

HORIZON, THE POST OFFICE AND FREE PARDONS

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Is the issuing of a free pardon under the Royal Prerogative of Mercy a potential remedy to the Horizon / post office scandal?

In so far as the legal system can seek to address the horrendous damage caused by the Post Office Horizon scandal, one option may be the use of the Royal Prerogative of Mercy^[1] to issue a pardon in each remaining case.

The Royal Prerogative of Mercy [RPM] is exercised by the King on Ministerial advice^[2] (Secretary of State for Justice). Its use— reflected in the coronation oath in which the Sovereign promises to administer justice ‘in mercy’— arose in cases in which the Sovereign felt it necessary to intervene personally to ensure justice was done.^[3]

It has been said that the RPM is a flexible power, and its exercise can and should be adapted to meet the circumstances of the particular case.^[4] The free pardon has been said to have been established as a remedy for wrongful convictions.^[5] It has been described as ‘an integral element in the criminal justice system, a constitutional safeguard against mistakes’,^[6] and ‘a flexible process intended in very rare cases to secure justice which the concluded Court process cannot achieve’.^[7]

Under s.16(2) Criminal Appeal Act 1995 the Criminal Cases Review Commission can invite the Secretary of State for Justice to recommend that the RPM should be exercised to grant a free and unconditional pardon.

So, is the RPM a potential wholesale remedy for the Horizon cases? At least two matters will need to be considered further.

Firstly, it may be argued that pardons in Horizon convictions should not be granted on a general basis, but should instead be limited to those cases in which it can be shown that the potential recipient was “morally as well as technically innocent...and that in the incident in question the defendant had no intention of committing an offence and did not in fact commit one.”^[8] However, past practice has shown that the “innocence test” is not determinative^[9], and that the discretionary and flexible nature of the RPM could provide a wholesale remedy – particularly if careful regard was had to the specific wording of the pardon.

Secondly, a free pardon is not the equivalent of an acquittal. The conviction remains even after the granting of a pardon.^[10] This principle has been said to respect ‘the constitutional distinction between the roles of the monarch and the Court’.^[11] As a result, it is not clear that the grant of a pardon will trigger a qualification for compensation. However, again, much will depend on the wording of any pardon and the specific terms of the compensation scheme (which may need to be amended to prevent the injustice continuing.)

^[1] See generally *Taylor on Criminal Appeals*, 3rd edition, Chapter 12.

[2] Criminal Law Act 1967, s. 9 states that a pardon granted under the sign manual, countersigned by the Secretary of State ‘shall be of like effect as a pardon under the great seal’.

[3] *Governance of Britain: Review of the Executive Royal Prerogative Powers: Final Report* [53]. For a useful historical analysis see Jennifer Schweppe, ‘Pardon Me: The Contemporary Application of the Prerogative of Mercy’, *Irish Jurist* 2013, 49, 211– 227.

[4] *R v Secretary of State for the Home Department, ex p Bentley* [1994] 2 WLR 101, 113.

[5] See *ex p Bentley*, at 107 where the example of the case of the posthumous pardon for Timothy Evans was given.

[6] *Burt v Governor- General* [1989] 3 NZLR 64, [1992] 3 NZLR 672 (quoted in *ex p Bentley*, at 110).

[7] *Shields*, [33], p. 776.

[8] *Miscarriages of Justice, Sixth Report of the Home Affairs Committee House of Commons (1981– 82), HC 421*, Minutes of Evidence [3]. This approach was referred to by Lord Devlin as ‘a reversal of the burden of proof’, *ibid.* [30].

[9] See for example the posthumous pardon granted to Alan Turing.

[10] *Foster* (1984) 79 Cr App R 61, CA

[11] Witness statement of the Commissioner John Weedon on behalf of the CCRC in *Mary Westlake v CCRC* [2004] EWHC 2779 (Admin), [30].