

should require that there be an honest and reasonable belief that the woman consented to the sexual act. Only when a woman consents to a sexual act explicitly and clearly is the validity of her consent established. Consent must have been voluntarily communicated before the act can be considered consensual.

RECOMMENDATION 21

The Committee recommends that Parliament repeal the defence of “mistake of fact” which relates to honest mistaken belief in consent in sexual assault cases, as was articulated in the *Pappajohn* case.

O. CUSTODY OF AND ACCESS TO CHILDREN IN DIVORCE CASES

Women who are affected by violence are often further harmed by inequality in the laws related to custody and access decisions in Canada. Some of these decisions are made under provincial family law legislation and the federal *Divorce Act* determines the rest. The *Divorce Act* requires that custody decisions be made on the basis of the best interests of the child. Parental conduct is relevant only to custody and access decisions where it adversely affects the emotional, psychological and spiritual welfare of the child. Judges do not direct their attention to aspects of parental conduct that are not seen as directly affecting the child.

Decisions about custody and access are not based on the needs or best interests of parents. The standard “best interests of the child” test is the one which is applied. The test is made up of assumptions that may not always reflect reality. For example, it is routinely assumed that it is in the best interests of all children to have maximum contact with both parents. Where one parent is the instigator of repeated violent incidents, this may not be true. Also, it is assumed that future promises are more important than past history, an assumption that often underlies a court’s unwillingness to base a decision to deny custody or restrict access on a history of violence.

In cases where domestic violence has occurred, courts may make custody and access decisions without considering the father’s assaults on the mother a factor. The fact that the father has assaulted the mother is considered not relevant in determining his parenting skills or ability, whether the issue at stake is custody or access. Lawyers advise their clients as a matter of course that allegations of wife assault will not be persuasive in disputes about custody or access, thus discouraging women from raising the issue of violence in custody litigation. In cases where these issues are raised, they are not accepted as determinative of the best interests of the children. For women who have