessitate a court's involvement in some way – either through an inquiry, an appeal, or advice. Section 114 of *CARA* explicitly preserves the prerogative of mercy, implicitly distinguishing it from the Act's remit.

Four criteria

So, let's say a person in custody petitions for mercy because of the spread of COVID-19. How would it be made?

In exercising their discretion, the Governor is entitled to take into consideration a broad range of material and is not bound by rules of evidence and procedure. But although there is no limit to the matters that can be considered, some guidance of what is ordinarily looked at can be drawn from case law, scholarship, and government policy. A review suggests that four broad criteria are relevant: sympathy and compassion for the petitioner; the petitioner's moral culpability; public concern in a particular case or outcome; and the public interest more generally.

The first criterion is a reflection of the moral heart of the prerogative. NSW Government policy regularly cites 'undue hardship' as one of the central criteria governing a grant of mercy. In this way the criterion relates directly to the particular circumstances of an inmate; ill health and old age, for example, are an already-recognised category of petitions for mercy. The worthiness of compassion for those in that category might become all the more urgent in the context of COVID-19 given the increased risks already faced by the sick and the elderly.

However, the second criterion exposes a different moral dimension to the power: a consideration of the reason a person is in custody in the first place. Petitioners for the prerogative of mercy are often persons who do not dispute their own guilt. This arguably has the result that those that are less morally culpable than others (who may, for example, have been convicted of less serious crimes) are more entitled to a grant of mercy. But COVID-19 shifts what might otherwise be a clear-cut moral calculation. If an inmate became infected or died, it would arguably render the 'sentence' imposed wholly disproportionate to a petitioner's moral culpability. No reasonable member of the community (let alone a judicial officer) would argue that possible infection with COVID-19 could be said to fall under one of the purposes of sentencing (per s 3A of the *Crimes (Sentencing Procedure) Act 1999)*. While difficult and possibly dependent upon the crime committed, such a consideration could inform a COVID-19 based petition for release.

Sir Anthony Mason has observed that the third criterion – public concern relating to a particular case or outcome – may be relevant to determining whether the prerogative should be exercised.[9] In the context of COVID-19 this is intertwined with the fourth criterion, being the public interest writ large. In other words, the public concern about the plight of a particular inmate is intertwined with the public interest we all have in preserving the collective and moral health of our community. A COVID-19 based petition for mercy would likely call upon such an argument.

Conclusion

In *Osland v Secretary to the Department of Justice* (2010) 241 CLR 320, at 345 the High Court remarked that the prerogative of mercy can '[engage] the public interest at a high level of importance',[10] due in part to its capacity to '[throw] up opinions about the fairness and authority of the criminal justice system … and asserted inadequacies in the law'.[11] The spread of COVID-19 has forced us, as a society, to re-evaluate the fairness of some of our most established institutions. This includes the criminal justice system. It has forced us to think about how we treat individuals in society, and in particular the most vulnerable. So, when considering the predicament of persons held in custody during the pandemic, we might do well to consider the use of an historical power intended as a moral remedy to the occasionally harsh operation of the law. It is a power with a long past that just might be suited to an unusual present. BN

ENDNOTES

1 WHO Europe, 'Preparedness, prevention and control of COVID-19 in prisons and other places of detention', (Interim guidance, 15 March 2020).
2 Australian Medical Association, 'Health and the Criminal Justice System' (Position Statement, 9 August 2012), <https://ama.com.au/position-statement/health-and-criminal-justice-system-2012#2>.
3 Tony Butler, Raina MacIntyre, Paul Simpson & Michael Levy, *Report on COVID-19 and the Impact on New South Wales Prisoners*, (Online, 16 April 2020) <https://www.publicdefenders.nsw.gov.au/Documents/butler-et-al-report-on-covid-19-and-impact%20on-nsw-prisoners.pdf> ('*Report on NSW Prisoners*'), p 7.
4 *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643, 705.
5 Ibid, 1336.
6 See *Kelleher*, 366-367 (Mason J), compare 371 (Wilson J).
7 Joel Harrison, 'Sovereignty' in Nicholas Aroney and Ian Leigh (eds), *Christianity and Constitutionalism* (Cambridge University Press, forthcoming) 20.
8 Sir Peter Cosgrove, 'Address to the Joint Sitting of Parliament on the Occasion of the Swearing in of the Governor-General' (Speech Parliament House, 28 March 2014) 1-2.
9 *Mickelberg v R* (1989) 167 CLR 259, 272 (Mason CJ).
10 *Osland*, 345 [47].
11 Ibid, 345 [48].