TO: Mr D A Lavery
Central Secretariat

FROM: Denis McCartney
Departmental Solicitor's Office

17 September 1996

TALKS: SUB JUDICE PRINCIPLE

1. I refer to your letter of 16 September.

2. In the sense that it would "tend to lower the plaintiff in the estimation of right-thinking members of society generally" (Lord Atkin in Sim v Stretch [1936]) the publication of a contention by the Alliance Party that the Reverend William McCrea has acted in such manner as constitutes a breach of the Mitchell principles of democracy and non-violence is defamatory and actionable. To any such action the defences of justification, fair comment and privilege (qualified) would no doubt be deployable.

3. It is not clear to me from Mr McCrea's press release whether his threat of "appropriate legal proceedings" relates only to the Alliance Party persisting to allege that he appeared at the Billy Wright rally in Portadown on a platform on which UVF banners were displayed (an allegation that party has withdrawn), or also relates to the "suggestion" that his attendance at that rally constitutes a breach of the Mitchell principles. Assuming however that his threat relates to both aspects, and he does issue proceedings against the Alliance Party and/or the Sunday World the question is whether that makes such matters sub judice, as Mr McCrea contends in his press release. If so, are the two Governments precluded from holding a formal hearing under rule 29 to take the views of participants, and from deciding whether the DUP has "demonstrably dishonoured the principles of democracy and non-violence"?

4. This begs the question of whether there is any such thing as a rule or principle of sub judice. I know it is frequently cited as a cover for avoiding comment on awkward issues, but there really is no rule or principle of sub judice (which simply means, in the course of trial), and what the citation of it reflects is really a fear of prejudicing one's own position in pending proceedings, and more particularly of being in contempt of court. Because something is in the course of trial care needs to be taken to avoid any act or publication of an opinion which would carry a risk of

prejudicing a fair trial. So, a matter being sub judice is a state of affairs of which account has to be taken lest any act or publication would, contrary to the public interest, be prejudicial to fair trial. But it is not a rule or principle which of itself precludes any act or comment relating to the cause of action.

5. In the Attorney-General v Times Newspapers Ltd [1973] 3 All ER 54, Lord Diplock in his speech stated that it would be a contempt of court to expose any litigant "to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law". That statement can perhaps be readily applied to the present circumstances, in that a decision by the two Governments adverse to the DUP on the facts complained of by the Alliance Party could be profoundly prejudicial to any defamation proceedings by Mr McCrea. However, Lord Diplock went on to say "that discussion, however strongly expressed, on matters of general public interest of this kind is not to be stifled merely because there is litigation pending arising out of particular facts to which general principles discussed would be applicable. If the arousing of public opinion by this kind of discussion has the indirect effect of bringing pressure to bear on a particular litigant to abandon or settle a pending action, this must be borne because of the greater public interest in upholding freedom of discussion on matters of general public concern".

6. That passage contains the essence of the issue - a balance of the public interest. Here we have a political process of critical interest to the people of Northern Ireland which, if proceeded with, could be prejudicial to a private action. I have no doubt that the court would not easily be persuaded that that process would have to give way to a private action by Mr McCrea, or be subverted by his private interests or those of the defendants in any action he initiated.

7. Care would need to be taken to avoid publishing anything more than was necessary following the conclusion of and decision under the rule 29 process; if there was to be a contempt it would be in that publication, rather than in the execution of the process.

8. I might add that it is a matter of the greatest doubt that the Crown, as the fount of justice, could be sued in its own courts for contempt, and that unimpeacability is likely to apply to the Irish Government in such a case as this in which the two Governments, by international agreement, act in concert.

9. Finally, it does seem that Mr McCrea has not yet issued proceedings; the matter is therefore not yet sub judice or in the course of trial. While a trial and the interests of

litigants may need to be protected even before proceedings have been commenced, the balance of public interest is all the more weighted in favour of the rule 29 proceedings running their course unimpeded in circumstances in which litigation is but a threat.

10. It is that balance of public interest which I submit would constitute an unassailable defence to any application by Mr McCrea that the rule 29 proceedings should be stayed pending resolution of any defamation proceedings. In summary then I think the two Governments can be robust in meeting any argument, in the courts or in the political arena, that they should not adjudicate on whether the DUP is in breach of the Mitchell principles.

D McCARTNEY

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