AN ANCIENT REMEDY FOR MODERN ILLS: THE PREROGATIVE OF MERCY AND MANDATORY SENTENCING

JULIAN R MURPHY, FELICITY GERRY QC, REBECCA TISDALE AND JULIA KRETZENBACHER*

The prerogative of mercy is an ancient power to forgive, or temper the punishment of, a legal wrong. In the Middle Ages in England, and later in colonial Australia, it was regularly used to spare the lives of persons found guilty of offences carrying mandatory death sentences. Scholarship and case law considering the prerogative of mercy in the United Kingdom and Australia have almost exclusively focused on its application to pardon persons whose convictions are attended by doubt, irregularity or other infirmity. This article takes a different perspective, highlighting the continued, albeit limited potential application of the prerogative of mercy to alleviate the injustices occasioned by mandatory sentencing. This potential application of the prerogative of mercy is explored in its historical, theoretical and contemporary dimensions, with the contemporary discussion focusing on a recent Australian case study. Drawing upon the case study and the historical and theoretical discussion, this article concludes by making practical recommendations as to how defence lawyers might begin to more regularly petition for mercy in mandatory sentencing cases.

I INTRODUCTION

Historically, the prerogative of mercy ('the prerogative') is a power to forgive, or temper the punishment of, a legal wrong.[1] It has been described as 'an integral element in the criminal justice system'.[2] Yet the prerogative is too often misunderstood or simply ignored by criminal law practitioners and commentators. This article seeks to reverse this trend and revive the prerogative in the theory

* Julian R Murphy (PhD Candidate, Melbourne Law School; Barrister, Victorian Bar); Felicity Gerry QC (Professor, Deakin Law School; Adjunct Fellow, Charles Darwin University; Barrister, Bars of Victoria and England and Wales); Rebecca Tisdale (Clinical Solicitor, Deakin Law School); Julia Kretzenbacher (Barrister, Victorian Bar).

1 CH Rolph, *The Queen's Pardon* (Cassell, 1978) 2; *R v Milnes* (1983) 33 SASR 211, 216–17 (Cox J) ('*Milnes*').

2 *Jasmin v The Queen* (2017) 51 WAR 505, 514 [25] (Buss P) ('*Jasmin*'). See also *Burt v Governor-General* [1992] 3 NZLR 672, 681–2 ('*Burt*').

and practice of Australian criminal law. In the United States, Barack Obama, writing in the *Harvard Law Review*, described his administration's efforts to 'reinvigorate' the pardon power as a systemic means to 'correct injustices' in sentencing, particularly mandatory sentencing.[3] There are good reasons why a similar project should be undertaken in Australia, where mandatory sentencing laws are also producing injustices of the type to which the Obama administration was responding. This article, written by the four drafters of a recent successful mercy petition in the Northern Territory of Australia on behalf of an Aboriginal man, makes the case for a revival of the use of the prerogative in the administration of criminal justice in Australia and makes practical recommendations as to how defence lawyers might better advise and assist their clients in bringing mercy petitions and associated applications, particularly in the mandatory sentencing context.

Functionally, the prerogative in Australia operates in two distinct ways — to pardon those whose convictions are attended by particular concern or to alleviate unjust sentences. (These operations are distinct but not disjunctive, in some cases, error in the conviction and unjustness in the sentence might both be asserted.) A central element of this article's contribution is to emphasise the prerogative's capacity to alleviate sentences, rather than its more celebrated yet controversial application to pardon those whose convictions are attended by error, doubt or other infirmity. Perhaps because of the public fascination with wrongful convictions, most Australian scholarship on the prerogative has been directed to this issue.[4] The focus of prerogative scholarship on wrongful convictions has, however, obscured the prerogative's more quotidian application to alleviate sentencing injustices. As legislative rights to second appeals against convictions have spread across Australia,[5] this article considers mechanisms for challenging sentences where the courts are restricted by mandatory sentencing laws.

Sentencing injustices arise far more often than wrongful convictions. After all, approximately 83% of persons in Australia's criminal justice system plead guilty.[6] Allowing for the small percentage of cases in which an accused has not

3 Barack Obama, 'The President's Role in Advancing Criminal Justice Reform' (2017) 130(3) *Harvard Law Review* 811, 838.

4 See, eg, Alex C Castles, 'Executive References to a Court of Criminal Appeal' (1960) 34(6) *Australian Law Journal* 163; Lynne Weathered, 'Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia' (2005) 17(2) *Current Issues in Criminal Justice* 203; Bibi Sangha and Robert Moles, 'Mercy or Right? Post-Appeal Petitions in Australia' (2012) 14(2) *Flinders Law Journal* 293 ('Mercy or Right?'); Bibi Sangha and Robert Moles, 'Post-Appeal Review Rights: Australia, Britain and Canada' (2012) 36(5) *Criminal Law Journal* 300; 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(1) *Adelaide Law Review* 211.

5 See generally Milne (n 4).

6 The figure of 83% is drawn from a review of data from the New South Wales District Court between 2011 and 2013: see Clare Ringland and Lucy Snowball, 'Predictors of Guilty Pleas in the NSW District Court' (Issue Paper No 96, NSW Bureau of Crime Statistics and Research, August 2014) 3.

been properly advised, or has entered a 'convenience plea',[7] in the vast majority of cases there is no question as to the integrity of the conviction. What *is* vigorously disputed in many cases, however, is the appropriateness of the sentence handed down, whether after a trial or a plea of guilty. The appropriate sentence type and duration is usually hotly contested at first instance, and regularly appealed.[8] Whilst it is understandable that wrongful convictions gain significant media and public attention, it is difficult to justify or explain the scholarly silence on the prerogative's application to unjust sentences, especially where sentencing contests comprise the bulk of the work of the criminal justice system. This absence of analysis is even more puzzling in light of the history of the prerogative in Australia, which saw it as primarily directed to alleviating unjust sentences, rather than responding to doubtful convictions. This article thus seeks not just to reinvigorate the prerogative in practice, but also to reorientate scholarship to a more concerted and responsible focus on the most wide-reaching potential application of the prerogative, namely, its application to sentences.

The article is structured in four parts. First, a survey of the prerogative's origins, development and present iteration. This descriptive component of the article is necessary because of the relative dearth of Australian scholarship on the prerogative,[9] particularly with respect to its application to alleviate sentences.[10] The second part of the article mounts the argument that the prerogative might helpfully respond to the injustices and anomalies produced by mandatory sentencing regimes in Australia. In the third part of this article, we develop the analysis through a case study of a recent successful mercy petition. Finally, we conclude by distilling practical recommendations as to how defence lawyers might begin to more regularly petition for mercy in mandatory sentencing cases. If the prerogative is in fact an 'integral element'[11] of the criminal justice system, there is good reason to suggest that it should be more regularly engaged in response to

7 For a discussion of some of the issues attending 'convenience pleas' in Australia, see Peter Hidden, 'Plead Guilty and Get It Over With?' [1991] (Summer) *Bar News* 19.

8 The Victorian Sentencing Advisory Council found that approximately 12% of sentences handed down by Victorian higher courts were appealed in financial year 2013–14: see Dennis Byles and Paul McGorrery, Sentencing Advisory Council (Vic), *Sentence Appeals in Victoria: Second Statistical Research Report* (Report, August 2018) 13.

9 The neglect of the prerogative in academic literature is so widespread that the neglect itself has become a trope in the extant commentary: see, eg, ATH Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' [1983] (Autumn) *Public Law* 398, 398; Joseph Azize, 'The Prerogative of Mercy in NSW' (2007) 1(6) *Public Space: The Journal of Law and Social Justice* 1, 1. Note, however, that there is a significant body of literature exploring the history of the prerogative: see, eg, Carrel Inglis Clark, 'The Judiciary and the Prerogative of Mercy' in Richard Ely (ed), *Carrel Inglis Clark: The Supreme Court of Tasmania, Its First Century, 1824–1924* (University of Tasmania Law Press, 1995) 118; David Plater and Penny Crofts, 'Bushrangers, the Exercise of Mercy and the "Last Penalty of the Law" in New South Wales and Tasmania 1824–1856' (2013) 32(2) *University of Tasmania Law Review* 295; David Plater and Sue Milne, '"All That's Good and Virtuous or Depraved and Abandoned in the Extreme"? Capital Punishment and Mercy for Female Offenders in Colonial Australia, 1824 to 1865' (2014) 33(1) *University of Tasmania Law Review* 83.

10 A recent and welcome exception to this rule is Catherine Dale Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *University of New South Wales Law Journal* 1328. See also Azize (n 9) 8–11.

11 *Jasmin* (n 2) 514 [25] (Buss P).

failings of that system.

II THE PREROGATIVE OF MERCY

The prerogative of mercy is little understood in Australian criminal law. This is somewhat unsurprising. The prerogative is an outlier in many respects. In an 'age of statutes',[12] the prerogative remains uncodified. The prerogative allows the executive to effectively interfere with the results of the criminal process in a way that appears to be in tension with Australia's strict separation of powers.[13] Also, anomalously, the prerogative reposes a very wide[14] — if not absolute — discretion in a decision-maker in a way that sits uneasily with modern administrative law.[15] Finally, the irregular usage of the prerogative may well be contributing to a level of ignorance and under-appreciation of its value, which this article seeks to remove. It is therefore useful to preface our argument for its reinvigoration with a brief account of its operation. As with other prerogative powers, 'the proper approach is a historical one' whereby one asks: 'how was it used in former times and how has it been used in modern times?'[16]

A *English Origins of the Prerogative and Its Operation in Australia*

The prerogative powers comprise 'a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority'.[17] Within this residue exist a number of powers that have come collectively to be known as the prerogative of mercy. In essence, these powers allow the executive to conditionally or unconditionally pardon a person or alleviate their sentence (a more precise description of the different ways in which the prerogative operates in Australia is provided below in Part II(B)).

12 *Buck v Comcare* (1996) 66 FCR 359, 365 (Finn J). Credit for coining the phrase 'age of statutes' is usually attributed to Guido Calabresi: see Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982).

13 See David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312, 331–7.

14 In *Jasmin* (n 2), the prerogative was described as 'purely a discretionary act': at 514 [24] (Buss P), citing *de Freitas v Benny* [1976] AC 239, 247 (Lord Diplock). Elsewhere the nature of the discretion has been described as 'complete' or 'unconfined and uncontrolled': see respectively *Aylett v The Queen* [1956] Tas SR 74, 81 (Crisp J); *Von Einem v Griffin* (1998) 72 SASR 110, 130 (Lander J).

15 Rachel E Barkow, 'The Ascent of the Administrative State and the Demise of Mercy' (2008) 121(5) *Harvard Law Review* 1332, 1334–5.

16 *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75, 101 (Lord Reid).

17 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 409 (Lord Diplock), quoted with approval in *Jarratt v Commissioner of Police (NSW)* (2005) 224 CLR 44, 68 [80] (McHugh, Gummow and Hayne JJ). See also Dicey's explanation of prerogative powers as 'nothing else than the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown': AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 8th ed, 1915) 420.

The prerogative of mercy can be traced back to ancient Athens.[18] Focussing on English and Australian sources for the purposes of this article, history relates the use of the power to pardon in the Middle Ages for persons who killed in self-defence and would otherwise have been liable to a mandatory death sentence (self-defence not having yet developed into a substantive defence).[19] In the 15th century, the power was confined to offences that were *malum prohibitum* (wrong because it is prohibited) as opposed to *malum in se* (wrong in itself), before the prerogative came to be more frequently exercised in the 16th century.[20] At around this time it appears that feudal lords (the 'lords of the marches') claimed the right to pardon offenders independently of the monarch.[21] That practice was put to an end by the 1688 Bill of Rights, which made clear that the pardon power rested solely with the King.[22] That power was exercised increasingly often in the 18th century in England so that perhaps half of all death sentences were 'commuted'[23] to transportation.[24] Many of the beneficiaries of the prerogative were transported to the Australian colonies, with one scholar suggesting that one third of the convicts on the First Fleet were recipients of the prerogative.[25] Conceding the historical importance of examining the movement of prerogative powers from England to Australia,[26] our primary focus remains on how it was and is being used in Australia.

In the Australian colonies, the prerogative resided with the Imperial Crown but was delegated to Governors by letters of commission and royal instructions. For example, when Victoria separated from New South Wales in 1851, the Lieutenant-Governor's Commission empowered him to remit fines and penalties

18 Greentree (n 10) 1334, citing Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge, 2015) 6. Other writers have noted early antecedents to the prerogative of mercy in the Code of Hammurabi (approximately 1754 BCE) and the amnesties of the Han dynasty in China (starting approximately 202 BCE): see David Tait, 'Pardons in Perspective: The Role of Forgiveness in Criminal Justice' (2000–01) 13(3–4) *Federal Sentencing Reporter* 134, 134.

19 Rolph (n 1) 19. See also *R v Secretary of State for the Home Department, Ex parte Bentley* [1994] QB 349, 357 (Watkins and Neill LJJ and Tuckey J) ('*Bentley*'); Stanley Grupp, 'Some Historical Aspects of the Pardon in England' (1963) 7(1) *American Journal of Legal History* 51, 60.

20 Rolph (n 1) 19–20.

21 Joseph Chitty, Jun, *A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject* (Joseph Butterworth and Son, 1820) 89.

22 *Bill of Rights 1688*, 1 Wm & M sess 2 c 2. For early statutory reference to the pardon see *Jurisdiction in Liberties Act 1535*, 27 Hen 8 c 24 (emphasising the royal character of the pardon, such that it could not be exercised by lords of the marches).

23 The language of 'commutation' is problematic, and might better be expressed as a 'conditional pardon': see Peter Brett, 'Conditional Pardons and the Commutation of Death Sentences' (1957) 20(2) *Modern Law Review* 131, 131. See also *Ex parte Lawrence* (1972) 3 SASR 361, 368 (Bray CJ, Zelling J agreeing at 373).

24 Leon Radzinowicz, *A History of English Criminal Law and Its Administration from 1750* (Stevens and Sons, 1948) vol 1, 159–61. For further discussion of the pardon power in the 18th century, see Douglas Hay, 'Property, Authority and the Criminal Law' in Douglas Hay et al, *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Pantheon Books, 1975) 17, 32.

25 GD Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788–1900* (Federation Press, 2002) 5.

26 See, eg, Hamish Maxwell-Stewart, '"To Fill Dishonoured Graves"? Death and Convict Transportation to Colonial Australia' (2011) 58(1) *Papers and Proceedings: Tasmanian Historical Research Association* 17.

as well as to pardon, suspend or alleviate punishment.[27] In practice, it appears that the prerogative was often exercised on advice from members of the colonial government. So, for example, in Victoria, the royal instructions required a meeting of the Executive Council to consider the exercise of the prerogative in cases involving the death penalty.[28] In all other cases, a circular issued in 1875 to Governors of the Australasian colonies stated that the Governors should obtain advice from the relevant Minister or Ministers.[29] Over time, Governors and Administrators came to symbolise states, rather than the Crown, but, although seemingly parochial, the power of pardon as an exercise in mercy remained an executive function.[30]

It appears that the prerogative of mercy was 'used extensively' in colonial Australia.[31] Just as the British exercise of the prerogative facilitated the initial convict migration to the Australian continent, so too the domestic exercise of the prerogative 'served a vital role in the development of the colony of NSW' and the other Australian colonies.[32] In early 19th century New South Wales, records indicate that hundreds of conditional and unconditional pardons were granted each year.[33] In 1872, the Victorian Premier and Attorney-General described the Governor's pardon as 'in every day practice'.[34] It appears that the youthfulness of offenders was a particular matter attracting the exercise of the prerogative in these times, especially to avoid the death sentence.[35] Similarly, at the same time in England, it appears that mental health or disability was a factor weighing towards the exercise of the prerogative. In 1864 a 'feeble minded youth' and 'a miserable halfwit' was granted a conditional pardon for his role in the attempted assassination of the Queen.[36]

On Federation, by virtue of s 61 of the *Australian Constitution*,[37] the prerogative was vested in the Governor-General of Australia (and, separately, in the Governors of each state), although it was said that the exact scope of the power turned on

27 Edward Jenks, *The Government of Victoria (Australia)* (Macmillan, 1891) 157.

28 Ibid 158.

29 Circular Despatch from Lord Carnarvon to Governors of the Australasian Colonies, 4 May 1875, quoted in Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 664.

30 Twomey (n 29) 664–5. See also JM Bennett, 'The Royal Prerogative of Mercy: Putting in the Boots' (2007) 81(1) *Australian Law Journal* 35, 36–9, 47.

31 *Milnes* (n 1) 216 (Cox J).

32 Greentree (n 10) 1335.

33 Chief Justice JJ Spigelman, 'The Macquarie Bicentennial: A Reappraisal of the Bigge Reports' (Annual History Lecture, History Council of New South Wales, 4 September 2009) 12 <https://historycouncilnsw.org.au/wp-content/uploads/2013/01/2009-AHL-Spigelman.pdf>.

34 Sir James Martin, Minutes to Circular Dispatch of 1 November 1871 (11 April 1872), quoted in Bennett (n 30) 37.

35 Bennett (n 30) 38–9.

36 Rolph (n 1) 16.

37 See *Davis v Commonwealth* (1988) 166 CLR 79, 93 (Mason CJ, Deane and Gaudron JJ), citing *Commonwealth v The Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 437–9 (Isaacs J).

the wording of the particular letters patent.[38] The scope of the prerogative so conferred is well-illustrated by the letters patent constituting the office of the Governor-General of Victoria, dated 29 October 1900:

> [T]he Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon … either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence [passed on such offender] for such period as the Governor thinks fit; and further, may remit any fines, penalties, or forfeitures due or accrued to Us …[39]

With the passage of the *Australia Act 1986* (Cth) ('*Australia Act*') and the *Australia Act 1986* (UK), the minutiae of letters patent need no longer trouble petitioners for mercy. Section 7(2) of the *Australia Act* now operates to conclusively repose in the Governor 'all powers and functions of her Majesty in respect of a State'. While s 7(5) asserts that advice to her Majesty is to be provided by the Premier, that general statement obscures more nuanced governmental machinations. In New South Wales, advice is received from the Executive Council and the Attorney-General.[40] Similarly, in South Australia, the Governor refers all petitions to the Premier for the views of the Executive Council.[41] In Victoria, the Governor receives advice from the Premier pursuant to s 87E(b) of the *Constitution Act 1975* (Vic), however 'in practice the views of the Attorney-General are decisive'.[42] (It should be noted, however, that a petition directly addressed to the Attorney-General might not be considered legally effective.)[43] The views of the Attorney-General's department also appear to be especially significant in the Northern Territory, where petitions are referred directly from the Administrator to the Attorney-General.[44]

38 *Re an Arbitration between the Standard Insurance Co Ltd and Macfarlan* [1940] VLR 74, 82.

39 Muir McKenzie, 'Letters Patent Passed under the Great Seal of the United Kingdom Constituting the Office of Governor of the State of Victoria and Its Dependencies, in the Commonwealth of Australia' in Victoria, *Victoria Government Gazette*, No 2, 28 December 1900, 7, 8 cl IX, quoted in ibid 82. The corresponding letters patent for the other states appear to be in identical terms: see, eg, Muir McKenzie, 'Letters Patent Passed under the Great Seal of the United Kingdom, Constituting the Office of Governor of the State of New South Wales and Its Dependencies, in the Commonwealth of Australia' in New South Wales, *Government Gazette of the State of New South Wales*, No 1, 1 January 1901, 2, 3 cl IX, quoted in *Kelleher v Parole Board of New South Wales* (1984) 156 CLR 364, 371 (Wilson J, Dawson J agreeing) ('*Kelleher*'). For a copy of the Tasmanian letters patent, see RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 4th ed, 1977) app IV.

40 Twomey (n 29) 665.

41 See 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, 523.

42 Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 104. Taylor explains in a footnote: 'I am informed that the Attorney-General's views are always sought and that no case is known in which they have been departed from': at 104 n 209.

43 *R v Davies* [1937] VLR 150, 154.

44 See, eg, Amos Aikman, 'Grieve's Mercy Plea Gets Closer', *The Australian* (online, 4 September 2017) <https://www.theaustralian.com.au/news/investigations/the-queen-and-zak-grieve/zak-grieves-mercy-plea-moves-a-step-closer/news-story/14a52030409c063fcf7e5cd92cfb98a5>.

Putting aside the regional variances in the decision-making process leading to the exercise of the prerogative, its execution is largely unencumbered by formal requirements. Historically, the only requirement was that the prerogative was executed under the 'great seal'.[45] In present day Australia, an informal call by the Governor to a television station will probably not do,[46] but a letter signed by the relevant Governor would appear to suffice.[47]

B *The Flexibility of the Prerogative*

All prerogative powers are, in some sense, residual and for that reason difficult to categorise; however, common applications can be described. Such descriptions are helpful because, rather than conveying strict limits to the prerogative, they illustrate its inherent nature as a 'flexible power', the exercise of which 'can and should be adapted to meet the circumstances of the particular case'.[48] The flexibility of the prerogative will thus be briefly discussed here, so as to inform discussion in the later parts of this article in which the flexible character of the prerogative is argued to recommend it as a response to the rigidity of mandatory sentencing.

As was explained above in Part II(A), the prerogative may operate — conditionally or unconditionally — to either pardon a person or alleviate their sentence. Technically, it is probably true — as FW Maitland observed over a century ago[49] — that the power to pardon and alleviate sentence are one and the same power, exercised to differing degrees. Yet for practical purposes, the two ways in which the prerogative may be exercised are best distinguished.[50] As to the former — the 'pardon power' — 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'.[51] As to the latter iteration of the prerogative — the power to alleviate sentence — the prerogative may partially or entirely remove the 'pains[,] penalties and punishments' associated with a conviction.[52] This is most commonly called remission, 'which is the reduction of the amount of a sentence

45 In *The Trial of Edward Earl of Warwick and Holland, before the House of Lords, for the Murder of Richard Coote, Esq* (1699) 13 St Tr 939 ('*Earl of Warwick's Case*') it was said 'it is the great seal that speaks the king's last and irrevocable intent, and passeth the pardon': at 1015.

46 *Milnes* (n 1) 222–3 (Cox J), 234 (Wells J, White J agreeing at 237), 238–9 (Legoe J).

47 WL Stuart, 'The King's Pardon' (1907) 4(6) *Commonwealth Law Review* 241, 242.

48 *Bentley* (n 19) 365.

49 FW Maitland, *The Constitutional History of England* (Cambridge University Press, 1908) 476, 480. See also Brett (n 23) 131.

50 See *Bentley* (n 19) 357.

51 *R v Cosgrov*e [1948] Tas SR 99, 106 (Morris CJ) ('*Cosgrove*').

52 *R v Foster* [1985] QB 115, 127 ('*Foster*').

or penalty without changing its character'.[53] (Closely associated with this power is a slightly different one, not considered further here: the power of reprieve, which is 'a temporary postponement of the execution of a sentence imposed by the court'.)[54] Whether it operates either to pardon or to alleviate sentence, it is worth noting that the prerogative is flexible enough to operate after a guilty plea[55] and even after a sentence has been imposed and the petitioner has passed away.[56]

Another way of illustrating the flexibility of the prerogative is to identify its very few limits. The two most important limits are that the prerogative cannot substitute one punishment for another,[57] nor can it operate to expunge a conviction.[58] Associated with this second limit is the fact that the prerogative does not extend to empowering an order for a retrial or re-hearing.[59] Less important limits to the prerogative are that it cannot be exercised in anticipation of a crime (ie before the crime has been committed),[60] may not be exercised in respect of a private prosecution or in response to a contempt of court in civil proceedings.[61]

Without detracting from the flexible nature of the prerogative, it can be summarised as having five potential operations:

i. To offer a respite, or reprieve, from a sentence;

ii. Without altering the head sentence, to release a person from the obligation to serve a sentence, or part of a sentence, in custody;[62]

iii. Without altering the head sentence, to release a person from the obligation to serve a sentence, or part of a sentence, in custody, but to require the person to be subject to conditions;[63]

53 Brett (n 23) 131.

54 Ibid.

55 One celebrated early example of the prerogative being exercised after a guilty plea is provided by Frances Bacon, Lord Chancellor of England, who, in 1621, pleaded guilty to corruption charges yet ultimately had his sentence remitted by the King: see Matthew Parris and Kevin Maguire, *Great Parliamentary Scandals: Five Centuries of Calumny, Smear and Innuendo* (Robson Books, 2004) 8–9.

56 As to the posthumous application of the prerogative, see *Re Ross* (2007) 19 VR 272, 275 [7] (Teague, Cummins and Coldrey JJ) ('*Re Ross*'); *R v Bentley (deceased)* [2001] 1 Cr App R 21, [3] (Bingham LCJ).

57 *Ex parte Lawrence* (1972) 3 SASR 361, 368, 371 (Bray CJ). See also *Re Effect of the Exercise by His Excellency the Governor General of the Royal Prerogative of Mercy upon Deportation Proceedings* [1933] SCR 269, 274 (Duff CJ).

58 *Cosgrove* (n 51) 105–6 (Morris CJ); *Foster* (n 52) 130 (Watkins, May LJJ and Butler-Sloss J).

59 Rolph (n 1) 3. Note that in 1879 the Criminal Code Commission recommended extending the power of mercy to the Secretary of State (now vested in the Lord Chancellor and Secretary of State for Justice) to direct a retrial but this instead was given to the courts pursuant to the *Indictable Offences Act 1848* (UK), which established the Court for Crown Cases Reserved (later the English Court of Appeal): ibid.

60 *R v Stead* [1994] 1 Qd R 665, 668–9. Note, however, that the prerogative can be exercised before conviction, albeit after the commission of the crime. As much appears to have been assumed in *Milnes* (n 1). See also Smith (n 9) 413–17.

61 Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 92. For other discrete limits to the prerogative, see Smith (n 9) 408–10.

62 *Kelleher* (n 39) 367 (Mason J).

63 Ibid 368 (Mason J). See also *R v Governor of Pentridge; Ex parte Arthur* [1979] VR 304, 308 (Young CJ).

iv. Without altering the conviction, to pardon a person on conditions;[64]

v. Without altering the conviction, to unconditionally pardon a person.[65]

It is primarily to the second and third of these operations that this article is directed, as these are best adapted to ameliorate the injustices of mandatory sentencing. However, before proceeding, it is important to say something about the statutory analogues to the prerogative as these are capable of having a similar ameliorative effect.

C *Statutory Analogues to the Prerogative of Mercy*

In many Australian jurisdictions,[66] the prerogative has been supplemented by analogous statutory powers.[67] These statutory powers range from limited powers to remit monetary penalties and property forfeitures,[68] to more robust powers to order the discharge of an offender from a term of imprisonment.[69] In their most powerful iteration, the statutory analogues include a pardon power.[70] The Australian Capital Territory's ('ACT') legislation is the most comprehensive, and thus serves as a helpful illustration of the potential scope of statutory analogues to the prerogative. The following is excerpted from the *Crimes (Sentence Administration) Act 2005* (ACT):

> **Remissions and pardons**
>
> **313 Remission of penalties**
>
> The Executive may, in writing, remit partly or completely any of the following in relation to a person convicted or found guilty of an offence:

64 Brett (n 23); Smith (n 9).

65 Brett (n 23); Smith (n 9).

66 New South Wales, Queensland and South Australia do not appear to have any sort of statutory remissions powers, although some Queensland prisoners may still be eligible for a remission under the repealed statutory remission power: see *Corrective Services Act 2006* (Qld) s 401 ('*Qld Corrective Services Act*'). Note that state and territory law on remissions applies to federal offenders held in state or territory prisons: see *Crimes Act 1914* (Cth) s 19AA(1). Furthermore, federal offenders sentenced before 1 July 1990 may be eligible for remission under *Commonwealth Prisoners Act 1967* (Cth) s 19 (now repealed).

67 This analysis does not cover statutory powers that are not analogous to the prerogative of mercy but do involve some interference with a sentence, for example the power to release a prisoner shortly before the completion of their sentence: *Prisons Act 1981* (WA) s 31; *Qld Correctives Services Act* (n 66) s 110.

68 See, eg, *Sentencing Act 1995* (WA) s 139 ('*WA Sentencing Act*'); *Sentencing Act 1997* (Tas) s 98 ('*Tas Sentencing Act*'); *Sentencing Act 1991* (Vic) s 108 ('*Vic Sentencing Act*'); *Crimes (Sentence Administration) Act 2005* (ACT) ss 313(b)–(c) ('*Crimes (Sentence Administration) Act*').

69 *Sentencing Act 1995* (NT) s 114(2); *Crimes (Sentence Administration) Act* (n 68) s 313(a); *Qld Corrective Services Act* (n 66) s 75 (note that while s 75 has been repealed, it remains applicable to certain prisoners by virtue of s 401); *Corrections Act 1997* (Tas) ss 86–7 ('*Tas Corrections Act*'); *Corrections Regulations 2018* (Tas) rr 25–6; *Corrections Act 1986* (Vic) s 58E; *Corrections Regulations 2019* (Vic) r 100. See also Julian R Murphy, 'Pandemic Sentence Remissions: A Model for Executive Decarceration During and Following COVID-19' (2021) 33(1) *Current Issues in Criminal Justice* 47.

70 See, eg, *Crimes (Sentence Administration) Act* (n 68) s 314.

(a) a sentence of imprisonment;

(b) a fine or other financial penalty;

(c) a forfeiture of property.

314 Grant of pardons

(1) The Executive may, in writing, pardon a person in relation to an offence of which the person has been convicted or found guilty.

(2) The pardon discharges the person from any further consequences of the conviction or finding of guilt for the offence.

314A Grant of pardons

The prerogative of mercy is not affected …

As s 314A of the ACT legislation makes clear,[71] statutory analogues to the prerogative are designed to run 'parallel'[72] with the prerogative, without limiting its operation in any way. Even without a provision such as s 314A, there is an 'extremely strong' presumption of statutory interpretation that preserves prerogative powers from statutory encroachment absent a 'clear and unambiguous provision'.[73] This article is primarily concerned with the prerogative itself, rather than its statutory analogues. However, it is convenient to make a few observations about the statutory analogues because they too might be employed to alleviate unjust mandatory sentences using similar arguments to those advanced in Parts III(C) and IV of this article with respect to the prerogative proper.

Statutory analogues to the prerogative are expressed in language suggestive of a broad discretion in the executive decision-maker. Typically, as is the case in the ACT legislation, this is achieved by conferring the power in permissive language, such as using the word 'may'.[74] However, the statutory powers are not

71 See also *WA Sentencing Act* (n 68) s 317; *Tas Sentencing Act* (n 68) s 97; *Tas Corrections Act* (n 69) s 89; *Vic Sentencing Act* (n 68) s 106; *Qld Corrective Services Act* (n 66) s 346(1).

72 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 12 [1.25].

73 *Barton v Commonwealth* (1974) 131 CLR 477, 488 (Barwick CJ). See also John Goldring, 'The Impact of Statutes on the Royal Prerogative: Australasian Attitudes as to the Rule in Attorney-General v De Keyser's Royal Hotel Ltd' (1974) 48 (September) *Australian Law Journal* 434.

74 As to the use of the statutory word 'may' to repose a discretion, see *Ward v Williams* (1955) 92 CLR 496, 504–5 (Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ). Of course, 'may' sometimes means 'must' such that, in rare instances it may be argued that the considerations weighing towards remission may be so strong that it is a legally compellable power: see generally *Julius v Bishop of Oxford* (1880) 5 App Cas 214, 222–3; *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106, 134–5 (Windeyer J); *Commissioner for Superannuation v Hastings* (1986) 70 ALR 625. Cf *Samad v District Court of New South Wales* (2002) 209 CLR 140, 152–3 [33]–[36] (Gleeson CJ and McHugh J).

'arbitrary and unlimited'.[75] Rather, statutory analogues to the prerogative will be 'confined … by the scope and purposes of the legislation'.[76] In particular, it may be expected that statutory analogues to the prerogative will be exercised by taking into account similar considerations to those informing the exercise of the prerogative itself. This will especially be the case where, as is the case in the ACT legislation, the power is granted using historically freighted language such as 'remission' or 'pardon'.[77] Finally, when considering the statutory analogues to the prerogative it is important to remember that they are 'remedial provision[s] … to be given a liberal interpretation, so as to give the fullest relief which the fair meaning of [the] language will allow'.[78]

D *Statutory Referral and Opinion Powers*

In addition to the statutory analogues to the prerogative discussed above, additional statutory powers operate in conjunction with, or as an 'adjunct'[79] or 'supplement'[80] to, the prerogative of mercy.[81] The general effect of these provisions is to create mechanisms for the involvement of state and territory courts in the consideration of mercy petitions in two distinct ways: by a 'reference power' and an 'opinion power'.[82] All Australian states and territories, except for the ACT,[83] have some statutory version of the reference power[84] and the opinion power.[85] Persons convicted of federal offences in state courts are also eligible for these procedures, as s 68(2) of the *Judiciary Act 1903* (Cth) applies the state legislation by analogy to federal convictions and thus allows the federal Attorney-General,

75 *Shrimpton v Commonwealth (*1945) 69 CLR 613, 619–20 (Latham CJ); *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492, 505 (Dixon J). See also *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. Cf Dicey (n 17) 420, where the prerogative is described as the 'residue of discretionary or arbitrary authority'.

76 *O'Sullivan v Farrer* (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).

77 For a discussion of the interpretative significance of common law terms in statutes see *Attorney-General (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469, 531 (O'Connor J).

78 *Jasmin* (n 2) 529 [96] (Buss P).

79 *Martens v Commonwealth* (2009) 174 FCR 114, 120 [23] (Logan J) ('*Martens*').

80 Hinton and Caruso (n 41) 520.

81 For a discussion of the historical origins of these provisions, see Castles (n 4) 163–4.

82 The distinction between 'reference' and 'opinion' powers is gratefully adopted from Hinton and Caruso (n 41) 521. For an early and insightful discussion of the distinction see *R v Gunn [No 1]* (1942) 43 SR (NSW) 23, 25 (Jordan CJ, Davidson J agreeing at 26) ('*Gunn [No 1]*').

83 The ACT has a different 'inquiry' scheme, that is not contingent upon the receipt of a petition for mercy: see *Crimes Act 1900* (ACT) pt 20.

84 *Criminal Code Act 1983* (NT) ss 431(a), 433A ('*NT Criminal Code Act*'); *Criminal Code Act 1899* (Qld) s 672A(a) ('*Qld Criminal Code Act*'); *Criminal Procedure Act 1921* (SA) ss 173(1)(a), 173(2) ('*SA Criminal Procedure Act*'); *WA Sentencing Act* (n 68) s 140(1)(a); *Criminal Code Act 1924* (Tas) s 419(b) ('*Tas Criminal Code Act*'); *Criminal Procedure Act 2009* (Vic) s 327(1)(a) ('*Vic Criminal Procedure Act*'); *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(a)–(b) ('*NSW Crimes (Appeal and Review) Act*').

85 *NT Criminal Code Act* (n 84) s 431(b); *Qld Criminal Code Act* (n 84) s 672A(b); *SA Criminal Procedure Act* (n 84) s 173(1)(b); *WA Sentencing Act* (n 68) s 140(1)(b); *Tas Criminal Code Act* (n 84) s 419(b); *Vic Criminal Procedure Act* (n 84) s 327(1)(a); *NSW Crimes (Appeal and Review) Act* (n 84) s 77(1)(c).

or other relevant Minister,[86] to refer a matter to a state court or seek an opinion from a state court.[87] While these statutory powers have, to date, almost exclusively been engaged in relation to asserted doubts about conviction, they would appear to be equally available on petitions for mercy seeking an alleviation of sentence.[88] These statutory powers are not considered further in this article, as they raise different considerations to the prerogative of mercy,[89] and the principles that govern them align more closely with those governing regular criminal appeals.[90] Similarly, for the reasons set out above, recent developments in South Australia and Tasmania[91] to allow for a second appeal are not explored in this article. The purpose of the remainder of this article is to assess the use and value of the prerogative in the mandatory sentencing context.

III MODERN DEMANDS FOR MERCY

The history of the prerogative described in Part II(A) reveals that the power has long been applied to alleviate sentences that, while within the letter of the law, have been considered harsh or unduly severe according to extra-legal, community standards. This sentence-alleviation function of the prerogative was seen to be especially important in responding to inflexible criminal laws incapable of discriminating between persons of differing moral culpabilities. Commonly such pleas were made to remit the death penalty, especially where persons who killed in self-defence would otherwise have been liable to a mandatory death sentence.[92] Given this aspect of the prerogative's history, it is surprising that so few Australian scholars and practitioners have recognised the capacity of the prerogative to correct injustices occasioned by modern mandatory sentencing regimes which can have life-changing consequences.[93] This scholarly myopia is all the more inexplicable in light of the work that has been done on exactly this

86 See *Martens* (n 79) 123 [35] (Logan J).

87 Ibid 118–19 [15]–[19]; *R v Martens [No 2]* [2011] 1 Qd R 575, 598 [85]–[86], 600 [92], [94] (Chesterman JA, Muir JA agreeing at 577 [1]); *Yasmin v Attorney-General (Cth)* (2015) 236 FCR 169, 172–4 [4]–[12] ('*Yasmin*'); *Jasmin* (n 2) 529 [96] (Buss P), 549–50 [227]–[228] (Mazza and Mitchell JJA). Cf *R v Martens [No 1]* [2010] 1 Qd R 564, 567 [14]–[15]; *Nudd v Minister for Home Affairs* (2011) 122 ALD 529, 532 [10] (Dowsett, Bennett and Greenwood JJ).

88 See the words in parentheses in *Re Ross* (n 56) 274 [4] (Teague, Cummins and Coldrey JJ).

89 Greentree argues that 'the prerogative of mercy is different in principle and practice from the statutory post-conviction review processes': Greentree (n 10) 1329.

90 See, eg, *Ratten v The Queen* (1974) 131 CLR 510; *Button v The Queen* (2002) 25 WAR 382; *Mallard v The Queen* (2005) 224 CLR 125 ('*Mallard*'). See also Bibi Sangha, 'The Statutory Right to Second or Subsequent Criminal Appeals in South Australia and Tasmania' (2015) 17(2) *Flinders Law Journal* 471.

91 *SA Criminal Procedure Act* (n 84) s 159; *Tas Criminal Code Act* (n 84) s 402A.

92 Rolph (n 1) 19. See also *Bentley* (n 19) 357; Grupp (n 19) 60.

93 See Greentree (n 10) 1347–50.

issue in other mandatory sentencing jurisdictions, particularly the United States,[94] where there have been calls to deploy the pardon power to alleviate mandatory sentences since the 1990s.[95] This article now begins its attempt to reorient the Australian scholarship in this direction. It is necessary first to understand the reach of Australia's mandatory sentencing laws and appreciate the way in which they produce injustices. Only then is it possible to explain why the prerogative is so well-suited a response.

Before proceeding, however, it is important to note that one may accept the appropriateness of the prerogative to respond to individual injustices of mandatory sentencing without necessarily believing that mandatory sentencing laws should be repealed.[96] To the contrary, and perhaps perversely, the availability of the prerogative to curb the injustices of mandatory sentencing may operate as an argument in favour of retaining such laws. Nor can the grant of mercy detract from the claimed (although disputed) deterrent effects of mandatory sentencing.[97] This might explain why — as will be discussed below — governments have long felt comfortable retaining mandatory sentencing laws while at the same time exercising the prerogative in favour of individual persons sentenced under those laws.

A *Mandatory Sentencing in Australia*

The modern trend[98] toward mandatory sentencing in Australia commenced in the Northern Territory and Western Australia in the 1990s. During that decade both Labor and Liberal state and territory governments experimented with mandatory sentencing.[99] In 1992, Western Australia introduced mandatory sentencing

94 See, eg, Aliza B Kaplan and Venetia Mayhew, 'The Governor's Clemency Power: An Underused Tool to Mitigate the Impact of Measure 11 in Oregon' (2020) 23(4) *Lewis & Clark Law Review* 1285. Cf Erik Luna and Mark Osler, 'Mercy in the Age of Mandatory Minimums', *Cato Institute* (online, 5 August 2016) <https://www.cato.org/publications/commentary/mercy-age-mandatory-minimums>.

95 See, eg, Editorial, 'The President's Pardons', *Washington Post* (27 December 1999) A24. For more recent commentary see Editorial, 'Mercy in the Justice System', *The New York Times* (online, 9 February 2014) <https://www.nytimes.com/2014/02/10/opinion/mercy-in-the-justice-system.html>.

96 Greentree has explained: 'The prerogative of mercy applied in some exceptional cases does not necessarily reflect that the law is wrong or unjust. Rather, mercy is simply part of the criminal justice landscape': Greentree (n 10) 1346.

97 The regular exercise of the prerogative in 18th and 19th century England has been argued to have had no effect on the deterrent function of the many mandatory capital offences at the time: see Steve Poole, *The Politics of Regicide in England, 1760–1850* (Manchester University Press, 2000) 33.

98 As has been noted elsewhere, mandatory sentencing in Australia is not an entirely novel phenomenon. Certain very serious crimes such as murder have previously attracted mandatory life sentence: see Lenny Roth, 'Mandatory Sentencing Laws' (E-Brief No 1/2014, Parliamentary Research Service, Parliament of New South Wales, January 2014) 2.

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

measures aimed at deterring high-speed pursuits in stolen motor vehicles.[100] 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.[101] Nevertheless, in 1996, Western Australia introduced 'three strikes' mandatory sentencing for property offences.[102] So-called three strikes laws, originating in the United States,[103] require mandatory prison sentences for persons found guilty of an offence who have previously been found guilty of the same or a similar offence at least twice. Empirical evidence gathered after the introduction of the Western Australian three strikes laws suggested that reported home burglaries increased immediately after the laws passed.[104] Robberies also appear to have increased in this time.[105] The Northern Territory introduced mandatory sentencing laws for property offenders in 1997.[106] 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.[107]

Both the Western Australian and Northern Territory mandatory sentencing regimes have been extended since the 1990s. In Western Australia, assaults against police, prison officers and transport workers were more recently prescribed mandatory prison sentences.[108] The Northern Territory's mandatory sentencing regime was extended to violent and sexual offences between 1999 and 2013.[109] The latter laws were subjected to an internal review in 2015.[110] 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).[111]

100 *WA Crime (Serious and Repeat Offenders) Sentencing Act* (n 99). See also Neil Morgan, 'Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories' (1999) 22(1) *University of New South Wales Law Journal* 267, 271–3.

101 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.

102 *WA Criminal Code Amendment Act (No 2)* (n 99) ss 4(2), 5.

103 For a description of the phenomenon of three strikes laws in the United States see Michael Vitiello, 'Three Strikes: Can We Return to Rationality?' (1997) 87(2) *Journal of Criminal Law and Criminology* 395.

104 Mary Ann Yeats, '"Three Strikes" and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia' (1997) 8(3) *Criminal Law Forum* 369, 377.

105 Morgan (n 100) 273–4.

106 *NT Sentencing Amendment Act (No 2)* (n 99); *NT Juvenile Justice Amendment Act (No 2)* (n 99).

107 Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience* (Occasional Paper, August 2003) 10, archived at <https://web.archive.org/web/20050305231949/http://www.nt.gov.au/justice/ocp/docs/mandatory_sentencing_nt_experience_20031201.pdf>.

108 *Criminal Code Amendment Act 2009* (WA). See also *Criminal Code Amendment Act (No 2) 2013* (WA).

109 *Sentencing Amendment Act 1999* (NT) s 17; *Sentencing Amendment (Violent Offences) Act 2008* (NT); *Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (NT).

110 Carolyn Whyte et al, Department of the Attorney-General and Justice (NT), *Review of the Northern Territory Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (Report, December 2015) 15–16.

111 Ibid.

One senior politician involved in the implementation of the Northern Territory's mandatory sentencing laws of the 1990s subsequently acknowledged that they were wrong and '"dictated by political exigency"'.[112] However, since then, the Northern Territory's mandatory sentencing regime has crept inexorably outwards and now encompasses an array of serious and non-serious offences.[113] Commenting on the Northern Territory's mandatory sentencing laws in 1999, two local lawyers warned: 'For those of us living in the Northern Territory, mandatory sentencing is something which diminishes us all. For those "down South", take note: the mandatory sentencing bandwagon is a roadtrain which is heading your way.'[114]

This prediction has been borne out by the introduction of mandatory sentencing laws in almost all Australian jurisdictions. In 2011, New South Wales prescribed a mandatory life sentence for murder where the victim is a police officer.[115] The following year, Queensland introduced mandatory sentences for certain (repeat) sexual offences and serious firearm offences.[116] Yet another year later, in 2013, Victoria introduced mandatory sentences for certain violent offences, including offences against emergency services workers.[117] The federal Parliament has also legislated for mandatory sentencing in a number of areas, most notoriously for 'people smuggling'.[118] A majority of the High Court found these laws to be constitutionally valid in 2013.[119] The federal mandatory sentencing net was recently extended to certain sexual offences.[120]

This short survey has illustrated that, in the last three decades, legislatures around Australia have increasingly enacted mandatory sentencing laws for a wide variety of criminal offences. Whilst there is room for debate over whether a plethora of mandatory sentencing laws would amount to executive overreach, this article retains its focus on usage and value of the prerogative in the mandatory

112 Morgan (n 100) 269 n 12.

113 Criminal Lawyers Association of the Northern Territory (CLANT), Submission No 75 to Australian Law Reform Commission, *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (11 September 2017) <https://www.alrc.gov.au/wp-content/uploads/2019/08/75._criminal_lawyers_association_of_the_northern_territory_clant.pdf>.

114 Russell Goldflam and Jonathon Hunyor, 'Mandatory Sentencing and the Concentration of Powers' (1999) 24(5) *Alternative Law Journal* 211, 215.

115 *Crimes Amendment (Murder of Police Officers) Act 2011* (NSW). It is to be noted that New South Wales, like other jurisdictions, already had mandatory sentencing laws in its statute books in the 1990s for murder (and very serious drug offences): see *Crimes Amendment (Mandatory Life Sentences) Act 1996* (NSW).

116 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld); *Weapons and Other Legislation Amendment Act 2012* (Qld). Other mandatory sentencing laws introduced in Queensland include: *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); *Vicious Lawless Association Disestablishment Act 2013* (Qld).

117 *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic) s 9.

118 See Andrew Trotter and Matt Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy' (2012) 36(2) *Melbourne University Law Review* 553.

119 *Magaming v The Queen* (2013) 252 CLR 381 ('*Magaming*'). See also *Palling v Corfield* (1970) 123 CLR 52, 58 ('*Palling*').

120 *Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Act 2020* (Cth) sch 6.

sentencing context. Accordingly, the next step is to explain why this phenomenon has increased the instances of unjust sentences. This explanation also provides context necessary for the claim made in Part III(C) that the prerogative is particularly well-suited to respond to injustices created by mandatory sentencing.

B *Mandatory Sentencing and Individual (In)Justice*

As ought to be apparent from the 'mandatory' label, mandatory sentencing operates to limit (and in some cases, eradicate) the discretion of sentencing judges to determine the appropriate sentence for a particular offence and offender.[121] In effect, mandatory sentencing laws require a particular sentence — or, more commonly, a particular *minimum* sentence — for a particular category of offence or offender. What is not immediately apparent from the 'mandatory' descriptor is that such legislative schemes sometimes allow — by exemption provisions — for departure from the mandatory sentence in narrowly confined circumstances.[122] However, the effect of these exemption provisions should not be overstated. The whole point of mandatory sentencing regimes is to impose mandatory sentences and, in the vast majority of cases, that is what they do.[123]

Problematically, the emphasis on consistency that is at the heart of mandatory sentencing — the same minimum sentence for a whole class of offences or offenders — comes at the cost of individualised justice. Mandatory sentencing prevents judges, in at least some instances, from giving effect to mitigating considerations that would otherwise have resulted in a sentence below the mandatory minimum. These mitigating considerations can relate to the offence or the offender. For instance, it might be that a mandatory prison sentence is required for conduct that, while technically a criminal offence, is simply so lacking in culpability as to make prison (or prison of a particular duration) inappropriate. This is essentially a complaint about the way mandatory sentencing can prevent proportionality between the criminal conduct and the penalty.[124] Other mitigating considerations that are foreclosed from full consideration are those personal to the offender, particularly the fact that an offender might pose little or no danger to the community. All of this leads to the *arbitrariness* inherent in mandatory sentencing

121 The term 'mandatory sentencing laws' is used in this article to describe 'laws that specify a minimum penalty or a fixed penalty that a judge must impose in relation to a particular offence or type of offender (e.g. a repeat offender). … These laws may be strict in their application or they may allow judges to depart from the minimum or fixed penalty in certain (narrowly defined) circumstances': Roth (n 98) 2.

122 See Yvon Dandurand, Department of Justice Canada, *Exemptions from Mandatory Minimum Penalties: Recent Developments in Selected Countries* (Report, March 2016).

123 For example, in the Northern Territory, the exemption from the mandatory non-parole period for murder appears only to have been engaged twice: *R v Namatjira* (Supreme Court of the Northern Territory, Southwood J, 3 July 2012); Transcript of Proceedings, *R v Malyschko* (Supreme Court of the Northern Territory, Mildren J, 9 January 2013), where Zak Grieve was co-accused ('*Malyschko and Grieve*').

124 The potential for 'grossly disproportionate' sentences is what caused the Supreme Court of Canada in 1987 to declare mandatory sentencing laws for particular drug offences to be unconstitutional: *R v Smith* [1987] 1 SCR 1045, 1072–8. See also *R v Goltz* [1991] 3 SCR 485; *R v Morrisey* [2000] 2 SCR 90.

laws, whereby they require judges to impose a sentence of imprisonment without permitting consideration of all relevant circumstances.[125]

It is no answer to say that mandatory minimum sentences simply reflect the sentences that would otherwise be imposed. The animating purpose of mandatory sentencing laws is to foreclose the possibility that, absent the mandatory sentencing law, some sentences would have been below the mandatory minimum. As is explained in the case law:

> 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.[126]

C *An Ancient Remedy for a Modern Ill*

The above description of the injustices occasioned by mandatory sentencing reveals that the problem is *systemic* in nature; mandatory sentencing *necessarily* results in individual instances of injustice. Realistically, however, the nationwide repeal of all mandatory sentencing laws is unlikely to happen in the immediate future. Thus, it is worth considering other responses. Here, we argue that there are three features of the prerogative that make it peculiarly well-suited to respond to injustices of mandatory sentencing.

First, the prerogative in Australia remains largely *apolitical* (at least in theory and public perception). The initial vesting of the prerogative in the monarch was intended to secure its impartiality.[127] There are good reasons for this, given how politically charged the punishment and forgiveness of criminal offenders can be. In Australia, the sourcing of the prerogative in an apolitical figure — the federal Governor-General, state Governor or territory Administrator — should remove this contentious category of decisions from the political sphere. As early as 1874, Henry Parkes recognised that it was advantageous to the proper exercise of the prerogative for it to be insulated from politicisation and for the government to

125 See, eg, Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report No 84, 1997) [19.50]–[19.64]; Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (Discussion Paper, May 2014) 21–3 [68], [70]–[77]; Human Rights Committee, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) annex ('*Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*') 23 [9.2]; Joint Standing Committee on Treaties, Parliament of Australia, *United Nations Convention on the Rights of the Child* (Report No 17, August 1998) 346 [8.26].

126 *Trenerry v Bradley* (1997) 6 NTLR 175, 187 (Mildren J).

127 Chitty, Jun (n 21) 89.

be able to distance itself from these potentially unpopular decisions.[128] These considerations weigh even more heavily today. In contemporary Australian politics, the fear of being labelled 'soft on crime' means that there is little political will to temper mandatory sentencing regimes.[129] This means that mandatory sentencing regimes are retained, and new regimes created, in full knowledge that they will inevitably result in individual instances of injustice. The only circuit-breaker for this manifestation of 'penal populism'[130] is the possibility of intervention by a non-political actor, that is, someone who is immune from the forces of electoral politics. That is exactly why the state and federal Governors, and the Northern Territory Administrator, are uniquely positioned to intervene in this sphere. Each of these figures ought to be above party politics. Even though those figures act upon the advice of members of the government, that advice will generally be given knowing that the political 'sell' will be easier in light of the apolitical character of the decision-maker. In the United States, where the prerogative *is* vested in elected officials — state Governors and the federal President — commentators have noticed that 'there is much more danger of election-year variations and demagoguery'.[131] In particular, it has been said that the imperative to preserve the 'public image' as 'tough on crime' has made Presidents reluctant to expend political capital dispensing mercy.[132] Conversely, Presidents have been castigated for their overtly political exercise of the prerogative.[133] It follows that there are good reasons to be cautious about expanding the direct involvement of elected officials in the process of exercising the prerogative.

The second feature of the prerogative recommending it for use in response to mandatory sentencing is that it is an inherently *individualised* response. The prerogative operates in individual cases without creating precedent and without detracting from the integrity and general applicability of the criminal laws. Thus, the prerogative can be exercised to alleviate sentences for discrete persons who have been unable to bring themselves within mandatory sentencing exemptions but nevertheless have powerful claims of injustice based upon their individual circumstances.

128 Bennett (n 30) 37.

129 See generally Russell Hogg, 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' (1999) 22(1) *University of New South Wales Law Journal* 262.

130 For an introduction to the Australian discussion of 'penal populism', see generally Julian V Roberts et al, *Penal Populism and Public Opinion: Lessons from Five Countries* (Oxford University Press, 2003); Arie Freiberg and Karen Gelb (eds), *Penal Populism, Sentencing Councils and Sentencing Policy* (Federation Press, 2008).

131 Stephanos Bibas, 'Forgiveness in Criminal Procedure' (2007) 4(2) *Ohio State Journal of Criminal Law* 329, 347 n 73.

132 Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge, 2016) 5–6.

133 Albert W Alschuler, 'Bill Clinton's Parting Pardon Party' (1973) 100(3) *Journal of Law and Criminology* 1131; David A Graham, 'Trump is Weaponizing Pardons', *The Atlantic* (online, 31 May 2018) <https://www.theatlantic.com/politics/archive/2018/05/trump-is-weaponizing-the-pardon-power/561617/>.

Thirdly, and notwithstanding its individualised application, the prerogative has a *systemic* character. It does not exist outside of the criminal justice system, rather it has been repeatedly emphasised to be an 'integral element',[134] 'important feature',[135] 'important component'[136] or 'important part'[137] of the criminal justice system. This quality of the prerogative makes it particularly well-suited to respond to perceived systemic failures. As has been acknowledged by Australian parliamentary committees, the apparently unjust or anomalous results produced by mandatory sentencing regimes can erode community trust in the legal system.[138] This manifests in a number of ways, and is amplified by those within the system — particularly judges — making adverse comments on the laws.[139] The need for *external* intervention to correct such perceived failings may well be a basis for suggesting that, without the exercise of the prerogative, the system is indeed broken. The prerogative therefore offers an intra-systemic response that can rebuild public trust by illustrating that where the system goes wrong it has self-correcting mechanisms beyond the appeal process.

The three features of the prerogative identified above help explain why the prerogative was historically used in England and Australia to alleviate the individual instances of injustice. These features also explain why the United States has returned to this use of the prerogative in recent times. In order to further substantiate the claim that the prerogative can serve such a function in contemporary Australia we now turn to describe and analyse our case study, the successful mercy petition of Zak Grieve — an Aboriginal man subjected to the Northern Territory's mandatory sentencing laws for murder.

IV CASE STUDY

In December 2018, after serving over seven years of a life sentence for murder, Mr Grieve received a letter[140] from the Administrator of the Northern Territory informing him that, on the advice of the Executive Council, the prerogative of

134 *Jasmin* (n 2) 514 [25] (Buss P). See also *Burt* (n 2) 681 (Cooke P).

135 *Bentley* (n 19) 362 (Watkins LJ) ('the prerogative of mercy … is an important feature of our criminal justice system').

136 *Yash v Legal Aid Review Panel* (2006) 18 PRNZ 320, [16] (which describes the prerogative as 'an important component of our criminal justice system').

137 *Paul v A-G (NZ)* [2009] NZAR 405, 412 [33], 413 [37] (describing the prerogative as a 'safety net' and 'an important part of New Zealand's constitutional arrangements').

138 Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (Report, March 2000) 108–9 [7.46]–[7.47]. See also Walter Sofronoff, *Queensland Parole System Review* (Final Report, November 2016) 105.

139 See, eg, Christine Flatley, 'Judge Slams Mandatory Sentence for People Smugglers', *The Sydney Morning Herald* (online, 11 January 2012) <https://www.smh.com.au/national/judge-slams-mandatory-sentence-for-people-smugglers-20120111-1puvi.html>. See also *R v Ambo* [2011] NSWDC 182, [17]–[18], [23]–[24]; *R v Mahendra* (2011) 252 FLR 303, 305 [9].

140 A copy of the letter is publicly available: see @DanBox10 (Twitter, 20 December 2018, 8:00am AEST) <https://twitter.com/DanBox10/status/1075496033319292928/photo/1>.

mercy was being exercised in his favour. His non-parole period would be reduced from the statutory mandatory minimum of 20 years to 12 years (his head sentence — life imprisonment — would remain unchanged). It was reported to be the first significant exercise of the prerogative of mercy in the jurisdiction since the Northern Territory gained self-government in 1978.[141] The case illustrates the way in which the appropriate exercise of the prerogative can go some way to alleviating the injustices of mandatory sentencing. This part of the article outlines the circumstances of Mr Grieve's trial, sentence, appeal and mercy petition in sufficient detail to ground a discussion of its implications, which is conducted in Part V.

A *Mr Grieve's Trial, Sentence and Appeal*

The facts of Mr Grieve's case have been extensively reported elsewhere,[142] it is sufficient for present purposes to summarise them briefly. On the facts found at trial,[143] Mr Grieve, a 19-year-old with no prior criminal record, became involved in a plan with two co-offenders to kill a man who was physically abusing the mother of one of the co-offenders (one of Mr Grieve's friends). Mr Grieve, however, had second thoughts and did not accompany the co-offenders to the deceased's house. At the time of the murder, Mr Grieve was asleep at his home. Yet, Mr Grieve's actions were not accepted by the jury as being sufficient to constitute withdrawal from the murder plan. Accordingly, Mr Grieve was, at law, found to be equally guilty of murder as the two co-offenders who physically killed the victim.

Usually, any obvious disparities between the moral culpability of co-offenders — arising from their different roles in the organisation or commission of the crime — are reflected at the sentencing stage.[144] Persons who exhibit a lesser involvement in the organisation or commission of a crime, or who genuinely but ineffectively attempt to withdraw from a crime, will — other things being equal — receive lower sentences. It has been held that instigators, or dominant figures, within joint criminal enterprises will be more culpable than secondary figures within the enterprise.[145] Furthermore, physical participation in the acts causing

141 Amos Aikman, 'Zak Reprieve Would Be a Territory First', *The Australian* (online, 18 September 2017) <https://www.theaustralian.com.au/nation/nation/zak-grieve-reprieve-would-be-a-northern-territory-first/news-story/d68e8a20704f53c1073b56f8cc22b9e6>.

142 See especially Steven Schubert, *Mandatory Murder: A True Story of Homicide and Injustice in an Outback Town* (HarperCollins, 2019) ('*Mandatory Murder*').

143 The factual summary provided in the text is drawn from the sentencing remarks in Mr Grieve's case: see *Malyschko and Grieve* (n 123).

144 *Lowe v The Queen* (1984) 154 CLR 606, 609 (Gibbs CJ). See also *KR v The Queen* [2012] NSWCCA 32, [19] (Latham J); *R v Wright* [2009] NSWCCA 3, [28]–[29] (James J) ('*Wright*'); *R v JW* (2010) 77 NSWLR 7, 35 [161] (Spigelman CJ, Allsop P agreeing at 41 [205]); *R v Taufahema* [2004] NSWSC 833, [49] (Sully J). See generally Andrew Dyer and Hugh Donnelly, 'Sentencing in Complicity Cases Part 1: Joint Criminal Enterprise' (Sentencing Trends & Issues No 38, Judicial Commission of New South Wales, June 2009).

145 *R v Mamae* [2001] NSWSC 936, [17]–[18] (Taylor AJ); *R v Spathis* [2001] NSWCCA 476, [193], [195]–[197] (Heydon JA); *R v Tan* [2007] NSWSC 684, [26] (Price J) ('*Tan*').

death will often be a significant factor bearing on moral culpability. This will usually mean that a peripheral offender who, like Mr Grieve, was found to have played little or no role in the physical attack will be adjudged to have a lower culpability than one who physically perpetrated the murder.[146] In the words of the Judicial Commission of New South Wales:

> 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.[147]

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. In the Northern Territory, murder attracts a mandatory life sentence and a mandatory minimum non-parole period of 20 years. This is the sentence Mr Grieve received. In a strange quirk of the Northern Territory's mandatory sentencing laws, Mr Grieve was unable to avail himself of the exemption clause that, if satisfied by limited criteria of exceptionality, would have allowed the judge to impose a lesser non-parole period. However, one of Mr Grieve's co-offenders *was* found to fall within the clause, since the deceased was his mother's abuser, and, as such, received a lesser sentence than Mr Grieve.

At the sentencing stage the judge acknowledged Mr Grieve's level of criminality was 'much less' than the two men who had physically committed the murder.[148] The sentencing judge found that Mr Grieve was 'a follower, not a leader',[149] that Mr Grieve 'found the courage to tell [his co-offender that he] could not go on with it' and that Mr Grieve was not physically present at the scene of the crime.[150] The judge also found that Mr Grieve was 'a youthful first offender',[151] 'a person of good character',[152] 'remorseful'[153] and 'unlikely to re-offend'.[154] Yet, the judge was prevented by the mandatory sentencing laws from giving effect to the many considerations in Mr Grieve's favour. Instead the mandatory sentencing regime, even with an exemption clause, meant that Mr Grieve received a more

146 See, eg, *Tan* (n 145) [24]–[25] (Price J); *R v Howard* (1992) 29 NSWLR 242, 253–7; *Wright* (n 144) [29] (James J); *Carruthers v The Queen* [2007] NSWCCA 276, [35]–[41] (Rotham J).

147 Judicial Commission of New South Wales, *Sentencing Bench Book* (online at 13 September 2021) [30-070] <https://www.judcom.nsw.gov.au/sentencing/>.

148 *Malyschko and Grieve* (n 123) 14.

149 Ibid.

150 Ibid 7.

151 Ibid 14.

152 Ibid.

153 Ibid 15.

154 Ibid 14.

severe sentence than one of his co-offenders who had struck the fatal blows. The judge was clearly troubled by the sentence he was required to impose, saying in his sentencing remarks that: 'I take no pleasure in this outcome. It is the fault of mandatory minimum sentencing provisions which inevitably bring about injustice.'[155] His Honour went on to describe the mandatory sentencing laws as 'unprincipled and morally insensible' and took the extraordinary step of recommending that the Administrator exercise the prerogative of mercy to make Mr Grieve eligible for parole after having served 12 years of his sentence.[156]

Mr Grieve appealed against his sentence, asserting that he should have been found to fall within the exemption to the mandatory sentencing laws.[157] The Crown also appealed against Mr Grieve's sentence, complaining that the sentencing judge's findings regarding Mr Grieve's limited involvement were not open to him and that Mr Grieve's sentence was manifestly inadequate.[158] Both Mr Grieve's and the Crown's appeals were dismissed, leaving the sentence undisturbed.[159] Neither Mr Grieve nor the Crown attempted to take the case further by way of an application for special leave to appeal to the High Court. From Mr Grieve's perspective such a further appeal would have been unlikely to bear fruit given the High Court's jurisprudence on the constitutional validity of mandatory sentencing.[160]

B *Public and Media Response to Mr Grieve's Case*

Mr Grieve's case generated significant concern in the public sphere, including in reportage and commentary in media outlets spanning the ideological spectrum. Contemporaneous articles in The Australian suggested that the harshness of the sentence shocked the public consciousness.[161] The Australian Broadcasting Corporation ran stories critical of the sentence on its online and audio platforms before ultimately publishing a true crime book on the case.[162] Other media outlets also ran long-form pieces exploring the concerning aspects of the Mr Grieve's

155 Ibid 15.

156 Ibid 16.

157 *Grieve v The Queen* [2014] NTCCA 2, [55]. It should be noted that Mr Grieve also unsuccessfully appealed against his conviction: at [34].

158 Ibid [38], [40].

159 Ibid [54], [63]–[64].

160 *Magaming* (n 119). See also *Palling* (n 119).

161 See, eg, Amos Aikman, '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>.

162 See Steven Schubert, '"I Can't Go Through with This": How Zak Grieve Backed Out of a Murder Plot but Got Life Anyway', *Australian Broadcasting Corporation* (online, 25 August 2017) <https://www.abc.net.au/news/2017-08-24/zak-grieve-ray-niceforo-inconsistences-in-nt-justice-system/8829736?nw=0>; 'The Murderer Who Wasn't There', *Conversations* (ABC Radio, 27 June 2019) <https://www.abc.net.au/radio/programs/conversations/steven-schubert/11233200>; Schubert, *Mandatory Murder* (n 142).

sentence.[163] Most important, perhaps, was a series of investigative articles authored by Dan Box for The Australian. These articles precipitated a mini-series titled *The Queen & Zak Grieve*, which was widely watched across Australia.[164]

In addition to the media coverage, a public petition was created under the title 'Free Zak Grieve', the petition ultimately attracted over a thousand signatories.[165] (Interestingly, this practice of amassing public signatures in favour of mercy petitions has a long history in Australia, dating back at least to 1845 where a petition with nearly 600 signatures resulted in the commutation of a death sentence.)[166] Even politicians felt sufficiently concerned to publicly weigh in, with the Chief Minister of the Northern Territory acknowledging that the case was 'an anomaly'.[167]

C *The Mercy Petition in Mr Grieve's Case*

Mr Grieve's mother initially filed a letter seeking mercy on his behalf without having received legal assistance,[168] before a second petition was filed with the assistance of the authors of this article. In drafting a formal petition both policy and legal arguments were deployed. This dual concern can be seen in the two distinct sections of the petition headed: 'Reasons for Bringing the Petition' and 'Grounds for Seeking Mercy'.[169] The former section was placed in the opening pages of the petition capable of catching the eye of the public and the media. Phrased in plain language and light on footnotes, this section made a moral and political argument for the injustice of Mr Grieve's sentence, an argument that would potentially appeal to the public, and thus persuade the Administrator that a grant of mercy would not only be the correct decision, but would also be viewed by the public as such.[170]

The more substantive section of the petition enumerated three 'Grounds for

163 See, eg, 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>.

164 *The Queen & Zak Grieve* (In Films, 2017) <https://www.theaustralian.com.au/the-queen-and-zak-grieve>.

165 See 'Free Zak Now! The NT Can Pardon Zak Now. Stop the Mandatory Sentencing in the NT!', *change.org* (Web Page, 2017) <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>.

166 See Plater and Crofts (n 9) 328. See also Bennett (n 30) 36.

167 Ben Millington and Tom Maddocks, 'Zak Grieve: Mercy Plea Lodged in Murder Case', *Australian Broadcasting Corporation* (online, 31 August 2017) <http://www.abc.net.au/news/2017-08-31/nt-administrator-rejects-claims-mercy-plea-for-zac-grieve/8858924>.

168 Amos Aikman, 'Grieve's Mercy Plea Gets Closer', *The Australian* (online, 4 September 2017) <https://www.theaustralian.com.au/news/investigations/the-queen-and-zak-grieve/zak-grieves-mercy-plea-moves-a-step-closer/news-story/14a52030409c063fcf7e5cd92cfb98a5>.

169 Petition from Felicity Gerry et al to the Administrator of the Northern Territory, 20 July 2018 <https://www.deakin.edu.au/__data/assets/pdf_file/0007/1444903/Petition-for-mercy-in-the-matter-of-Zak-Grieve-FULL-DOCUMENT.pdf> ('Petition for Mercy from Zak Grieve').

170 Ibid 1–3 [4]–[10].

Seeking Mercy', they were:

1. Mandatory sentencing prevented the judge from imposing a sentence consistent with Mr Grieve's moral culpability;

2. Mandatory sentencing violates fundamental human rights, freedoms and liberties and exacerbates the disadvantage experienced by Indigenous people and young people;

3. The mandatory sentence in Mr Grieve's case is contrary to the public interest.[171]

Ground 1 focused on Mr Grieve's *moral culpability*. This is an issue that has traditionally been at the centre of mercy petitions, which have most chance of success where a person is at least morally innocent (even if they are legally guilty).[172] It sought to illuminate his low moral culpability in two ways. First, the defendant relied on interstate sentencing comparatives to show that accused persons on the periphery of joint criminal enterprise murders often received significantly reduced sentences to reflect their lower level of involvement and thus their lower moral culpability. Secondly, it was suggested that Mr Grieve's involvement in the crime was best analogised to conspiracy to murder. With reference to 16 interstate sentences for conspiracy to murder, it was showed that such cases are treated far less seriously by the courts than cases in which a plan to commit murder has been followed through. Ground 2 engaged international human rights law in support of Mr Grieve's case. Drawing from the wealth of international scholarship and decisions of various United Nations bodies, it was suggested that mandatory sentencing statutes either breach, or exist in tension with, international human rights laws. The petition relied in particular on the right to be free from cruel, inhuman or degrading treatment and the right not to be arbitrarily detained. Ground 3 was something of a 'catch-all' directed at questions of the *public interest*. This ground criticised mandatory sentencing yet also suggested that a grant of mercy would in fact *heighten* public trust in the justice system, rather than detract from it.

D *Conclusion to the Case Study*

While certain aspects of Mr Grieve's case were unusual — particularly his low level of involvement in the crime for which he was ultimately found guilty — the injustice of his sentence was capable of being attributed to the inflexibility of the Northern Territory's mandatory sentencing laws. In the petition, each of the three

171 Ibid 7 [30].

172 See United Kingdom, *Parliamentary Debates*, House of Lords, 21 November 1983, vol 445, col 103 (Lord Elton): 'The grant of a free pardon is confined as far as possible to those who are innocent morally as well as technically'; *Bentley* (n 19) 364.

'Grounds for Seeking Mercy' explicitly identified mandatory sentencing as the cause of the unjust sentence. The fact that the Northern Territory Administrator ultimately exercised the prerogative in Mr Grieve's favour suggests recognition of two important propositions: (i) that mandatory sentencing can produce individual instances of injustice; and (ii) that the prerogative can be an appropriate means to alleviate these injustices. These propositions, and Mr Grieve's case more generally, hold important lessons for those working in the criminal justice system.

V LESSONS LEARNED

In this section of the article we tease out the implications of Mr Grieve's case and the lessons that might be learned, particularly for defence lawyers. Given the irregularity with which mercy petitions are made, it is likely that most defence lawyers are unfamiliar with the process and strategy for seeking the exercise of the prerogative. This should not be the case; as has been said elsewhere, 'it is incumbent upon the advocate to familiarise him or herself with the institution of mercy and its operation'.[173] Mr Grieve's case illustrates that mercy petitions can provide tangible positive outcomes for clients, even after an unsatisfactory sentence and an unsuccessful appeal. Yet, there is little guidance in the textbooks, practitioner's manuals or scholarly articles for defence lawyers looking to become effective at petitioning for mercy. This section of the article seeks to offer such guidance by addressing three preliminary questions — timing, procedure and supporting material — before outlining various potential mercy petition strategies. Inevitably these suggestions coming from the drafters of Mr Grieve's successful petition are tinged with opinion, but it is hoped that the exercise assists in our theme of use and value.

A *Timing, Procedure and Supporting Material*

First, lawyers need to consider the appropriate time in the proceedings to petition for mercy. One school of thought holds that the prerogative can only be exercised 'after the exhaustion of all other avenues for which the criminal justice system provides'.[174] Obviously, this would have disqualified Mr Grieve, as he never made an application for special leave to appeal to the High Court. The better view, however, is that there is no legal impediment to the prerogative being exercised before the exhaustion of other avenues of appeal or review.[175] Admittedly, it will usually be prudent to pursue these other options first if the injustice complained

173 See Hinton and Caruso (n 41) 519.

174 *Yasmin* (n 87) 189 [86].

175 See generally *Jasmin* (n 2) 527–30 [89]–[101] (Buss P), 550–1 [229]–[232] (Mazza and Mitchell JJA). Such an assumption seems to have been made in *Gunn [No 1]* (n 82) 25 (Jordan CJ, Davidson J agreeing at 26).

of is one that is susceptible to being corrected by appeal or review.[176] Notably, where a petition raises human rights issues such as systemic over-incarceration of Indigenous peoples, an individual application to the United Nations Human Rights Committee would require domestic remedies to be exhausted.[177] When considering the appropriate time to petition for mercy it is important to note that there are no limits to the number of mercy petitions that can be made.[178] In Mr Grieve's case, the successful petition was technically the second (an earlier one having been made by Mr Grieve's mother). However, it will usually be prudent to submit a petition only when one is able to fully present all of the relevant materials and arguments.

Secondly, consideration must be given to the specific power that is sought to be invoked. Leaving to one side cases involving problematic convictions, which are not the focus of this article, there are generally three avenues that the advocate might take. First, the petitioner can seek the exercise of the prerogative proper, that is the non-statutory power. The obvious advantage of this power is that it is the most flexible; the obvious disadvantage is that the prerogative may not be subject to judicial review.[179] Secondly, the petitioner can seek the exercise of one of the statutory analogues to the prerogative mentioned in Part II(C) of this article. These powers are potentially less flexible than the prerogative but more likely to be amenable to judicial review. Thirdly, and relatedly to the first course, a petitioner could request that a question be referred for judicial determination or opinion pursuant to the statutory supplements to the prerogative discussed in Part II(D) of this article. These avenues are not mutually exclusive and would usually be capable of being initiated by a single letter to the repository of the power, usually the state Governor or territory Administrator. Absent statutory requirements, there is no particular form that a petition for mercy must take. The repository of power will usually look to the substance of the request to determine whether it constitutes a request for one or a number of the alternatives identified above.[180]

176 See Hinton and Caruso (n 41) 519 n 2: 'Technically there is no legal impediment to seeking the exercise of the prerogative prior to all avenues of appeal being exhausted, but in practice, save in the exceptional case, it would be open to the Crown to reject a petition unless and until all appeal rights have been exhausted.'

177 See generally Cesare PR Romano, 'The Rule of Prior Exhaustion of Domestic Remedies: Theory and Practice in International Human Rights Procedures' in Nerina Boschiero et al (eds), *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (Asser Press, 2013) 561.

178 In the United Kingdom, Adolph Beck was ultimately pardoned in 1877 after 16 petitions for mercy: see Rolph (n 1) 36.

179 Whether or not the prerogative of mercy is amenable to judicial review remains uncertain in Australia: see *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 297–8 [47] (Gleeson CJ, Gummow, Heydon and Kiefel JJ) (deliberately leaving the question undecided), 328 [153] (Hayne J) (deliberately leaving the question undecided). See also *Eastman v A-G (ACT)* (2007) 210 FLR 440, 458–9 [78] (Lander J) (finding that 'the discretion as to the exercise of the prerogative of mercy is not amenable to judicial review … [but] concluding that the processes which must be observed … are subject to judicial review'). See also Julian R Murphy, 'Mercy and Judicial Review: The Reviewability of the Prerogative of Mercy' (Conference Paper, Australian Institute of Administrative Law National Administrative Law Conference, 5 August 2021).

180 See, eg, *Martens* (n 79) 116–17 [4].

It is to be remembered that no evidentiary criteria or exclusionary rules limit the material that may be taken into account by the repository of the prerogative power.[181] Accordingly, letters petitioning for mercy will usually be accompanied not just by legal submissions, but also any associated material that is sought to be relied upon. Petitioners might refer to news reports, affidavits or letters from laypersons including family members, expert reports and any other material that they might consider helpful. When seeking an exercise of the prerogative to alleviate sentence, two areas for evidentiary exploration will usually be particularly important: the personal circumstances of the petitioner and any good behaviour or progress made by the petitioner subsequent to the sentence. As to the first consideration, personal circumstances — such as mental or physical illness or disability — making prison particularly onerous have been suggested to be relevant to the exercise of the prerogative.[182] As to the second consideration, good behaviour has historically been a relevant consideration in the grant of remissions,[183] and thus may be expected to tend in favour, although non-decisively, of the exercise of the prerogative.

B *Strategy*

With these preliminary questions of timing and procedure out of the way, it is possible to identify six substantive strategies that are likely to improve a petitioner's prospects of success, namely:[184]

i. Inviting judicial comment;

ii. Considering the audience;

iii. Invoking quasi-legal imperatives, including policy considerations and international law;

iv. Comparing other jurisdictions;

v. Engaging with the media; and

vi. Addressing the relevant criteria.

As to the first — *inviting judicial comment* — the fact that a mandatory sentence

181 *Mallard* (n 90) 129 [6] (Gummow, Hayne, Callinan and Heydon JJ); ibid 128–9 [54] (Logan J).

182 *R v WEF* [1998] 2 VR 385, 388–9 (Winneke P, Charles JA and Hampel AJA agreeing at 390); *Anastasiou v The Queen* [2010] NSWCCA 100, [35] (Rothman J, McClellan CJ at CL agreeing at [1] and James J agreeing at [2]); *Cameron v The Queen* [2017] NSWCCA 229, [13] (Basten JA, Button JA agreeing at [16]–[18]).

183 *Hoare v The Queen* (1989) 167 CLR 348, 353–5 (Mason CJ, Dean, Dawson, Toohey and McHugh JJ). See also *R v Maguire* (1956) 40 Cr App R 92, 94 (Goddard LCJ, Cassels and Donovan JJ); *Menz v The Queen* [1967] SASR 329, 330–1 (Bray CJ, Travers and Mitchell JJ).

184 Note that these strategies are primarily derived from Mr Grieve's case and thus do not consider potentially fruitful searches for fresh evidence to support second or subsequent appeals or inquiries.

may be a foregone conclusion should not stop defence lawyers from establishing a record at the sentencing proceedings as to an offender's subjective circumstances and any matters in mitigation. This material may encourage a judge to make a comment as to the inappropriateness of the mandatory minimum. Such judicial comments — although not binding in any way — can be a powerful consideration weighing in favour of the prerogative. It is surely no coincidence that, when the prerogative was exercised in Mr Grieve's favour, his sentence was reduced to exactly that suggested by Mildren J.[185] Nor is Mildren J alone in making such comments. Kelly J, also of the Supreme Court of the Northern Territory, made another such recommendation in the case of Edward Nafi, involving federal mandatory sentencing laws for 'people smugglers'.[186] In the United States, federal judges who have recently expressed their frustration at mandatory sentences they were required to impose have been vindicated by subsequent presidential pardons.[187] (Indeed, in the United States, the United Kingdom and Australia the practice of making judicial recommendations for mercy in mandatory sentencing cases has very deep historical roots.)[188]

As to the second point of strategy — *considering the audience* — it has been mentioned earlier that the formal addressee of a petition is the apolitical figure of the federal Governor-General, state Governor or territory Administrator. However, there are at least three other potential audiences. First, the *political* audience of the Attorney-General, Premier or wider Executive Council who — depending on the particular arrangements of the state or territory[189] — may consider the petition. Second, the *public* audience (and the media) who will usually learn of the petition and whose opinions the various decision-makers will no doubt consider, if only subconsciously. Thirdly, the *legal* audience comprised of the government lawyers from whom advice will be sought regarding the petition.[190] Both the political and the public audience are likely to be receptive to quasi-legal arguments, including policy considerations and even normative

185 *Malyschko and Grieve* (n 123) 16.

186 Transcript of Proceedings, *R v Edward Nafi* (Supreme Court of the Northern Territory, Kelly J, 19 May 2011).

187 See also James Cole, 'Remarks as Prepared for Delivery by Deputy Attorney General James Cole' (Speech, New York State Bar Association Annual Meeting, 30 January 2014) <https://www.justice.gov/opa/speech/remarks-prepared-delivery-deputy-attorney-general-james-cole-new-york-state-bar>.

188 See George Lardner Jr and Margaret Colgate Love, 'Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850' (2004) 16(3) *Federal Sentencing Reporter* 212; EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Allen Lane, 1975) 255; Clark (n 9).

189 See above nn 40–4 and accompanying text.

190 In South Australia, for instance, then Solicitor-General Christopher Kourakis QC (now Chief Justice of South Australia) prepared a 150-page advice regarding the third petition for mercy by Henry Keogh. After a protracted legal battle for the release of the advice, it is now publicly available: Petition to Her Excellency Marjorie Jackson-Nelson, Governor of South Australia (31 August 2003) <http://netk.net.au/Keogh/Keogh118.pdf>. In Victoria, independent legal counsel are sometimes retained to provide recommendations as to mercy petitions: see, eg, 'Statement on Petition for Mercy on Behalf of Jason Roberts' (Media Release, Office of the Premier of Victoria, 6 August 2018) <https://www.premier.vic.gov.au/statement-petition-mercy-behalf-jason-roberts>; 'Statement on Petition for Mercy on Behalf of Faruk Orman' (Media Release, Office of the Premier of Victoria, 26 June 2019) <https://www.premier.vic.gov.au/statement-petition-mercy-behalf-faruk-orman>.

statements couched in international law.

As to the third point – *invoking quasi-legal imperatives* – it has been said that 'the prerogative of mercy is able to look "beyond" the law to moral questions … It allows consideration of those matters that would be unavailable or improper for a [sentencing] court to consider, such as policy, public interest, and compassion'.[191]

However, it is not always obvious how claims of policy, public interest and compassion ought to be framed with sufficient objectivity to appeal to the relevant decision-maker. One way of demonstrating that a particular sentence offends against morality, or is contrary to the public interest, is to refer to international law, as this provides an objective articulation of widely held norms and values. Further resort can also be had to the reports of human rights bodies and non-governmental organisations. These types of quasi-legal considerations are also relevant in light of the multiple audiences to which a petition is directed. It should also be noted that reference to sources of international law in a mercy petition can assist in paving the way for an application to the United Nations Human Rights Committee, if the petition for mercy is refused. Mr Grieve's petition was drafted with one eye to this possibility. Our reasoning was that, should the petition initially be refused by the Northern Territory Administrator, a positive finding at the United Nations Human Rights Committee might provide grounds for a subsequent petition.

The reasons for the fourth strategy — *comparing other Australian jurisdictions* — are analogous to the third. Where a sentence is arguably lawful and appropriate on the domestic law of a jurisdiction, it is necessary to find some external criteria against which to illustrate its injustice. While international law offers one such measuring stick, comparative domestic law can also assist. It was for this reason that scores of interstate sentencing exercises were summarised in Mr Grieve's mercy petition. Admittedly, the fact that a particular case may appear to be at odds with interstate law or policy is unlikely to be determinative of a mercy petition. After all, the relevant prerogative decision-maker owes their primary fidelity to the jurisdiction in which they hold office. However, interstate comparisons can be useful in sharpening the analysis, clarifying the issues or establishing that a particular case is an outlier or anomaly within the national context.

As to the fifth strategy — *engaging with the media* — it is an inconvenient reality for petitioners that extending mercy to those found guilty and sentenced for serious crimes has the potential to expose the government to political and popular criticism and the label of being 'soft on crime'. While this risk is diminished by reposing the prerogative in a non-elected official, it is not completely

191 Greentree (n 10) 1342, citing Sangha and Moles, 'Mercy or Right?' (n 4) 302.

eradicated.[192] Accordingly, mercy petitions are likely to be more attractive where they are considered to be of low political cost. The best way for petitioners to lower the political cost of their petitions is to actively engage the media. This can be achieved by both proactive public messaging and also by being open to advances from the media to have access to the details of the case. It can also be achieved by using plain language in the petition itself. A petition that is understandable to the general public is more likely to garner support. Similarly, making a petition readily accessible — for example, by placing it online — can make it more likely to attract favourable public discussion. If a petitioner is truly convinced of the patent injustice of their case then it serves their cause to reveal the full circumstances of that injustice to the public. Public concern is not just strategically helpful to encourage the expeditious progress of a mercy petition, it has also been suggested to be a legally relevant consideration for the exercise of the prerogative.[193]

As to the final matter — *addressing the relevant criteria* — it was said in 2012 that '[t]here is little material regarding the principles and criteria governing the exercise of the prerogative of mercy'.[194] Thankfully, that position is changing. Some jurisdictions, such as Canada, have published criteria according to which the prerogative is exercised.[195] Other jurisdictions, such as New South Wales, have released their guidelines under freedom of information requests.[196] Other Australian jurisdictions are not so transparent, however it is possible to identify four considerations likely to be relevant to petitions to alleviate sentences: sympathy (or compassion), reduced moral culpability, the public interest and the integrity of the judicial system. Matters of sympathy and compassion for the petitioner will naturally be relevant, as indicated by the label of the prerogative as one of 'mercy'.[197] In the Northern Territory, it appears that persons convicted of murder in 'unfortunate' circumstances have previously been afforded the benefit of mercy.[198] In Mr Grieve's case general matters of sympathy, including Mr Grieve's experience of societal disadvantage, were argued to weigh in favour of the exercise of the prerogative. An accused's moral culpability has also traditionally been considered in the exercise of the prerogative, especially in

192 In New South Wales, opposition politicians accused Premier Bob Carr of pretending to be 'tough on crime' while advising the Governor to exercise the prerogative to release prisoners sentenced to life: see New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 September 2001, 16374 (Christopher Hartcher).

193 *Mickelberg v The Queen* (1989) 167 CLR 259, 272 (Mason CJ).

194 Hinton and Caruso (n 41) 527.

195 Parole Board of Canada, *Royal Prerogative of Mercy* (Ministerial Guidelines, 31 October 2014) <https://www.canada.ca/content/dam/pbc-clcc/documents/publications/Royal-Prerogative-Of-Mercy-Ministerial-Guidelines.pdf>.

196 Department of Justice NSW, *Royal Prerogative of Mercy* (Procedural Document, 23 October 2007) <http://chrisnowlan.com/RPMguidelines.pdf>.

197 Parole Board of Canada (n 195) 4–5.

198 See, eg, the case of Billy Benn, discussed in Northern Territory, *Parliamentary Debates*, Legislative Assembly, 30 November 1978, 684 (James Murray Robertson, Community Development). See also Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 September 1978, [55] (Neville Perkins).

cases of full pardons.[199] This is likely to be a focus of prerogative applications relating to mandatory sentencing, as it was in Mr Grieve's case. Scholars have suggested that the public interest more generally will usually guide the exercise of the prerogative.[200] It has also been posited that matters of government policy may inform the exercise of the prerogative,[201] although this might be debatable. In any event, a person's ability to make contributions to the community — through work, volunteering, family life or otherwise — may weigh in their favour, and these matters were put forward in Mr Grieve's case. Broader questions of public safety will also likely inform an assessment of the public interest. Finally, questions of the integrity of the judicial system (particularly the separation of powers and finality) have been said to inform the exercise of the prerogative.[202] In Mr Grieve's case, the preservation of judicial authority was argued to tend *in favour* of mercy, because the judge himself recommended mercy. This will obviously not always be the case, but it can be helpful to emphasise that the prerogative is a feature of Australia's constitutional system, and historical practice shows that the appropriate exercise of the prerogative can increase public confidence in the ability of the criminal justice system to respond to outlier instances of injustice.

VI CONCLUSION

The prerogative was designed to prevent or ameliorate injustices occasionally arising from the general applicability of criminal law.[203] Such injustices are inevitable because, for all their perceived advantages, generally applicable laws are incapable of adaptation to the infinite multitude of individual circumstances. 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. … [I]n special circumstances to avoid the rigidity of inexorable law is of the very essence of justice'.[204] The 'rigidity of inexorable law' is at its highest in mandatory sentencing regimes, which deny the sentencing judge the capacity for mercy.[205] Yet there is, hidden in plain sight, an institutional response to such injustices — the prerogative of mercy. The prerogative has long served as an intra-systemic response to the occasional injustices of mandatory sentencing, but its capacity to function in this way has been largely forgotten by modern Australian scholars

199 See above n 172 and accompanying text.

200 Milne (n 4) 222.

201 Ibid.

202 Hinton and Caruso (n 41) 528.

203 See Chitty, Jun (n 21) 89: 'An offence may be within the letter, but foreign to the general scope and spirit of the law. … As, therefore, society cannot sufficiently provide for every possible transgression of its ordinances, … it has entrusted the King with the power of extending mercy'.

204 *Cobiac v Liddy* (1969) 119 CLR 257, 269 (Windeyer J).

205 As to the capacity for judges to show mercy in cases not governed by mandatory sentencing, see Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1.

and practitioners. It is hoped that this article will correct this amnesia, and reinvigorate the prerogative as a practical and doctrinally sound response to the injustices sometimes occasioned by mandatory sentencing.