An Examination of the Alternatives Available to Amend the Criminal Code after the Decision of the Supreme Court of Canada in Seaboyer and Gayme

A Paper Submitted to the Ontario Women's Directorate

by

the Women's Legal Education and Action Fund

January 10, 1992

POSITION PAPER ON REFORM OF SEXUAL ASSAULT LAW
IN LIGHT OF THE SEABOYER & GAYME DECISION

THE SEABOYER AND GAYME DECISION

The Women's Legal Education and Action Fund, together with a number of other groups representing rape crisis and treatment centres, and policy, research and advocacy groups working on behalf of survivors of sexual abuse and assault, intervened at the Supreme Court of Canada in the Seaboyer and Gayme cases in support of sections 276 and 277 of the Criminal Code. These groups intervened not because they believed that these sections were perfect, or even barely adequate to the task of ensuring victims of sexual assault equal protection from the criminal justice system, but because they were better than no law at all, and because it was important that the Court hear and take account of the perspectives of women and children, the class of victims of sexual assault, in making any decision about a law designed to benefit victims of an offence that implicates section 15 of the Charter as directly as does sexual assault.

The Court in a majority decision, with a strong dissent written by Madame Justice L'Heureux Dube, struck down section 276 of the Criminal Code, the most comprehensive and important of these two provisions. The immediate task that faced by policy-makers was the task of responding to the Seaboyer decision in a manner that both furthers the objectives of the previous rape shield law, and complies with the Charter.

GOVERNMENT'S OBJECTIVES IN DRAFTING NEW LEGISLATION

In ensuring that new legislation complies with the Charter, it is

the task of government not only to take account of the fair trial rights of those accused of sexual assault, but also to take account of the constitutional rights the Charter guarantees to the women and children of Canada who are, as a group, the victims of sexual assault. Any new law which takes account only of the rights of the accused and not those of the victims will not meet Charter standards. Those latter rights include not just equality rights, but also the right to fair trial processes ensuring just outcomes and the right to equal security of the person.

The legislative history of the rape shield laws suggests that they were designed to meet three fundamental objectives:

(1) to ensure that cases would be decided on their merits, and not on the basis of myths, stereotypes and preconceived assumptions about how women do behave, how women should behave, and how the criminal law should treat victims who do not conform to sex unequal social rules;

(2) to ensure that victims are treated with justice and dignity in the course of the trial; and

(3) to persuade women that they can trust the criminal justice system when they have been sexually assaulted, and thus encourage them to report rape and other forms of sexual assault.

The Supreme Court in Seaboyer accepted that these were the objectives of the legislation, although it trivialized these objectives by failing to appreciate their sex equality dimensions or the fact that they implicated significant Charter values. The Court also accepted that these objectives were legitimate, even laudable, and meet, without more, the first branch of the Oakes

test.

While section 15 of the Charter of Rights and Freedoms ensures equality for all women, it is of utmost importance that legislation consider the multicultural nature of Canadian society. Recognition needs to be given to the fact that our laws and judicial system have been sexist and racist and that colonialism and colonial values have been embedded in Anglo-American common law. The law and justice systems have not accommodated the differences or other inequalities in the application of the law. Just as important is the history of the judicial systems and unequal treatment of women with disabilities. In light of the recent studies documenting the incidents of abuse of institutionalized women, it is clear that legislation must also meet their needs. Only by meeting the needs of the most disadvantaged women in our society will the needs of the majority be met.

The government has a minimum obligation to the women of Canada to bring in replacement legislation that fulfils at least these objectives insofar as it is constitutionally possible to do so. In fact, bearing in mind that section 276 was passed prior to the coming into force of s.15 of the Charter, prior to the decision of the Supreme Court of Canada in Andrews interpreting s.15 purposively and substantively, prior to the Supreme Court's recognition of systemic inequality against women, in cases like Action Travail des Femmes, Janzen and Govereau v. Platy Enterprises, and Brooks, Allen and Dixon v. Canada Safeway, it is our position that the constitutional obligation of government to the women of Canada is much higher than it was in 1983 when s.276 was passed. The government's objectives in considering replacement legislations must meet the higher equality standard now enunciated by the Supreme Court of Canada, but which the Court itself failed to take into account in Seaboyer. It is also imperative that in framing reform legislation, the government act on well-enunciated,

well-researched and well-documented legislative objectives that explicitly and specifically invoke equality rights and the other constitutional rights of victims.

On December 12, 1991, the Minister of Justice introduced Bill C-49, an Act to Amend the Criminal Code. A coalition of women's groups will be meeting to discuss the bill and the changes they feel are necessary to stengthen women's rights to equality and security of persons. The suggestions for change which LEAF has are set out below in section IV.

CODIFICATION OF THE GUIDELINES

It is submitted that any legislation which merely codifies the guidelines for trial judges outlined in the majority judgement in Seaboyer will both fail to meet the three objectives section 276 was designed to serve, and fall drastically and unconstitutionally short of what is possible to achieve within the ambit of the Charter.

The Seaboyer guidelines suffer from an obvious flaw in meeting the policy objectives outlined above; they provide no certainty to women, at the time they must decide whether to invoke the criminal justice system, that their cases will be decided based on what happened to them, and not on their sexual history. The need for such certainty was recognized by the Supreme Court of Canada in R. v. Canadian Newspapers. But that is not the most serious flaw in the guidelines. The majority of the Court makes it clear that "relevance" is to be the hallmark of admissibility. But "relevance" to what? And how is "relevance" to be determined?

The answer to these questions is clear from the decision: it appears now to be a constitutional principle that determinations about relevance must be left to the unfettered discretion of the trial judge. This result returns the power over that determination

to a group of people who were instrumental in creating the problem in the first place; it was the consistently poor record of judges, as well as other participants in the criminal justice system in appreciating the injustices and inequalities resulting from the admission of victim sexual history evidence that created the social climate in which the necessity for rape shield laws was universally acknowledged in the first place. The Supreme Court offers us the complacent assurance that those days are gone for good, without a shred of evidence of any kind to substantiate that assurance. In 1fact there is considerable evidence in trial transcripts, in the caselaw, and in recent Canadian and American studies on gender bias in the judicial system, that those days are still very much with us.

But even if we had perfect faith in the ability of trial judges to make determinations about relevance without being influenced by myths and stereotypes about women, the codification of the Seaboyer guidelines would still leave the law in a state which would not meet the policy objectives outlined above. In many ways the most chilling aspect of the Seaboyer decision is the renewed focus it has brought to bear on the issue of consent and the role played by the doctrine of mistaken belief in consent in Canadian law.

We have suggested that any new law which merely codifies the Seaboyer guidelines will fall unconstitutionally short of its goals. We would bring the same charge against any legislative response which fails to confront directly the most fundamental flaw in our law of sexual assault which produced the Seaboyer decision: the fact that the law as it now stands not just allows, but compels, the facts of the alleged assault to be assessed solely from the point of the view of the accused. The law purports to draw the line between lawful and unlawful force in sexual contact at "consent"; in fact it does no such thing as it has been interpreted by our courts. The social concept of "consent" appears to require

the willing participation of the other party; the courts, however, have made clear that from the point of view of the law forced sex is not unlawful if the accused believed the victim was consenting, no matter how egregious the force, or how unreasonable the belief. As long as belief in consent, rather than consent, remains the gravamen of our law of sexual assault, no legislative reform will meet constitutional equality standards. It will not provide equal protection and equal benefit of the law on the basis of sex. It will not provide equal security of the person to women and children, the class of victims of sexual assault, a class clearly protected by section 15.

LEAF believes that much more must and can be done, within the ambit of the Charter, to create conditions of sex equality in the law of sexual assault. LEAF believes that the government must and can come much closer to meeting the policy objectives of the original rape shield law than it has hitherto recognized or acknowledged. Appended to this document are a number of proposals for reform which would bring the body of our law on sexual assault much closer to meeting constitutional sex equality standards. It is our view that each of these proposals is constitutional.

In our view, codifying the guidelines will simply exacerbate many of the problems currently inhering in the trial process by increasing the scope for judicial discretion, while diverting policy-makers from the need for effective reform measures going to the root of a fundamentally flawed sexual assault law.

CONSULTATIONS

In drafting our proposals and in considering the list of possible options, LEAF participated in consultations with the following groups.

(1) Canadian Association of Sexual Assault Centres

(2) Disabled Women's Network
(3) Intercede
(4) National Organization of Immigrant and Visible Minority Women
(5) National Association of Women and the Law
(6) National Action Committee on the Status of Women
(7) Canadian Nurses' Association
(8) Metropolitan Toronto Region Action Committee on Violence Against Women
(9) Church Council of Justice and Corrections
(10) Women's College Hospital Sexual Assault Centre.
(11) Regroupement des centres d'aide et de lutte contre les agressions sexuelles et l'association canadienne des centres contre le viol.

Also, participating in the discussions were representatives from the Native Women's Association of Canada and the Ontario branch.

The final recommendations to the federal government were developed in four phases dictated in part by the Federal government's response to positions taken by the women's community. The focus of the research and discussions changed through the consultations process. Each of the four phases involved in developing recommendations for substantive change to the Criminal Code sexual assault provisions will now be reviewed.

SUBSTANTIVE CHANGE TO SEXUAL ASSAULT LAW

The Evolution of Change - The Four Phases

I. POSSIBLE OPTIONS - The Research

In phase one, a researcher reviewed the literature, the legislation of other jurisdictions and caselaw. The result was a list of options which were considered by the National Legal Committee of LEAF.

1. Limitations on Amendments Imposed by the Charter of Rights

Since any proposals must meet the limitations imposed by the Charter, these limitations are set out below.

(a) Moral Innocence.

In several recent decisions of the Supreme Court of Canada regarding mens rea, it appears that criminal responsibility is a constitutional issue. Starting with Re: B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 and continuing to the recent decision in Hess v. R. (1990), 79 C.R. (3d) 332, the Court is moving towards an emphasis on stigma and penalty as the determining factors in deciding whether full mens rea is constitutionally required. Lamer C.J.C. has found theft to be an offence requiring full mens rea partly because of the stigma attached. It is reasonable to believe that sexual assault would be similarly categorized.

b) Reverse Onus

Following the Oakes decision (1986), 24 C.C.C. (3d) 294 (S.C.C.), reverse onus provisions are likely to be found unconstitutional, in violation of s.11(d) of the Charter, absent compelling objectives and the unavailability of alternative measures which infringe upon section 11(d) to a lesser extent.

2. Possible Options

a) Change the requirement for the defence of belief in consent from honest belief, even if unreasonable, to honest and reasonable.

At present, in the United States, the standard in most states is one of reasonableness with regard to the belief in consent defence to a charge of rape. In American law, the necessary mens rea is based on whether an offence requires general or specific intent. A specific intent offence requires full mens rea. Rape is generally considered a general intent offence for which negligence is sufficient mens rea.

Thus, in the United States, the mistake of fact defence relates to the way in which the offence is defined and the interpretation of the Court as to whether specific intent is required, while in Canada, the nature of this defence is based on whether an offence requires full mens rea. By and large,

Criminal Code offenses require full mens rea, while regulatory offenses require only strict or absolute liability.

b) Add a fourth type of offence of sexual assault.

Commentators on the subject have suggested the inclusion of a lesser offence of negligent sexual assault with a lower penalty. An American commentator has suggested that the lesser penalty is required as judges and juries are less likely to convict for negligent sexual assault in the United States because there is no gradation of penalty according to the degree of culpability. This proposal has support from some sectors as it promotes a communication model of sexuality which emphasises mutuality. On the other hand, others have stated that this alternative is unnecessary since even when the test <u>is</u> a subjective test, objective standards are necessarily relied on by the trier of fact in the process of drawing inferences about the defendant's state of mind.

c) Define reasonableness as it relates to sexual assault.

Even a reasonableness test has its limitations because men and women may differ in what they consider reasonable and may not communicate effectively in the sexual sphere. Authors have suggested that it is the content of the reasonableness test

that matters. The reasonable person standard assumes a consensus within the population, and assumes that the perceptions of one hypothetical person of average prudence and intelligence will equally reflect the perceptions of both defendants and victims. Moreover, U.S. experience shows that courts vary in what must be reasonable and whether they differentiate the behaviours involved and examine the reasonableness of each.

Because of this, one commentator has suggested that "reasonableness" be defined to make sure that "simple rapes", where the rape does not look like the stereotypical violent stranger rape, are covered by the law. In this commentator's opinion, although the reasonableness standard applies in most states, it fails to ensure that "simple rapes" are covered by the criminal law; most states are still affected by notions that "no" means "yes" and an assumption that men are aggressive in sex and women are passive.

d) Reverse onus regarding consent to require that the accused prove consent.

Some jurisdictions in the United States define offenses in such a way as to reverse the onus with regard to the issue of consent. In Canada, caselaw suggests that while regulatory offenses may use reverse onus clauses, reverse onus clauses

with offenses which carry a stigma (and it is suggested that sexual assault would be such an offence) would be found to violate section 11(d) of the Charter.
(See R. v. Oakes).

e) Define Consent to require actual Words or Conduct indicating agreement to have sexual relations.

In the United States, some statutes define consent in a specific and positive way. In Canada, non-consent is defined in section 264(3) of the Code and it may be that this provision reinforces the old narrow manner in which sexual assault is seen as requiring great force on the part of the accused and great resistance on the part of the victim.

In Wisconsin, consent is defined as "words or overt actions...indicating freely given agreement to have sexual intercourse or sexual contact" where the felony is "sexual intercourse with a person without the consent of the person". The state need only prove the lack of overt consent. It has been suggested that this provision is far more effective in protecting the victims than the "reasonable resistance" mode which predominates in the courts in the United States. It is also suggested that the law ought to require that consent to sex be unequivocal. However, criminalizing failure to ensure consent might be questioned, if it is seen as an attempt to

apply criminal sanctions where the accused is unaware of the factors making his actions criminal.

f) Limit the factual circumstances in which the defendant may call evidence of the victim's sexual history.

A legal commentator has suggested that the law might require the defendant to show independent of sexual history evidence, some grounds for interpreting the woman's behaviour at the time of the encounter in question as a manifestation of consent. Only then will sexual history become relevant. This differs from a blanket prohibition of certain types of sexual history and could, restrict the accused from leading this type of evidence.

II. OPTIONS - NATIONAL LEGAL COMMITTEE PRELIMINARY ANALYSIS

During phase two of the process, the members of the National Legal Committee conducted their own research and considered the options presented from the research. They developed the following options in preparation for a meeting with representatives from the Department of Justice.

The position taken by National Legal Committee was that tinkering was insufficient. This was the opportunity to ask the government for major changes in the criminal code to protect women's rights

under sections 7 and 15 of the Charter.

1. Sexual Touching

Replace the current Code provisions dealing with sexual assault with a new offence of forceable sexual touching. Specifically provide that consent is not a defence. An extension of this, would be to replace the current Code provisions dealing with sexual assault with a new offence of sexual touching for which consent had not been sought and obtained. Define consent as requiring "words or overt actions which, to a reasonable observer, unequivocally communicate a voluntary agreement".

In the alternative, replace the current Code provisions dealing with sexual assault with a strict liability offence of unsolicited sexual touching. Provide that an accused can be acquitted if he establishes consent. Define "consent" as "words or overt actions which, to a reasonable observer, unequivocally communicate a voluntary agreement".

As well, add to the existing offenses a strict liability offence as stated above, or an offence of negligently engaging in non-consensual sexual touching, to the existing levels of offence provisions.

2. Consent

a) Circumstances when there is no consent.

Add to the list of circumstances in which there is no consent as a matter of law, currently in s.265(3),

(i) any situation in which there is inequality between the accused and the victim, and there is no overt consent. Consent would be defined as requiring "words or overt actions which, to a reasonable observer, unequivocally communicate a voluntary agreement".

(ii) an expanded definition of fraud, which would include any significant lie which influenced the decision to permit sexual contact, and

(iii) a clause making it clear that the list of circumstances enumerated in the Code is not exhaustive of the circumstances which may legally vitiate consent.

These proposals were developed taking into account the current state of Canadian jurisprudence on the constitutional rights of accused persons, and mens rea, including the recent decisions of the Supreme Court of Canada in Wholesale Travel Group v. The Queen (judgment rendered on October 24, 1991) and Jobidon v. The Queen (judgment rendered on September 26, 1991). There is American

precedent for specific, objective definitions of consent; Jobidon, of course, makes it clear that proof of lack of consent is not an inherent requirement, constitutional or otherwise, for offenses of this type.

In addressing sexual assault law reform, the government should also be addressing a variety of measures designed to ensure that a reformed law will be effectively enforced. Measures such as the following should be considered:

(i) Mandatory judicial education on sex equality issues should be legislated;

(ii) Mandatory education on sex equality issues for Crown prosecutors and members of police forces dealing with victims of sexual assault should be legislated; and

(iii) There should be a statutory commitment to adequate funding of legal support services for victims of sexual assault, including funding for the proper preparation for trials of these issues.

It will also be necessary to provide protections, procedural and otherwise, where an accused seeks to introduce evidence of victim sexual history or reputation, whether with the accused or with third parties, designed to ensure that where such evidence might

be admissible, only evidence meeting a minimum threshold of relevance (i.e. evidence is demonstrably relevant, and probative value outweighs prejudicial effect) will be admitted. These protections would have to be tailored to meet the shape of the reformed offence or offenses; in the context of reconceptualized offenses, a form of "rape shield" quite different from that outlined in the Seaboyer guidelines might well be appropriate.

III. POST CONSULTATION

After consultations with the aforementioned groups and one meeting with officials from the Department of Justice, it became clear that we would have to focus on two areas. Because of the Minister of Justice's commitment to move quickly on new legislation, we accepted the priorities of the groups assembled and focused on a fuller examination of consent and a preamble. Not only was research conducted but also, drafting became part of the aim of the exercise. The following is taken from a publicly disseminated LEAF document representing the recommendations to the federal government as of November 1991 of the following organizations (the "Coalition"):

1. The Recommendations to the Federal Government

Immediate changes to the sexual assault provisions of the Criminal Code will address a number of issues, from procedures for the

admissibility of evidence concerning a sexual assault complainant's past sexual history, to substantive changes to the Criminal Code approach to consent concerning sexual assault law. The Coalition of women's organizations focused on substantive changes (though not for lack of importance of other issues). The coalition's position is that immediate amendments to the sexual assault provisions of the Criminal Code, to be consistent with and promote women's equality as required by the Charter, should include the following:

(1) A strong preamble to the Bill referring explicitly to the Constitution, the greater exposure of some women to male violence, and a strong review of the objects served by the legislation; and

(2) A codification of consent requiring clear voluntary agreement, plus additional provisions that preclude myths and stereotypes from informing consent.

a) Preamble.

The preamble to legislation sets out why the government wants to make the legal changes set out in a Bill. What is contained in the preamble will be carefully scrutinized by a court should there be a subsequent constitutional challenge to the law. It is also an important statement of public policy.

The Coalition considered it critical that the preamble to the sexual assault Bill name in explicit and prominent terms the particular vulnerability to violence of certain classes of women based on race, class, disability and other enumerated and analogous grounds found in section 15 of the Charter. The preamble should also set out every object intended to be served by the legislation, including the following:

A. To enact a law that will work more effectively to reduce and eliminate sexual violence against women and children. This objective should be defined as the protection and promotion of their constitutional section 7 and section 15 rights, it being understood that effective sexual assault laws promote not only sex equality but also equality based on race, national and ethnic origin, colour, religion, age and mental and physical disability as well as analogous grounds such as class and sexual identity.

The legislative record should document the scope of male violence against women and the fact that more women are violated by intimates and acquaintances than by strangers. It should also document the criminal law's historic and continuing inadequacy to curb male sexual violence and the legal history of doctrines which have legitimated sexual coercion and led to the non-enforcement of rape law, and the likelihood of acquittal of rapists.

The legislative objectives would elaborate social and legal rationales for clear definitions of consent, emphasizing that a law which does not deter spousal, date or acquaintance rape, will be constitutionally underinclusive.

B. To ensure that law enforcement and adjudication of sexual assault cases will be pursued according to the factual merits of the case, and not on the basis of myths, stereotypes and preconceived notions about how women in general or particular classes of women in particular do behave, how they should behave and how the criminal law should treat complainants who do not conform to rules, values or practices shaped by inequalities of sex, race, origin, age, physical or mental disability, and on other s. 15 grounds.

The legislative record should articulate how such myths, stereotypes and preconceived notions have operated and should emphasize that the proposed clarification of the meaning of consent seeks to focus law enforcement and criminal trials on the actual interaction between the individual accused and the individual complainant, not on the actual or projected behaviourial traits of groups of which the complainant is an individual member.

C. To ensure that complainants are treated with justice and dignity in the course of the trial process.

The legislative record should explain how these amendments will serve this end by reference to the kinds of irrelevant and/or unduly prejudicial evidence it will exclude.

D. To persuade all women that they can trust the criminal justice system to deliver equality before and under the law and equal protection and benefit of the law when they have been sexually assaulted, and thus encourage them to report rape and other forms of sexual assault.

The legislative record should underline that the reasons for fearing or refusing to report sexual assault are not the same for all women. Women's willingness to report sexual assault is inversely related to their familiarity with the accused and their social privilege and, hence, credibility.

E. To use the influence of public law as a significant vehicle for educating men about their legal responsibility to seek and obtain consent <u>before</u> initiating sexual activity and to respect the law's decree that no means no; for encouraging women to articulate unwillingness to participate in unwanted sexual activities clearly; and for educating lawyers, judges and juries about the meaning of legal consent.

b) Codification of Consent.

Under current criminal law, there is no sexual assault where the woman is considered to have consented to the sexual activity or the accused believed she consented, however unreasonable that belief is. Historically, the legal treatment of consent and belief in consent has meant that the legal determination of whether there has been an assault has been defined from the perspective of the accused and not from women's experiences of assault. In addition,

the law's approach to consent has affected when the past sexual history of a woman will be considered relevant and therefore admissible in a court, further affecting the extent to which the law of sexual assault and its prosecution focuses on the sexual assaults experienced by women.

Women's organizations have long recognized the problems with the legal treatment of consent. The Supreme Court of Canada's decision in Seaboyer and Gayme has highlighted the need for change. Accordingly, the coalition of women's organizations proposed that an amended Criminal Code contain a definition of consent along the following lines:

DRAFT LEGISLATION

General Definition of Consent

S. 265(2)(a) **For the purposes of sections 271, 272 and 273, consent [shall be sought and] shall mean words or gestures which unequivocally express or manifest voluntary agreement to the sexual activity or sexual activities between the accused and the complainant which form the subject matter of the charge.**

This provision emphasizes that for consent, there must be agreement that is unequivocally expressed. Equivocation, mixed signals, ambiguous messages, are not consent. It also focuses the trial on the actual sexual conduct which generated charges, and not on any other consensual activities between the parties or the complainant and others.

For a Greater Certainty, Common Myths and Stereotypes are Precluded

S. 265(2)(b) **Without limiting the generality of section 265(2)(a) but for greater certainty,**

(i) there is no voluntary agreement where the complainant has, by words or gestures, expressed unwillingness to participate in the sexual activity or activities which form the subject matter of the charge. In this respect, words such as "no", "stop", "don't", "I don't want to" or like expressions in any language constitutes such lack of voluntary agreement.

This provision clarifies that "no means no" is the law.

(ii) actual or rumoured sexual activity with the accused or with another individual or individuals on prior occasions does not constitute voluntary agreement to the sexual activity or activities with the accused which form the subject matter of the charge.

This provision is designed to make clear that prior sexual history with the accused or with a third party is irrelevant to whether there was voluntary agreement on the occasion at issue.

(iii) Voluntary agreement to specific sexual activities with the accused on the occasion culminating in criminal charges does not constitute voluntary agreement to any or all further or subsequent sexual activities with the accused. Once the complainant has, by words or gestures, communicated unwillingness to continue sexual contact with the accused or to engage in particular sexual activities with the accused, prior agreement, if any, is negated.

This provision legally clarifies the right to say no at any point.

(iv) Voluntary agreement to sexual activity cannot be presumed from the complainant's economic class, sexual identity or membership in any class enumerated or recognized as an analogous ground in section 15 of the Charter.

This provision means that there is no implied consent or perpetual accessibility based on racial or other stereotypes about women's sexuality.

(v) Words or overt gestures which unequivocally express voluntary agreement to sexual activity constitute consent except where such apparent agreement is elicited by:

(a) the application of force to the complainant or to a person other than the complainant; (current s. 265(3)(a))

(b) threats or fear of the application of force to the complainant or to a person other than the complainant; (current s. 265(3)(b))

(c) fraud or false representation or any significant lie which influenced the decision to agree to the sexual activity or activities which formed the subject matter of the charge;

(d) the exercise of authority or the abuse of trust or of social, economic or institutional power to secure sexual compliance on the basis of the accused's power to deny the complainant or a person other than the complainant significant benefits or necessities of life or to impose upon the complainant or a person other than the complainant significant harm;

(e) (criminal sexual harassment - a provision that captures the power holder who exploits his privilege and the complainant's subordinate position e.g. doctor/patient, employer/immigrant.)

(f) conduct by the accused subsequent to obtaining the complainant's voluntary agreement to sexual activity which voids the conditions under which her agreement was offered;

(g) other circumstances which may legally vitiate consent.

These provisions address situations in which apparent agreement is coerced and therefore non-consensual, eg. sexual compliance by a domestic worker for fear of losing her job or immigration status, the man who refuses to pay a prostitute after sex.

c) Mistaken Belief in Consent

A provision dealing with mistaken belief in consent must contain explicit reference to the difference between mistakes of fact and of law as to consent such that an accused who excuses assault on the basis of honest belief that consent means less than the law requires has made a mistake of law.

d) Intoxication

The law should specifically codify that intoxication provides no defence to sexual assault.

IV. BILL TO AMEND THE CODE

On December 12, 1991, the Minister of Justice tabled a bill to amend the Criminal Code. A clause by clause analysis of the legislation shows that the bill contains many of the

recommendations made by LEAF and other women's organizations. The draft legislation does not contain the word "unequivocal" in the definition of consent but does contain clauses referring to the abuse of authority, intoxication and most importantly, the language was open ended. The preamble provides support for upholding the legislation when the legislation is considered by the Court, although it is gender and race neutral.

The draft legislation is a credit to the work done by LEAF and the groups representing women. The work could not have been done without the funding and support of the Ontario Women's Directorate. We are certain that without the opportunities afforded by the funding, women would have been forced to live with mere tinkering with the legislation. Our rights under sections 7 and 15 of the Charter would not have been recognized, articulated and included in the preamble to legislation.

We realize that the process has just begun as the bill has been tabled and there is an expectation that there will likely be strong opposition to the bill. Should the legislation pass and the amendments become part of the Criminal Code, there is likely to be a challenge to the legislation by an accused alleging that his rights under sections 7 and 11(d) of the Charter have been violated. The Directorate funding has ensured that with the research and consultation, we will be better able to defend this legislation when and if the need arises. In the same way, the work already done makes clear that there are important ways in which the Bill can be strengthened to promote women's equality, issues that we also expect to address in the coming months.