13 February 2018

Ms Lida Kaban
General Counsel
Office of the General Counsel
Department of Justice
GPO Box 6
SYDNEY NSW 2001

Dear Ms Kaban

Review into the Royal Prerogative of Mercy

Thank you for the opportunity to make a submission to the review into the exercise of the Royal prerogative of mercy and petitions to the Governor for review of convictions and sentences.

Legal Aid NSW would be open to increased transparency in these two processes, provided that there were limitations and safeguards in the information that is made publicly available.

Petitions to the Governor for review of conviction or sentence

Legal aid is available for applications under Part 7 of the *Crimes (Appeal and Review) Act 2001*. However Legal Aid NSW usually advises clients to make applications to the Supreme Court under section 78, rather than to petition the Governor under section 76. We assisted a number of clients who were sentenced prior to the *Muldrock* decision, and had exhausted their appeal rights, to make applications under section 78—see, for example, *Sinkovich v Attorney General of New South Wales* [2013] NSWCA 383.

Transparency and privacy

It would be consistent with recent developments regarding freedom of information and open government to increase the transparency of the exercise of the Royal prerogative of mercy and reviews of convictions and sentences by the Governor. Transparency in decision making helps to avoid suspicions of improper influence and arbitrariness, and encourages consistency and public confidence in the process.

However, Legal Aid NSW considers that petitions themselves should not be made public. As the fact sheet attached to the Terms of Reference notes, petitions frequently contain highly sensitive and personal information, including information about the petitioner's health. They sometimes contain information about the petitioner's post-conviction assistance to authorities. Publication of this information could endanger the life of both the petitioner and his or her family, and should always be kept private.

In the context of judicial decision-making, we also note that the originating process is not, as a matter of course, made public in NSW proceedings.[1]

We would be open to the decision itself, and high level reasons for the decision, being made public in most cases.

The decision and reasons for the decision

Legal Aid NSW notes that the general practice is not to give reasons for a decision to exercise or not to exercise the prerogative of mercy.[2] However, it is well established in other contexts that requiring a decision maker to give reasons improves the quality of decision making and promotes public confidence in the process. We consider that when the executive is making a decision as serious as one that effectively overturns decisions of judicial officers, it is appropriate to make the reasons for that decision public.

Providing reasons would be consistent with the procedure of the Supreme Court when an application is made for an inquiry into a conviction or sentence under section 78. While proceedings under that section are not judicial proceedings but administrative acts, the Court has held that reasons should be provided for the decision whether or not to direct an inquiry or refer a case.[3]

Suitable redactions

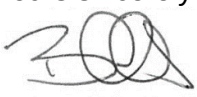
In cases where a person is pardoned for reasons that include post-conviction assistance to authorities, we consider that 'suitable redactions' would include the name of the petitioner. In some cases, if it became publicly known that a person had been pardoned, this would raise suspicion that he or she had provided assistance, and his or her safety and that of their family could be at risk.

Where there was a non-publication or suppression order associated with the original proceedings, these should apply also to the publication of decisions and reasons for decisions.

Legal Aid NSW has some concerns that increased transparency, with its attendant publicity, could deter some people from making applications. We are also concerned that the increased publicity could affect the exercise of the discretion of the Attorney General and/or the Governor. However, we consider that on balance, the public interest would be advanced by increased transparency. Petitioners, supporters and victims would benefit from knowing the reasons for decisions that affect them, and the general public would also benefit from knowing that executive power is being exercised in an open and transparent way.

Thank you for the opportunity to contribute to the review. If you have any questions about this submission, please contact Robyn Gilbert, Senior Law Reform Officer, Strategic Law Reform Unit on (02) 9213 5207 or robyn.gilbert@legalaid.nsw.gov.au

Yours sincerely



Brendan Thomas
Chief Executive Officer

[1] *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512.
[2] *Osland v Secretary to the Department of Justice* (2008) 234 CLR 275 [47].
[3] *Crimes (Appeal and Review) Act 2001* (NSW) s 79(4), *Application of Peter James Holland under s.78 Crimes (Appeal and Review) Act 2002* [2008] NSWSC 251 (28 March 2008) [5], [18]-[19]