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P-5200-14 Vol 2 (JAG)

24 January, 1974

The Minister (through Deputy Minister)

PROPOSED AMENDMENTS - NATIONAL DEFENCE ACT

1. You will recall that in connection with a question that arose at the meeting of the Cabinet Committee on External Affairs and Defence on 16 Jan 74, the Deputy Minister asked me to set out for you reasons in support of a difference between the criminal and military law applicable to homosexuals.

2. The Criminal Code of Canada was amended by the Criminal Law Amendment Act, 1968<sup>69</sup> to provide that certain sections concerning sexual offences do not apply to acts committed in private between two consenting persons, each of whom is 21 years or more of age. Prior to that amendment, a serviceman who engaged in a homosexual act with a consenting adult male could have been charged before a military tribunal either under the Criminal Code, or with one of the following offences under the National Defence Act: scandalous conduct by an officer (section 83 - now section 82), disgraceful conduct (section 84 - now section 83) or conduct to the prejudice of good order and discipline (section 118 - now section 119). As a general rule, however, disciplinary action was not taken unless there were circumstances beyond the mere act of homosexuality per se that might scandalize other members of the armed forces or lead to discredit of the armed forces.

3. When the amendment to the Criminal Code was being considered in 1968, studies were undertaken in the Canadian Forces to determine whether it would automatically amend military law and, if so, what effect it would have on morale, discipline, and efficiency in the Canadian Forces, as well as the effect on security bearing in mind the application to the Forces of Cabinet Directive 35 dated 18 December, 1963 (copy attached).

4. In a letter dated March 24, 1969 (copy attached) the Deputy Minister of Justice said that, in his opinion, the amendment to the Criminal Code would not alter the military law. It was therefore decided that it would not

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be necessary to follow the British precedent and insert a provision in the Criminal Code to say that the amendment did not affect the National Defence Act. In the United Kingdom, legislation had been enacted in 1967 to implement a recommendation of the Wolfenden report that homosexual acts in private between consenting adults no longer be an offence. However, the new legislation expressly stated that it did not affect the British Army Act, the Air Force Act and the Naval Discipline Act; therefore, private homosexual acts between consenting adults may still be charged in the British armed forces under those British Acts.

5. It should be noted that in his letter of March 24, 1969 the Deputy Minister of Justice mentioned that homosexual acts would not, from the point of view of Service discipline, stand in any different position from other military offences that are not offences under the Criminal Code e.g. absence without leave, desertion, or insubordination (In civil life these are not crimes at all, whereas they can be very serious crimes in military life). He added that the mere removal of certain conduct from the ambit of the criminal law does not involve moral approval of that conduct and that conduct may be scandalous or disgraceful without constituting a criminal offence. He also expressed the opinion that continuing to charge such offences under the National Defence Act would not, on moral grounds, constitute an improper invasion of private rights, as the mere fact that a civilian who is not bound by military duties could not be prosecuted for a criminal offence if he engaged in certain conduct, was not a proper test for determining whether a serviceman had infringed the relevant offence sections of the National Defence Act.

6. Homosexual conduct in a military context and environment was, and is, considered to be contrary to the Code of Service Discipline in certain circumstances because of the possibility of its:

- (a) undermining authority where different ranks are involved;
- (b) involving younger servicemen through their close enforced proximity to homosexuals in ships, barracks, etc.;
- (c) security implications; i.e. although mores and moral standards are rapidly changing, some participants in homosexual activities (or certain hetero-sexual activities) could still be open to blackmail on the basis of general abhorrence by segments of the population of such conduct, its effect on family

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relations, or the certainty that a participant's service career would be terminated if his conduct became known; and

- (d) the effect of such conduct on the morale of service personnel if such conduct were countenanced or appeared to be countenanced by the armed forces.

7. Since the Criminal Code was amended in 1968, Canadian Forces policy, as reflected in CFAO 19-20, (copy attached) and practice, has continued to be that disciplinary action should not be taken to punish consenting parties to sexual acts, but that such acts, whether homosexual or hetero-sexual, that amount to scandalous or disgraceful conduct or are prejudicial to military discipline should be subject to disciplinary action. It has been a long standing policy that known homosexuals would be released, irrespective of whether or not they had been charged with a criminal or military offence. Military orders have long made provision for counselling homosexuals being released from the Canadian Forces with a view to ensuring liaison between them and civil agencies that might provide assistance to them following release.

ORIGINAL SIGNED BY  
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