

SECRET

MEMORANDUM TO CABINET

MEMOIRE AU CABINET

CANADIAN FORCES POLICY
ON SEXUAL ORIENTATION

January , 1988

Le janvier 1988

Minister of National Defence

Ministre de la Defense
Nationale

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MEMORANDUM TO CABINET

PART 1 - ISSUE

1. Current National Defence policy renders persons who engage in sexual acts with others of the same gender ineligible for service in the Canadian Forces. Since mid-1986, implementation of this policy, as it relates to members already serving who object to honourable release as being not advantageously employable, has been suspended, pending a political decision that it is to continue notwithstanding the Government's announced position concerning sexual orientation as a proscribed ground of discrimination throughout the Federal Public Service. A decision is urgently required, since continued deferral of these cases is causing serious administrative problems for the Canadian Forces, and is unfair to the members who have a legal and moral right to have their cases dealt with properly and expeditiously under clearly-defined policy as reflected in Service Orders.

2. Four Options have been identified:

- 1) Abolition of the policy described above, with the result that homosexuality would no longer constitute a bar to enrolment in the Canadian Forces, or grounds for release of members already serving. It is the opinion of my senior military staff, and my own, that such a change of policy would have a seriously damaging effect on Service morale and cohesion, and therefore operational effectiveness. I would also draw Ministers' attention to the fact that, to date, there have been eight known and confirmed cases of members of the Canadian Forces who tested HIV antibody positive. Of these eight cases, six members have been positively identified as homosexuals, two of these have developed AIDS, and one has died. It is current policy that

007904

- 2 -

members will not be compulsorily tested for AIDS or the HIV antibody and will only be tested if the member so requests. Accordingly, it is impossible to determine with accuracy what proportion the figure of eight known HIV antibody positive members would bear to the total number of members now serving who would fall into this category if tested. However, the Director of Medical Treatment Services advises that the total number will materially increase if homosexuality ceases to be grounds for ineligibility to serve in the Canadian Forces. As the Minister charged with the control and management of the Canadian Forces, which bear ultimate responsibility for the security of the Nation, I cannot accept this as a viable Option.

- 2) Reaffirmation of existing policy as described in paragraph 1 above. This would take the form of approval in principle for the issue of a revised Canadian Forces Administrative Order in the form attached as Annex B. 

 This is the Option which I mostly strongly recommend, and is the position which I took in my statement to the Standing Committee on Human Rights on 11 February 1987.

- 3) Do Nothing. For reasons stated in paragraph 1 above, and more fully explained in the Analysis portion of this Memorandum, I reject this Option as being indefensible from all points of view.

007905

AGC-1836_0003

- 3 -

4) Assess the propriety or impropriety of sexual conduct for purposes of retention or release from the Canadian Forces solely on the basis of the circumstances surrounding the act or acts in question, i.e., make no distinction between heterosexual or homosexual acts, and apply the same standards to both. This would mean that homosexual acts per se would cease to disqualify the individuals concerned from service in the Forces. Practising homosexuals would then be eligible for enrolment and the pursuit of a full military career, subject only to behaviour deemed sufficiently inappropriate to justify release. My objections to this Option are summarized in paragraph 7 in the Analysis portion of this Memorandum, and are discussed in more detail at Annex E. As with Option 1 above, there is also the increased likelihood of AIDS infection among our military personnel to be considered. I therefore cannot accept this policy change as a viable Option.

3. In summary, I am convinced that selection of the course of action described at Option 2 above is essential in the interests of Canada, to avoid jeopardizing the effectiveness of our Armed Forces in peace and war. [REDACTED]

[REDACTED] I am in no way dismayed by the possibility of a court challenge, and in fact, as I indicated in my statement to the Standing Committee on Human Rights, I believe that the judiciary is the proper authority to decide the legal validity of a policy with aspects which are relevant to national security. I therefore recommend to Cabinet in the strongest terms the selection of Option 2 above.

Minister of National Defence

Ministre de la Defense
Nationale

007906

AGC-1836_0004

- 4 -

PART II - ANALYSIS

BACKGROUND

1. The following information on the background and implementation of Canadian Forces policy on sexual orientation, as it concerns those members already serving or persons making application for enrolment, is provided by way of further explanation of and support for the Recommendation contained in Part 1 of this Memorandum.

2. The existing Canadian Forces Administrative Order, referred to as a CFAO, which reflects policy in this area is CFAO 19-20, attached as Annex A. This Order in its present form has been in effect for eleven years, but has been recently changed in its application and is currently under review. Like other CFAOs, it is issued under the authority of the Chief of the Defence Staff pursuant to section 18 of the National Defence Act. The members of the Canadian Forces to whom this CFAO applies are those who are determined with reasonable certainty, after full investigation, to have a sexual propensity for persons of the same gender. Normally such members are deemed not advantageously employable, and are honourably released under Item 5(d) of the Table to Article 15.01 of Queen's Regulations and Orders for the Canadian Forces, which is a regulation made by the Governor in Council. Similarly, persons who are not already serving and are seeking enrolment are deemed ineligible for service when it is determined with reasonable certainty, through their own acknowledgement or otherwise, that they fall in the same category.

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

007907

AGC-1836_0005

- 5 -

"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 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

007908

AGC-1836_0006

- 6 -

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 strong conviction of our military leadership that the current policy must be maintained to ensure effective armed forces.

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."

4. Associated with my policy statement, a number of developments took place:

- 1) first, although amendment of the Administrative Order was deferred pending further clarification of policy,

007909

AGC-1836_0007

- 7 -

action was taken by my military staff to ensure that my commitment to the Standing Committee concerning termination of the obligation to report, and change of basis for ineligibility to serve from "propensity" to "acts", was recognized and implemented. In the latter regard, the senior officer holding the appointment of Director of Personnel Legal Services is now required, in his review of recommendations made in each case, to ensure with reasonable certainty that the individual concerned has been engaged in recent homosexual activity;

- 2) second, the authority for final approval of the release of a serving member from the Canadian Forces on grounds of sexual orientation was retained by the Chief of the Defence Staff personally. In fact, the last release of a member on this ground alone took place in June 1986; since that time, although recommendations for release received from unit authorities continue to be staffed at National Defence Headquarters, cases involving members whose release on grounds solely of sexual orientation is proposed, and who object, have not been finalized pending confirmation of applicable policy. There are currently 31 of these cases awaiting career disposition, and problems of morale and administration are being experienced in a number of them;
- 3) third, a new CFAO 19-36, attached as Annex B, was drafted, with the intention that upon approval, it will replace the existing CFAO 19-20 to which I have referred. Whereas it reaffirms the existing policy of

007910

- 8 -

exclusion from service of persons who have participated in sexual acts with others of the same gender, it incorporates a number of substantive and procedural safeguards as follows:

- i) any action taken or investigation carried out pursuant to the Administrative Order shall be in such a manner as to ensure maximum confidentiality and to protect the privacy and dignity of any persons involved;
- ii) a committee composed of the Director General Personnel Careers Other Ranks as chairman, and the Director Personnel Legal Services (a legal officer) and the Director Medical Treatment Services (a medical officer) as members, reviews all cases involving a sexual orientation aspect which are received at National Defence Headquarters from unit authorities. It is only where the committee concludes with reasonable certainty that acts of a homosexual nature have occurred, and further that they did not occur in circumstances which would not justify release, such as being an isolated incident which is out of character, that release will be recommended;
- iii) my Assistant Deputy Minister (Personnel), to whom the committee's recommendations are made, will not depart from a recommendation for retention unless in his view there are compelling reasons which render the member's continued service wholly unacceptable; and

007911

AGC-1836_0009

- 9 -

- iv) when the Assistant Deputy Minister (Personnel) determines that there is sufficient evidence to substantiate the initiation of release proceedings, he is required to
- A. cause a notice of intent to recommend release to be delivered to the member, regardless of the status, rank, or length of service of the member,
 - B. ensure that the member is accorded the opportunity to make representations thereon in the same manner as provided for in other circumstances in other Regulations, and
 - C. if release is approved, ensure that the member is aware of his or her right to apply for redress of grievance under the provisions of section 29 of the National Defence Act and Article 19.26 of Queen's Regulations and Orders for the Canadian Forces, the latter being a Governor in Council regulation.

5. As a proposed Administrative Order, the new CFAO, like its predecessor, falls within the purview of the Chief of the Defence Staff under section 18 of the National Defence Act. However, because of the importance of this aspect of Canadian Forces policy in the context of Canadian society as a whole in the 1980's, and because I had addressed the subject in my statement before the Standing Committee on Human Rights, it was deemed appropriate by my military staff to seek my concurrence before promulgation of the new Administrative Order. Accordingly, [REDACTED]

007912

AGC-1836_0010

- 10 -

[REDACTED] the proposed CFAO 19-36 was forwarded on 24 March 1987 to my Office with a request for my concurrence. This recommendation was repeated in a Briefing Note prepared on 6 May 1987 following a meeting with my civilian and military staffs. Subsequently, in a letter dated 14 August 1987 to the Honourable Minister of Health and Welfare Canada, I gave further expression to my views and intentions as follows:

[REDACTED] since, apart from considerations of military cohesion and operational effectiveness, I have consistently taken the view, as indicated in my February 11, 1987 statement, that the Courts will ultimately have to decide this question.

It is imperative that the question of the issue of the proposed Canadian Forces Administrative Order be resolved as soon as practicable, since at last count there are 24 [now 31] cases of alleged or acknowledged homosexual conduct awaiting disposition. Serious problems of morale and efficiency are being caused as the result of the inability of Service authorities to resolve these cases in the absence of approved relevant policy. In at least one case, the individual concerned has complained by way of a formal application for redress of grievance, to which the

007913

AGC-1836_0011

- 11 -

Chief of the Defence Staff is obligated to reply, both legally and morally, at the earliest possible date.

In light of the foregoing, it is my present intention to direct the Chief of the Defence Staff to proceed with promulgation of the applicable Order, and to apply its provisions both to the list of cases awaiting disposition and to other cases of homosexual activity as they arise in future."

OPTIONS

6. On 15 December 1987 the Deputy Prime Minister's Operations Meeting had before it for consideration a paper entitled "Background Information on Sexual Orientation in the Canadian Forces", attached as Annex D. The four Options listed in that paper, with the perceived implications, advantages, and disadvantages in each case, are quoted below:

"1. Compliance With The Government Policy As Announced In 'Toward Equality'.

a. Implications

i) The 24 members on 'special status' would be returned to their normal duties.

ii) Homosexuals would be integrated into the Forces.

007914

AGC-1836_0012

- 12 -

b. Advantages

It demonstrates the Government's commitment to the policy stated in 'Toward Equality'.

c. Disadvantages

i) It is inconsistent with the recommendation of DND's internal task force that homosexuals not be permitted to enlist nor remain in the Forces once identified.

ii) It is inconsistent with Mr. Beatty's February 1987 statement to the Standing Committee on Human Rights.

2. Issue A CFAO Based On Mr. Beatty's Statement.

a. Implications

i) The 24 members retained under 'special status' could be 'honourably' released.

ii) The Forces would continue to exclude homosexuals.

b. Advantages

i) It implements the policy announced by the Minister responsible for the Forces.

007915

AGC-1836_0013

- 13 -

c. Disadvantages

i) It is inconsistent with the Government's statement in 'Toward Equality'.

ii) It raises questions as to its consistency with the Charter and is open to a court challenge.

3. Do Nothing

a. Implications

i) A decision cannot be made on the redress of grievance which is pending at the Chief of Defence Staff level.

ii) Further delay in deciding on the redress may result in the member going to the media and the media raising questions about the government policy.

b. Advantages

i) It avoids an immediate decision on a controversial issue.

c. Disadvantages

i) It is inconsistent with the Forces Order requiring that a redress of grievance be dealt with as expeditiously as possible.

007916

AGC-1836_0014

- 14 -

- ii) It has a demoralizing effect on the Forces and creates uncertainty for the members involved.

4. Issue A CFAO That Applies In The Same Manner To Homosexual and Heterosexual Conduct

a. Implications

- i) Homosexuals and heterosexuals would be released if their sexual conduct is harmful to the operational effectiveness of the Forces.

b. Advantages

- i) It is consistent with the Government statement in 'Toward Equality'.
- ii) It is consistent with the Charter.
- iii) It could be interpreted as consistent with Mr. Beatty's statement that homosexuals will be released on conduct, if conduct is qualified as 'conduct harmful to the operational effectiveness of the Forces' and the policy is extended to heterosexuals.

007917

- 15 -

c. Disadvantages

- i) It will be more difficult for the Forces to prove the detrimental effect of a member's sexual conduct than to prove homosexual conduct.

- ii) It does not address DND's claim that the presence of homosexuals in the Forces has a demoralizing effect on the Forces as a whole."

CONCLUSION

7. For reasons explained in the preceding paragraphs, I do not support the choice of Option 1, "Compliance With The Government Policy As Announced In 'Toward Equality' ", or Option 3, "Do Nothing", as these Options relate to sexual orientation policy in the Canadian Forces. While I am equally opposed to Option 4, "Issue A CFAO That Applies In The Same Manner To Homosexual and Heterosexual Conduct", I feel that the statement attached as Annex E is necessary in further explanation of my position in this regard. As indicated in the final paragraph of that statement:

"In the interests of maintaining operational effectiveness in the Canadian Forces, I cannot agree to the interpretation which Option Four places on the statement I made on 11 February 1987 and which would officially sanction the presence of practising homosexuals in the Canadian Forces."

007918

AGC-1836_0016

- 16 -

I am therefore convinced that the only viable policy decision which can be made is the selection of Option 2, that is, to approve the issue of a CFAO based on my 11 February 1987 statement before the Standing Committee on Human Rights, and I strongly so recommend.

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AGC-1836_0017