SUBJECT.

Due 17th
ccs
+ Bernard Ingham

10 DOWNING STREET

From the Principal Private Secretary

26 January 1982

sc. Master set.

Dear John,

LAW OF RAPE

The Prime Minister held a meeting this morning with the Home Secretary, Lord Chancellor, Secretary of State for Scotland, Attorney General and Lord Advocate to discuss the present public concern about rape cases and the law of rape.

The Prime Minister said that the impression was gaining ground that in rape cases the law was on the side of the guilty and against the innocent and that it did not offer adequate protection to women. There was a widely held view that in questioning complainants, the police behaved as though they disbelieved the allegations they were investigating. Similarly, people believed that judges were predisposed to think that when rape was committed, it was the fault of the woman involved. It might well be the case that the law of rape could not be improved in any substantive way, but the fact remained that public concern had now reached a point where it was a political problem and the Government had to be seen to be responding. They could not get away with doing nothing. Such was the public interest in the matter now that the press would go on giving extensive publicity to any rape cases. The question was what the Government should do. She had had a preliminary word with the Lord Chancellor the previous week, and he had suggested that as far as the law of rape in England and Wales was concerned, it might be possible to build on the review of the law conducted by the Advisory Group on the Law of Rape in 1975 and to ask Mrs Justice Heilbron, who had chaired the review, to consider further the Advisory Group's findings in the light of recent events.

The Home Secretary said that the Criminal Law Revision Committee was in the process of reviewing the law on sexual offences, including rape, but they were not expected to report until mid-1983. They had issued a working paper which dealt in depth with the law of rape, and they were still receiving comments on their proposals. He doubted whether it would be possible to get the committee to report earlier. Moreover, it was unlikely that the committee or indeed any other inquiry would propose major changes in the law of rape. Virtually all of the Advisory Group's recommendations had been implemented in the Sexual Offences (Amendment) Act 1976.

CONFIDENTIAL

As regards the approach of the police to rape cases, they often had to question complainants persistently and in detail in order to establish the facts. Nonetheless, the Home Office had prepared guidance for Chief Constables on the handling of rape cases, and he was considering whether to issue it and if so, when.

The Lord Chancellor said that none of the recent rape cases had shown up any serious defect in English law, and he could not see how it could be substantively improved. Where the defence was consent, the burden of proof fell on the prosecution, and this meant that the woman very often had to go through a very considerable ordeal in giving detailed evidence. Even then she might well see the defendant found not guilty, with the implication that she had had sexual relations with a stranger.

As regards sentencing, the Lord Chief Justice, at his prompting, had made an admirable and proper statement from the Court of Appeal, and he did not see what more could be done in this respect. He had himself dealt with Judge Richards and his remarks about contributory negligence, and he had no intention of going any further on that matter.

He thought that it would be useful if the Prime Minister and one or two of her colleagues were to see Mrs Justice Heilbron to ask her, in the light of the work of her Advisory Group on the Law of Rape, how she thought the present disquiet should be dealt with.

The Attorney General said that the Advisory Group's recommendations in 1975 had been well received at the time. Many of them had been designed to make it more tolerable for the woman to proceed with her complaint, and the Group's report particularly offered some very good guidelines for police and medical investigations. He agreed that the law of rape itself was perfectly satisfactory as it stood at present: the present problems arose with the pre-prosecution period and the post-conviction stage, i.e. with police inquiries and with sentencing.

The Prime Minister, summing up this part of the discussion, said that she would be grateful if the Home Secretary could let her have a form of words for her use at Question Time that day on the work which the Criminal Law Revision Committee were undertaking on the law of rape. He might wish to clear this with Lord Justice Lawton, the Chairman of the Committee. The Lord Chancellor should get in touch with Mrs Justice Heilbron to invite her to come and see the Prime Minister to discuss the present situation. She would like to be able to say at Question Time later in the day that she would be seeing Mrs Justice Heilbron, and the Lord Chancellor should ensure that this was acceptable to Mrs Justice Heilbron.

The Prime Minister then turned to the question of the law of rape in Scotland. She understood that the complainant in the Glasgow rape case was now planning to bring a private prosecution. This meant that although the case was not yet strictly sub judice, it would be wrong for her to offer any comment on it at Question Time.

The Lord Advocate said that he understood that the woman's solicitor would need some fourteen days to prepare the material on which to base an application to the court for permission to institute a private prosecution. When the application was heard, he as the public prosecutor would have to state his position. This would not be easy, given the earlier decisions on the case taken by the Crown Office. He was of course very well aware of the sensitivity of the matter and he would be extremely careful in the words he used. He proposed to explain why it had been decided not to prosecute before, and he would go on to say that if the reasons for the decision not to prosecute no longer applied, he would not oppose the application. But he would have to make it clear that because the Crown Office had previously decided not to prosecute he, as a technicality, could not formally concur in the private prosecution.

The Secretary of State for Scotland said that there was a good deal of press interest in whether the woman would receive legal aid for her private prosecution. It was not clear whether she would be eligible under the existing arrangements, but if she were not, he proposed to make every endeavour to ensure that she would not be out of pocket as a result of the private prosecution. It might be necessary for his department to make an ex-gratia payment.

As regards the wider question of the law of rape in Scotland, the Scottish Home and Health Department had begun a research study into sexual assaults in 1980. It was due to be completed in 1982. It was, however, a departmental review and as such would not carry the same authority in public as the work of the Criminal Law Revision Committee in England.

The Lord Advocate said that the Scottish Law Commission was already examining the law of evidence generally and their review would cover the law of evidence as it related to rape. It would be possible to say in public that the findings of the SHHD study would be made available to the Scottish Law Commission to see whether it added anything to their inquiry into the law of evidence. If the SHHD review recommended any change in the substantive law of rape, that would be a matter for the Secretary of State for Scotland to pursue.

The Prime Minister, summing up this part of the discussion, said that her office would prepare, in the light of the discussion, a line for her to take at her Question Time on the law of rape in Scotland and the Glasgow rape case. This would be cleared with the Secretary of State for Scotland and the Lord Advocate.

I attach in its final form the material which was prepared for the Prime Minister's use during her Questions today. You and the copy addressees of this letter kindly cleared the parts of it which are of direct concern to you and them. In the event, the Prime Minister drew on virtually all of it except the passage on the law on rape in Scotland.

I am sending copies of this letter and of the attachment to Michael Collon (Lord Chancellor's Office), Muir Russell (Scottish Office), Jim Nursaw (Law Officers' Department) and Christine Duncan (Lord Advocate's Department).

Yours ever,

Steve Whatmore.

John Halliday, Esq.,
Home Office.

LAW OF RAPE IN ENGLAND AND WALES

Building on the changes made in 1976 following the Report of the Advisory Group on the Law of Rape, chaired by Dame Rose Heilbron, the Criminal Law Revision Committee has carried out a comprehensive review of sexual offences, including rape and allied offences and the penalties for them. In October 1980 it published an important Working Paper on which it invited comments. The Chairman of the Committee, Lord Justice Lawton, has confirmed to the Home Secretary that comments on the Working Paper, which dealt in depth with the law on rape, are still being received and that the Committee's eventual Report will take full account both of these and of recent events. The Committee's intention is to produce a Report which places the law on rape in the context of sexual assaults generally.

Dame Rose Heilbron

More immediately, I thought that I would find it helpful to discuss recent events with Dame Rose Heilbron in her capacity as the Chairman of the Advisory Group on the Law of Rape which reported in 1975. She will be coming to see me in the next day or so.

LAW OF RAPE IN SCOTLAND

The Scottish Law Commission is already examining the law of evidence generally. Their review covers the law of evidence as it affects rape.

At the same time the Scottish Home and Health Department has been undertaking a research study into sexual assaults. This has examined, among other things, police and medical procedures and complainers' court and trial experiences. The study will indicate whether particular changes of practice or procedure would be helpful and the scope for changes in the law.

The study is due to be completed in the middle of this year, and its findings will be made available to the Scottish Law

/ Commission

Commission to see whether they add anything to their inquiry into the law of evidence. If the study recommends any change in the substantive law of rape in Scotland, that will be a matter for my rt hon Friend the Secretary of State.

GLASGOW RAPE CASE

I understand that an application for permission to institute a private prosecution is likely to be made in the near future, and it would therefore be wrong for me to offer any comment now on that particular case.

/ Legal Aid: If legal aid cannot be granted under the existing regulations, my rt hon Friend the Secretary of State will make every endeavour to see that the complainer is not out of pocket as a result of her private prosecution. /

From: THE PRIVATE SECRETARY

HOME OFFICE
QUEEN ANNE'S GATE
LONDON SWIH 9AT

26 January 1982

Dear Clive,

RAPE

In case it is helpful for tomorrow's meeting with Dame Rose Heilbron, the Home Secretary has asked me to send you the enclosed background note.

Yours ever,

J. F. HALLIDAY

Clive Whitmore, Esq.

RAPE.

The ~~President~~ PRESENT. Law on Rape

Most of the present law is contained in the Sexual Offences (Amendment) Act 1976. This implemented nearly all of the recommendations of the Advisory Group under the chairmanship of Mrs. Justice Heilbron which examined the law of rape in 1975, following public outcry, in which Jack Ashley played a major part, over decisions in certain cases.

2. The main provisions of the Act are:

(i) A man commits rape if he has unlawful sexual intercourse without the woman's consent, knowing that she does not consent, or being reckless as to whether she consents or not.

(ii) The previous sexual history of the complainant with men other than the accused is inadmissible in evidence except by leave of the trial judge, which he may grant only if satisfied that it would be unfair to the defendant to withhold it.

(iii) The complainant is protected from having her name revealed in the Press (as is the accused unless he is convicted).

The Review by the Criminal Law Revision Committee

3. The law on rape is already under review. The Criminal Law Revision Committee (Chairman, Lord Justice Lawton) is reviewing the whole of the law on sexual offences, including rape.

4. In a Working Paper published in October 1980, the Criminal Law Revision Committee said that it saw no reason for trying to improve on the definition in the 1976 Act and would concentrate on matters not covered by it. The Working Paper made certain provisional recommendations of which the following are of the most interest:

(a) Inducing sexual intercourse by fraud or threats other than threats of force should be criminal and attract heavy penalties but not be rape; a minority considered that this amounted to a narrowing of the law on rape and opposed the recommendation.

(b) The offence of rape should be extended to cover husbands who have sexual intercourse with their wives without consent (prosecutions would require the consent of the DPP).

(c) Men and women who aid or abet rape should be punished for aiding and abetting, even if the principal offender was acquitted of rape.

(d) The maximum penalty for rape should continue to be life imprisonment: in particular there should not be a two-tier offence with a lesser penalty where there was no actual evidence, or threat of violence by a stranger to the victim.

Most of the issues raised by the Criminal Law Revision Committee are relatively minor; there is no suggestion that the existing law on rape is fundamentally defective.

5. The recommendation as to marital rape followed the advice of the Policy Advisory Committee on Sexual Offences (which numbers among its members not only lawyers and judges but also doctors, social workers, sociologists, a police officer, a headmistress and a clergyman). This Committee, chaired by Mr. Justice Waller, was set up to provide an assessment of lay opinion and to advise the Criminal Law Revision Committee on medical and social issues.

Reaction to the Proposals

6. So far there is little consensus on the specific issues raised. Women's groups have suggested that the offence of rape should be extended to all penetrations (buggery, oral sex, assault with instruments); that the absence of consent should be replaced by the concept of "against the woman's will"; and (contrary to the general law on evidence) that the man's previous sexual offences should be made known to the jury. In general, lawyers' groups who have commented seem opposed to any widening of the law of rape.

Timing and Scope of the Review

7. The Criminal Law Revision Committee and the Policy Advisory Committee have yet to assess reaction to the Working Paper with a view to producing a final report. It is not easy to predict how long this will take, but it is unlikely that there will be a final report for at least a year.

8. The Criminal Law Revision Committee will take full account, in framing its eventual proposals, both of comment on the Working Paper and of recent events.

IMMEDIATE

NON-SECURE FACSIMILE

For Operator Use Only	
Location / Serial No.	12/24
No. of Pages	5
Date / Time	26/1/82

PLEASE SUPPLY GOOD COPY
i.e. BLACK TYPE ON WHITE PAPER
DO NOT USE COLOURED INK

Despatch Instructions:

PLEASE INSERT NAME, ADDRESS AND ROOM NO.

FROM: PS/SHHD, SAH

TO: PS/S of S, DH

COPIES: PS/Mr Rifkind, PS/US of S (NSCIH), Mr G Aitken — all DH; Mr Dunsmore, Mr Malcolm — both LAD via DH; Miss Pollock, Crown Office, Regent Road.

Supplementary message to recipient:

Signature: [signature] Dept. SHHD Room: 169

Support for Jamble private Case.

PS/Secretary of State

Copy to Mrs Duncan
Miss Pollock
Mr Malcolm
PS/Mr Rifkind
PS/US of S

LAW ON RAPE

I attach a brief for the use of the Secretary of State at the Prime Minister's meeting on Tuesday 26 January at 9.30 am. We have had preliminary exchanges with Home Office and Crown Office but have not yet had the opportunity to consult them on the line taken.

J GILMOUR

PS/SUHD
25 January 1982
ENC

LAW ON RAPE

BRIEF FOR USE BY THE SECRETARY OF STATE AT THE PRIME MINISTER'S MEETING ON TUESDAY 26 JANUARY AT 9.30 AM

BACKGROUND

In her letter of 22 January to the Lord Chancellor, the Prime Minister expressed her intention of arranging a meeting to decide upon the next steps both on the broad question of the law of rape and on the narrower issue of the Scottish case, as to which the Prime Minister expressed the hope that a private prosecution would be brought and that there would be no question of a private prosecution failing because the complainer lacked the necessary funds.

GENERAL ISSUES: PENALTIES

2. Concern has been expressed about the penalties for rape in the context of the recent English case where a fine was regarded as an appropriate disposal. Rape is a common law offence in Scotland which is tried in the High Court of Justiciary which has the power to impose any length of custodial sentence and/or an unlimited fine or compensation order. Rape has always been regarded as a serious crime meriting condign punishment and in a recent case the Lord Justice Clerk took the opportunity of reiterating this (as has the Lord Chief Justice in England). The table at Annex A sets out the incidence and disposal of rape cases in Scotland for the period 1976 to 1979 (the latest year for which detailed figures are available) with certain earlier years: these bear out that the likely outcome of a conviction for rape is a custodial sentence; it may be assumed that there were good reasons for the few non-custodial sentences.

3. The Home Secretary has confirmed the inaccuracy of Press reports to the effect that he contemplated amendments to the Criminal Justice Bill which would introduce mandatory prison sentences for rape. The Lord Chancellor has pointed out to colleagues that it is of first importance that Ministers should not make any public statements which could be construed as an attempt to interfere with the independence of the judiciary. It would be contrary to current practice to introduce a minimum sentence for any offence and might be counter-productive; there would be pressure for similar provisions for other repellant crimes, but there might be a reaction to the application of minimum sentences in particular cases and there might also be a reluctance on the part of juries to convict (as in capital cases previously). The general rule should be to allow the judiciary to exercise their discretion in particular cases: there is no doubt that rape is regarded by Scottish judges as a serious crime for which a custodial sentence would usually be appropriate.

GENERAL ISSUES: EVIDENTIAL ETC REQUIREMENTS

4. Of more concern than the question of disposal is the means of securing convictions. Following the report of the Heilbron Committee in 1976, the Sexual Offences (Amendment) Act 1976 made it no longer permissible in England and Wales, without special leave of the judge, for the defence to introduce material about the complainant's previous sexual activity with men other than the accused.

While there is no such provision in Scotland there are certain safeguards under the common law of Scotland. If the accused wishes to attack the character of the complainant as part of his defence then notice of this intent has to be given in advance to the court and the prosecutor.

Provided notice has been given timeously the defence may competently attack the complainant's general character by putting questions to her or by seeking to prove her bad repute at the time of the offence. The defence may not however seek to prove individual sexual acts on the complainant's part with other men.

5. There is no statutory provision in Scotland guaranteeing the anonimity of the complainer; however, it is a long-established practice on the part of the police and the courts to conceal as far as possible from the public the identity of the complainant during the investigation and at any subsequent criminal proceed

REVIEW OF THE PRESENT POSITION

6. The major problem appears to lie not in the law of rape or in the relevant criminal procedures but in reconciling the legitimate but usually conflicting interests of the victim and the accused in rape cases. On the one hand, rape is a most serious crime of which no one should be convicted unless the evidence establishes his guilt beyond any reasonable doubt. On the other, the powers of police questioning and of cross-examination in court necessary to establish the truth may be distressing in the extreme to the victim and is apparently a deterrent to the reporting of such crimes.

Against this background, a research study into sexual assaults was set up by SHHD in 1980. This examined police and medical procedures, complainers' court and trial experience, the reasons for the high percentage of cases which are discharged on trial or abandoned at an early stage. It is intended to indicate whether particular changes of practice or procedure would be helpful, and the scope for legislative change. The components of the research are an analysis of police, fiscal and court records, interviews with a sample of sexual assault victims and interviews with police officers responsible for the investigation of sexual assault complaints. No new cases have been followed up since May 1981, and work is continuing on processing

material. A final report should be available in mid-1982, but no decision about publication can be taken until the outcome is known.

8. This study may provide the basis for a review of policy and practice in relation to the law of rape in Scotland. It has been suggested that in England and Wales Mrs Justice Heilbron's enquiry might be reviewed, but we would not recommend an extension of this to Scotland in the different circumstances prevailing. A separate enquiry would be appropriate, if required, and this might best be judged in the light of the outcome of the research study. The main difficulty which has arisen in the Glasgow case appears to be in the administration of the present procedure rather than in the procedure itself.

FUNDS FOR PRIVATE PROSECUTION

9. A private prosecution requires the consent of the High Court of Justiciary, who will usually look for the concurrence of the Lord Advocate. The Lord Advocate will no doubt speak to this aspect of the case at the meeting. The statutory system of criminal legal aid does not contemplate payments to private prosecutors (the procedure is very rarely used). On first sight, any payment would have to be made ex gratia, but this will require further consideration in the light of the action currently undertaken by the complainer's solicitor and of the consultation with Treasury; consultation with the Lord Chancellor's Department has established that a private prosecutor in England and Wales would not receive legal aid as such, but might be able to recover costs from public funds after a successful prosecution under provisions not applicable in Scotland.

OTHER COMPLAINTS

10. The complaints against sentencing and against police conduct (in Reading) have not been features of recent rape cases in Scotland. In the Glasgow case, the complainer was reported as appreciative of police action.

CONCLUSION

11. We would therefore recommend that at this stage:-

(a) no action should be contemplated to introduce a mandatory minimum sentence for rape, given past practice and the recent remarks by the Lord Justice Clerk;

(b) any question of a review of the law of rape and the relevant procedure in Scotland should await resolution of the proposed private prosecution and the completion of the current SHHD research study into cases of sexual assault;

(c) in any case, any review of the law of rape and related offences in Scotland should be conducted separately from, although having regard to, any such review for England and Wales, where concern has been generated by different circumstances.

ANNEX A

RAPE IN SCOTLAND

Year	Cases recorded by the police	Cases cleared up	Persons proceeded against	Charge proved	Custodial sentence	Given other sentence	Details of non-custodial sentence
1959	34	23	6	2	-	2	(2 probation)
1962	42	36	13	9	7	2	(1 fined, 1 admonished)
1967	101	78	19	12	7	5	(1 fined, 2 probation, 2 other*)
1976	184	111	52	28	26	2	(1 probation, 1 admonished)
1977	178	125	60	35	35	-	-
1978	166	118	52	29	28	1	(1 probation)
1979	145	102	50	34	33	1	(1 guardianship order - implies mental illness, probably mental deficiency)
1980	166	133	N/A	N/A	N/A	N/A	N/A

*details not available