

ANNEX B

TO: MND Letter

DATED 5 January, 1986

DND COMMENTS ON  
THE PROPOSED CANADIAN GOVERNMENT RESPONSE TO  
THE RECOMMENDATIONS CONTAINED IN  
"EQUALITY FOR ALL"

General

1. The long Introduction appears to give undue emphasis to the concerns of providing for the rights of individuals. Mention of the need to balance these rights with the collective rights of society as a whole is confined to eight lines in the three and a half pages. Limitations on individual rights are necessary to enable governments to govern in the collective interest. Therefore it would seem to be appropriate for the Government response to present a more balanced view of the two considerations that must equally affect decisions on rights and freedoms issues. It would be unfortunate if a Government document could be interpreted as encouraging unrealistic expectations of the degree to which individual rights and freedoms might be pursued.

2. The purpose of the Overview is stated as being to highlight current reform processes relevant to recommendations in Equality for All. However, the section on the CHRA is largely concerned with discussion of the applicable recommendations themselves. The reservations of this Department concerning the exception concept are set out in the comments on individual recommendations in the body of the paper. Also, the reference to 'social' policy reasons in the last paragraph of page VIII is not understood; the rewrite should reflect this Department's position that current retirement policies constitute reasonable limitation within the meaning of section one of the Charter.

Recommendations 6 and 8

3. The Department of National Defence is not persuaded that the provisions of Section 14.(c) of the

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CHRA are inconsistent with section 15 of the Charter. In addition this Department does not believe that, as a general proposition, the retirement policies in the federal public sector, and of the Canadian Forces in particular, should be subject to the CHRA.

4. This Department considers that current Canadian Forces policies for mandatory retirement constitute a reasonable limitation within the meaning of section one of the Charter and that section one of the Charter would permit a broader defence of these policies than would a challenge under the CHRA. Furthermore, our comments on an exclusion are set out in our response to recommendation 10 following. Thus the proposed response, to recommendations six and eight, does not meet the objective of this Department, which is to ensure that Canadian Forces policies that are vital to the security of Canada are challengeable only under the Constitution of Canada.

Recommendation 9

5. The last sentence of paragraph three of the proposed Government response to recommendation nine is not clear. An additional sentence is required to explain that pension benefits cannot be accrued beyond 35 years of service.

Recommendation 10

6. This Department does not agree with the recommendation to amend the CHRA by adding sexual orientation as a prohibited ground of discrimination.

7. The proposal to exempt the Canadian Forces from this amendment would only serve to highlight the accommodation made, however justified, in such a way as to invite criticism and agitation for its removal. Also, 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 being subject to adverse decision under the narrower focus of the CHRA without the substance of the issue having been considered in a court of law under the broader focus of section one of the Charter.

Recommendation 11

8. It is recommended that paragraph three of the proposed response be deleted and the following paragraphs be included as a more accurate reflection of this Department's position:

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"Because the review was conducted in terms of the Canadian Charter of Rights and Freedoms, the Canadian Forces also had to consider the effects of any change in policy on the rights of current members. The examination raised serious concerns as to the infringement of the right to privacy of other members, due to the particular conditions inherent in military service, and which could not be accommodated without impairing the capability of the Canadian Forces.

The considerations that gave rise to this issue must be balanced against the potential effects on the rights of other members, and on the ability of the Canadian Forces to contribute to the vital national objective of ensuring the security of Canada. The conclusion of this Government is that in consideration of these factors, the present Canadian Forces policy on sexual orientation is a reasonable limitation within the meaning of section one of the Canadian Charter of Rights and Freedoms."

Recommendation 14

9. This Department reiterates its disagreement with the inclusion of sexual orientation as a proscribed ground of discrimination in the Canadian Human Rights Act for the reasons stated in the comments on Recommendation 10.

Recommendation 17

10. The suggestion in paragraph two that different definitions for common-law status be used for different classes of benefits and obligations cannot be supported. As stated in correspondence on this subject, the differing definitions could themselves constitute inequality of a more serious nature than any that may now exist. There are so many unresolved problems associated with this issue that a fundamental review from first principles of all recognition, including that which now exists, would seem to be more in order than any extension of recognition.

Recommendation 23

11. The comments on recommendation 17 also apply to this recommendation.

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Recommendation 24

12. This Department cannot support the Government response to this recommendation in the absence of any explanation of how the breakdown of common-law relationships would be defined. It is also difficult to understand how a definition of breakdown of common-law relationships can be established when it has not yet been possible to define how or when a common-law relationship begins. No ready solution is seen to this complicated issue, and the comments on recommendation 17 apply.

Recommendation 54

13. It is recommended that the word "all" in line seven of paragraph one of the proposed Government response be changed to "many" to correct an error in fact.

Recommendation 56

14. The phrase, "such as members of the Canadian Armed Forces Reserve", is not considered to be necessary and should be deleted. There are many other part-time occupations that involve irregular hours, and an example might tend to be misleading.

Recommendation 60

15. The purpose of the brackets enclosing the last sentence in paragraph four of the proposed Government response is not understood. It is recommended that the brackets be removed.

Recommendation 71

16. The implied Government commitment contained in paragraph one of the proposed Government response should be reconsidered. It is understood that Governments at all levels in Canada presently spend approximately \$1 billion each year on child care services. The expansion of this service to provide adequate, accessible, and affordable child care has been estimated to cost as much as an additional \$5 billion. It would seem to be prudent to avoid any semblance of a commitment without adequate study of the enormous financial implications. Thus paragraph one should be deleted from the proposed Government response.

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Recommendation 77

17. This Department cannot agree to the proposed Government response to this recommendation. There are several important aspects of this issue that were not addressed in Equality for All, and it is the position of neither this Department nor the Chief Electoral Officer that any decision has been reached to implement this recommendation. It is the intention of the Chief Electoral Officer to convene a committee to study this and other possible amendments to voting provisions, with representation from this Department, early this year. This position was confirmed in a telephone conversation with staff of the Chief Electoral Officer on January 2, 1986.

Recommendations 79, 80, 81, 82

18. This Department does not consider that its concerns, contained in correspondence dated 11 December 1985, have been adequately stated or addressed either in this document or the draft Memorandum to Cabinet, nor is the argument therein considered to be sufficient to warrant a change in the DND position. Therefore, this Department remains opposed to the responses proposed for recommendations 79, 80, 81 and 82.