

ANNEX A

TO: MND Letter

DATED 5 January 1986

DND COMMENTS

ON EXECUTIVE SUMMARY AND

MEMORANDUM TO CABINET CONCERNING

EQUALITY FOR ALL REPORT

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General

1. An emphasis on obtaining agreement to the recommendations of Equality for All with minimization of adverse consequences has given the draft Memorandum to Cabinet the appearance of subjectivity and lack of balance. The approach of this document, especially in areas where controversy or inter-departmental disagreement exists, must be one of complete objectivity. The following comments and suggested amendments are forwarded with a view to this approach.

Executive Summary

2. Paragraph 1. For clarity it is suggested that paragraph 1 be amended to read "...those recommendations that it has accepted".

3. Paragraph 7. The Department of National Defence does not agree that the policy concerning women in combat is a compromise position. The Government policy on women in combat is clearly stated and justified, based on the operational effectiveness of the Armed Forces, and is considered to be a reasonable limitation under section one of the Charter.

4. Paragraph 9. This paragraph is one-sided in its approach. It is equally likely that some segments of the Canadian public may perceive that the responses concerning sexual preference and marital or family status have gone too far and do not consider collective rights as opposed to individual rights in a manner consistent with the Charter of Rights and Freedoms. It is suggested that this paragraph be incorporated with paragraph 8, simply stating that these areas will be controversial.

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5. Paragraph 15. It is not understood why a response to one possible criticism is highlighted. This appears to imply only one criticism is likely, while in paragraphs 8 and 9, a number of controversial areas are suggested. If this paragraph is not deleted in toto, the answer should be changed as follows:

- a. from the second sentence delete "now", and
- b. amend the last sentence to read "will be continued as rapidly as is consistent with the operational effectiveness of the Canadian Forces".

Strategy

6. Paragraph 3b. It is suggested that this sub-paragraph be ended after the word "policies". While the argument of sparing individual Canadians costly litigation is stressed several times in this response, the Court Challenges programme also satisfies this objective.

7. Paragraph 4b. Employment equity rights for families of service personnel and public servants abroad are not included in any recommendation in Equality for All and should therefore be deleted.

8. Paragraph 4(c). The Department does not consider that the Government will be criticized only in these two areas. It is likely that other issues will also draw criticism and that criticism on controversial issues will be both pro and con.

Memorandum to Cabinet

9. Paragraph 5. The cursory comment in the last sentence of this paragraph does not properly convey the concerns and position of this Department regarding the expansion of the role of the CHRC. These concerns were clearly stated in this Department's letter of 11 December, 1985 to the Department of Justice and should be summarized in this paragraph. The thrust of recommendations 79 to 82 is one of fundamental change to the nature and purpose of the CHRC that is considered to be neither desirable nor necessary to ensure that the Charter is respected and that there is not undue interference with guaranteed individual rights. It is the Charter, rather than the CHRA, that provides the mechanisms necessary to permit laws to be assessed by balancing the rights of individuals against the collective rights of society.

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10. Paragraph 7. This Department does not agree in principle with recommendation 10 that the CHRA be amended to add sexual orientation as a prohibited ground of discrimination. The opinion that sexual orientation will be one of the grounds given protection under the equality rights guarantees of the Charter has not been tested in court. Should this opinion not be correct, inclusion in the CHRA will result in yet another area of conflict between the CHRA and the Charter. In addition, reference to the Toronto Star and Canadian Human Rights Commission surveys could be misleading. The bases of these surveys are not outlined, and both are outdated.

11. Paragraph 9. The consequence of agreeing to recommendation 79 should be more clearly stated in this paragraph. The CHRC and Human Rights Tribunals are appointed, administrative bodies operating outside courts of law and functioning independently of the Government. To have such bodies involved in considering the validity of federal laws would be a fundamental change in the concept of Government that is unjustified and unwarranted by the limited discussion of the implications in this paper.

12. Paragraphs 10 & 11. The thrust of these paragraphs appears to be biased. Arguments in favour of recommendation 79 are listed as advantages while those not in favour are not similarly highlighted as disadvantages, and are cursorily summarized, including an incorrect reference (paragraph 5 vice 6). A balanced and full presentation would likely result in the disadvantages clearly outweighing the purported advantages.

13. Paragraph 16. This paragraph should be expanded to include the reasoning of this Department in reaching this conclusion. The following sentences should be added to the paragraph: "DND considers that the Canadian Human Rights Commission and Human Rights Tribunals are appointed, administrative bodies which function independently of the Government and outside courts of law. Therefore they should not have the power to consider the validity of federal laws. Policies which are important to the achievement of legitimate objectives of Canada should be subject to examination only under the Constitution of Canada in courts of law."

14. Paragraphs 19 to 26. DND reiterates its disagreement with recommendations 6 and 8. There is no practical substitute for retirement age as a reliable means of ensuring that the Canadian Forces retain the necessary level of physical ability; therefore, this Department considers that current Canadian Forces policies for mandatory retirement constitute a reasonable

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limitation within the meaning of section one of the Charter. Section one of the Charter would permit a broader defence of these policies than would the bona fide occupational requirement rule of the CHRC. The enactment of a legislative provision to exempt the Canadian Forces from mandatory retirement would not meet the objectives of this Department. As has been stated, the concept of such an exclusion could itself be the subject of a challenge under the Charter which, if it were upheld, could result in the Canadian Forces having to comply with CHRA policy on mandatory retirement without ever having the opportunity to defend their current policy in a court of law as a reasonable limitation within the meaning of section one of the Charter.

15. Paragraph 27. The discussion in this paper does not justify the statement that there are "strong legal and policy reasons" for making this amendment. Despite DND concerns about the concept of an exclusion, formally raised in correspondence, the adverse aspects and risks inherent in this proposal are not even mentioned. Therefore this paragraph does not represent a consolidation of departmental positions and should be clearly identified as a Department of Justice proposal if it is not changed.

16. Paragraph 37. The latter half of this paragraph implies that the Government policy on women in combat is temporary and that a transition period is envisaged. This is not correct. The current policy is considered to be a reasonable limitation within the meaning of section one of the Charter. The need for this limitation will be reviewed continually and the employment of women will be expanded as soon as that can be done without adverse effect on the operational capability of the Canadian Forces. It is requested that the term 'near combat' be deleted, and that all after that sentence be replaced with a statement that contains the gist of the foregoing comment.

17. Paragraph 57. The last line of this paragraph should be amended to read "to implement those recommendations of the Report with which it agrees".

18. Paragraph 58. DND could agree with this recommendation only if suggested amendments are incorporated.

19. ANNEX I, Communications Plan. DND comments on the Communication Plan are contained in Appendix 1 attached.