

MEMORANDUM

1605-19-36 (DPLS 2)

28 Jul 87

Note to File (through DPLS)

POLICY AND PROCEDURE
INAPPROPRIATE SEXUAL CONDUCT
AND BEHAVIOUR

1. At 1100 hrs this date, LCol RA McDonald, D Law/HRI, and I attended at the office of Mr Martin Lowe, Department of Justice, for the purpose of discussing and/or ascertaining the background ~~to more of~~ substantiation for the letter dated 29 Jun 87 from the Minister of Justice to the MND wherein the Minister of Justice indicated that he could not give his approval to the proposed CFAO 19-36 "in its present form." Mr Lowe had Ms Claire Beckton in attendance as well.

2. Mr Lowe commenced by saying that the background, as we suspected, was primarily a policy one; however, he did feel there were legal implications as well. In short, he indicated that the Minister of Justice, being a strong advocate of equality as defined and prescribed by Sec 15 of the Charter, was being placed in an awkward position in view of the diametrically-opposed position being taken by our Minister with respect to ~~the~~ non-employment of homosexuals. It became readily apparent that the concerns were centered specifically on subpara 4.b. in that this para specifically centers out homosexuality. It was therefore overly broad.

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- 2 -

3. Claire Beckton expressed the concern that, in being overly broad, we were perhaps not being realistic in stating that all relations of a homosexual nature could not be tolerated. She used the example of a member who goes home at night to his homosexual friend and returns for work the next day. This type of relationship probably does exist, and has been existing for some period of time, and thereby demonstrates that it has no direct effect on military discipline or operational capability. In fact, it would only become a problem once the set of circumstances was made known to military authorities. And I suppose at this time one might add that thereby the problem is being created by military authorities, not by the member being a homosexual. She and Mr Lowe did acknowledge, however, that there might be circumstances where sexual relations of both a homosexual or a heterosexual nature may indeed be appropriate cases for dismissal, for example, where the relations occur on board ship, between ranks or even within the confines or context of someone's duty.

4. Mr Lowe suggested that perhaps the problem was curable by removing subpara b. and adding to subpara a. words to the effect "or would be of a nature as to jeopardize military discipline, cohesion, etc ..." We pointed out to him, in return, that this might also be shot down as being too vague and not readily identifying the activity which it is sought to curb. Mr Lowe acknowledged that we may, in fact, be caught between the proverbial rock and a hard place.

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- 3 -

5. The conversation then turned to discussing whether or not that which is contemplated by CFAO 19-36, in its present form, would be caught by the terms of Sec 15(1). Mr Lowe and Ms Beckton were of the opinion that it would be. While we did not concede one way or another agreement with them, we then looked at whether or not justification might exist under Sec 1. In short, we will, I suspect, get little or no help from the Department of Justice in trying to formulate an argument on Sec 1. Mr Lowe was of the opinion that we would not be able to put together a strong enough case to combat learned counsel attacking the merits of this legislation. He did not say that in fact the CFAO would be shot down; however, he did think there was a strong risk that it would be and that it did infringe the Charter. As Mr Lowe put it, if CFAO 19-36 was already existing legislation, he would in fact present the client's case in the best possible manner to defend it. However, now, where it is only at the proposal stage, he cannot support it, feels that his Minister cannot support it, and they are in a position to shoot it down at first instance, before it becomes effective legislation.

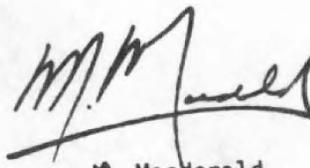
6. D Law/HRI asked Mr Lowe if he would be prepared to put these comments, that is to say, his legal arguments, in a written opinion. Obviously, this made Mr Lowe very uncomfortable, and I doubt that a well-reasoned legal opinion would be quickly forthcoming, as it appears that both Mr Lowe and Ms Beckton feel that this is a matter of policy which must be decided between the Ministers themselves and, most probably, or more probably, by all of their colleagues in a collective

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- 4 -

vote. It was readily obvious that they felt that this was going to be the only resolution of the matter, and did not seem prepared to support DND even if they were willing to put the matter to test before the Court right now.



M. Macdonald

LCol

DPLS 2

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