

BRIEFING NOTE FOR THE MINISTER
AND THE ASSOCIATE MINISTER
OF NATIONAL DEFENCE

SUBJECT POLICY AND PROCEDURE - INAPPROPRIATE SEXUAL CONDUCT
AND BEHAVIOUR

PURPOSE

1. To provide the further written briefing regarding Canadian Forces policy on the subject matter, requested by the Minister at a meeting with military authorities on 1 May 1987.

BACKGROUND

2. On 11 February 1987, the Minister made the following statement before the Standing Committee on Human Rights on the matter of sexual orientation as it affects the Canadian Forces:

"I will turn now to another major equality rights issue, sexual orientation. The practical application of equality principles here would be fairly straightforward if we were concerned only with eight hours a day at the workplace. That is not the case with armed forces. Their function often requires them to work and live together in close confinement with little or no privacy, and with no choice of with whom they associate. Their profession must dictate not only the conditions under which they work, but also the conditions under which they live for 24 hours a day for weeks or months on end. This fundamental difference from other activities of society brings with it unique problems, particularly

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in the extremely stressful circumstances of a real war.

One serious dilemma is the chronic problem of privacy in military life. In keeping with the norms of our society, the Canadian Forces provide for privacy between the sexes. Surely it would be discriminatory if comparable privacy were not provided between heterosexuals and homosexuals.

The exceptional impact on personal privacy results in the presence of homosexuals being highly disruptive in armed forces. With the added tensions of war, this disruption would seriously detract from the operational effectiveness of military forces. These serious concerns were studied exhaustively by the Charter Task Force. The Task Force report clearly demonstrates that there are legitimate reasons for the concerns I have mentioned. In the final analysis, those who are most qualified to assess operational effectiveness are our military leaders, who have spent entire careers being responsible for the capability of our armed forces. It is their carefully-considered conclusion that a change in our present policy on sexual orientation would seriously damage the operational effectiveness of the Canadian Forces.

As you know, the Canadian Forces' policy on sexual orientation is always subject to challenge under the Canadian Charter of Rights and Freedoms. It is the

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strong conviction of our military leadership that the current policy must be maintained to ensure effective armed forces. It is the firm opinion of my senior legal counsel that our present policy, therefore, is sustainable as a reasonable limitation as provided for in Section 1 of the Charter. Of course, the courts will ultimately decide that question. Because of its importance to the security of Canada, I think that it is entirely appropriate that this policy be subject to a searching and impartial review in the courts under the Constitution of Canada.

Nevertheless, it is my intention to ensure that this reaffirmed policy is no more restrictive than it must be. The obligation for members to report suspected homosexuality will be removed. Most importantly, the continuing exclusion of homosexuals will be based on conduct or behaviour rather than on orientation alone."

3. After careful consideration of Canadian Forces operational requirements, the fact that a change in present policy on sexual orientation would seriously damage operational effectiveness, and having also recognized the need to respect and safeguard individual rights and dignity, Canadian Forces Administrative Order 19-36 - Inappropriate Sexual Conduct and Behaviour (Annex A) - was prepared, based on the Minister's policy statement quoted above.

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POLICY

4. The policy reflected in the Order at Annex A is, in essence, that persons who have engaged in inappropriate sexual conduct shall not normally be enrolled in the Canadian Forces, and Canadian Forces members who have engaged in similar activities shall not normally be retained. "Inappropriate sexual conduct" is defined in the Order as follows:

"sexual acts, offers or requests relating to sexual acts, advocacy of sexual acts, provision of descriptions or depictions relating to sexual acts except in the course of duty, or other conduct of a like nature that would promote or tend to promote sexual acts which:

- a. constitute an offence under the Criminal Code of Canada or the Code of Service Discipline; or
- b. involve persons of the same sex."

PROCEDURE IN RESPECT OF SERVING MEMBERS

5. If a Commanding Officer has reasonable grounds to believe that a member of the Canadian Forces has been involved in inappropriate sexual conduct, he shall cause a preliminary investigation to be made.

6. When a preliminary investigation or follow-up investigation contains reasonable substantiation of

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inappropriate sexual conduct by a member, a confidential report is forwarded to National Defence Headquarters. A Committee composed of the Director General Personnel Careers Officers or the Director General Personnel Careers Other Ranks as appropriate as Chairman, and the Director Personnel Legal Services and the Director Medical Treatment Services as members, then reviews the report. Following review, the Committee is required to take one of the following courses of action:

- a. return the confidential report to the applicable unit for destruction should it be determined that there is not reasonable certainty that the member has been involved in inappropriate sexual conduct;
- b. recommend retention of the member if the conduct is considered an isolated incident, out of character, not involving criminal or disciplinary proceedings, or not involving willing participation of the member; or
- c. recommend release from the Canadian Forces.

7. Recommendations made by the Committee are forwarded to the Assistant Deputy Minister (Personnel), who will authorize the member's retention or cause release proceedings to be initiated depending on the recommendations of the Committee and his appreciation of the facts presented. Members who have engaged in acts falling solely within (b) of the definition of inappropriate sexual conduct

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in paragraph 4 above, i.e., acts involving persons of the same sex, will normally be honourably released under Item 5(d) of the applicable Regulation, as being not advantageously employable in the Canadian Forces. Before release can be approved, however, such members will receive:

- a. a notice of intent to recommend release, regardless of the status, rank or length of service of the member;
- b. the opportunity to object to the intended release; and
- c. if release is approved, information as to his or her rights under Section 29 of the National Defence Act and Articles 19.26 and 19.27 of Queen's Regulations and Orders for the Canadian Forces concerning the submission of an application for redress of grievance.

LEGAL AND ADMINISTRATIVE SITUATION

8. Provided that the above policy and its related procedures are "prescribed by law", it is considered that they are defensible in the context of the Canadian Human Rights Act and the Canadian Charter of Rights and Freedoms. "Prescribed by law" requires the approval and issue of the Order at Annex A. This requirement is becoming increasingly urgent because:

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- a. there has already been one court challenge to our policy (which the court declined to hear because the plaintiff had not exhausted his rights under the application for redress of grievance regulations), and more are expected; and
- b. there are in excess of 30 cases of inappropriate sexual conduct awaiting review and decision, a number of which have already become the subject of reports of serious administrative problems, and inquiries from Members of Parliament and members of the legal profession. In the interests of the individuals themselves and the Canadian Forces, it is essential that these cases be adjudicated upon without further delay.

RECOMMENDED ACTION

9. It is recommended that Canadian Forces Administrative Order 19-36, Annex A, receive the concurrence of the Minister in order that it can be published under the authority of the Chief of the Defence Staff as soon as practicable.

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