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MEMORANDUM

→ 1605-19-20 (DPLS 3)

8 Jan 87

ADM(Per)

EQUALITY ISSUES IN THE CF (C)

- Refs: A. Confidential CDS draft memorandum to MND entitled "Equality Rights Policy for the Canadian Forces" dated 6 Jan 87 (attached)
B. Confidential memo from CDS to ADM(Per) dated 7 Jan 87 (attached)
C. Draft CFAO 19-36 - Policy and Procedure - Inappropriate Sexual Conduct and Behaviour (attached)

1. (C) You directed that I review Ref A in light of the CDS' concerns raised in Ref B and that, in conjunction with DG Charter, I provide you with any legal comments considered appropriate for use in your impending discussion with the CDS on the matter. You further directed that the area that DG Charter and I concentrate upon be the present wording of para 14 of Ref A, since that paragraph contains wording that causes concern to the CDS. A revised para 14 which suggested changes, for reasons outlined below, is attached as Annex A to this memorandum. Further, the entire contents of Ref A were discussed to determine whether any of its contents, if quoted out of context after the document had been accessed, would cause embarrassment to the Department, the MND or the CDS.

2. (C) It may be that the CDS has difficulty with the word "behaviour" itself. The nouns "behaviour" and "conduct" are almost synonymous in the literal sense, with the Oxford definition of "behaviour" being "Deportment, manners, moral conduct, treatment shown to or towards others; ..." and "conduct" as being "... (Art) mode of treatment, behaviour (esp. in its moral aspect as good, bad -); ..." However, I suggest that many people consider "behaviour" to be passive and "conduct" to be active. If the intent of para 14 of Ref A is to convey to the MND that the new CF policy will be to take action only if something "active" of a homosexual nature has actually occurred, as opposed to the former policy now in CFAO 19-20 of taking action either where something "active" has occurred or where someone has merely had a propensity to become involved in such activity, then I suggest that the

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word "conduct" should replace "behaviour". However, if a potential recruit were to admit to being a homosexual but not admit to homosexual acts, then it is possible that there would be no grounds, using the "activity" test, to deny enrolment. As DG Charter and I were of the opinion that this potential state of affairs was not the intent of the interim policy, it is suggested that reference should also be made to "behaviour" with its passive connotations. By doing so, the literal sense of the fourth sentence of para 14 would remain unchanged but would more faithfully bring out the CDS's intent. I note that you wrote "public?" in the margin beside the words "publicly agreed to", but regret that I am not familiar enough with all of the background in this matter to provide an opinion as to whether the "pressure" from Mr Svend Robinson forced the agreement. In any event, DG Charter and I suggest that reference to Mr Robinson has the potential for difficulties if quoted out of context, and we recommend that the reference be deleted. The suggested fourth sentence of para 14 of Ref A would then read:

"With respect to homosexuality, this would in effect adopt an approach towards homosexual conduct and behaviour which would be more or less consistent with the interim policy publicly agreed to by Mr. Andre and General Thériault."

3. (C) In para 14 of Ref A, the fifth from the top line on page 8 contains the words "report any evidence of ..." and, as such, is not completely correct in law since any CF member must report offences committed by other CF members (QR&O 4.02(e) and 5.01(e) refer), and homosexual activity without consent of one party or with one party a minor remains a crime. Therefore, it might be preferable to state:

"Another element of the proposed new policy would be to eliminate the existing obligation of members to report on the known or suspected homosexual conduct and behaviour of a CF member if it is not contrary to the Code of Service Discipline."

4. (C) It is suggested that the second portion of the last sentence in para 14 of Ref A could be expanded so as to avoid the perception that releases for homosexual conduct are not now dealt with administratively, as the word "discharge" has a legal meaning associated with criminal offences. A possible wording might be as follows:

".... release would continue to be purely administrative with an honourable release Item given and without any disciplinary action taken (unless, of course, the homosexual conduct and behaviour involved the commission of an offence, in which case both disciplinary action and a less favourable release Item might be considered)."

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5. (C) With respect to the remainder of Ref A, DG Charter and I concur in your suggested inclusion of the word "known" before "homosexual" in the third line in para 12. A perceptual vice legal observation deals with the sidelined comment later in the para that "... the total absence of restrictions on homosexuals in the civilian component of DND is fully accepted today." While the statement that there is a "total absence of restrictions on homosexuals in the civilian component of DND" is probably recognized by all rank levels, it is suggested that the acceptance of that statement still remains less than unanimous. Further, it is suggested that the preceding and following sentences, which contain the heart of the CDS' argument, could be strengthened. The three sentences would then read as follows:

"A policy of unlimited acceptance of homosexuals might be made to work, despite serious difficulties and without catastrophic consequences, in peacetime. In this regard, it should be noted that there is a total absence of restrictions on homosexuals in the civilian component of DND today and that the role of the civilian component would not change dramatically in war. However, I am convinced that in a wartime setting the presence of military homosexuals would become intolerable, because it is in combat that such abstract but vitally important attributes as unit cohesion, morale and trust become dominant, and where the factors that make the presence of homosexuals so disruptive (lack of privacy, suspicion, etc.) are so critical."

6. (C) In para 17 of Ref A, the second sentence refers to a "vocal minority", and it is just this group who might take issue with the words "full equality." It is suggested that those words be replaced by "the total removal of all limitations", which expresses the same idea without creating the necessity of engaging in a Section 1 of the Charter discussion, when and if this document is made public. As the then MND did not wish to provide a full rebuttal to the testimony heard from many other witnesses before the Boyer Committee, the reference to that committee being "notoriously one-sided" may be itself open to rebuttal and criticism if Ref A were accessed. It is therefore suggested that the existing sentence be amended to read as follows:

"The Boyer Committee, for example, did not appear to address both sides of the issue."

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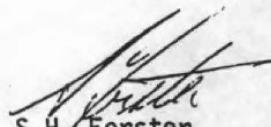
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7. (C) I hope that the above and the attached Annex are satisfactory for your purposes; please advise the undersigned or DG Charter if they are not, or if further information is necessary.



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cc. DG Charter

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