

Hon Judith Collins
Minister of Justice

INITIAL BRIEFING ON THE ROYAL PREROGATIVE OF MERCY

Date:	17 January 2012	File Number:	CON 34-22
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Action Sought

Timeframe

Note the content of this report, which provides a brief outline of the exercise of the Royal prerogative of mercy;

Note Appendix B, which details the applications that are currently being examined by the Ministry

Note that officials are available to meet to discuss this area with you.

n/a

Contacts for telephone discussion (if required)

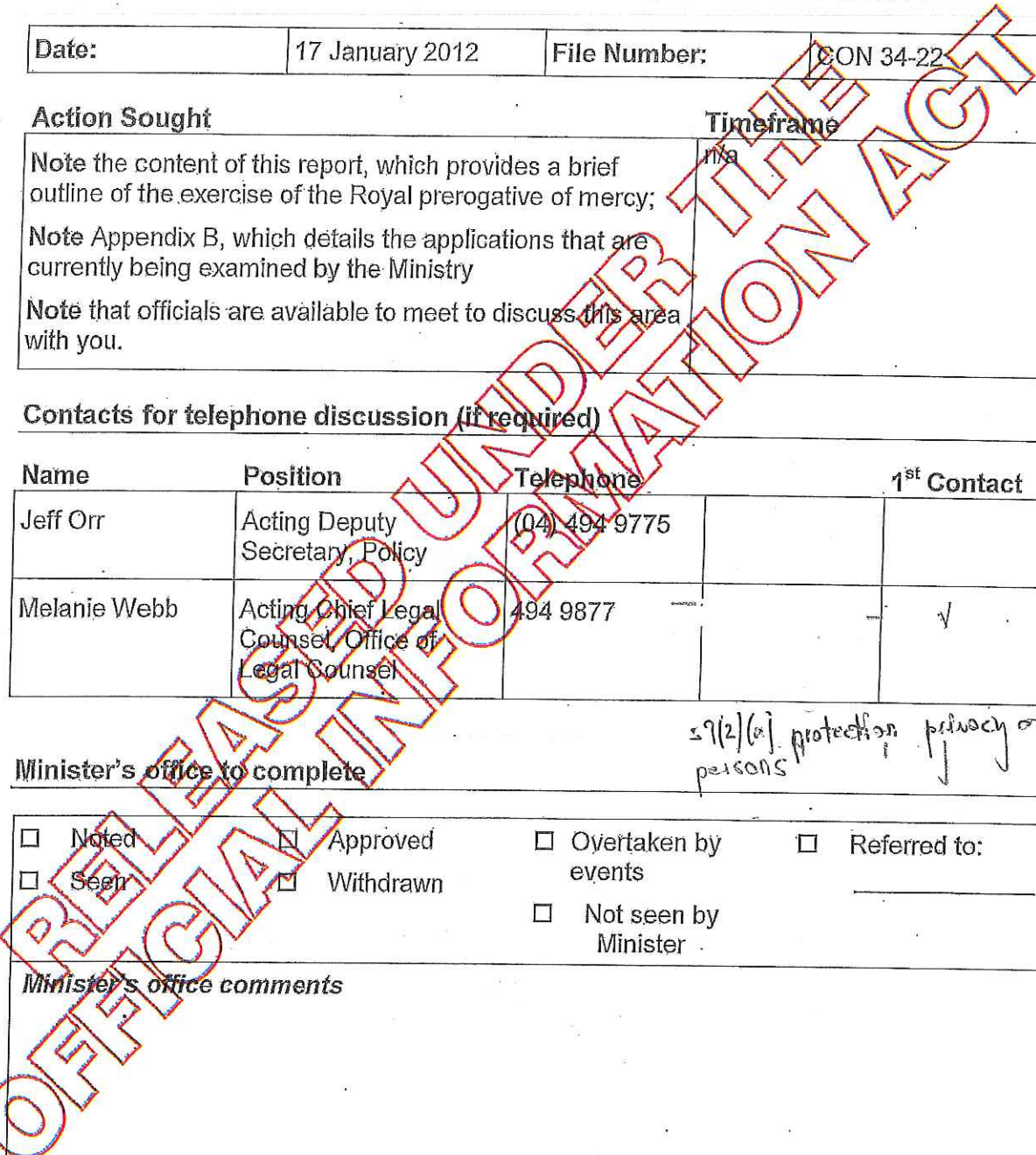
Name	Position	Telephone	1 st Contact
Jeff Orr	Acting Deputy Secretary, Policy	(04) 494 9775	
Melanie Webb	Acting Chief Legal Counsel, Office of Legal Counsel	494 9877	✓

s 9(2)(a) protection privacy of natural persons

Minister's office to complete

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|--------------------------------|------------------------------------|---|---|
| <input type="checkbox"/> Noted | <input type="checkbox"/> Approved | <input type="checkbox"/> Overtaken by events | <input type="checkbox"/> Referred to: _____ |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Withdrawn | <input type="checkbox"/> Not seen by Minister | |

Minister's office comments



17 January 2012

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INITIAL BRIEFING ON THE ROYAL PREROGATIVE OF MERCY

Purpose

1. This paper provides a brief outline of the exercise of the Royal prerogative of mercy and introduces you to the current work of the Ministry in this area.

Background

What is the Royal prerogative of mercy and when will it be exercised?

2. The Royal prerogative of mercy is a unique constitutional safeguard that provides an avenue for convicted persons to seek a remedy in cases where a miscarriage of justice may have occurred. It is usually sought only after rights of appeal have been used. The Royal prerogative of mercy will normally be exercised when new information becomes available that was not able to be properly examined by a court and which raises serious doubts about a person's conviction or sentence. The Royal prerogative of mercy does not operate as another appeal or a further opportunity to re-examine facts and arguments that have already been considered by the courts. In practice the prerogative of mercy is no longer exercised purely for merciful reasons.
3. In New Zealand, convention dictates that the Governor-General acts on the advice of the Minister of Justice when considering applications for exercise of the Royal prerogative. The Minister in turn seeks advice from the Ministry of Justice.
4. The power to exercise the Royal prerogative of mercy is delegated by the Queen to the Governor-General in New Zealand under clause XI of the Letters Patent 1983. Under the prerogative powers the Governor-General may grant a number of remedies, including a full pardon (which has occurred on only two or three occasions in New Zealand's history).
5. Section 406 of the Crimes Act 1961, which supplements the Royal prerogative, provides that the Governor-General may, on the application of a convicted person, either refer the conviction or sentence back to the Court of Appeal or the High Court for determination, or ask the Court of Appeal for an opinion on a particular issue.
6. Section 406 is important in the New Zealand setting because it provides an option between granting a full pardon and declining relief. It also reflects the constitutional principle that criminal cases should be decided by the courts, and not the Executive. Section 406(a), which is the most commonly used provision, enables the Governor-General to return a meritorious case to the courts for further consideration. When this is done the court deals with the matter as if it were hearing an appeal. Section 406(b), which has only been used twice since its enactment, enables the Governor-General to seek the Court of Appeal's opinion on any point arising from an application.

The Royal prerogative of mercy in practice

7. A flow diagram of the process for considering applications for the exercise of mercy is attached at Appendix A.
8. Applications are received by Government House and referred to the Minister of Justice with a request for formal advice. The Minister then refers the application to the Ministry. The Ministry reviews the information and submissions supplied in support of the application and all relevant court and police files. Sometimes additional information will be gathered or further enquiries made. In complex cases a senior lawyer or retired judge may be appointed to help with the consideration of the application or to peer review draft advice. The Ministry then prepares a report for the Minister containing full legal analysis of the application.
9. The Minister of Justice provides formal advice to the Governor-General with a copy of the report from the Ministry. When the Governor-General has considered the Minister's advice, the Official Secretary to the Governor-General will inform the applicant of the outcome.
10. Applications can be made by a convicted person or someone on their behalf. Following a High Court decision (*Yash Paul v Legal Aid Review Panel*), applicants can apply for legal aid. However, in practice, many applications involve self-represented applicants.
11. Volumes of applications have remained steady over the last decade at approximately 10-12 applications per year. There are currently 16 applications under review. About 12% of applications since 1995 have resulted in a referral to the High Court or the Court of Appeal.

Improvements to Ministry procedure

12. In late 2009, the Ministry developed an application form and information brochure for applicants. These are publicly available on the Governor-General's website (with a link appearing on the Ministry's website) and in hard copy on request. The application form has allowed Government House and the Ministry to quickly identify applications that are incomplete or ineligible and to return them to the applicants with further guidance on what is required.
13. The Ministry has a comparatively high number of applications currently under review (16 applications). The Ministry is looking at ways to improve its processes for considering applications, including ways to increase the speed with which applications are dealt with.

Current work

Outside of scope

Outside of scope

Policy – organisational arrangements for considering miscarriages of justice

19. England and Scotland have established Criminal Cases Review Commissions that perform a similar function to the Royal prerogative of mercy in New Zealand. There is ongoing public debate around whether an independent body should also be established in New Zealand to consider alleged miscarriages of justice. Often the debate is triggered by an individual high profile criminal case and could come to the forefront again in relation to one of the current high profile Royal prerogative applications, such as Scott Watson or Peter Ellis. There are important constitutional and public policy arguments around the subject, and the practice in comparable Westminster jurisdictions varies.
20. The Ministry has done some initial policy work on the best way to deal with cases that may warrant referral back to the Courts for consideration. A key objective is that there is a robust, cost-effective system for investigating the minority of claims which are complex or have some real substance. The Ministry identified four broad options for addressing concerns (the options are not necessarily mutually exclusive):
- further strengthening the Ministry's own capacity and procedures;
 - making greater use of external counsel to review advice;
 - formalising external peer review in a special panel to oversee the Ministry's function; or
 - establishing an independent Criminal Cases Review Commission or similar body.
21. Policy work in this area is not currently in the Ministry's work programme. If requested, the Ministry can prepare a briefing on the issues. The work could be included in future work programmes depending on your priorities.

Conclusion

Outside of Scope

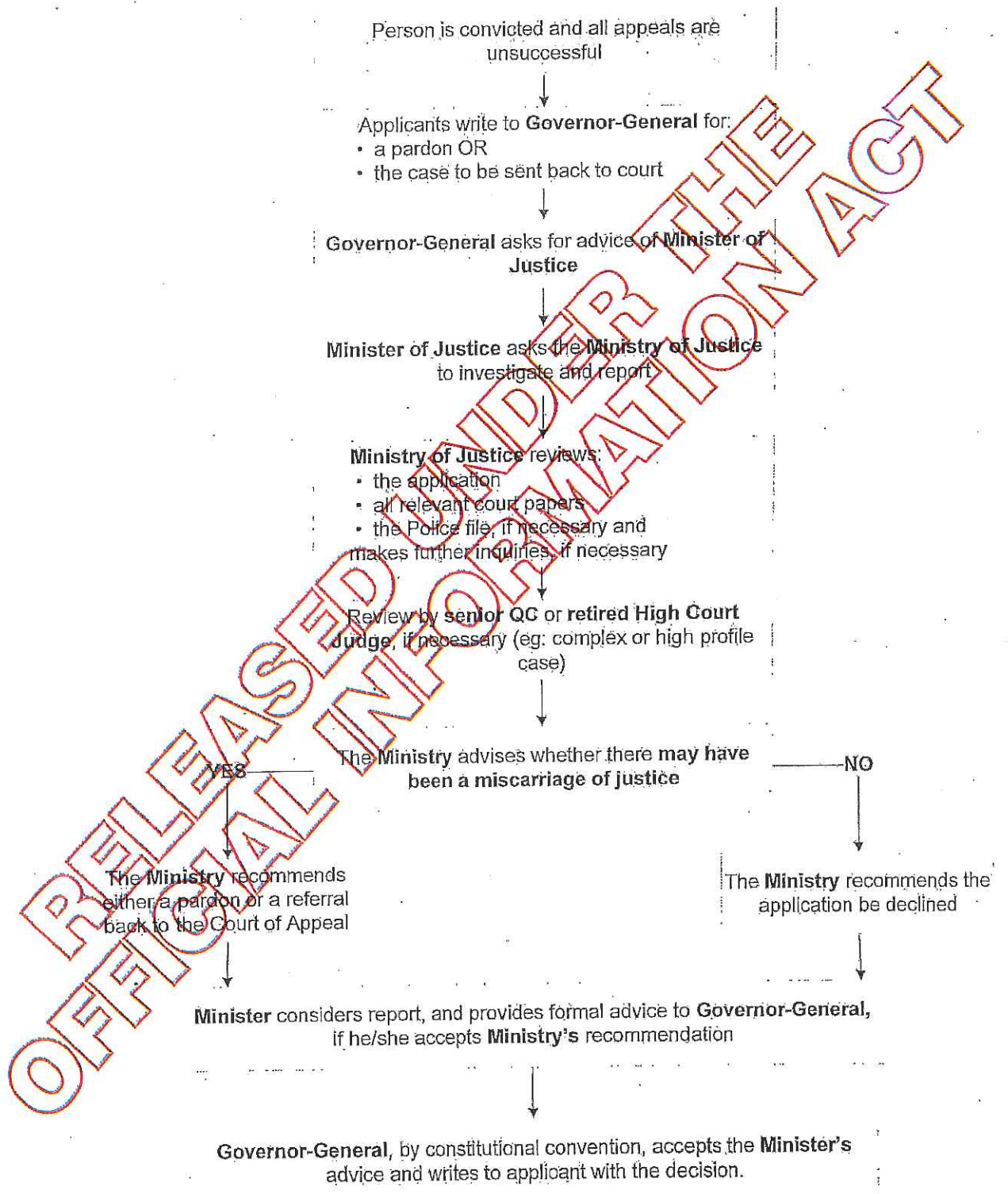
Melanie Webb
Acting Chief Legal Counsel
Office of Legal Counsel

APPROVED / SEEN / NOT AGREED

RELEASED UNDER THE
OFFICIAL INFORMATION ACT

APPENDIX A

Application for exercise of the Royal prerogative of mercy



RELEASED UNDER THE OFFICIAL INFORMATION ACT

APPENDIX B

ROYAL PREROGATIVE OF MERCY
APPLICATIONS UNDER REVIEW BY MINISTRY OF JUSTICE

Outside of Scope

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