

(Milne, J., 2021)



In 1916 Rua Kēnana was arrested on trumped up charges including illicitly selling alcohol at Maungapōhatu; last year the Governor-General formally pardoned him. Photo: Police Gazette



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JUSTICE

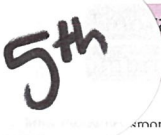
Plea to Governor-General for presidential-style pardon

Unlike the United States, there is very little precedent in New Zealand for politicians to issue discretionary pardons – creating a challenge for those like Professor Sean Davison who might have a humanitarian claim to mercy but cannot document any miscarriage of justice.

It was New Zealand's last politically-driven pardon. An opponent of the government of the day who was jailed on trumped-up charges; last year the Governor-General travelled deep into the Ureweras to pardon him and apologise on behalf of a new government.

- P. Rua Kēnana was a religious leader whose opposition to conscription annoyed wartime leaders so, in 1916, armed police arrived at his peaceful settlement of Maungapohatu to arrest him on charges relating to the sale of liquor.
- Q. His son and another local were killed in the police ambush.

After a lengthy trial, all the charges against the Tūhoe prophet were dropped apart from the offence of "active resistance" – yet the judge handed down one year's hard labour followed by 18 months' imprisonment. Māori needed to learn that the law "reached every corner" of the land, he ruled. Eight



members of the jury later publicly protested against the harshness of this sentence.

New Zealand has a new system for investigating claims of miscarriage of justice – but is it enough for those who might have a humanitarian claim to mercy? [Click here to comment.](#)

P. It was not until last year that Royal assent was given to a Parliamentary enactment quashing Rua's conviction.

Now, this month, Professor Sean Davison is writing to the Governor-General, pleading for a pardon for assisting his terminally ill mother to take her own life. Justice Minister Kris Faafoi wrote to him last month on behalf of the Prime Minister, advising that because there was no miscarriage of justice, that was his only avenue to have his conviction quashed.

It is a plea for a discretionary pardon, like those issued by US Presidents. "I know my request is complicated by the laws around the granting of pardons," Davison writes, "but I am hoping you will be guided by your own compassion and not be restricted by the constraints of human made laws."



Professor Sean Davison is writing to the Governor-General seeking the Royal prerogative of mercy, "guided by your own compassion" without being constrained by the legal precedent around such pardons. Photo: Getty Images

Tomorrow, US President Donald Trump is expected to issue about 100 pardons and commutations to white-collar criminals, high profile rappers who backed him in last year's election campaign, the son of a former Arkansas senator, the founder of the notorious online drug marketplace Silk Road, a Florida doctor convicted of rorting the healthcare system, and a Manhattan socialite who pleaded guilty in a fraud scheme.

There has been a crush of pardon requests during Trump's final days in office from allies, lobbyists and others hoping to cash in on their loyalty to Trump – at a price. Lobbyists are getting paid tens of thousands of dollars to lobby on behalf of felons, New York Times reports; former CIA leak John Kiriakou says he was told Trump's personal lawyer Rudolph W. Giuliani could help him secure a pardon for \$2 million.

"Everyone assumed there's no formal process and they should reach out to the administration directly," one lobbyist told CNN. "Everyone hopes they have a friend of a friend of a friend of a cousin who they hope will get them to read their email."

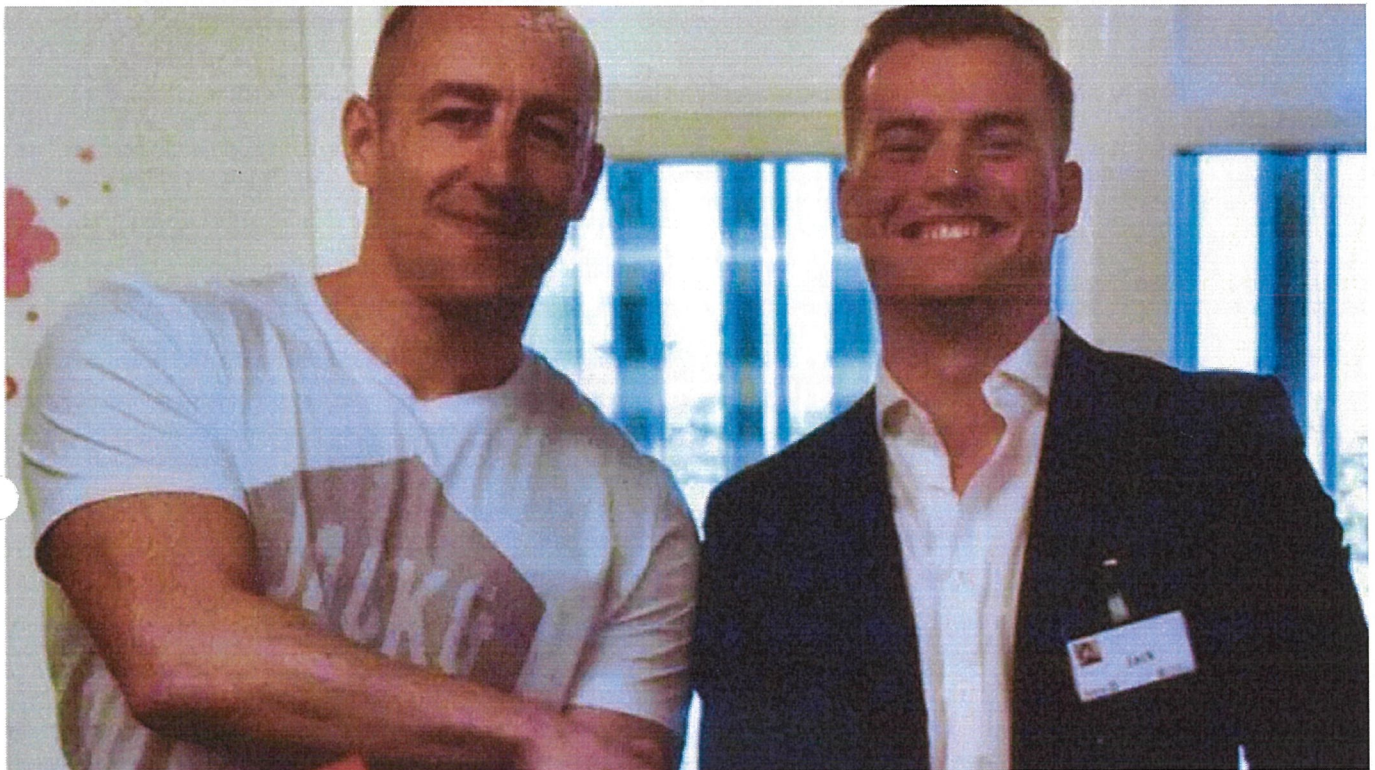
Unlike the United States, there is very little precedent in New Zealand for politicians to issue discretionary pardons. The power for the Governor-General to issue pardons is descended from Britain's Royal prerogative of mercy, but is now wielded on the advice of the Justice Minister.

AUT University law professor Kris Gledhill says the prerogative of mercy is theoretically a wide power, perhaps an unlimited power, that can be used in all sorts of settings. "It used to be most commonly used to commute death sentences and undo miscarriages of justice, so it became associated with those settings, but can be used in any setting," he explained.

There have been cases in the UK where a decision not to exercise it has been challenged in the courts, such as in relation to Derek Bentley, controversially hanged for being party to the murder of a policeman who died intervening in an attempted burglary.

"A decision to exercise it is probably something the courts cannot control," Gledhill says. "It could be used more, but political reasons have restricted its use in a way that is more limited than in the USA."

He suggests it could be used in New Zealand where a person properly convicted has done something that merits a reward, such as reducing the sentence of a prison inmate who does a heroic deed. Recently in the UK, a prisoner on day release tackled a terrorist on London Bridge who had killed two people. Convicted murderer Steven Gallant, who had been attending a prisoner rehabilitation event at Fishmongers Hall, was granted an early parole hearing.



Jack Merritt, right, who died in the London Bridge attack, worked with Steve Gallant, left, on the Learning Together rehabilitation course. Photo: Supplied

His case had not yet come before the Parole Board because he had not yet served the minimum non-parole period set by the courts, but the prerogative of mercy was used to bring that forward by 10 months or so because he put his own life at risk in intervening.

In New Zealand, grounds for pardons include miscarriage of justice, and might also include national security – as in US President George HW Bush's pardon of former secretary of state Caspar Weinberger for his role in the Iran-Contra Affair.

Parliament itself can grant a pardon by enacting a law. The pardon of Rua Kēnana was implemented through the Rua Kēnana Pardon Act 2019. And a year earlier, Parliament passed the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill that allowed up to 1000 men to apply to have historic convictions quashed for sex with other men, prior to the decriminalisation of homosexuality in 1986.

Legal experts and practitioners could cite no other instances of discretionary pardons, in any New Zealand jurisdiction. Prison wardens cannot pardon inmates found guilty of misdemeanours like smuggling contraband. Military chiefs cannot pardon serving personnel for disciplinary offences. Doctors and lawyers and other professionals found guilty of breaching their professional codes cannot be pardoned by their respective associations; they may only seek judicial review.

Last year the Parliament established a new Criminal Cases Review Commission. It will investigate claims of miscarriage of justice, including any referred to it by the Governor-General. Already, Te Kāhui Tātari Ture has had as many applications in the first five months as it expected to get in a year.

Chief Commissioner Colin Carruthers told RNZ they had already received 125 claims, some dating back up to 20 years. Five had been declined – usually because they had not exhausted their appeal rights – and the rest were still being assessed.

Among them were 54 convictions for sexual assault (half of them minors convicted of sex with other minors) and 21 murder or manslaughter convictions. Cases expected to come before the commission include Scott Watson and Mark Lundy.

In cases where the Commission's investigators discover the conviction was unsound, the commission will not decide guilt or innocence in but instead, refer it back to the courts for an appeal hearing.

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