



Hon Mark Burton
Minister of Justice

Member's bill: Criminal Cases Review Tribunal Bill

Date	26 October 2007	File reference	CON-34-22
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Action Sought	Timeframe/Deadline
Sign attached letter to Hon Michael Cullen	Next member's day is 7 November 2007

Contacts for telephone discussion (if required)

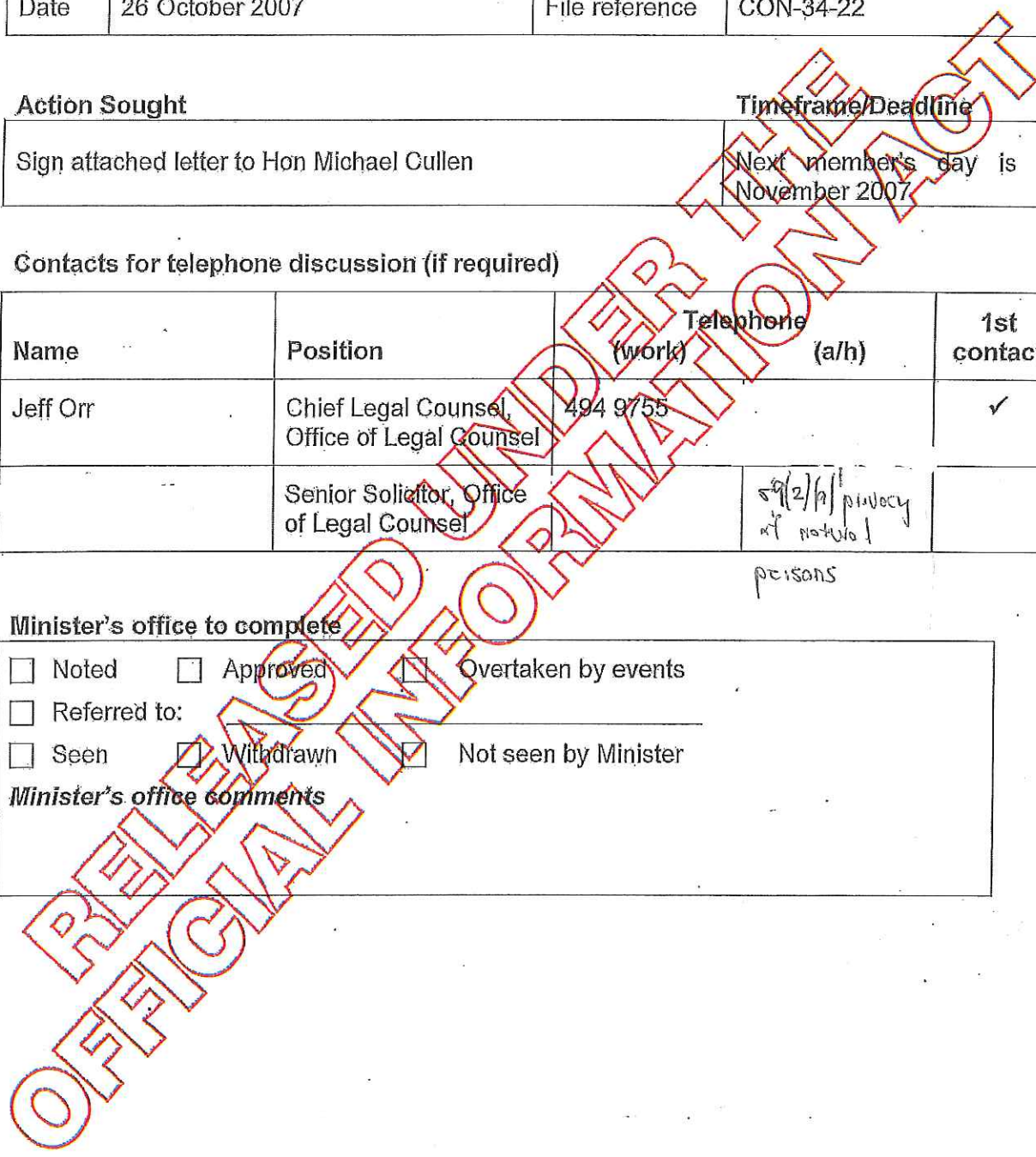
Name	Position	Telephone (work)	Telephone (a/h)	1st contact
Jeff Orr	Chief Legal Counsel, Office of Legal Counsel	494 9755		✓
	Senior Solicitor, Office of Legal Counsel		59(2)(a) privacy at notwa1	

prisons

Minister's office to complete

- Noted Approved Overtaken by events
 Referred to: _____
 Seen Withdrawn Not seen by Minister

Minister's office comments





26 October 2007

Hon Mark Burton
Minister of Justice

Member's bill: Criminal Cases Review Tribunal Bill

Purpose

1. Dr Richard Worth MP has written to the Attorney-General to ask whether the Government is interested in adopting his Member's bill; the Criminal Cases Review Tribunal Bill ("the Bill"). This report:
 - advises you on the Bill; and
 - attaches, for your approval and signature, a draft letter to the Attorney-General that recommends that the Government not adopt the Bill.

Background

2. The Bill, a member's bill in the name of Dr Richard Worth, proposes to establish a Criminal Cases Review Tribunal to consider alleged miscarriages of justice and refer deserving cases back to the courts. The Tribunal would also be able to recommend a pardon. The Tribunal is also given power to award compensation to persons who are wrongly convicted and imprisoned. A copy of the Bill is attached.
3. The Tribunal would be appointed by the Governor-General on the House's recommendation, comprising at least 5 members of whom a majority must be criminal lawyers. The status of the Tribunal is somewhat unclear as the Bill anticipates it will be "located" within an agency, organisation or department (clause 6 of the Schedule).
4. The Bill is in the Member's ballot. Dr Worth has written to the Attorney-General to ask whether the Government is interested in taking over the Bill. The Ministry of Justice has been asked by the Attorney-General's office to provide advice on whether the Bill should be adopted.

Proposed response

5. Our advice is that the Government should not adopt the Bill. We have drafted the attached letter to the Attorney-General, for your approval and signature, which provides a brief summary of the Government's current work on organisational arrangements for considering miscarriages of justice and the key problems with the Bill. The letter recommends against the Government adopting the Bill.
6. In summary, we consider it would be premature to adopt the Bill. The Ministry is currently conducting a review of organisational options for considering alleged miscarriages of justice. An independent body is only one option being considered. Adopting the Bill would pre-empt the outcome of this review.

7. There are also several substantive problems with the Bill, which mean the Bill is too broad in its scope and would have unwarranted constitutional and fiscal consequences. If, after the completion of the current policy review, the Government were to favour the establishment of a permanent body or tribunal, this should be done by way of a government bill. It would need careful preparation.

Recommendations

8. It is recommended that you:

- 8.1 Agree that the Government should not adopt the Criminal Cases Review Tribunal Bill, a members' bill in the name of Richard Worth; and YES / NO
- 8.2 Approve and sign the attached letter to the Attorney-General that recommends the Government does not adopt the Bill. YES / NO

Jeff Orr
Chief Legal Counsel
Office of Legal Counsel

APPROVED / SEEN / NOT AGREED

Hon Mark Burton
Minister of Justice
Date:

Attachments

-

Hon Dr Michael Cullen
Attorney-General
PARLIAMENT BUILDINGS

Dear Michael

MEMBER'S BILL: CRIMINAL CASES REVIEW TRIBUNAL BILL

I refer to a letter you received on 20 September 2007 from Dr Richard Worth MP about his Criminal Cases Review Tribunal Bill in the Members' bill ballot. The Bill would establish a Criminal Cases Review Tribunal to consider alleged miscarriages of justice and refer deserving cases back to the courts or recommend a pardon. The Tribunal is also given power to award compensation to persons who are wrongly convicted and imprisoned. The status of the Tribunal is somewhat unclear as the Bill anticipates it will be "located" within an agency, organisation or department (clause 6 of the Schedule).

Dr Worth seeks your advice on whether the Government is interested in taking over the Bill.

The Government is already engaged in the issues the Bill attempts to address. I consider that any legislative action at this stage would be premature. There are also several substantive difficulties with the Bill that make the Bill unsuitable for adoption.

In the paragraphs below, I provide a brief summary of the Government's relevant current work and the key substantive difficulties with the Bill.

Relevant current work

Miscarriages of justice

I have asked the Ministry of Justice to review the options for organisational arrangements for considering alleged miscarriages of justice. Currently, persons who allege a miscarriage of justice may apply to the Governor-General for the exercise of the Royal prerogative of mercy. By constitutional convention, the Governor-General takes advice from the Minister of Justice, who in turn relies on the Ministry of Justice to investigate and provide a thorough report on each application.

I enclose a briefing the Ministry prepared for me in July of this year that outlines the organisational options being considered and the Ministry's preliminary views on those options. An independent body is one option being considered. At its very essence, the most appropriate organisational option will be one that can deal competently with the few applications of real substance (since January 2006 only 3 applications have required substantial analysis) and maintain public confidence, especially when dealing with high profile cases.

The Ministry is due to report back to me by the end of the year on the outcome of its review. Adopting the Bill would pre-empt the outcome of this review.

Compensation

Compensation for wrongful conviction and imprisonment is currently by way of ex gratia payment, assessed according to Cabinet Guidelines, with Cabinet itself making the final decision. The Ministry of Justice keeps the working of the guidelines under review, focusing on ensuring consistency, clarity and fairness in the application of the guidelines.

Difficulties with the Bill

The key difficulties I see with the Bill are summarised below.

Miscarriages of justice

1. The Tribunal's mandate and powers are very wide.
2. The Bill effectively creates a new legal procedure at the end of the court process. Any convicted person who has exhausted his or her remedies in the courts can then complain to the Tribunal that there has been a miscarriage of justice and has a right to have that complaint investigated at the Government's expense. No procedural requirements or other qualifying criteria are specified.
3. There is also a wide-ranging legal obligation on the Tribunal to investigate any other complaint "brought to its attention, whether or not made by the person directly affected".
4. To interfere with the final decision of the courts is an exceptional step. However, the Bill's criteria for sending a case back to the courts are vague (they just refer to a "miscarriage of justice", and "the interests of justice") and provide no direction to the Tribunal on when it would be appropriate to intervene.
5. The comparable UK legislation, by contrast, is more focussed and consequently much tighter. It requires an assessment that "there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made." Unless there are exceptional circumstances, this must be based on new evidence or argument not previously considered by the courts. The UK test is very similar to the existing New Zealand practice governing the exercise of the Royal prerogative of mercy.

6. The Bill only provides for *convictions* to be referred back to the courts. Perhaps in error, the Governor-General's existing power to refer back a person's *sentence* appears to have been extinguished.

Compensation

7. The Bill would make fundamental changes to the current system for paying compensation to persons who are wrongly convicted and imprisoned.
8. The Bill makes compensation a legal right and appears to shift the final decision on both entitlement and quantum to the Tribunal.
9. Further, the pool of convicted persons is broadened well beyond the deserving few who currently apply. The Bill provides that compensation must be assessed for any imprisoned claimant whose conviction is set aside on appeal, and an acquittal entered. Unlike the Cabinet Guidelines, there is no requirement on the claimant to establish 'innocence' — under the Bill, the question of innocence is a factor relevant only to quantum.
10. The means by which the Tribunal's assessment of compensation is enforced is unclear, as is the source of funds to pay compensation.

Summary

The Bill contains other technical deficiencies and gaps. The main point, however, is that the Bill is too broad in its scope and would have unwarranted constitutional and fiscal consequences.

Concluding comment

If, after the completion of the current policy review, the Government were to favour the establishment of a permanent body or tribunal, I consider this should be done by way of a government bill. It would need careful preparation.

I recommend against the Government adopting the Bill.

Yours sincerely

Hon Mark Burton
Minister of Justice

Encl:

Briefing from Ministry of Justice "Miscarriages of Justice: Organisational arrangements and availability of legal aid" dated 17 July 2007.