

**CRIMINAL JUSTICE: ROYAL PREROGATIVE OF MERCY APPLICATION ALLAN KESSING**

**Issue and timing**

In 2007, Allan Kessing was found guilty under subsection 70(2) of the *Crimes Act 1914* for the unauthorised disclosure to the media of classified Customs reports on crime and security at Australia's airports. Mr Kessing has steadfastly maintained that he is innocent of the offence.

Mr Kessing has admitted that, prior to the report being leaked to the media in 2005, he met with and provided a copy of the report to Anthony Albanese's electorate officer. Mr Kessing has also informed the media that he subsequently provided Mr Albanese with information on other Customs matters. On the advice of legal counsel, Mr Kessing did not raise this at trial.

Senator Nick Xenophon wrote to the Minister for Home Affairs in October 2009 about Mr Kessing's case, but this letter was not regarded as a pardon application as it did not contain any indication that Mr Kessing wished to apply for a pardon, or disclose the grounds on which a pardon was sought. The Department commenced processing Mr Kessing's application in February 2010, upon receiving confirmation that Mr Kessing wished to proceed with the application. The grounds, as stated by Senator Xenophon, are that Mr Kessing maintains he is innocent of the offence, though he had revealed the report to his local MP.

In accordance with its usual procedure, the Department sought input from the Commonwealth Director of Public Prosecutions and the Australian Federal Police. On 21 May 2010, the Department wrote to Mr Kessing, advising him of the comments made by the agencies that may be adverse to the pardon application, and providing him with an opportunity to respond to those adverse comments. Mr Kessing has not responded to that letter. When Mr Kessing's response is received, a submission will be drafted for the incoming Minister's consideration.

The Governor-General may grant a pardon to a federal offender under the Royal Prerogative of Mercy (RPM). Section 85ZR of the *Crimes Act 1914* (Cth) provides that where a person has been granted a free and absolute pardon because they were wrongly convicted of a Commonwealth offence, they are taken never to have been convicted of the offence.

While technically the power to grant a pardon is entirely discretionary, a high threshold has been applied in the past to ascertain whether a pardon would be appropriate, given the significant consequence flowing from the grant of a pardon. In most cases, a pardon would not be recommended unless the person was morally and technically innocent of the offence, and there is no remaining avenue of appeal against conviction.

The Minister's decision on whether to recommend a pardon is not subject to judicial review.

This matter is the subject of ongoing reporting in *The Australian*, and the paper has suggested that Mr Albanese's office was the source of the leak to the media.

---

**Action or decision required**

When a response to the Department's letter of 21 May 2010 is received from Mr Kessing, a submission will be made to the incoming Minister for Home Affairs on whether to recommend to the Governor-General that she exercise the Royal Prerogative of Mercy.