TO THE ADMINISTRATOR OF THE NORTHERN TERRITORY OF AUSTRALIA

PETITION FOR MERCY IN THE MATTER OF ZAK GRIEVE

1. This is a petition to the Administrator of the Northern Territory of Australia for mercy for Zak Grieve.[1] Zak has been in custody since 27 October 2011. He is serving a sentence of life imprisonment with a non-parole period of 20 years for a murder that he did not physically commit. The injustice of Zak's sentence is a product of the Northern Territory's mandatory sentencing laws.

2. Zak seeks that his sentence be remitted under s 114 of the *Sentencing Act* (NT) such that he is immediately and unconditionally released. Immediate and unconditional release could also be achieved by the exercise of the common law prerogative of mercy ("the prerogative").

3. In the alternative, Zak seeks that the prerogative be exercised such that he is immediately released on parole or an undertaking, pursuant to s 115 of the *Sentencing Act*.

REASONS FOR BRINGING THE PETITION

4. It has long been acknowledged that mandatory sentencing laws produce instances of grave injustice. The sentence of Zak Grieve to life imprisonment with a minimum non-parole period of 20 years for a crime he did not physically commit is a paradigm example of how mandatory sentencing can go wrong. Whether it is described as unique or, in the Chief Minister's words, "an anomaly", Zak's case is characterised by a confluence of factors – a perfect storm – that meant that it was incapable of being justly resolved by mandatory sentencing. It was for this reason that the judge sentencing Zak called the laws "unprincipled and morally insensible" and recommended that the Administrator exercise the prerogative.

5. The prerogative is justifiably regarded as an "exceptional"[2] remedy, but Zak's case is exceptional. Zak fell to be sentenced as a nineteen-year-old; he had no prior convictions of any kind; he had a work history; he had a supportive family; he was remorseful; he was unlikely to reoffend; he was, in the words of the sentencing judge, "a person of good character" and a "non-violent character". Most importantly of all, Zak did not physically commit the crime for which he was sentenced. Yet, because of mandatory sentencing, Zak received a harsher sentence than one of the people who *did* physically commit the crime.

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[1] See Transcript of Proceedings, *R v Grieve* (Supreme Court of the Northern Territory, 21136195, Mildren J, 9 January 2013).

[2] Martin Hinton and David Caruso, "The Institution of Mercy" in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519, 528.

6. The unique injustice of Zak's case was reflected in the public concern at his sentence, a concern that has not abated over the years Zak has spent in custody. While media coverage is not always a perfect proxy for public sentiment, the sympathetic reporting of Zak's cases proves that the harshness of his sentence shocked the public consciousness.[3] This is confirmed by the numerous investigative articles on Zak's case, some written many years after his sentence.[4] Most recently, Zak's case was again in the headlines as a result of the mini-series titled "The Queen and Zak Grieve", which was widely watched across Australia.[5] Finally, public concern about the injustice of Zak's sentence is palpable in the thousands of comments by signatories to the "Free Zak Grieve" online petition.[6]

7. In order to alleviate this injustice and restore public confidence in the criminal justice system, it is appropriate for the Administrator to remit Zak's sentence, either by s 114 of the *Sentencing Act* or by the common law prerogative.

8. While this petition strictly relates only to Zak's case it will be necessary to say something of mandatory sentencing laws more generally. The many shortcomings of mandatory sentencing laws are well known. First and foremost, such laws do not work: they do not deter potential offenders; they do not result in lower crimes rates; and, they do not protect the community. What mandatory sentencing laws *do* is endanger fundamental human rights; exacerbate the disadvantage of particular social groups, most notably Indigenous people and young people; and, ultimately diminish public confidence in the legal system. The criminal justice system has long succeeded in striking a careful balance between the rights of victims, the safety of the public and the dignity and liberty of the subject. Mandatory sentencing destroys this age-old balanced approach.

9. It is a welcome development that the Northern Territory government is currently reviewing its mandatory sentencing laws. Zak's case highlights the many problems with these laws and shows why the government must repeal these archaic and discriminatory laws and replace them with modern, evidence-based sentencing legislation. It is further hoped that people sentenced thus far under these laws would be permitted to apply for judicial reconsideration of

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[3] See, e.g., Amos Aikman, 'Zak Grieve: widespread calls for axing of mandatory jail terms' *The Australian* (online), 13 October 2017. < https://www.theaustralian.com.au/news/nation/zak-grieve-widespread-calls-for-axing-of-mandatory-jail-terms/news-story/c0302787e07fca0f16a02e88d70afb98>

[4] See, e.g., Steven Schubert, 'How Zak Grieve backed out of a murder plot but got life anyway' *ABC* (online), 25 August 2017 ,< http://www.abc.net.au/news/2017-08-24/zak-grieve-ray-niceforo-inconsistences-in-nt-justice-system/8829736>; John Safran, 'Zak Grieve, the man who wasn't there' *The Sydney Morning Herald* (online), 14 November 2014 <https://www.smh.com.au/lifestyle/zak-grieve-the-man-who-wasnt-there-20141113-11lrok.html>.

[5] *The Queen and Zak Grieve* (Directed by Ivan O'Mahoney, In Films, 2017).

[6] See: 'Free Zak now! The NT can pardon Zak now. Stop the mandatory sentencing in the NT!', change.org (online), <https://www.change.org/p/the-new-northern-territory-government-justice-for-zak-grieve-free-zak-now-mandatory-sentencing-in-the-nt-is-perpetuating-injustice >.

their sentences. Finally, the current review also provides an opportunity for the Northern Territory to consider instituting modern sentencing guidance in the form of a Sentencing Advisory Council. In the current absence of such systemic improvement, as an individual, this petition is Zak's only route. It is made at a time when he as served a considerable period of time in prison and after an informal plea, by letter, from his mother.

10. The repeal and replacement of mandatory sentencing laws like those under which Zak was sentenced will not only better serve all Territorians, but it will also go a long way to addressing the Northern Territory's alarming rates of Indigenous incarceration and alleviating the reputational damage currently suffered by the Northern Territory criminal justice system. Until these laws are repealed, however, it is incumbent on the Administrator to correct the grave injustice in Zak's particular case by remitting his sentence or exercising the prerogative.

FACTUAL BACKGROUND[7]

11. On or about 24 October 2011, Raffaeli Niceforo ("the deceased") was murdered in his home in Katherine by Chris Malyschko and Darren Halfpenny. Four people were charged and sentenced in relation to the deceased's death – Mr Halfpenny, Mr Malyschko, Mr Malyschko's mother Bronwyn Buttery, and Zak. A fifth person, Trevor Tydd, has been implicated in the murder plot but was never charged or tried.[8]

12. The deceased had been in a turbulent relationship with Ms Buttery, which was characterised by extreme domestic violence by the deceased towards his partner. The deceased had also made repeated threats to kill Mr Malyschko. Ms Buttery had sought, and been granted, domestic violence orders on behalf of her and her son. However, these orders had little practical effect in preventing the deceased's continued violence and threats – with the deceased making threats against Ms Buttery and Mr Malyschko at least a month before his death.

13. Mr Malyschko formulated a plan in September 2011 to kill the deceased. Mr Malyschko's evidence was that on 20 September he made the decision that the

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[7] Unless otherwise indicated, this factual summary is drawn from Transcript of Proceedings, *R v Zak Grieve* (Supreme Court of the Northern Territory, 21136195, Mildren J, 9 January 2013).

[8] Mr Tydd has been implicated in the murder by the evidence of a number of witnesses, police surveillance, comments of the sentencing judge and his own statements to *The Australian*. Mr Tydd has admitted to assisting to count the money used to pay for the murder and holding the money for Mr Malyschko and Ms Buttery, although he denies knowing the purpose of the cash. The sentencing judge found that Mr Tydd had taken steps to dissuade Ms Buttery from calling off the murder, telling her it was "too late now". The sentencing judge also found that Mr Tydd returned with Mr Malyschko to the deceased's flat to remove the murder weapons and that Mr Tydd disposed of these weapons, which appear to be the acts (at least) of an accessory after the fact. Notably Zak maintained that he never received any money. In the absence of Mr Tydd at trial, it is not clear how the jury resolved this issue although Zak was sentenced on the basis that he had some financial benefit.

deceased "needed to die" because "if he didn't die it would have been myself and or my mother he would kill."[9] Mr Malyschko conferred with his mother about this plot, asking her if she wanted the deceased to be killed. Ms Buttery agreed to provide $15,000 to facilitate the death of the deceased. In late September, Ms Buttery paid the money to her son in two instalments. Ms Buttery was not told how the killing would occur or who was going to carry it out.

14. Zak's connection to this crime came through his friendship with Mr Malyschko, who approached Zak. The sentencing judge found that Zak initially agreed to participate and that he introduced Mr Malyschko to Mr Halfpenny, who willingly agreed to participate in the murder for money.[10] After further preparatory steps were taken by Mr Malyschko, the deceased was killed in his home late on the evening of 24 October 2011 or early in the morning of 25 October 2011. The deceased's body was then transported to a campsite outside Katherine, where it was found on the morning of 25 October 2011.

15. Mr Halfpenny pleaded guilty to murder and gave evidence at the trial of Zak, Mr Malyschko and Ms Buttery. Mr Halfpenny testified that all three men had physically participated in the murder. On this basis, the Crown asked the jury to accept that Zak was physically involved in the crime. This was despite the evidence of both Zak and Mr Malyschko that Zak was not present during the commission of the crime, having been driven home beforehand when he explained that he was unable to participate. Footage of a vehicle route corroborated this testimony and the defence case that Zak was at home asleep when the murder was committed.

16. The sentencing judge found Mr Halfpenny to be an unreliable witness, preferring the evidence of Zak and Mr Malyschko as to Zak's withdrawal from the plan. The judge further stated that Mr Halfpenny "was a practiced liar and clearly an untrustworthy witness". The judge remarked that Zak "found the courage to tell [his co-offender that he] could not go on with it" and there was no forensic evidence that Zak was involved in the killing.

17. Following a trial before a jury, Mr Malyschko and Zak were found guilty of murder, while Ms Buttery was found not guilty of murder but guilty of manslaughter. On 9 January 2013, the sentencing judge imposed the following sentence:

    - Mr Malyschko was sentenced to life imprisonment with a non-parole period of 18 years. In relation to Mr Malyschko, the sentencing judge found that the degree of the offending was very serious. Mr Malyschko planned the murder, involved Mr Halfpenny and Zak and harboured the intent to kill the deceased for some weeks before the killing took place on 24 October 2011. The murder itself was described as "vicious and brutal"

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[9] Transcript of Proceedings, *R v Grieve* (Supreme Court of the Northern Territory, 21136195, 7 December 2012) 1188-1189.

[10] Transcript of Proceedings, *R v Halfpenny* (Supreme Court of the Northern Territory, 21136189, Mildren J, 3 July 2012) 3.

by the Crown. However, it was found by the sentencing judge that there was an "extreme level of provocation", amounting to exceptional circumstances, due to the behaviour of the deceased. These exceptional circumstances warranted a non-parole period less than the 20 year mandatory minimum for murder and, accordingly, a non-parole period of 18 years was imposed.

- Ms Buttery was convicted of manslaughter and was sentenced to imprisonment for 8 years, with a non-parole period of 4 years. The degree of violence and aggression shown by Ms Buttery was determined to be excessive and the gravity of the offending was located in the mid to high range. However the level of provocation experienced by Ms Buttery was found be "severe and extreme" due to the conduct of the deceased within their relationship, leading to the conviction of manslaughter. Ms Buttery was found to have a reduced capacity to act rationally and with full control over her emotions and decisions. Ms Buttery's admission of guilt, absence of prior convictions, acceptance of the grief of the deceased's family and the likelihood that she would not re-offend all mitigated her sentence. Ms Buttery has since been released from prison.
- Zak was convicted of murder and sentenced to the mandatory minimum sentence of life imprisonment with a non-parole period of 20 years. He was sentenced on the basis that he withdrew from the plan to murder the deceased but that his steps were not sufficient to absolve him of legal liability. The sentencing judge found that Zak's degree of criminality was "much less" than Mr Malyschko and Mr Halfpenny. The sentencing judge also found that Zak did not have a violent character, that he was remorseful and that he was unlikely to reoffend. The judge stated that if it were not for the existence of a mandatory minimum sentence, a lesser non-parole period than 20 years would have been imposed. Because of the unprincipled and morally insensible nature of mandatory sentencing, Zak received the harshest sentence of the group. The sentencing judge added that he would have imposed a sentence that saw Zak released after 12 years if he had the power to do so. The sentencing judge, however, did not have the benefit of the schedule of cases which are provided below and which allow the Administrator to make a more informed assessment of Zak's appropriate release date.
- Mr Halfpenny was sentenced separately on 3 July 2012. He was sentenced to life imprisonment with a non-parole period of 20 years.

18. An appeal was filed by the Crown against Zak's sentence, alleging that the sentencing judge's findings regarding Zak's involvement were not open to him and that Zak's sentence was insufficient. This was rejected by the Northern Territory Court of Criminal Appeal, which found that "the sentencing facts ultimately found by his Honour in respect of [Zak] were well open on the evidence."[11]

[11] *Grieve v The Queen* [2014] NTCCA 2, [42]. Zak appealed against both his conviction and sentence. His appeals were dismissed.

ZAK'S PERSONAL CIRCUMSTANCES

Zak's life before the offence

19. On 16 February 1992, Zak was born in Tennant Creek to Glenice and Wal Grieve. Glenice is a Jingili woman and Zak is a proud Warlpiri man who speaks his traditional language and identifies with his culture. Unfortunately, Zak was unable to attend his traditional initiation ceremony due to his incarceration.

20. Although Zak describes his childhood as "not too bad" he witnessed and experienced considerable violence in his family and the Tennant Creek community as he was growing up.

21. Zak attended Tennant Creek Primary School and Tennant Creek High School for years 7 and 8. Zak then attended Katherine High School from years 9 to 12.

22. After leaving school Zak began working a number of jobs in the Katherine community, including delivering pizzas and working at his parents' sunglasses shop. At a young age he was responsible for managing the business when his mother became too ill to work.

23. It is clear from the evidence heard during the trial, that Zak was a well-liked and respected young man in the Katherine community. The sentencing judge noted the number of witnesses who had come forward to testify on Zak's behalf, variously describing him as a "really nice guy", "happy-go-lucky", "popular", "friendly" and "kind-hearted". The judge encapsulated these comments, finding him to be a "person of good character". He was a valued member of the Katherine community.

Zak's time in prison

24. Zak has not been idle during his nearly seven years in prison. He has keenly accessed educational opportunities; in his words, he has obtained "just about every qualification you can get".

25. Having previously tutored in a number of construction courses (White Card, Elevated Work Platform and Working at Heights), Zak now tutors other students in accredited educational courses in Maths and English offered through Batchelor Institute's Vocational Pathways program.

26. Zak also tutors in an art program run by Batchelor and his own artwork has been featured in the Darwin Festival's "Behind the Wire" exhibition for the last four years.

27. Apart from his tutoring commitments, Zak is undertaking tertiary units in maths and basic psychology and counselling offered by the University of Southern Queensland.

28. Finally, Zak will soon be commencing a series of workshops offered by the Alternatives to Violence Project.

29. In what spare time he has left after the above activities, Zak writes fiction. He has completed the manuscript for a nine-chapter novel and is hard at work on a second book. He is an intelligent, artistic and sensitive young man who has made the best of his time in custody. He could, and would, contribute significantly to the Northern Territory community when released.

GROUNDS FOR SEEKING MERCY

30. The grounds on which Zak seeks to bring this mercy petition are as follows, and are considered in detail below:

> Ground 1 – the imposition of a mandatory sentence in this case prevented the judge from imposing a sentence consistent with Zak's moral culpability;
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> Ground 2 – the imposition of a mandatory sentence in this case violates fundamental human rights, freedoms and liberties and exacerbates the disadvantage experienced by Indigenous people and young people;
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> Ground 3 – the imposition of a mandatory sentence in Zak's case is contrary to the public interest.

<u>Ground 1 – the imposition of a mandatory sentence in this case prevented the judge from imposing a sentence consistent with Zak's moral culpability</u>

(i) Equal justice

31. Equal justice has long been a cornerstone of Australia's legal system. The High Court has called it "an aspect of the rule of law" and, borrowing from Hans Kelsen, "the starting point of all other liberties".[12]

32. Equal justice requires that like cases are treated alike and different cases are treated differently.[13] The High Court has observed: "Equal justice requires … *different* outcomes in cases that are different in some relevant respect."[14]

33. One "relevant respect" in which cases may differ, and thus demand different sentences, is the level of moral culpability of each offender.[15] Yet mandatory sentencing precludes any consideration of a person's moral culpability and often requires that differently circumstanced people are treated alike, thereby offending the principle of equal justice.[16]

34. There are two respects in which Zak's sentence can be seen to be untethered from his moral culpability: first, by reference to other sentences for murder by

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[12] *Green v The Queen* (2011) 244 CLR 462, [29].
[13] *Lowe v The Queen* (1984) 154 CLR 606, 609.
[14] *Wong v The Queen* (2001) 207 CLR 584, [65] (emphasis in original).
[15] *R v MacGowan* (1986) 42 SASR 580, 582-583.
[16] See Morris J Fish, "An Eye for an Eye: Proportionality as a Moral Principle of Punishment" (2008) 28 *Oxford Journal of Legal Studies* 57, 69.

joint criminal enterprise; and, secondly, by analogy to sentences for the offence of conspiracy to murder. These comparisons are appropriate in light of the facts found at trial as to Zak's involvement, namely, that he was involved in some discussion and preparation but was not present at the killing.

(ii) Gradations of culpability within joint criminal enterprise murder

35. Murder has historically been acknowledged to be an offence that is capable of encompassing offenders of vastly different levels of moral culpability, whether as principal offenders or accessories.[17] This is especially true in instances of murder by joint criminal enterprise.[18]

36. Accordingly, the High Court has stressed that an assessment of culpability for murder by joint criminal enterprise must proceed by reference to the individual roles played by each offender in the enterprise.[19] It has been held that instigators, or dominant figures, within joint criminal enterprises will be more culpable than secondary figures within the enterprise.[20] Furthermore, it is accepted that physical participation in the acts causing death will often be a significant factor bearing on moral culpability. This will usually mean that a peripheral offender who, like Zak, plays little or no role in the physical attack will be adjudged to have a lower culpability than those who physically perpetrated the murder.[21] In the words of the Judicial Commission of New South Wales:[22]

> Generally, the perpetrator responsible for the actual killing will be treated as having demonstrated greater objective criminality than an offender who is not physically responsible for the death … Such an approach is consonant with the distinction between an offender's responsibility for criminal conduct and his/her culpability.

37. Of course, mandatory sentencing precludes such individualised consideration of moral culpability – requiring instead a mandatory minimum sentence for all offenders convicted of murder regardless of the particular role they played in the offence. Had mandatory sentencing not been operative in Zak's case, it is highly likely that Zak would have received a considerably lighter sentence by reason of his lesser culpability within the joint criminal enterprise.

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[17] See generally, Sentencing Advisory Council, "Sentencing Snapshot No. 198 – Murder" (April 2017) (describing a wide range of sentences handed down for the crime of murder in Victoria between 2011 and 2016, including 14% of sentences being custodial supervision orders).

[18] See generally, Andrew Dyer and Hugh Donnelly, "Sentencing in complicity cases – Part 1: Joint criminal enterprise" (Judicial Commission of New South Wales, 2009).

[19] Lowe v The Queen (1984) 154 CLR 606, 609 (Gibbs CJ). See also *KR v R* [2012] NSWCCA 32, [19]; *R v Wright* [2009] NSWCCA 3, [28]–[29]; *R v JW* (2010) 77 NSWLR 7, [161]; *R v Taufahema* [2004] NSWSC 833, [49].

[20] *R v Mamae* [2001] NSWSC 936, [17]-[18]; *R v Spathis* [2001] NSWCCA 476, [196]; *R v Tan* [2007] NSWSC 684, [26].

[21] See, e.g., *R v Tan* [2007] NSWSC 684 [24]-[25]; *Howard v The Queen* (1992) 29 NSWLR 242, 253-257; *R v Wright* [2009] NSWCCA 3 [29]; *Carruthers v The Queen* [2007] NSWCCA 276.

[22] Judicial Commission of New South Wales, "Murder" in *Sentencing Bench Book*, [30-000].

38. Zak's involvement in the enterprise was, on any view, less than that of his two co-offenders. The sentencing judge found that Zak was "a follower, not a leader", that Zak "found the courage to tell [his co-offender that he] could not go on with it" and that Zak was not physically present at the scene of the crime. According to established sentencing principles, this would usually have tended to the conclusion that Zak ought to receive a considerably lower sentence than those handed down to his two co-offenders and Ms Buttery for manslaughter.

39. A consideration of jurisdictions[23] without mandatory sentences for murder reveal justifiably lower sentences than Zak's that are commonly handed down to offenders in joint enterprises:

- *R v Safetli* [2013] NSWSC 1096 – offender aged 46; no prior convictions; recruited shooter and was present at fatal attack – **9 years' imprisonment with a non-parole period of 6½ years;**
- *R v Campbell*[24] – offender aged 20; prior convictions; involved in group attack – **9 years 7 months' imprisonment with a non parole period of 5 years 7 months;**
- *R v Gallateri* [2013] NSWSC 1097 – offender aged 63; no prior convictions; significant role in enterprise – **10 years' imprisonment with a non-parole period of 7½ years;**
- *R v Moulds* [2013] NSWSC 715 – offender aged 30; minor prior convictions; present with weapon and participated in assault – **10 years' imprisonment with a non-parole period of 7½ years;**
- *R v Johnston* [2008] VSCA 133 – offender aged 25; no prior convictions; not a dominant figure in enterprise – **10 years' imprisonment (non-parole period distorted by other offending);**
- *R v Zanker* [2017] NSWSC 1254 – offender of unknown age; comparatively minor prior convictions; not present at time of murder by had assisted before hand in digging grave – **12 years' imprisonment with a non-parole period of 6 years and 8 months;**
- *R v Johnson*[25] – offender aged 18; some priors convictions; participated in group attack – **12 years' imprisonment with a non-parole period of 8 years**;
- *R v Hoskins* [2016] NSWCCA 157 – offender aged 39; prior convictions for assault; present with weapon and participated in assault – **12 years' imprisonment with a non-parole period of 9 years.**

40. In light of the above, it is reasonable to conclude that had Zak been sentenced in a jurisdiction without mandatory sentencing for murder, his low level of moral culpability, lack of prior convictions, good character, and youthfulness would

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[23] Western Australia, Tasmania, Victoria and the Australian Capital Territory do not impose mandatory life sentences for murder. New South Wales only requires a mandatory life sentence for murder in certain circumstances – see *Crimes (Sentencing Procedure) Act 1999*, s 61. The remaining jurisdictions – South Australia, Queensland and the Northern Territory – impose mandatory life sentences for murder.

[24] Unreported, Supreme Court of New South Wales, Abadee J, 3 September 1993.

[25] Unreported, Supreme Court of New South Wales, Ireland J, 24 April 1996.

have called for a head sentence of less than 12 years and a non-parole period of less than the nearly 7 years that Zak has already spent in custody. Accordingly, it is appropriate that Zak be eligible for immediate release.

(iii) Zak's culpability best analogised to conspiracy

41. While it was unchallenged at trial and on appeal that it was open to the Crown to proceed against Zak on a complicity basis, in retrospect, and in light of the facts that emerged at trial, it is clear that a conspiracy charge would have more appropriately reflected his moral culpability.[26] This assessment is confirmed when one investigates the elements and the relevant cases in respect of the offence of conspiracy to murder, many of which involve circumstances similar to Zak's but produced dramatically lower sentences.

42. The constituent elements of conspiracy in the Northern Territory are contained in s 43BJ(2) of the *Criminal Code*. It must be shown that:

- The defendant entered into an agreement;
- The defendant and at least one other party to the agreement intended that an offence would be committed as part of the agreement; and
- The defendant or another party to the agreement committed at least one overt act pursuant to the agreement.[27]

43. As to the sentencing principles pertaining to conspiracy offenders, the fact that a conspirator repents and does not go through with an offence reduces that person's moral culpability.[28] This stems from the fact that the particular acts of each conspirator are relevant to moral culpability because they demonstrate the degree of commitment of the offender to the conspiracy.[29] Also relevant is the conspirator's role or "position within the organizational hierarchy".[30] These principles are illustrated by the few Australian cases that involve comparable factual circumstances to Zak's, that is: a conspiracy to murder in which the offender attempts to withdraw before the commission of the crime.

44. A recent case from the Australian Capital Territory, *R v Duffy*, is illustrative.[31] Like Zak's case, *Duffy* involved a 19 year old young man with no prior convictions who became involved in a murder plot. Mr Duffy took considerable steps to further the plot but, crucially, withdrew from the agreement before the victim was attacked. In light of his youth, his limited role, and his good prospects of rehabilitation, Mr Duffy was sentenced to **2 years 9 months' imprisonment to be served entirely by periodic detention and suspension** – a far cry from the life sentence and 20 year minimum non-parole period that

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[26] For an understanding of the overlap between complicity and conspiracy see David Lanham, "Complicity, Concert and Conspiracy" (1980).
[27] *Criminal Code* (NT) s 43BJ(2).
[28] See, e.g., *R v Duffy* (2014) 297 FLR 359, 364 [32], [34], 365 [43]. See also *R v Kane* [1975] VR 658, 661; *Savvas v R* (19950 183 CLR 1.
[29] *Sonnet v The Queen* [2013] VSCA 2, [18].
[30] *R v Chalmers* (2007) 173 A Crim R 458, 472 [83]. See generally, Peter Gillies, *The Law of Criminal Conspiracy* (2nd ed, Federation Press, Sydney) 254-255.
[31] *R v Duffy* (2014) 297 FLR 359.

Zak received. Mr Duffy received this modest sentence notwithstanding the fact that the maximum for conspiracy to murder in the ACT is life imprisonment.

45. Also informative is the Victorian case of *R v XX*.[32] The offender in that case took significant steps preparatory to the murder – including stealing a car for use by his co-offenders – before withdrawing from the plan. He was sentenced to **3 years' imprisonment, wholly suspended**. Admittedly, *XX* pleaded guilty and cooperated with police while Zak did neither of these things. Nevertheless, the case illustrates the justifiably low sentences that can be due in conspiracy to murder cases even where, as was the case in Victoria, the maximum penalty is life imprisonment.

46. Another conspiracy to murder case in which an offender attempted to withdraw form the plan is *R v Elkins*.[33] In that case, a 33 year old offender with some criminal history and significant involvement in planning the offence was sentenced to **10 years' imprisonment with a non-parole period of 5 years**.

47. Finally, reference should be made to the sentence of Steven Radalj in Western Australia, at a time when the maximum penalty for conspiracy to murder was 14 years (as it is now in the Northern Territory).[34] Mr Radalj, a man with no prior convictions, became significantly involved in a murder conspiracy, including by acting as an intermediary with potential "contract killers". At no point did Mr Radalj withdraw from the conspiracy; he was only stopped by being apprehended. Mr Radalj received a head sentence of **7 years' imprisonment with eligibility for parole**.

48. The four cases discussed above all involve offenders, like Zak, who attempted to withdraw from a conspiracy to murder. In light of these comparable sentencing exercises, it is reasonable to believe that were Zak to have been sentenced as a conspirator he would have received a head sentence in the order of 7 years or less with a lesser non-parole period.

49. The above conclusion is fortified when one considers a number of sentences in conspiracy to murder cases where there has been *no withdrawal* from the conspiracy. Consider, for example:

- *R v Pandelis* [1998] QCA 245 – offender aged 40; substantial criminal history; instigator of conspiracy – **6 years' imprisonment with a non-parole period of 2½ years**;
- *R v Noffke* [1999] QCA 240 – offender aged 31; no criminal history of violence; instigator of conspiracy – **6 years' imprisonment with a non-parole period of 2 years**;
- *R v DBJ* [2015] QCA 247 – offender aged mid-30s; limited criminal history; "pivotal" role in conspiracy – **6½ years' imprisonment with a non-parole period of 2½ years**;

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[32] *R v XX* [2004] VSC 323 (discussed in *R v Hildebrandt* (2008) 187 A Crim R 42 and *R v Sonnet* [2008] VSC 221).
[33] *R v Elkins* (Unreported, Supreme Court of New South Wales, Maxwell J, 22 May 1987).
[34] *R v Steven Radalj* (unreported) discussed in *Green v The Queen* [1993] WASC.

- *King & Fulton v The Queen*[35] – offender aged 35; no prior convictions; leading role in conspiracy – **6 years' imprisonment with a non-parole period of 4 years**;
- *Andrea Morgan v The Queen*[36] – offender of unknown age; unknown prior convictions; encouraging role in conspiracy – **6 years' imprisonment with a non-parole period of 4 years;**
- *R v AC* [2016] NSWSC 404 – offender aged 34; no prior convictions; accessory before the fact in conspiracy to murder – **8 years' imprisonment with a non-parole period of 5 years;**
- *John Morgan v The Queen*[37] – offender of unknown age; no prior convictions; leading role in conspiracy – **8 years' imprisonment with a non-parole period of 6 years;**
- *Sleiman v The Queen* (2011) 34 VR 80 – offender of unknown age and unknown criminal history; provided encouragement and support in conspiracy – **9 years' imprisonment with a non-parole period of 6 years**;
- *R v Garry Charles Hargrave* [2009] VSC 634 – offender aged early 50s; no relevant criminal history; "took an active part" in the conspiracy – **9 years' imprisonment with a non-parole period of 7 years**;
- *R v Proud* [2017] NSWSC 286 – offender aged 29; no significant prior convictions; was accessory before the fact in conspiracy, largely passive involvement – **10 years' imprisonment with a non-parole period of 6 years**;
- *R v Blundell* [2016] NSWSC1810 – offender aged 21; relevant priors; accessory before the fact in conspiracy to murder – **10 years' imprisonment with a non-parole period of 7 years;**
- *Sonnet v The Queen* [2013] VSCA 2 – offender aged 42; substantial criminal history; D was to be shooter in the conspiracy – **10 years' imprisonment with a non-parole period of 7½ years.**

50. There is, as a matter of law and evidence, considerable overlap between complicity and conspiracy, which leaves discretion to the Prosecution in choosing to proceed either with murder (mandatory life sentence and minimum non-parole period) or conspiracy (14 year maximum and no minimum non-parole period). However, in Zak's case the comparative approach to sentencing is informative and, it is submitted, a relevant consideration on this petition. In light of the above, it is likely that, were Zak to have been sentenced as a conspirator he would have received a head sentence of 6 to 9 years with a significantly reduced non-parole period.

(iv) Conclusion to ground 1

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[35] Unreported, Supreme Court of Victoria, Court of Criminal Appeal, Phillips CJ, Hampel and Nathan JJ, 3 November 1994.
[36] Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Hayne JA and Southwell AJA, 13 August 1996.
[37] Unreported, Supreme Court of Victoria, Court of Appeal, Phillips CJ, Hayne JA and Southwell AJA, 13 August 1996.

51. The effect of imposing identical, or similar, sentences on people of vastly different moral culpability is to produce unfairness and injustice. As the High Court has explained, where "comparable sentences [are imposed] upon co-offenders whose respective conduct and antecedents warrant disparate sentences", the result is a "justified sense of unfair treatment is produced".[38]

52. So undeniable is the capacity of mandatory sentencing laws to create unacceptable injustice, that Northern Territory parliamentarians supporting such laws have previously admitted as much. When the "three strikes" mandatory sentencing laws were introduced for property offences in the Northern Territory, a member of the government conceded: "there will be a small percentage of people who will be treated unfairly and the impact on them will be considered to be too harsh."[39] Zak has undoubtedly been treated unfairly and harshly by the mandatory sentencing laws under which he was sentenced.

53. The prerogative is rightly reserved for cases of exactly this nature, where the interaction between the powers of the Legislature and the duties of the Judiciary cause a grave injustice that amounts to nothing less than a systemic failure and a taint on the broader criminal justice system. In order to ameliorate this systemic failure, it would be appropriate for the Administrator to remit Zak's sentence such that he is released immediately, or to exercise the prerogative to the same effect. It is cases such as this that demonstrate where the prerogative powers can be uniquely utilised – in order to effect justice – including where the separation of powers inhibits a balanced and fair solution.

<u>Ground 2 – the imposition of a mandatory sentence in this case violates fundamental human rights, freedoms and liberties and exacerbates the disadvantage experienced by Indigenous people and young people</u>

54. Zak's sentence is a violation international law's protection of fundamental human rights, freedoms and liberties. As a signatory to all of the major international treaties, Australia has committed to upholding these rights and protecting individual liberty within its domestic criminal justice system. Yet in Zak's case Australia has fallen short of its commitments. In order to end this serious violation of international law, the Administrator should act immediately to remit Zak's sentence.

55. To understand how Zak's sentence violates international law one need turn no further than reports of committees of the Australian Senate and the United Nations. These committees have previously registered concern that the Northern Territory's mandatory sentencing laws (although not the exact laws that Zak was sentenced under) contravene a number of international obligations.[40] More

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[38] *Lowe v The Queen* (1984) 154 CLR 606, 617.
[39] Northern Territory, *Parliamentary Debates,* Assembly, 19 November 1996 (Mr Reed).
[40] Senate Legal and Constitutional References Committee, Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (March 2000) [5.91]; United Nations Human Rights Committee: Australia, *Concluding Observations*, CCPR/CO/69/Australia, (28 July 2000) 17.

precisely, mandatory sentencing laws like those that Zak was sentenced under endanger the following rights, freedoms and liberties:[41]

- the right to equal treatment before the law;
- the right to be free from cruel, inhuman or degrading treatment; and
- the right not to be arbitrarily detained.

(i) The right to equal treatment before the law

56. The right to equal treatment before the law is contained in numerous international instruments.[42] Like the domestic principle of equality before the law, the international obligation to ensure equal treatment before the law requires that states operate their criminal justice systems so as to treat offenders consistently or differently only on account of *relevant* similarities or differences.

57. As was explained above in the discussion of Ground 1, mandatory sentencing regimes will often offend the right to equal treatment before the law because such regimes force the courts to impose identical penalties in cases characterised by relevant differences.[43] In Zak's case the violation of the right to equal treatment before the law can be seen in the fact that Zak received the same sentence as Mr Halfpenny (and a higher sentence than Mr Malyschko) despite the judge's findings that Zak was the least culpable of the trio.

(ii) Cruel, inhuman or degrading treatment

58. The right to be free from cruel, inhuman or degrading treatment is contained in a number of international instruments.[44] The United Nations Committee Against Torture,[45] the United Nations Human Rights Committee[46] and esteemed

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[41] Another right that might be thought to be violated is that protected in Article 14(5) of the *International Covenant on Civil and Political Rights* (right to appeal or review of sentence). See Jenny Blokland, 'International Law Issues and the New Northern Territory Sentencing Regime' (paper presented at the sixth biennial conference of the Criminal Lawyers Association of the Northern Territory, 22-26 June 1997, Sanur Beach, Bali, Indonesia) 19; Law Council of Australia, 'Mandatory Sentencing' (Policy Discussion Paper, May 2014) [78]-[80]; Dato' Param Cumaraswamy, 'Mandatory sentencing: the individual and social costs' (2001) 7 *Australian Journal of Human Rights* 7, 14.

[42] See, e.g., *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 26.

[43] Jen Hardy, 'Mandatory sentencing in the Northern Territory – a breach of human rights?' (2000) 11(3) *Public Law Review* 172, 174.

[44] A *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948), art 7; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 7; *Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment*.

[45] United Nations, *Conclusions and Recommendations of the Committee Against Torture: Australia*, CAT/C/XXH/Concl.3, (21 November 2000) 6(e), 7(h).

commentators[47] have all suggested that grossly disproportionate terms of imprisonment may amount to cruel, inhuman or degrading treatment.[48] As will be explained below, mandatory sentences are often grossly disproportionate and thus will often contravene the international law prohibition on cruel, inhuman or degrading treatment.

59. Canada has the most developed jurisprudence in the common law world on the way that mandatory minimum sentences can amount to cruel, inhuman or degrading treatment.[49] As early as 1987, the Supreme Court of Canada struck down a mandatory minimum narcotics sentence on the basis that it infringed the right to be free from cruel and unusual punishment. The Court defined cruel and unusual punishment to encompass a mandatory minimum sentence that is "grossly disproportionate" or "so excessive as to outrage standards of decency".[50] When understood in these terms it is easy to see that Zak's sentence amounts to cruel, inhuman or degrading treatment. Zak's sentence is both grossly disproportionate to his minimal involvement in the crime and it is so excessive as to outrage standards of decency (as evidenced by the public response to his sentence described at the opening of this petition).

60. Europe also has a mature jurisprudence describing the link between disproportionate punishments and cruel, inhuman or degrading treatment.[51] The European cases emphasize that a sentence will be amount to inhuman or degrading treatment where it does not allow for a meaningful possibility of a person rehabilitating themselves so as to re-enter the community outside of prison. In Zak's case, the 20 year non-parole period presents such a remote

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[46] United Nations Human Rights Committee, *Views of the Human Rights Committee under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights* (112th session) concerning Communication No. 1968/2010 17.

[47] Jenny Blokland, 'International Law Issues and the New Northern Territory Sentencing Regime' (paper presented at the sixth biennial conference of the Criminal Lawyers Association of the Northern Territory, 22-26 June 1997, Sanur Beach, Bali, Indonesia) 8-12; Andrew Dyer '(Grossly) disproportionate sentences: can charters of rights make a difference?' (2017) 43 *Monash University Law Review* 218-219.

[48] In some jurisdictions, the right to be free from disproportionate punishment is considered a free-standing right independent of the torture prohibition. One example is Article 49(3) of the European Union Charter of Fundamental Rights. Article 49(3) of the European Union Charter of Fundamental Rights provides, relevantly that the "severity of penalties must not be disproportionate to the criminal offence." See also *Garage Molenheide v Belgium* [1997] ECR I-7281.

[49] The Canadian jurisprudence stems from section 12 of the Canadian Charter of Rights, which provides: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." See *Constitution Act 1982* (Can), Pt I, s 12.

[50] *R v Smith* [1987] S.C.J. No. 36, [53]. See also *R v Goltz* [1991] S.C.J. No. 90; *R v Morrisey* [2000] S.C.J. No. 39.

[51] See, e.g., *Vinter v United Kingdom* [2013] III Eur Court HR 317, 344 [102]; *Vinter v United Kingdom* (2012) 55 EHRR 34, [88]-[89], [93]; *Harkins v United Kingdom* (2012) 55 EHRR 19, [133]; *Ahmad v United Kingdom* (2013) 56 EHRR 1, [237]. The European jurisprudence focuses on Article 3 of the European Convention on Human Rights, which provides: "No one shall be subject to torture or to inhuman or degrading treatment or punishment."

possibility of re-entry to the community that, for a young person, it can and should be seen to be cruel, inhuman or degrading treatment.

61. Another principle deriving from the European decisions is that, for a sentence to avoid characterisation as inhuman or degrading, it must be reasonably related to the risk of reoffending.[52] In Zak's case, this factor suggests that the sentence is inhuman and degrading because it cannot be justified on the basis of a risk of reoffending (Zak was found to pose little risk of reoffending).

(iii) Right not to be arbitrarily detained

62. The right not to be arbitrarily detained[53] has been held to require that State detention of individuals be:

- Reasonable;
- Necessary;
- For a legitimate purpose;
- Proportionate to the purpose.[54]

63. There are a number of ways in which it can be seen that mandatory sentencing will often fail to satisfy these requirements. First, where mandatory sentencing laws require judges to impose a sentence of imprisonment without permitting consideration of all relevant circumstances this may be unreasonable, and thus arbitrary.[55] Zak's sentence can be seen to be unreasonable, and thus arbitrary, in this sense because the sentencing judge was precluded from giving weight to a number of highly relevant considerations, such as Zak's youth and good prospects of rehabilitation.

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[52] *R (on the application of Knights) v Secretary of State for Justice* [2017] EWCA Civ 1053.

[53] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, art 9(1).

[54] *Van Alphen v Netherlands*, Communication No. 305/1988, CCPR/C/39/D/305/1988 (23 July 1990) [5.8]; *Gorji-Dinka v Cameroon*, Communication No. 1134/2002, CCPR/c/83/D/1134/2002 (17 March 2005) [5.1]; *F.K.A.G. et al. v Australia*, Communication No. 2094/2011, CCPR/C/108/D/2094/2011 (20 August 2013) [9.3], [9.6]-[9.7]; *M.M.M. et al. v Australia*, Communication No. 2136/2012, CCPR/C/108/D/2136/2012 (20 August 2013) [10.3]-[10.4], [10.6]; United Nations Human Rights Committee, *General Comment No. 27: Freedom of movement* (1999) [13].

[55] See, e.g., Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, report No 84 (1997), 554; Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (May 2014) [68], [70]-[77]; Meredith Wilkie, 'Crime (Serious and Repeat Offenders) Sentencing Act 1992: A Human Rights Perspective' (1992) 22 *Western Australian Law Review* 187, 194-195; Jenny Blokland, 'International Law Issues and the New Northern Territory Sentencing Regime' (paper presented at the sixth biennial conference of the Criminal Lawyers Association of the Northern Territory, Sanur Beach, Bali, Indonesia, 22-26 June 1997) 11-14; Martin Flynn, 'Mandatory Sentencing, International Law and the Howard/Burke Deal' (2000) 4(30) *Indigenous Law Bulletin* 7, 9; Jenny Hardy, 'Mandatory sentencing in the Northern Territory – a breach of human rights?' (2000) 11(3) *Public Law Review* 172, 174; Angela Ward, 'Mandatory sentencing assessed against regional systems for the protection of human rights' (2001) 7 *Australian Journal of Human Rights* 61, 67-68; Chris Cunneen, 'Mandatory Sentencing and Human Rights' (2002) 13 *Current Issues in Criminal Justice* 322, 323.

64. Mandatory sentencing can also be seen to produce unnecessary, and thus arbitrary, sentences in the way that sentence length is not calibrated according to the risk that a particular offender poses to the community. The necessity-deficit is stark in Zak's case, where he posed no relevant risk to the public but was sentenced to life in prison.

65. Most importantly for present purposes, each of the United Nations Human Rights Committee,[56] the Inter-American Court[57] and the Joint Standing Committee on Treaties[58] have explained that detention will be arbitrary if it is disproportionate. There is perhaps no better way to communicate disproportionality, and thus arbitrariness, of Zak's sentence than to point to the many news reports expressing disbelief at the fact that "the man who wasn't there" received a sentence in excess of one of the offenders who physically perpetrated the murder.[59]

(iv) Discriminatory impact on minority communities

66. Margaret McMurdo, former president of the Queensland Court of Appeal, has cautioned that minimum non-parole periods "will almost certainly disproportionately impact on Indigenous Australians and create an upward spiral of the already shockingly large numbers of Indigenous people in custody".[60] There is no mystery to how this occurs. Certain Indigenous communities experience tragically high crime rates, largely as a result of unique contemporary and historic forces of social and economic disadvantage. Rather than permit sentencing judges to take account of these unique circumstances, mandatory sentencing regimes exacerbate Indigenous incarceration rates thereby further compounding community deterioration.[61]

67. This was exactly the effect of the Northern Territory's now repealed mandatory sentencing provisions for property offences. A 2003 review by the Office of Crime Prevention found that offenders subjected to the laws were

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[56] *A v Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993 (3 April 1997) [9.2].
[57] Gangaram Panday Case 2 IHRR (1995) 360.
[58] Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the United Nations Convention on the Rights of the Child* (1998) 346 [8.26].
[59] See, e.g., Steven Schubert, 'How Zak Grieve backed out of a murder plot but got life anyway' ABC (online), 25 August 2017 ,< http://www.abc.net.au/news/2017-08-24/zak-grieve-ray-niceforo-inconsistences-in-nt-justice-system/8829736>; John Safran, 'Zak Grieve, the man who wasn't there' The Sydney Morning Herald (online), 14 November 2014 <https://www.smh.com.au/lifestyle/zak-grieve-the-man-who-wasnt-there-20141113-11lrok.html>.
[60] Margaret McMurdo, 'Sentencing' (Speech delivered at the Queensland Magistrates State Conference 2011, Brisbane, 4 August 2011) 16. See also Ah Kit, 'You know why: compulsory jailing and racism' The Nugget Coombes North Australia Lecture, 20 September 2000.
[61] For similar diagnoses of the effects of the Northern Territory property mandatory sentencing laws see Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24 *Alternative Law Journal* 211, 215; Jenny Hardy, 'Mandatory sentencing in the Northern Territory – a breach of human rights?' (2000) 11(3) *Public Law Review* 172, 173-174.

disproportionately Indigenous (73% Indigenous and 27% non-Indigenous).[62] Put another way, Indigenous people were 8.6 times more likely to be subjected to the mandatory sentencing laws.[63] This result was even more pronounced for the highest sentence bracket in the mandatory sentencing scheme, which included 95% Indigenous people and 5% non-Indigenous people.[64] Similarly, it appears that the extension of mandatory sentences to violent offences in 2013 resulted in an initial divergence between the average sentence given to Indigenous and non-Indigenous repeat offenders.[65]

68. The Western Australian experience with mandatory sentencing has produced similarly dispiriting results for the Indigenous population. The result of Western Australia's mandatory sentencing laws has been the imprisonment of even greater numbers of Indigenous people, particularly children.[66] The Aboriginal and Torres Strait Islander Social Justice Commissioner commented that the laws "targeted Indigenous people and had been costly and ineffective in deterring crime".[67]

69. Where mandatory sentencing regimes disproportionately impact people of a particular racial or ethnic group those regimes may contravene international law, particularly the Convention on the Elimination of all Forms of Racial Discrimination.[68] Mandatory sentencing can discriminate in at least three ways:[69]

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[62] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience,* Discussion Paper (2003) 2.
[63] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience,* Discussion Paper (2003) 3-4.
[64] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience,* Discussion Paper (2003) 13.
[65] Northern Territory Department of Attorney-General and Justice, *Review of the Northern Territory Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (December 2015) 46, 51. See also Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on Indigenous Offenders' (paper presented at National Judicial Conference, Canberra, 6-7 February 2010) 3.
[66] The Law Society of Western Australia, 'Briefing Paper: Mandatory Sentencing' (December 2016); The Law Society of Western Australia, 'State Government and Opposition respond to Law Society's Policy Positions' (March 2017) 26; Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (2nd ed, 2016, Federation Press, Sydney) 53-54; Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) *University of New South Wales Law Journal* 267, 277.
[67] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (Human Rights and Equal Opportunity Commission, Sydney).
[68] Article 2(1)(a) of the Convention on the Elimination of all Forms of Racial Discrimination ("CERD") provides: "Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation."
[69] For a more extensive taxonomy see David Brown 'Mandatory sentencing: a criminological perspective' (2001) 7 *Australian Journal of Human Rights* 31, 43-45.

- mandatory sentences can be applied selectively, to crimes that are disproportionately committed by people from disadvantaged social groups;[70]
- mandatory sentences can be triggered by certain factors – such as previous convictions – which are more commonly attributed to people from disadvantaged social groups;[71]
- even if applied universally, mandatory sentences disproportionately impact people from disadvantaged social groups because sentencing judges are precluded from mitigating their sentences based on the particular disadvantages experienced by members of those groups.

70. The discriminatory operation of the Northern Territory's mandatory sentencing laws causes considerable reputational damage to the jurisdiction. These laws have previously attracted adverse comment from the international community for their discriminatory impact.[72] In the Committee on the Elimination of Racial Discrimination's Concluding Observations in 2000, it observed:

> The Committee expresses its concern about the minimum mandatory sentencing schemes with regard to minor property offences enacted in Western Australia, and in particular in the Northern Territory. The mandatory sentencing schemes appear to target offences that are committed disproportionately by indigenous Australians, especially juveniles, leading to a racially discriminatory impact on their rate of incarceration. The Committee seriously questions the compatibility of these laws with the State party's obligations under the Convention and recommends to the State party to review all laws and practices in this field.[73]

71. The United Nations Committee on the Elimination of Racial Discrimination has made similar remarks with respect to Western Australia's past mandatory sentencing laws.[74]

72. The statistics on Indigenous representation for the crime of murder in the Northern Territory are not known. It is likely, however, that Indigenous people

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[70] Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) *University of New South Wales Law Journal* 267, 277; Chris Cunneen, 'Mandatory Sentencing and Human Rights' (2002) 13 *Current Issues in Criminal Justice* 322, 323-324.

[71] See, e.g., the discussion of Western Australia's 1992 and 1996 suites of mandatory sentencing laws: Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) *University of New South Wales Law Journal* 267, 277.

[72] See Committee on the Elimination of Racial Discrimination: Australia, *Concluding Observations,* CERD/C/56/Misc.42/rev.3, (24 March 2000) para 16; Angela Ward, "Mandatory sentencing assessed against regional systems for the protection of human rights" (2001) 7 *Australian Journal of Human Rights* 61, 68-69.

[73] Committee on the Elimination of Racial Discrimination: Australia, *Concluding Observations,* CERD/C/56/Misc.42/rev.3, (24 March 2000) para 16.

[74] See Committee on the Elimination of Racial Discrimination: Australia, *Concluding Observations,* CERD/C/AUS/CO/14, (10 March 2005) para 20 (commenting on Western Australian mandatory sentencing laws and explaining that where such laws have a disparate impact on Indigenous people they may constitute indirect discrimination in breach of the Convention).

are disproportionately convicted of this crime, given statistics from Queensland which show vastly disproportionate rates of Indigenous conviction for murder.[75]

(iii) Zak's sentence as an example of how mandatory sentencing can exacerbate Indigenous disadvantage

73. As a young Indigenous man from a supportive family Zak might not first present as a "typical" candidate for the discriminatory impact of mandatory sentencing laws. Yet, set in the context of historic social disadvantage in the Tennant Creek and Katherine regions, Zak's case illustrates how the "social determinants of crime" can funnel even unlikely candidates into the net of mandatory sentencing.

74. While Zak had, and continues to enjoy, the benefits of a strong family he is also a product of his broader social context. Educational outcomes in Tennant Creek and Katherine are some of the lowest in the country. Health metrics are similarly poor. Importantly, dramatic rates of Indigenous incarceration in the area erode the social fabric and deny many young men like Zak exposure to a range of positive role models. Most significantly, rates of violence in these communities are extremely high, resulting in exposure to violence as a semi-normalised aspect of life.

75. Without discounting the benefits Zak has enjoyed by virtue of his supportive family, Zak is also the product of the social forces mentioned above. He witnessed countless incidents of violence as a child and young person growing up in Tennant Creek and Katherine. He did not complete his high school studies. His only post-school education has been in prison. He has missed his traditional initiation ceremony obligations by virtue of being incarcerated.

76. Given the vast bodies of empirical research on the social factors linked to crime, it is impossible to deny that the disadvantage experienced by Territorian Indigenous people contributed to Zak's involvement in the offence for which he was sentenced. Relevant social factors which make someone more likely to be involved in crime include: economic hardship, low school attendance and performance, association with delinquent peers, unstable family structure, substance abuse and being raised in a community with a high level of tolerance of violence.[76] Zak experienced all of these factors growing up but the sentencing judge was unable to consider them to mitigate Zak's sentence because of the irrational and illogical rigidity of the mandatory sentencing laws, which fundamentally prevent a reasoned approach.

(iv) Mandatory sentencing and young people

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[75] Queensland Sentencing Advisory Council, "Sentencing spotlight on … murder" (July 2017) 5. See also T Cussen and W Bryant, 'Indigenous and non-Indigenous homicide in Australia' (2015) 37 *Research in Practice* (Australian Institute of Criminology, Canberra).

[76] See Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) 61ff; Don Weatherburn, 'What Causes Crime?' (2001) *NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin*.

77. Numerous commentators have remarked that mandatory sentencing provisions are particularly prone to produce injustice when they are applied to youths and young adults.[77] Sir Anthony Mason, former Chief Justice of Australia, described the effect of the Northern Territory's now repealed property mandatory sentencing laws on young people as "inhuman".[78] The United Nations has observed that Australian mandatory sentencing laws applying to children violate international law,[79] a view shared by the Commonwealth Parliament's Joint Standing Committee on Treaties and the Northern Territory courts.[80] Such laws contravene Articles 3, 37 and 40 of the Convention on the Rights of the Child (CROC).[81] Article 3(1) states that courts should have the best interests of the child as a primary consideration.[82] Article 37(b) requires that detention only be used as a last resort and for the shortest possible period. Article 40 stipulates that sentences must be proportionate to the circumstances of the offence and must be subject to appeal.

78. While the Convention on the Rights of the Child only applies to persons under 18,[83] the rationale for its prohibition on mandatory sentencing holds true in respect of young adults. This is because courts need to retain their flexibility when sentencing young adults to maximise their rehabilitative prospects. Instead, mandatory sentences like the one Zak received ensure that youths' social development will be stunted by long periods in prison.

79. The sentencing judge described Zak as "immature" and "a youthful first offender". Traditionally,[84] these factors would have been balanced against the seriousness of the crime to mitigate Zak's moral culpability. Mandatory sentencing prevented the judge from crafting a sentence to take into account Zak's immaturity, his youthfulness, his lack of prior convictions, his supportive family and his good prospects of rehabilitation. The injustice apparent in such a situation is that Zak – a 19 year old with no prior convictions – received the same non-parole period as would a hardened criminal in his 50s. Zak's case thus

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[77] See, e.g., Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the United Nations Convention on the Rights of the Child* (1998) 346 [8.26]; Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24 *Alternative Law Journal* 211, 214; Law Council of Australia, "Policy Discussion Paper on Mandatory Sentencing" (May 2014) [81]-[94], [124]-[127].

[78] Anthony Mason, 'Mandatory sentencing: implications for judicial independence' (2001) 7 *Australian Journal of Human Rights* 21, 29.

[79] United Nations Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, CRC/C/AUS/CO/4, 28 August 2012, [84].

[80] Joint Standing Committee on Treaties, Parliament of Australia, *Inquiry into the United Nations Convention on the Rights of the Child* (1998) 346 [8.26]; *Ferguson v Setter and Gokel* (1997) 7 NTLR 118; *Police v MK* [2007] NTMC 047 (31 July 2007) [17].

[81] The CROC was ratified by Australia on 17 December 1990 and came into force on 16 January 1991.

[82] See also United Nations General Assembly, *Rules for the Protection of Juveniles Deprived of their Liberty* A/RES/45/113 (14 December 1990) ("The well-being of the child shall be the guiding factor in the consideration of his or her case.").

[83] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 1.

[84] *R v Mills* [1998] 4 VR 235; *TM v The Queen* [2017] NTCCA 3, [25].

throws into stark relief the way that mandatory sentencing laws produce illogical and unjust results, especially as applied to young adults.

Ground 3 – the imposition of a mandatory sentence in Zak's case is contrary to the public interest

(i) Mandatory sentencing results like Zak's erode public trust in the legal system

80. It has been observed that "inconsistency in punishment bespeaks unfairness and unequal treatment *which is productive of an erosion of public confidence in the integrity of the administration of justice*."[85]

81. Specifically with respect to mandatory sentencing, the Senate Legal and Constitutional References Committee has noted that the apparently unjust or anomalous results produced by mandatory sentencing regimes can erode community trust in the legal system.[86] The same sentiments have been echoed by prominent judges and commentators.[87] In the present case, the Court of Criminal Appeal observed that mandatory sentencing provisions can be "productive of a sense of grievance and injustice."[88]

82. The aim of the mandatory minimum sentencing provisions under which Zak was sentenced was to provide a carefully calibrated sentencing scheme capable of taking into account gradations in moral culpability and objective seriousness within the crime of murder. As was explained in the second reading speech to the bill that introduced the relevant provisions:

> It is accepted that crimes of murder have different degrees of heinousness and culpability, notwithstanding the tragic consequences of each case. Some crimes of murder result from conduct of such cruelty and brutality and cold-bloodedness, that there can be no doubt they deserve a natural life sentence, both to punish the offender and to provide for the protection of the community. Other crimes of murder may be committed in circumstances which indicate the community's interest in ongoing retribution and punishment is not so great.[89]

83. Unfortunately, the sub-sections 52A(6)-(8) of the *Sentencing Act* were insufficiently nuanced to account for the unique circumstances of Zak's case.

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[85] Hon Justice Geoffrey Nettle, "The Jurisprudence of the High Court of Australia on Sentencing" (speech delivered at the National Judicial College of Australia Conference – "Sentencing: New Challenges") (Canberra, 3 March 2018) 2 (emphasis added). See also *Rees v The Queen* [2012] NSWCCA 47, [50] (Garling J).

[86] Parliament of Australia, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (March 2000) [7.46]-[7.47].

[87] See, e.g., Michael Adams, 'Launch of UNSW Law Journal Forum' (1999) *University of New South Wales Law Journal* 257, 260.

[88] *Grieve v The Queen* [2014] NTCCA 2, [58].

[89] Northern Territory, *Parliamentary Debates,* Assembly, 16 October 2003 (Dr Toyne, Justice and Attorney-General).

84. As the Chief Minister has acknowledged in the context of this case, sentencing legislation can occasionally be a "blunt" instrument.[90] Former Solicitor-General of Queensland, Walter Sofronoff QC, recommended the abolition of mandatory minimum non-parole periods for exactly this reason, cautioning that such laws "invariably create unintended and unforeseeable anomalies that tend against the public good in many surprising ways."[91]

85. Zak's case need not remain a byword for the failures of the Northern Territory's criminal justice system. If the prerogative were to be exercised in Zak's case it would serve as an illustration of the ability of the criminal justice system to respond to, and rectify, instances of the most grave injustice. This is exactly the role of the prerogative, and it is exactly the reason why this ancient power has been retained in our modern legal system.

(ii) Mandatory sentencing does not protect the community

86. Across the developed world there is now a near consensus among researchers and experts that mandatory sentencing laws have little effect on crime rates and community protection.[92] In North America, where modern mandatory sentencing began, studies have found little evidence that such laws succeed in protecting the community.[93] In fact, a review of two decades of crime data from 188 large cities suggested that cities enacting "three strikes" laws saw *increases* in certain crimes as compared to cities that did not introduce the laws.[94]

87. In Australia, much of the research on mandatory sentencing laws began after the early experiments with these laws in the Northern Territory and Western Australia in the 1990s.[95] In 1992 Western Australia introduced extreme mandatory sentencing measures aimed at deterring high-speed pursuits in stolen

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[90] Chief Minister Michael Gunner quoted in Ben Millington and Tom Maddocks, 'Zak Grieve: Mercy plea lodged in murder case', *ABC News* (online), 31 August 2017 <http://www.abc.net.au/news/2017-08-31/nt-administrator-rejects-claims-mercy-plea-for-zac-grieve/8858924>.

[91] Walter Sofronoff, *Queensland: Parole System Review, Final Report* (Department of Justice and Attorney-General) (2016) 105.

[92] See, e.g., Michael Tonry 'Functions of Sentencing and Sentencing Reform' (2005) 58 *Stanford Law Review* 37, 52-53 ("Imaginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects. Three National Academy of Sciences panels, all appointed by Republic presidents, reached that conclusion, as has every major survey of the evidence." citations omitted).

[93] See, e.g., Lisa Stolzenberg and Stewart J D'Alessio, ''Three Strikes and You're Out': The Impact of California's New Mandatory Sentencing Laws on Serious Crime Rates' (1997) 43 *Crime & Delinquency* 457.

[94] Tomislav V Kovandzic, John J Sloan III and Lynne M Vieraitis, 'Unintended Consequences of Politically Popular Sentencing Policy: The Homicide Promoting Effect of 'Three Strikes' in U.S. Cities (1980-1999)' (2002) *Criminology & Public Policy* 399.

[95] See *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA); *Criminal Code Amendment Act (No 2) 1996* (WA); *Sentencing Amendment Act 1996* (NT); *Juvenile Justice Amendment Act (No 2) 1996* (NT).

motor vehicles.[96] Empirical research on the effects of the laws indicated that, far from deterring vehicle-related crime the laws were attended by a significant *increase* in motor vehicle theft and related arrests.[97] Later, in 1996, Western Australia introduced "three strikes" mandatory sentencing for property offences.[98] Again, empirical evidence suggested that reported home burglaries *increased* immediately after the laws passed;[99] robberies also appear to have increased in this time.[100] The Northern Territory's own "three strikes" laws for property offenders were introduced in 1997 (and repealed in 2001) and had similar effect. A review of the laws by the Office of Crime Prevention revealed that the available data did not support the claim that the laws could reduce recidivism or deter potential offenders.[101] The Northern Territory's mandatory sentencing regime was extended to violent offences in 2013[102] and subjected to an internal review in 2015.[103] The authors of that review noted that violent crime rates decreased after the laws were introduced, however this decrease could not be attributed to the mandatory sentencing legislation (and was thought to be the product of other criminal justice initiatives).[104]

88. The evidence is clear: mandatory sentencing does not succeed in protecting the community. While it is the proper place of the Northern Territory government to consider how best to repeal and replace mandatory sentencing laws, until then, it is appropriate for the Administrator to ameliorate the particular irrationality of mandatory sentencing laws in the present case by remitting Zak's sentence or exercising the prerogative of mercy.

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[96] *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA). See also Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) *University of New South Wales Law Journal* 267, 271-273.

[97] Roderic Broadhurst and Nini Loh, 'The Phantom of Deterrence: The Crime (Serious and Repeat Offenders) Sentencing Act' (1993) 26(3) Australian & New Zealand Journal of Criminology 251.

[98] *Criminal Code Amendment Act (No 2) 1996* (WA).

[99] Mary Ann Yeats, ''Three Strikes' and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia' (1997) 8 *Criminal Law Forum* 369, 377.

[100] Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) *University of New South Wales Law Journal* 267, 273-274.

[101] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience,* Discussion Paper (2003) 10.

[102] *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT)

[103] Carolyn White et al, Department of Attorney-General and Justice, *Review of the Northern Territory Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (2005) 15-16.

[104] Carolyn White, Joe Yick, Dee-Ann Vahlberg and Leonique Swart, "Review of the Northern Territory *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013*" (2015, Department of Attorney-General and Justice, Darwin) 15-16.

MERCY – COMMON LAW & STATUTORY FRAMEWORK

89. The power of the Crown to pardon a person found guilty of a criminal offence, or to remit such a person's sentence, is a prerogative power generally referred to as the prerogative of mercy. It can be traced back to the 1688 Bill of Rights.[105]

90. In the Northern Territory, the power is reposed in the Administrator of the Northern Territory and derives from sections 31 and 32 of the *Northern Territory (Self-Government) Act 1978* (Cth) whereby the Administrator assumed certain prerogative powers of the Crown.[106] Prior to that, the power was reposed in the Governor-General of Australia.[107]

91. The Administrator's prerogative of mercy has not been displaced by legislation.[108] As such, the traditional prerogative might be described as a common law prerogative. The common law prerogative can be exercised to remit a sentence,[109] or to conditionally or fully pardon a person.[110] It operates prospectively to remove "all pains, penalties and punishments" associated with a conviction, although it does not remove the conviction itself.[111]

92. Without compromising the plenary nature of the Administrator's common law prerogative of mercy, there are specific statutory avenues available for the exercise of the prerogative, should the Administrator choose to avail herself of them. They are:

- Release on recognizance;
- Release on undertaking;
- Release on parole.

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[105] 1 Will & Mar s 2 c 2 (IMP). For early statutory reference to the pardon see 27 Hen. VIII ch. 24 (emphasizing the royal character of the pardon, such that it could not be exercised by lords of the marches).

[106] Earlier in the Northern Territory's history the prerogative of mercy was understood to be only exercisable by the Governor-General of Australia. See Northern Territory, *Parliamen*tary *Debates*, Assembly, 19 September 1978, (Questions without notice). Of course, the Commonwealth itself assumed these powers from the British Crown pursuant to s 61 of the Australian Constitution. See *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437-439.

[107] See *Criminal Law Consolidation Act 1978* (NT) (transferring the prerogative of mercy from the Governor-General to the Administrator); *Criminal Law and Procedure Act 1981* (NT, s 58.

[108] See *Criminal Code* (NT) s 431(1); *Sentencing Act* (NT) s 115; *Parole Act* (NT) s 16.

[109] As to the distinction between the common law prerogative power of pardon and remission see *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 366-367 (Mason J); compare 371 (Wilson J).

[110] Peter Brett, "Conditional Pardons and Commutation of Death Sentences" (1957) 20 *Modern Law Review* 131; A T H Smith, "The Prerogative of mercy, the Power of Pardon and Criminal Justice" [1983] *Public Law* 398.

[111] *R v Cosgrove* [1948] Tas SR 99, 105-106; *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 371 (Wilson J); *R v Foster* [1985] QB 115, 130; *Eastman v DPP (ACT)* (2003) 214 CLR 318, 350-351 (Heydon J). See also G R Rubin, 'Posthumous Pardons, the Home Office and the Timothy Evans Case' (2007) (Jan) *Criminal Law Review* 41, 47.

93. While each of these options is discussed below, the most appropriate remedy in Zak's case is remission, which is addressed in the following section.

Release on recognizance

94. Section 432 of the *Criminal Code* (NT) provides:

> **Conditional remission of sentence by Administrator**
> (1) In any case where the prerogative of mercy is extended to an offender, it may be extended upon condition of the offender entering into a recognizance conditioned as in the case of offenders conditionally released by a court of trial.
> (2) The offender is thereupon liable to the same obligations and is liable to be dealt with in all respects in the same manner as a person conditionally released by a court of trial.

95. This permutation of the prerogative appears analogous to a bail undertaking and thus more suited to circumstances demanding a *temporary* rather than lasting reprieve from a sentence.

Release on undertaking

96. Section 115 of the *Sentencing Act* (NT) relevantly provides:

> **Release by Administrator in exercise of prerogative of mercy**
> (1) The Administrator may, in any case in which he or she is authorised on behalf of Her Majesty to extend mercy to any person under sentence of imprisonment, do so by directing that the person be released, even before the end of a non-parole period:
> (a) on giving an undertaking;
> …
> (2) An undertaking under subsection (1)(a):
> (a) must have as a condition that the person be of good behaviour;
> (b) may have as a condition that the person be under the supervision of an employee employed in the Agency responsible under the Minister for the administration of the *Correctional Services Act*; and
> (c) may have any other condition that the Administrator considers to be in the interests of the person or the community.
> (3) The period of an undertaking under subsection (1)(a) is the period fixed by the Administrator, which must not be less than the unexpired term of the original sentence.
> (4) A person who gives an undertaking under subsection (1)(a) must be released from custody.
> …
> (9) A person who gives an undertaking under subsection (1)(a) is discharged from the original sentence at the end of the period of the undertaking if an order has not been made under subsection (5).

97. While Zak is prepared to give any undertaking that the Administrator might deem appropriate, it is ultimately submitted that such an undertaking is

unnecessary in Zak's case. Zak was sentenced as someone who had no prior convictions and no physical involvement in the crime before the court. He was assessed to have good character, good prospects of rehabilitation, and to be unlikely to re-offend. In these circumstances, it does not seem necessary or desirable to impose an undertaking on Zak. If Zak were to be required to give an undertaking under this section it would run for the course of his life.[112]

Release on parole

98. Section 115 of the *Sentencing Act* (NT) relevantly provides:

> **Release by Administrator in exercise of prerogative of mercy**
> (1) The Administrator may, in any case in which he or she is authorised on behalf of Her Majesty to extend mercy to any person under sentence of imprisonment, do so by directing that the person be released, even before the end of a non-parole period:
>
> …
>
> (b) on parole under and subject to the *Parole Act*.

99. Under this provision it would be open to the Administrator to order that Zak be immediately eligible for parole. While Zak would cooperate with such approach, and would no doubt present as a likely candidate for parole, it is maintained that the more appropriate mechanism is a remission of his sentence. The reason why release on parole is not the most appropriate avenue in Zak's case is that Zak's offending is not of such a nature as to require a lifetime on parole. As the sentencing judge made clear, Zak presents little danger to the community. Furthermore, since being incarcerated Zak has demonstrated through his pro-social educational commitments that he is capable of leaving prison immediately as a responsible and productive member of the community.

Traditional criteria for the exercise of the prerogative weigh in favour of mercy

100. The timely and proper exercise of the prerogative should not be understood as an anomalous, supererogatory event. Rather, it is "an integral element in the criminal justice system"[113] and much "more than a royal favour".[114] An appreciation of the place of the prerogative in the criminal justice system, and particularly the ameliorative function of the prerogative, is essential to a proper understanding of the considerations that ought to inform its exercise.

101. There are no formal, procedural or evidentiary criteria constraining the matters that may properly be taken into account in the exercise of the prerogative.[115] This deliberate absence of formal and procedural constraints is reflected in the

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[112] In this regard, sub-section (9) suggests that undertakings under this provision were intended to have a definite end point at which time they would be discharged. Sub-section (9) presents as somewhat ill-suited to life-sentences like Zak's.

[113] *Burt v Governor-General* [1992] 3 NZLR 672, 678, 681; *R v Home Secretary; Ex parte Bentley* [1994] QB 349, 362-363.

[114] *Black v Chrétien* (2001), 54 O.R. (3d) 215 [55] (Canada pursuant to Ch 2).

[115] *Mallard v The Queen* (2005) 224 CLR 125, 129 [6] (Gummow, Hayne, Callinan and Heydon JJ); *Martens v Commonwealth* (2009) 174 FCR 114, 128-129 [54]-[65] (Logan J).

fact that petitions need not take any particular form.[116] Nevertheless, five matters are identified below, and applied to Zak's case, as traditionally bearing upon the exercise of the prerogative. It should not be thought that the below list is exhaustive. The prerogative is intended to be "a flexible power and its exercise can and should be adapted to meet the circumstances of the particular case".[117]

102. First, matters of sympathy and compassion for the petitioner will naturally be relevant, as indicated by the label of the prerogative as one of "mercy".[118] In the Northern Territory, it appears that persons convicted of murder in "unfortunate" circumstances have previously been afforded the benefit of mercy.[119] In Zak's case general matters of sympathy, including Zak's experience of societal disadvantage, weigh in favour of the exercise of the prerogative.

103. Secondly, matters of the defendant's moral culpability have traditionally been considered in the exercise of the prerogative, especially in cases of full pardons.[120] Zak's low level of moral culpability thus makes him eligible for the prerogative.

104. Thirdly, it has been suggested by Sir Anthony Mason that public concern as to a particular case or outcome may be a factor relevant to the exercise of the prerogative.[121] The public outcry described at the opening of this petition is a compelling reason to exercise the prerogative in this case.

105. Fourthly, scholars have suggested that the public interest more generally will usually guide the exercise of the prerogative.[122] It has also been posited that matters of government policy may inform the exercise of the prerogative,[123] although the petitioner does not necessarily accept that such factors will be relevant where they tend *against* the beneficial exercise of the prerogative. The public interest in this case clearly weighs in favour of release such that Zak can again begin making contributions to his family and the broader community. As there is no countervailing threat to community safety in Zak's case, the public interest is squarely in favour of remission. To the extent that government policy

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[116] *White v The King* (1906) 4 CLR 152, 159.
[117] *R v Secretary of State, ex parte Bentley* [1993] 4 All ER 442, 454-455.
[118] See Parole Board of Canada, 'Royal Prerogative of Mercy Ministerial Guidelines' (31 October 2014) 5.
[119] See, e.g., the case of Billy Benn, discussed in Northern Territory, *Parliamen*tary *Debates*, Assembly, 30 November 1978, (Mr Robertson, Community Development). See also Northern Territory, *Parliamen*tary *Debates*, Assembly, 19 September 1978, (Questions without notice).
[120] See United Kingdom, *Parliamentary Debates*, House of Lords, 21 November 1983, vol 45, col 103 ("The grant of a free pardon is confined as far as possible to those who are innocent morally as well as technically."); *R v Secretary of State; ex parte Bentley* [1993] 4 All ER 442, 454.
[121] *Mickelberg* (1989) 167 CLR 259, 272 (Mason CJ).
[122] Sue Milne 'The Second or Subsequent Criminal Appeal, The Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36 *Adelaide Law Review* 211, 222.
[123] Sue Milne 'The Second or Subsequent Criminal Appeal, The Prerogative of Mercy and the Judicial Inquiry: The Continuing Advance of Post-Conviction Review' (2015) 36 *Adelaide Law Review* 211, 222.

is relevant, the current Government's commitment to reviewing mandatory sentencing and to tackling Indigenous incarceration both weigh towards a grant of mercy in Zak's case.

106. Fifthly, considerations of the separation of powers and the finality of judicial decisions have been said to inform the exercise of the prerogative.[124] In Zak's cases, the preservation of judicial authority tends *in favour* of mercy, because the judge himself recommended mercy.

REMISSION – STATUTORY POWER

107. The Administrator also has a statutory power to remit a sentence. This power is granted by section 114 of the *Sentencing Act* (NT), which relevantly provides:

> **Remission of sentence by Administrator**
> …
> (2) The Administrator may, by writing under his or her hand, order the remission, with or without conditions, of a sentence of imprisonment under, or in respect of an offence against, a law of the Territory.

108. The effect of a remission order is that "the consequences of conviction are ameliorated by the remission of the sentence of imprisonment such that the prisoner is discharged from having to serve what would otherwise have remained of the term of imprisonment."[125] It has been said of both common law and statutory remissions that "they do not operate upon the head sentence and non-parole period but advance the date of release thereunder."[126]

109. Properly characterised, this power is independent of the prerogative.[127] The statutory avenues discussed above (release on recognizance, release on undertaking, release on parole) are explicitly tied to the prerogative of mercy. Those provisions either use the words "the prerogative of mercy" or are conditioned on authorisation "on behalf of Her Majesty to extend mercy". In respect of the powers to release an offender on parole or an undertaking, these appear under a statutory heading unambiguous titled "Prerogative of Mercy".[128]

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[124] Martin Hinton and David Caruso, 'The Institution of Mercy' in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519, 528.
[125] Thomson Reuters, *The Laws of Australia* (as at 30 May 2012) 12 Criminal Sentencing, '8 Post-custodial Orders' [12.8.1370].
[126] Martin Hinton and David Caruso, "The Institution of Mercy" in Tom Gray, Martin Hinton and David Caruso (eds), *Essays in Advocacy* (Barr Smith Press, 2012) 519, 524. See also *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 368-369.
[127] A number of eminent scholars, including Professors Cheryl Saunders, Ian Freckleton and Mirko Bagaric, have drawn this distinction between the common law prerogative and statutory powers of remission. See Thomson Reuters, *The Laws of Australia* (as at 30 May 2012) 12 Criminal Sentencing, '8 Post-custodial Orders' [12.8.1370]; Thomson Reuters, *The Laws of Australia* (as at1 January 2015) 19 Government, '3 Executive' [19.3.710].
[128] Statutory headings form part of the legislation falling for interpretation – see *Interpretation Act* (NT), s 55(1).

110. Section 114(2), on the other hand, is deliberately located in a preceding part of the *Sentencing Act*, rather than under the heading "Prerogative of Mercy". The exclusion of s 114(2) from the part of the statute dealing explicitly with the prerogative is a powerful indicator that s 114(2) is not concerned with the prerogative.[129] This is unsurprising, as s 114(2) presents as a garden variety statutory grant of power to a member of the Executive, as is made clear by its boilerplate expression: "The Administrator may … order".

111. It might be true that the word "may" in s 114(2) reposes a discretionary power in the Administrator as to whether or not to remit a sentence.[130] It does not follow, however, that the Administrator's discretion is "arbitrary and unlimited".[131] Rather, the Administrator's discretion will be "confined … by the scope and purposes of the legislation".[132]

112. By the traditional principles of statutory interpretation – looking to text, context and purpose[133] – it is possible to identify a number of considerations that will be relevant to the Administrator's decision under s 114(2). These are discussed below.

Text

113. A consideration of s 114(2) must begin with the text.[134] The first, and perhaps most significant, textual feature is the use of the word "remission". This is not a word in ordinary usage but is instead a word with a long common law history against which it should be interpreted.[135] The use of the historically freighted word "remission" suggests that this statutory power is to be exercised in a manner analogous to historical remission powers (both common law and statutory). For present purposes, the most important result of this interpretative conclusion is that a prisoner's good behaviour will almost certainly be a relevant factor to the exercise of the power under s 114(2). After all, remissions

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[129] *Re Commercial Bank of Australia Ltd* (1893) 19 VLR 333, 375 (Holroyd J).

[130] See *Ward v Williams* (1955) 92 CLR 496, 505. It is not conceded, however, that "may" could never mean "must" in this provision. There may well be circumstances in which the provision could impose a positive, enforceable obligation on the Administrator to remit a sentence. See *Julius v Bishop of Oxford* (1880) 5 App Cas 214, 222-223; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106, 134-135; *Commissioner for Superannuation v Hastings* (1986) 70 ALR 625. Compare *Samad v District Court of New South Wales* (2002) 209 CLR 140, [33]-[36].

[131] *Shrimpton v Commonwealth* (1945) 69 CLR 613, 619-620; *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505; *R v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45, 49; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40.

[132] *O'Sullivan v Farrer* (1989) 168 CLR 210, 216.

[133] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381.

[134] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [47].

[135] *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 531.

were traditionally reserved for cases when a prisoner has been of good behaviour.[136]

114. The reference to "imprisonment" in s 114(2) is also informative; this confirms the historical understanding of the remission power that it may properly be ordered with respect to persons found guilty of serious crimes attracting sentences of imprisonment.

115. Also illuminating is the explicit power to impose "conditions" on a person whose sentence has been remitted. Conditional liberty is a concept that can be found at multiple places in the *Sentencing Act*,[137] and is an important mechanism for striking a balance between community protection, rehabilitation and the law's inherent preference for individual liberty. That s 114(2) permits a sentence to be remitted with conditions illustrates that it is anticipated that remission may be extended to persons who still pose some risk to the community or may require some further rehabilitation.

116. Another textual feature worthy of note is the requirement that a remission be "by writing". There are only a small number of instances in which the *Sentencing Act* specifically requires communications to be by writing.[138] It may be surmised that the requirement for "writing" in s 114(2) achieves at least two things. First, it reinforces the significance of the decision to remit a sentence and the legal consequences that flow from such a decision.[139] Secondly, it emphasizes the importance of the identity of the decision-maker.

117. The identity of a statutorily prescribed decision-maker will throw light on the nature of the power to be exercised.[140] In s 114(2), the legislative decision to assign the power to the Administrator – rather than the Attorney-General, a Judge or the Commissioner of Corrections – indicates a preference for a decision-maker outside of the internal workings of the justice system and outside of the political realm. From this, three things may be implied:

- First, political considerations will not normally be relevant to the exercise of the discretion (the Administrator being outside of the representative political process);
- Secondly, considerations of public safety may be relevant but will not usually be determinative in the exercise of the discretion (the Administrator being institutionally ill-suited to an assessment of such matters); and

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[136] *Hoare v The Queen* (1989) 167 CLR 348, 353-355. See also *R v Maguire and Enos* (1956) 40 Cr. App. R. 92, 94; *Menz and Royce v The Queen* [1967] SASR 329, 330-331.

[137] See, e.g., *Sentencing Act* (NT), ss 5(1)(b), 11(1)(c), 14(1), 39E, 39F, 39G, 42, 48E, 48F, 100, 101.

[138] See, e.g., *Sentencing Act* (NT), ss 34(2)(b), 81(2), 106B(8)(a).

[139] In this respect, the "by writing" requirement is analogous to the only formal requirement of the traditional common law prerogative in England, that it be executed under the Great Seal. See *Earl of Warwick's Case* (1699) 13 St. Tr. 939, 1015. See also *R v Milnes* (1983) 33 SASR 211, 216.

[140] Thomson Reuters, *The Laws of Australia* (as at 1 March 2014) 2 Administrative Law, '4 Irrelevant Considerations' [2.4.1040].

- Thirdly, considerations of the public interest may be relevant to the exercise of the discretion (the Administrator being a politically-neutral figure who has historically been charged with making decisions in the public interest).

Context

118. As to context, s 114(2) is a mechanism working within a broader statutory scheme established by the *Sentencing Act*. Within this broader scheme, s 114(2) is clearly intended to be remedial or beneficial, that is, it is intended to alleviate potential injustice and/or confer a benefit on an individual.[141] Accordingly, it should be construed liberally, that is to say in favour of the individual to whom the provision confers a benefit.[142] This interpretative approach has been endorsed with respect to other legal instruments governing remissions.[143]

119. As the nature of a power will inform considerations relevant to its exercise,[144] it may be concluded that the remedial nature of the s 114(2) power allows the Administrator wide latitude to consider any factor that might reasonably tend in favour of remission.

Purpose

120. The purpose[145] of the *Sentencing Act* will inform the meaning of s 114(2) and the considerations relevant to the exercise of the Administrator's power.

121. Section 5(1) of the *Sentencing Act* goes some way to illuminating the legislation's purpose. That sub-section explains that the only purposes for which a sentence may be imposed are: punishment; rehabilitation; general and specific deterrence; denunciation and community protection. It may be inferred that considerations of this nature are relevant to the exercise of the power in s 114(2).

122. To the extent that it is necessary,[146] the Second Reading Speech reveals that the reform and consolidation of the sentencing law in the *Sentencing Act* was intended to enhance public trust in the *just* and *effective* operation of the criminal justice system. The Second Reading Speech reads: "The aim is to provide fairness and effectiveness in sentencing and ensure community confidence in the ability of the criminal justice system to deal with offenders."[147] It may safely be said that public trust in the justice system is a relevant consideration to the Administrator's power under s 114(2).

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[141] See *Re McComb* [1999] 3 VR 485, 490.
[142] *Timothy v Munro* [1970] VR 528.
[143] *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364, 369.
[144] Thomson Reuters, *The Laws of Australia* (as at 1 March 2014) 2 Administrative Law, '4 Irrelevant Considerations' [2.4.1040].
[145] Purposive interpretation is required by *Interpretation Act* (NT), s 62A.
[146] Reference to the Second Reading Speech is permitted in certain circumstances by *Interpretation Act* (NT), s 62B.
[147] Northern Territory, *Parliamen*tary *Debates*, Assembly, 18 May 1995, (Mr Finch, Attorney-General).

Considerations in favour of remission in Zak's case

123. In light of the above description of the scope of the Administrator's discretion under s 114(2), it is clear that the following considerations weighing in favour of remission properly fall for consideration under the statute:

- the six years and 9 months Zak has already spent in custody are sufficient to give effect to three aims outlined in s 5(1) of the *Sentencing Act*: punishment, deterrence and denunciation;
- further imprisonment would actually be *contrary* to two aims outlined in s 5(1) of the *Sentencing Act*: rehabilitation and community protection (it is submitted that Zak presents no risk to the community and but that this risk may actually *increase* as a result of institutionalisation if he is imprisoned for a further 13 years):
- further imprisonment would be unjust in light of Zak's low moral culpability;
- further imprisonment might contravene Australia's human rights obligations under international law;
- further imprisonment would unnecessarily deprive Zak's family of his presence;
- remission is appropriate given Zak's good behaviour in prison;
- remission would tend to restore the public's confidence in the ability of government to correct grave injustices in the criminal justice system in a balanced way, given time served;
- remission would further the Northern Territory's commitment to addressing the over-incarceration of Indigenous people;
- remission would allow Zak to become a productive member of the Northern Territory community.

CONCLUSION

124. The High Court has remarked: "The whole history of criminal justice has shewn that severity of punishment begets the need of a capacity for mercy. … in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice."[148]

125. The wisdom of this remark is brought home by a case like Zak's, where the "rigidity of inexorable law" has produced a result that even the sentencing judge disagreed with and felt hampered by. Whether it is described as unique or, in the Chief Minister's words, "an anomaly",[149] Zak's case implicates all of the potential pitfalls of mandatory sentencing. Here we see fundamental rights

[148] *Cobiac v Liddy* (1969) 119 CLR 257. 269.

[149] Chief Minister Michael Gunner quoted in Ben Millington and Tom Maddocks, 'Zak Grieve: Mercy plea lodged in murder case', *ABC News* (online), 31 August 2017. <http://www.abc.net.au/news/2017-08-31/nt-administrator-rejects-claims-mercy-plea-for-zac-grieve/8858924>.

endangered, the rights of Indigenous and young people eroded, and the whole system of criminal justice diminished in the eyes of the public.

126. There could be no more appropriate case for the Administrator to exercise the prerogative or, as has been recommended above, to remit Zak's sentence such that, having already served a significant sentence of imprisonment, he be released immediately.

(20 July 2018)

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