RECOMMENDATION 20

The Committee recommends that, if the Supreme Court of Canada strikes down sections 276 and 277 of the *Criminal Code*, Parliament re-enact the provisions using section 33 of the Charter (the override provision) to protect the provisions from further constitutional challenges or erosion.

N. DEFENCE OF MISTAKE OF FACT IN SEXUAL ASSAULT CASES

The law relating to the evidence of victims of sexual offences was identified by Madam Justice Beverly McLachlin in a recent speech to the Elizabeth Fry Society in Calgary, Alberta, (17 April 1991) as an area of the criminal law where sexual stereotypes and myths have led to unequal and unfair treatment of women. The law reflects the continuing influence of the myths that claim women are irrational and profoundly sexual beings, predisposed to lying about having consented to intercourse. The law of consent in sexual assault cases is founded on stereotypes of sexual inequality.

This concern was raised by witnesses to this Committee, who said that the law on sexual assault in Canada contributes to the perpetuation of violence against women. Since 1980, it has been settled law in this country that an honest, unreasonable mistake as to non-consent could absolve an accused charged with sexual assault, as held by the Supreme Court of Canada in the *Pappajohn* case. Where an accused leads evidence that he was under a mistaken belief that a sexual act was consensual, the law allows him to use this as the basis for the defence that he did not commit the mental element of the offence. Witnesses before the Committee took the position that the defence of "mistake of fact", related to the mistaken belief in consent, is unconstitutional and should not stand.

The participants in the criminal justice system, judges, defence lawyers and prosecutors, can be influenced by myths and stereotypes about female sexuality, including the view that violent behaviour is normal for a sexual encounter. For example, it was reported recently that a B.C. Superior Court judge, in acquitting a man of sexual assault, found that the complainant had not resisted strongly enough. The judge's comments included: "No may mean maybe, or wait awhile". (*Globe and Mail*, April 27, 1991)

The Committee believes that if the criminal law is to be used as a tool to protect the right of women to self-determination in sexual relationships, it must be interpreted and applied in a manner that excludes all defences based on attitudes, beliefs and norms that are inconsistent with that right. The court's determination of the mental element of sexual assault offences should depend on the finding of consent on an objective standard. In other words, an unreasonable belief in consent should not be sufficient; the defence