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BRIEFING NOTE FOR THE MINISTER
AND THE ASSOCIATE MINISTER

SUBJECT NATIONAL DEFENCE POLICY ON SEXUAL ORIENTATION

ISSUE

1. (PB) 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. 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.

BACKGROUND

2. (PB) 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 thirteen 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 the Queen's Regulations and Orders for the Canadian

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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. (PB) On 11 February 1987, the previous Minister of National Defence 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 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

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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 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

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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. (PB) Associated with the previous Minister of National Defence's policy statement, a number of developments took place:

- a. first, although amendment of the Administrative Order was deferred pending further clarification of policy, action was taken by military staff to ensure that the 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 homosexuality;
- b. second, the authority for final approval of the release of a serving member from the Canadian Forces on grounds of sexual orientation was

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retained by the Chief of the Defence Staff personally. In fact, the last release over a member's objections on this ground alone was approved in June 1986, and took effect in August of that year; 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 18 of these cases awaiting career disposition, and problems of morale and administration are being experienced in a number of them; and

- c. 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 referred to above. Whereas it reaffirms the existing policy of 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:

- (1) 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,

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- (2) 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 when 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,
- (3) the 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
- (4) 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

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of service of the member (which is an extension of the rights accorded to members whose releases are proposed in other circumstances),

- (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 the Queen's Regulations and Orders for the Canadian Forces, the latter being a Governor in Council regulation.

5. (PB) 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 National Defence policy in the context of Canadian society as a whole in the 1980s, and because the previous Minister of National Defence had addressed the subject in his statement before the Standing Committee on Human Rights, it was deemed appropriate by military staff to seek Ministerial concurrence before promulgation of the new Administrative Order. Accordingly, having been approved as to form and legality by the senior legal officer concerned in the Office of the Judge

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Advocate General on 20 March 1987, the proposed CFAO 19-36 was forwarded on 24 March 1987 with a request for such concurrence. Subsequently, in a letter dated 14 August 1987 to the Minister of Health and Welfare Canada, the previous Minister of National Defence gave further expression to his views and intentions as follows:

"... the Judge Advocate General of the Canadian Forces has expressed the view [attached as Annex C] that the policy of refusing to enrol or releasing individuals for homosexual conduct as reflected in the Order would stand a good chance of being justified under section 1 of the Charter, even if it is determined to violate subsection 15(1). I am very much inclined to follow this opinion 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 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 [three currently outstanding at senior levels of adjudication], to which the Chief of

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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."

Notwithstanding the above, the Chief of the Defence Staff is still awaiting appropriate direction, despite having pursued the matter vigorously at various levels of governmental authority in the interim.

6. (PB) Two other events relevant to this issue have occurred recently. First, Corporal D.C. Dwyer, an acknowledged homosexual and one of the applicants for redress of grievance mentioned above, has filed a Statement of Claim (Annex D) in the Federal Court Trial Division, alleging that:

"CFAO 19-20 is unconstitutional as being in contravention of the Canadian Charter of Rights and Freedoms for failing to provide equal benefit and protection of the law in accordance with the principles of fundamental justice."

Corporal Dwyer is seeking a declaration that he "is entitled to the equal protection and equal benefit of the law without discrimination", and, among a number of specific items of relief, that all career restrictions based on his sexual orientation be removed, and damages awarded:

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"for humiliation and for the loss of income [he] could have expected to have obtained for a promotion in the normal course of events...."

7. (PB) The other event concerns a former member, Mr. Sylvain Bordeleau. In January 1987, Mr. Bordeleau commenced an action based on his involuntary release from the Canadian Forces in August 1986, as a person to whom CFAO 19-20 applied. On 23 June 1989, the Federal Court Trial Division allowed Mr. Bordeleau's appeal (Annex E), and set aside a previous Order whereby he was prevented from pursuing his action pending resolution of his application for redress of grievance, which is currently being staffed for Governor in Council adjudication. It remains to be seen when and in what manner Mr. Bordeleau will recommence proceedings.

CONCLUSION

8. (PB) On 23 August 1989, a meeting was held in the Minister's Office to discuss a number of current issues, including the subject of this Briefing Note. At that meeting, the Minister expressed his support for the policy reflected in the proposed CFAO 19-36, and indicated that, following a further meeting of his Ministerial colleagues, he hoped to be in a position to give his concurrence to its approval by the Chief of the Defence Staff.

9. (PB) The further meeting of Ministers, including the Minister of Justice, and senior officials, including Mr. Hartt, the Prime Minister's Chief of Staff, was held at Meech Lake on 30 August 1989, with the Assistant Deputy Minister (Personnel) and the Director Personnel Legal Services in

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attendance. Ministers collectively expressed support for the Canadian Forces policy of exclusion from service of active homosexuals, and issued instructions that the Director Personnel Legal Services prepare a revised version of the CFAO at Annex B, which would address the definition on "inappropriate sexual conduct" contained in the Order.

10. (PB) After a meeting on the morning of 31 August 1989 with Mr. Tait, Deputy Minister of Justice, Mr. Protti, Deputy Secretary to the Cabinet (Operations) in the Privy Council Office, and other senior officials, and further consultation that afternoon with Mr. Low, Senior General Counsel in the Human Rights Law Section of the Department of Justice, the documents at Annexes F (revised version of CFAO 19-36 prepared by the Director Personnel Legal Services on 30 August 1989 pursuant to Ministerial direction), G (list of questions and answers prepared by the Director Personnel Legal Services at the request of Mr. Protti, for use in responding to anticipated media inquiries following approval and promulgation of the new CFAO), and H (information in chart form as to the policy of other western nations vis-à-vis homosexuals in their armed forces, prepared by the Director Personnel Legal Services in accordance with direction received on 30 August 1989) were forwarded to Mr. Protti via Brigadier-General Gentles in the Privy Council Office on 31 August 1989. It is understood that Mr. Protti intended to use these documents as the basis for a submission to the Prime Minister's Office. At the time of writing, National Defence staff have no knowledge of any subsequent developments, except for preparation by the Director Personnel Legal Services of the list of supplementary questions and answers at Annex J at

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the request of the staff of the Minister, the Associate Minister, and the Director General Information.

RECOMMENDATION

11. (PB) It is essential that the Chief of the Defence Staff be directed to issue the new proposed CFAO 19-36 as soon as practicable. Otherwise, the courts adjudicating in the Dwyer and Bordeleau cases will necessarily do so on the basis of the existing CFAO 19-20 which, as described above, is no longer an accurate and fair reflection of Canadian Forces policy on sexual orientation, and the principles of justice and fairness embodied in that policy. Only by immediate promulgation of CFAO 19-36 and the simultaneous cancellation of CFAO 19-20 can the Department of National Defence be given a reasonable opportunity to defend the policy of exclusion from service in the Canadian Forces of persons who engage in homosexual acts, which policy is considered imperative in the interests of operational effectiveness, cohesion, and morale. It is therefore recommended in the strongest possible terms that Ministerial approval be given as a matter of urgent priority.

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