

Zak Grieve: Murder, mercy and mandatory sentencing

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With thanks to Felicity Gerry QC, Rebecca Tisdale and Julia  
Kretzenbacher



*Government House  
Northern Territory*

Ms Rebecca Tisdale  
Deakin Law Clinic  
727 Collins Street  
MELBOURNE VIC 3000

Via email: [law-clinic@deakin.edu.au](mailto:law-clinic@deakin.edu.au)

Dear Ms Tisdale,

I refer to your correspondence dated 20 July 2018 and attached Petition for the Exercise of the Prerogative of Mercy on behalf of Mr Zak Grieve.

I have acted on the advice of the Executive Council to exercise the Prerogative of Mercy in favour of Mr Zak Grieve by reducing the non-parole period of his sentence for murder from 20 years to 12 years imprisonment.

Yours sincerely

A handwritten signature in cursive script that reads "Vicki O'Halloran".

Vicki O'Halloran AM  
Administrator of the Northern Territory

19 December 2018

## Structure of paper

1. Trial and sentence
2. Mercy petition
  1. Mandatory sentencing
  2. Lessons?

*The Queen & Zak Grieve* – episode 1

(00:00 – 07:55)

With thanks to Ivan O'Mahoney (director)

<https://www.theaustralian.com.au/news/investigations/the-queen-and-zak-grieve>

# The trial

“The mother who paid for an ex-lover’s murder; the son who organised the hit; the accomplice who turned against his mates; and the man who wasn’t there.” – Steven Schubert

4 people charged

3 accused go to trial

- Bronwyn Buttery (the mum)
- Christopher Malyschko (the son)
- Zak Grieve (the man who wasn’t there)

1 co-offender turned Crown witness (Darren Halfpenny)

100 witnesses

## The sentences

1. Bronwyn Buttery (the mum) – 8 years with 4 year NPP (manslaughter by provocation)
1. Christopher Malyschko (the son) – life with 18 year NPP
1. Darren Halfpenny (the co-offender turned Crown witness) – life with 20 year NPP
2. Zak Grieve (the man who wasn't there) – life with 20 year NPP

## Mildren J remarks on Zak's sentence

“I take no pleasure in this outcome. It is the fault of mandatory minimum sentencing provisions which inevitably bring about injustice.”

“Legislation of this kind is unprincipled and morally insensible; it cannot encompass the factual and moral distinctions between crimes essential to a just and rational sentencing policy.” (quoting Prof Norval Morris)

“However, the prerogative of mercy which rests with the Crown can still be enlivened. ... I recommend to the Administrator that after you have served a minimum of 12 years of that sentence ... you be released on parole”

## What is the prerogative of mercy?

The common law prerogative can be exercised to partially or entirely remove the “pains, penalties and punishments” associated with a conviction, although it does not remove the conviction itself. – *R v Foster* [1985] QB 115

The prerogative “is in no sense equivalent to an acquittal. It contains no notion that the [person] to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives [them] a new credit and capacity.” *R v Cosgrove* [1948] Tas SR 99



Where does the prerogative of mercy come from?

- 1688 Bill of Rights
- Constitution, s 61 (and letters patent to the Governors General, then *Australia Act 1986* (Cth), s 7)
- *Northern Territory (Self Government) Act 1978* (NT), ss 31 and 32

## Statutory avenues of the prerogative

1. Release on recognizance – s 432, *Criminal Code*
  
2. Release on undertaking – s 115(1)(a),  
*Sentencing Act*
  
1. Release on parole – s 115(1)(b), *Sentencing Act*

# The remission power

“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.” — *Sentencing Act*, s 114(2)

# Zak's mercy petition #1

To: Prime Minister Malcolm Turnbull

cc: Governor-General Peter Cosgrove  
Northern Territory Chief Minister Michael Gunner  
Northern Territory Administrator John Hardy  
Amnesty International

Dear sir,

I am the mother of Zak Grieve, who has been imprisoned for 20 years to life for murder under the mandatory sentencing laws of the Northern Territory, even though the judge found he wasn't there, that he did not do this, but that he failed to make a phone call to the police. Even the judge said it was an "injustice" in court, but his hands were tied.

I'm gutted. I'm frustrated. Confused by how to understand the law, the system. I understand there should be some punishment, but 20 years to life for not making a phone call? I can't fathom that. I'm bewildered. I'm a mother who's looking to you to find some sort of mercy. For your compassion, your consideration, for my plea to have my son released. So this is like an SOS. Even the judge said Zak should not spend that long in jail. Can you make sure he is released? Can you pardon Zak?

I believe he should not be in there. I believe he should be home with his family and I appreciate you taking the time to read this letter, for giving me some sort of hope that you are actually listening to a mother's plea to release my son who's been there six years already. It's just too severe. The sentence that my son has received is too severe. I understand he should receive something but not this. Not this. To take a young man's life away from him for one mistake.

I'm appealing to you as a parent, as a father. How would you feel if this happened to your child? What would you do? I need your help. Please help me.

Yours sincerely,



Glenice Grieve

# Zak's mercy petition #2

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.<sup>1</sup> 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*.

# Different audiences

1. “Reasons for bringing the petition”
  
2. “Grounds for seeking mercy”
  - i. Moral culpability
  - ii. Human rights
  - iii. Public interest

# NT mandatory sentencing for murder

- Mandatory life sentence
- “Standard” minimum NPP 20 years
- Heightened minimum NPP 25 years where victim police officer etc and murder occurred while victim carrying out their duties
- Discretion to impose a greater NPP or none at all
- Limited carve-out from “standard” NPP

# “Exceptional circumstances”

“For there to be exceptional circumstances sufficient to justify fixing a non-parole period [shorter than 20 years], the sentencing court must be satisfied of the following matters and must not have regard to any other matters:

- (a) The offender is:
  - i. otherwise a person of good character; and
  - ii. unlikely to re-offend;
- (b) The victim’s conduct, or conduct and condition, substantially mitigate the conduct of the defendant.”

*Sentencing Act, s 53A(7)*



# NT mandatory sentencing for murder

- 67 people imprisoned for life
- 65 with standard NPP or higher
- 2 established “exceptional circumstances”
- No empirical evidence to support efficacy

# CLANT's obsession with mandatory sentences

Year	Number of papers discussing mandatory sentencing	Authors
2017	2	Fyles; Martin
2015	4	Goldflam; Hu
2013	2	Riley; Yehia
2011	4	Coates; Cune

*The Queen & Zak Grieve* – episode 5

(00:00 – 01:05)

With thanks to Ivan O'Mahoney (director)

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# A.G. Fyles at CLANT 2017

“There are two key questions our government is looking at with mandatory sentencing:

- Is there evidence showing mandatory sentencing reduces crimes?
- What are the costs – both financially and socially of various forms of mandatory sentencing?”

# A last word from Mildren J

“Prescribed minimum mandatory sentencing provisions are the very antithesis of just sentences. If a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case.”

*Trenergy v Bradley* (1997) 6 NTLR 175

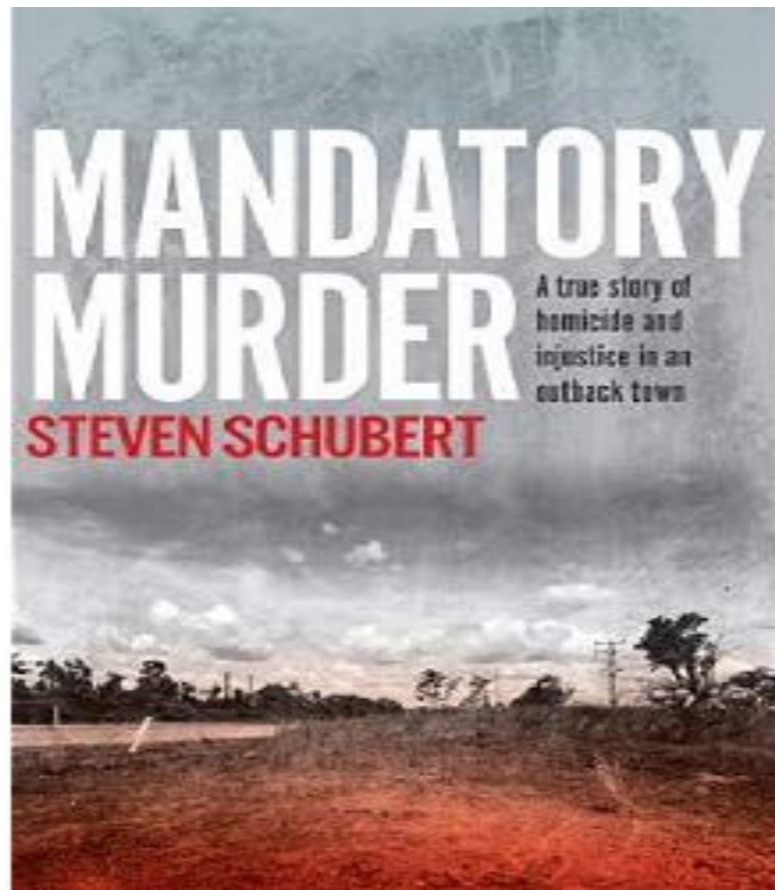
# Lessons learned

1. Judges

2. Prosecutors

1. Defence lawyers

# Further reading/watching



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