

Note for Operations Ministers Meeting

December 18, 1989

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Item: Proposed Canadian Forces Administration Order (CFAO) on Inappropriate Sexual Conduct

Issue:

How best to deal with the proposed Canadian Forces Administration Order (CFAO) on inappropriate sexual conduct in the context of the development of broader government policy on sexual orientation.

Background:

The proposed CFAO (extracts attached) would have the effect of expelling or excluding individuals from the Canadian Forces for inappropriate sexual conduct which is defined as 'any act, offer or request of a sexual nature ... which involves persons of the same gender'.

The Department of National Defence believes that approval of the CFAO is necessary to maintain morale at a difficult time for the department, to safeguard operational effectiveness and to enhance the department's position in current court challenges to its present outdated policy on homosexuality.

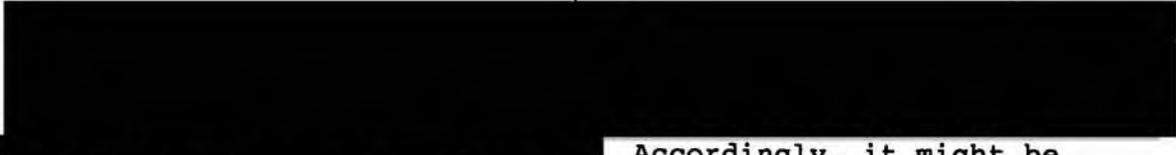
The Department of Justice [REDACTED]

[REDACTED] It also noted the inconsistency between the CFAO and the government's 1986 policy statement on sexual orientation in 'Toward Equality' in which it undertook 'to take whatever measures are necessary to ensure that sexual orientation is a prohibited ground of discrimination in relation to all areas of federal jurisdiction.'

On August 30, 1989 Ministers McKnight, Collins, Lewis and Mazankowski met to consider the proposed CFAO and agreed to proceed with it subject to the Prime Minister's concurrence. Prior to bringing the matter to the Prime Minister's attention, [REDACTED]

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Accordingly, it might be advisable to consider a broad government policy on sexual orientation



Taking a broader approach to sexual orientation could also provide the government with an opportunity to articulate a policy on when family benefits accrue. The corollary of prohibiting discrimination on the basis of sexual orientation is not necessarily extending the definition of 'family' to homosexual couples for benefit purposes.



Depending on the preferences of Operations Committee Ministers, the options for proceeding include the following:

Option 1

On the basis of the August 30 agreement between Ministers, DND's proposed policy could be approved by Mr. McKnight in advance of Cabinet reaching a broader policy on sexual orientation.

Option 2

DND's proposed policy could be referred to a policy committee of Cabinet and approved in advance of Cabinet reaching a broader policy on sexual orientation.

Option 3

DND's proposed policy could be addressed when

Cabinet considers the broader issue of sexual orientation, including the CHRA amendments. While this option would delay the proposed CFAO, it would provide a policy framework for all government issues involving sexual orientation, including restricting or extending benefits to homosexuals. The policy framework could establish the general principle of prohibiting discrimination on the basis of sexual orientation (CHRA amendment) while recognizing that sexual activity whether heterosexual or homosexual could be restricted in the interests of security, discipline, etc. (DND, CSC) and clarifying what constitutes a 'family' for benefit purposes. This balanced policy framework might be more acceptable to Caucus than proceeding with the CHRA amendments alone.

A recommendation on how to proceed with DND's CFAO alone is difficult given that Ministers have agreed to proceed with it

Developing a broader policy framework on sexual orientation may be a preferable alternative for Ministers since they will eventually have to address the issues anyway and it might avoid the need of having to endorse a specific administrative order.

Mr. McKnight believes that the Canadian Forces require a clear statement at this time on the unacceptability of practising homosexuals in its ranks. The proposed CFAO, would succeed in making this statement.

In a September 27, 1989 letter to the Prime Minister, Mr. Lewis proposed that the CFAO be considered by Cabinet at the same time that amendments to the Canadian Human Rights Act (CHRA) are addressed. Among other things, Mr. Lewis will be advocating that sexual orientation be added to the CHRA as a prohibited grounds of discrimination but that the Canadian Forces be exempted from its application. Since the CHRA amendments will not be ready before February 1990, DND has expressed reservations relating to the delays associated with this proposal.

The government is also facing broader policy issues relating to sexual orientation. There are at least three cases presently before the courts relating to benefits for homosexual couples.

PCO Comment

Determining the appropriate policy respecting homosexuality in the armed forces has been an issue of long standing for the government. Further delays in resolving this issue are likely to result in increased operational difficulties and morale problems within the Canadian military. The resolution should be consistent with the government's broader policy on sexual orientation.

This matter could be dealt with by: (a) briefing the Prime Minister and seeking his concurrence to the proposed CFAO; (b) returning the matter to the four Ministers who met in August; or, (c) referring the matter to the Ad Hoc Cabinet Committee on Justice and Legal Affairs to quickly develop a policy framework on sexual orientation.

Referring DND's proposed CFAO to the Ad Hoc Cabinet Committee on Justice and Legal Affairs to be considered in the context of the broader issues of sexual orientation has much to commend it. It would avoid the delays associated with waiting for Mr. Lewis' proposed CHRA amendments. The policy framework could establish the general principle of prohibiting discrimination on the basis of sexual orientation (to set the stage for the CHRA amendment) while recognizing that sexual activity whether heterosexual or homosexual could be restricted in the interests of security, discipline, etc. (DND, Correctional Service of Canada) and clarifying what constitutes a 'family' for benefit purposes.

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If Ministers agree, Operations Ministers could ask
Ministers Lewis and McKnight to prepare a joint submission on
this item.