CONFIDENTIAL

H(86)2nd
H(86) 3

File JA1AKH

cc: LPO
LCO
LPS
CW
GW
VAG
CO

10 DOWNING STREET

From the Private Secretary

11 February 1986

Dear Stephen

LENIENT SENTENCING

The Prime Minister has noted the proposals contained in the draft White Paper on the Criminal Justice Bill 1986/87 which deal with lenient sentencing (H(86)3 and the associated minutes H(86)2nd refer), and the Home Secretary's minute of 31 January.

The Prime Minister recalls a point which was raised at her meeting with the Home Secretary's predecessor on 3 April last year (my letter to Hugh Taylor of that date refers). She believes that the proposals contained in Clause 22 of the Prosecution of Offences Bill, which the Lords rejected, amounts to a sensible extension of the Attorney General's right to refer an acquittal to the Court of Appeal on a point of law (section 36 of the Criminal Justice Act 1972). This allows the Court of Appeal to give an opinion on that point of law, though this cannot affect the acquittal itself. The Prime Minister considers that this provides a clear parallel with the Government's earlier proposal to allow the Attorney General to refer a sentence to the Court of Appeal, so that guidance on sentencing in that kind of case could be issued, though the individual sentence in the particular case would not be subject to review.

The Prime Minister wonders whether this point was forcefully put to their Lordships when they were debating Clause 22. She thinks it difficult to sustain the argument that such an arrangement can legitimately apply in the case of a point of law on an acquittal, but not in relation to sentence following conviction. It could, after all, be said that the former involved a point of principle more significant than the latter.

The Prime Minister would be grateful for the Home Secretary's views.

JA

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I am copying this letter to Joan MacNaughton (Lord President's Office), Richard Stoate (Lord Chancellor's Office), David Morris (Lord Privy Seal's Office), Murdo Maclean (Chief Whip's Office), David Beamish (Government Whips' Office, Lords), Henry Steel (Law Officers' Department) and to Michael Stark (Cabinet Office).

Yours ever

Mark Addison

(MARK ADDISON)

Stephen Boys Smith, Esq.,
Home Office.

H (86) 3

PRIME MINISTER

LENIENT SENTENCES

The Home Secretary's minute, attached, explains the background to his thinking on his proposal on lenient sentences for inclusion in the Criminal Justice Bill, which is the subject of a paper going to H Committee on Tuesday. The Home Secretary proposes that, instead of introducing a power for the Attorney General to refer a specific sentence to the Court of Appeal, he put on a statutory basis the Appeal Court's practice of giving guideline judgments on sentencing in particular classes of cases.

The Home Secretary has had to try and pick his way through the difficulty, on the one hand of meeting genuine public concern on lenient sentencing and, on the other, of meeting the objections of the lawyers who are completely opposed to involving the prosecution in sentencing in any way.

It will be important to take the Lord President's mind on the likely reaction of the Lords, and this can be fully discussed at H on Tuesday. I shall report to you again after that.

You will also wish to note that the Home Secretary proposes that the Criminal Justice Bill should provide for the implementation of most of Roskill and for the abolition of peremptory challenge to jurors.

Mark Addison

(MARK ADDISON)
31 January 1986

CO
HO
Legal Pm office
} agreed.
MEA 3/2

SRWANV

PRIME MINISTER

to request attachment *

LENIENT SENTENCES

As you know, I have been considering how we should deal with the problem of lenient sentences when we come to the Criminal Justice Bill which we shall be introducing in the autumn. In view of your previous interest in the matter, I thought you might like to see the attached paper which H Committee will be discussing at a meeting on Tuesday. Paragraphs 3 - 9 of the paper summarise my current thinking, and the terms on which I propose to open the matter to public discussion can be founds in paragraphs 6 - 11 of the attached White Paper which I plan to publish next month. *

2. I started by thinking that we should simply reintroduce the provision ("clause 22") which was defeated in the House of Lords during the passage of the Prosecution of Offences Act, which would have given the Attorney General a power to refer apparently over-lenient sentences to the Court of Appeal. Having reflected a good deal on the matter over the last few months, I think that it would be unwise to do so. Even if the Bill is introduced in the Commons I am doubtful whether we could carry it in the Lords. Those who voted against us last time (a broad coalition of legal Peers, the Opposition and some of our own supporters) felt strongly that it would be wrong in principle for the prosecution to be involved in sentencing even in the very limited way which clause 22 would have allowed. I believe that argument to have been overdone, but I have no reason to think that feeling on the subject now is any less strong than it was.

3. Part of the difficulty with clause 22 was that the Lords' hostility was not matched by enthusiasm in the Commons. The reason may have been that, under the clause, the Court of Appeal would have been able to give its opinion on the sentence which should have been passed in the case before it, but the offender himself would not have been adversely affected. The provision looked as though it affected the individual case and therefore infuriated the Lords. But in fact it did not, and could therefore be criticised as artificial. In the end, we had the worst of both worlds.

4. We could get round the accusation of artificiality only by giving the Court of Appeal power to increase sentence on a reference by the Attorney General, as has been proposed in a recent Bow Group paper by Michael Stephen. I have thought hard about that possibility. It has the virtue of logic and would be quite acceptable to the Lord Chief Justice. The arguments of substance against it do not seem to me as strong as is often made out. But as is said in the paper for H, it would be genuinely

vulnerable to the criticism of unacceptable prosecution involvement in sentencing, and on that account even less likely to carry in the Lords. The Law Officers have made it clear that they would be strongly opposed in principle, fearing as they do that involvement in such a procedure would put their relationship with the judiciary under great strain. The Lord Chancellor is also opposed. I must give weight to these views.

5. I have also in mind that we may not want to become bogged down in the spring and summer of 1987 with a time-consuming argument between Lords and Commons on this issue.

6. For all these reasons I have looked for a somewhat different way of meeting the genuine concern of the public and ourselves which you articulated to the American Bar Association. I propose to suggest an approach whose purpose, like that of clause 22, would be to ensure that the correct sentencing principles were fully articulated by the Court of Appeal and well known to the lower courts. This could be done by reorganising, strengthening and putting on a statutory basis the practice of the Court, with the Lord Chief Justice's agreement, of giving "guideline" judgments on sentencing in particular classes of cases. The Court's advice would be promulgated under statutory authority by the Judicial Studies Board. It would be embodied in a handbook for judges, which would be available to the public at large. At the moment the Court does give guideline judgments but they tend to be publicised in a rather haphazard way, and few people outside the judiciary (and by no means all judges) seem to be at home with them.

7. A provision in the Criminal Justice Bill establishing a statutory basis for improving sentencing practice would go with the constitutional grain, and would be widely recognised as a real advance in a difficult area. I have had a talk with the Lord Chief Justice, who could accept the proposal just described. If, as I believe will be the case, he is willing to make his support for it known our position will be considerably strengthened.

8. The Criminal Justice Bill will be a massive and far reaching measure which will include, if colleagues accept my recommendations, a number of drastic proposals, for example to implement most of Roskilll, to do away with peremptory challenge to jurors in all cases, and to abolish the prima facie rule in cases of extradition. Whatever decision we take on lenient sentences no-one will be able to describe the Bill as a mouse.

9. I am sending a copy of this minute to the Lord President of the Council, the Lord Chancellor, the Leader of the House of Commons, the Chief Whips in the House of Lords and the House of Commons, the Attorney General and Sir Robert Armstrong.

Douglas Hurd.

31st January 1986


31. I.
PM 86