MINISTRY OF
JUSTICE

FILE

LA 04 01 00 03
MP CJ RP

8 June 2000

Rt Honourable Sir Thomas Eichelbaum

Dear Sir Thomas

PETER HUGH MCGREGOR ELLIS

You have asked the Ministry to provide an opinion on whether, prior to sending extracts from the depositions and trial transcript of Mr Ellis's case to overseas experts, leave should be sought from the Court.

The Criminal Proceedings (Search of Court Records) Rules 1974

At present, access to criminal court records is regulated by the Criminal Proceedings (Search of Court Records) Rules 1974. In summary, the Rules prescribe that only a very limited part of the criminal record, including the registers of persons committed, tried and sentenced, is available for public search. The Rules also provide that sole defendants to criminal proceedings may have access to Court records relating to those proceedings. Outside of these limited examples, however, the Rules provide that any Court files or documents relating to criminal proceeds may only be searched, inspected, or copied with the leave of a Judge, and subject to such conditions as the Judge may impose. Rule 2(8) provides a general exception for documents more than 60 years old.

The leading cases relating to the Criminal Proceedings (Search of Court Records) Rules are *Amery v Mafart* [1988] 2 NZLR 747 and *Amery and Mafart* (No 2) [1988] 2 NZLR 754. These judgments collectively emphasise that the Rules vest a broad judicial discretion in the Court to permit access to files and documents relating to criminal proceedings. The judgments also emphasise that this discretion should be exercised

cautiously, particularly where access to the information might result in an invasion of privacy for the individuals involved. One such privacy consideration is where information from a criminal record might be used to identify the particular offender.

The general principles surrounding exercise of the Court's discretion under the Criminal Proceedings (Search of Court Records) Rules were discussed in some detail by you in *R v Philpott* (Unreported Wellington High Court judgment, 14 February 1991, T 74/90). In that case, you commented that:

> In my view the principal motivation for enactment of the Rules was to confirm and enhance the Court's supervisory powers over such material, and to rationalise the basis for dealing with the not infrequent requests to access for it ... as Thorp J said in *Amery v Mafart* at p 751, the applicant must show some sufficient reason for the grant of access. Whether the reason is sufficient must in a broad sense be determined according to the interests of justice. There is no requirement to show exceptional circumstances. In the end the Court must exercise a broad judicial discretion, which requires a balancing exercise involving consideration of the reasons advanced by the applicant, the legitimate claims for privacy defendants have after the conclusion of a trial, and any other relevant circumstances.

Your comments in this regard have been subsequently applied in a number of cases, including *R v Hawkins* (Unreported Auckland High Court judgment, Tompkins J, 28 April 1992, T 240/91) and *Television New Zealand v R* [1996] 2 NZLR 462.

Conclusion

In our opinion, the safest course may be to seek and obtain leave from the Court prior to sending extracts from the depositions and trial transcript of Mr Ellis's case to overseas experts for them to consider. At this stage, leave has not been obtained under the Rules in relation to the Court files currently held by you, primarily because the Ministry of Justice enjoys relatively unrestricted access to Court files for the purpose of considering applications for exercise of the Royal prerogative of mercy. However, the depositions and trial material clearly fall within the ambit of the Rules. We would note in particular that, in *Amery and Mafart* (No 2), Gault J noted that the Rules apply to all proceedings under the Crimes Act 1961, including preliminary hearings in the District Court.

We would not anticipate that any difficulty would arise in proving sufficiency of purpose in the terms set out in either *Amery v Mafart* or *R v Philpott*. An application could possibly be made informally to the Court of Appeal as is envisaged by subclause 2(6) of the Rules. If you wish, we would be happy to make such an application on your behalf.

We would anticipate that the Court may wish to consider the imposition of conditions on the release of the information. In terms of privacy considerations, the Court may wish to ensure that the identities of the complainants, their families, and all other individuals whose names have been suppressed are protected, both during and subsequent to the inquiry.

Finally, we would note that, in *R v Philpott*, the issue arose as to whether the release of information pursuant to the Rules might attract an implied undertaking as to the use for which the material might be put, in terms of the principles arising from *Home Office v Harman* [1982] 1 All ER 532. The specific concern you articulated was whether it was necessary for the Court to make orders authorising the provision of material to other parties. We would not however anticipate any difficulties in relation to this matter, provided that the Court is specifically informed the material will be provided to overseas experts for the purposes of the inquiry.

We enclose the Criminal Proceedings (Search of Court Records) Rules 1974, and copies of the judgments *Amery v Mafart, Amery and Mafart* (No 2), and *R v Philpott* for your information.

Please do not hesitate to contact me if you have any queries in relation to the matters raised in this letter, or if you wish the Ministry to make an application to the Court on your behalf.

Yours sincerely

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