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ANNEX A
TO 1605-12-20 (SA/ADM(Per))
DATED 25 SEP 86

INTERIM APPLICATION OF CF POLICY ON HOMOSEXUALITY

BACKGROUND

1. Following the Government response to the Equality For All report, ADM(Per) on 17 Mar 86 confirmed to CPCSA that the basic policy on homosexuality contained in CFAO 19-20 remained in effect but that the authority for release of known homosexuals, as a temporary measure, would rest with the CDS personally. Subsequently, the Assoc MND (on 15 Apr 86) and the CDS (on 17 Jun 86) made statements before Parliamentary committees concerning the status of the CF policy on homosexuality. The meaning of those statements has been interpreted differently by various members of the staff.

2. On 22 Aug 86 DG Charter offered the opinion that "... these statements of policy (by the Assoc MND and the CDS) have effectively suspended the option of any release at all under CFAO 19-20". This opinion has had the effect of delaying any further processing of homosexual members for release pending clarification of the status of CF policy and procedures.

AIM

3. To recommend an interim policy on homosexuality.

FACTORS

4. The following factors apply:
- a. what was said by the Assoc MND and the CDS to the Parliamentary committees and what commitments were given;
 - b. a distinction between homosexuality and homosexual activity;

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- c. administrative versus disciplinary action;
- d. the potential consequences of leaving the issue unresolved until the report of the Charter Task Force (CTF) is received and a decision is made on that report; and
- e. other developments.

WHAT WAS SAID

5. The present uncertainty derives from varying interpretations of the import of the statements made to Parliamentary committees by the Assoc MND and the CDS on 15 Apr 86 and 17 Jun 86 respectively. Those statements are at Flags A and B and relevant portions are excerpted below.

6. In the case of statements by the Assoc MND, he was responding to questions from Mr. Robinson. Mr. Robinson was seeking assurance that no individual of the armed forces, who happens to be a gay or lesbian, and who is otherwise qualified, will be released from the armed forces while the CTF study is underway. Mr. Andre replied:

"... if any incident like that were to occur, it would be as a result of deliberate action, not as a result of automatic application of this rule. ... But within the context of maintaining an operationally effective armed force, I do not think I would be fulfilling my responsibilities if I were to foreclose the possibility of behaviour resulting in a dismissal. It would be behaviour, not the fact that somebody informed that such-and-such is a homosexual or lesbian."

Pressed further by Mr. Robinson, Mr. Andre confirmed that it would be inappropriate behaviour by the individual, whether homosexual or heterosexual, that could lead to a dismissal.

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7. There are three important elements to Mr. Andre's reply:

- a. he clearly left open the possibility that homosexuals could continue to be processed for release;
- b. he indicated that evidence of inappropriate behaviour would be required; and
- c. he confirmed that a simple assertion by an informant that someone is a homosexual would be inadequate cause to proceed with release.

It is concluded that there is nothing in Mr. Andre's statement that precludes the continuing processing of homosexuals for release provided there is evidence of inappropriate behaviour. There is no suggestion that such activity needs to have been in the nature of an offence and there is no commitment that disciplinary proceedings must precede release action.

8. In his appearance before the Standing Committee on Human Rights on 17 Jun 86, the CDS responded to a number of questions from Mr. Robinson. In response to a question about the status of the policy in CFAO 19-20, he replied:

"It is in effect. It is in force, Mr. Chairman, to the extent that a substitute policy has not yet ... there has not yet been time to develop in detail a substitute policy. Quite clearly, given that new position taken by the government, homosexuals will not be eliminated from the armed forces strictly and simply because they might be labelled as homosexuals."

A further question about the implementation of CFAO 19-20 elicited this reply:

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"... direction has been given that cases of this nature would not be disposed of short of the personal sanction of the Assistant Deputy Minister of Personnel or myself having reviewed the specific circumstances involved. No, it has not been business as usual."

9. There are three important elements to Gen Thériault's reply:

- a. the general policy in CFAO 19-20 ^{is} still in effect;
- b. the fact of being a homosexual ^{is} not, of itself, sufficient cause to proceed with release; and
- c. the approval level for the release of a homosexual under CFAO 19-20 now rests ^{ed} with the ADM(Per) or the CDS.

It is concluded that there is nothing in Gen Thériault's responses that represents a commitment to stop processing homosexuals for release or to ensure that release action is based on the results of a disciplinary process. The principal commitment is that homosexuality per se is not, by itself, sufficient cause for release.

DISTINCTION BETWEEN ACTIVE AND PASSIVE HOMOSEXUALITY

10. Both the Assoc MND and the CDS, in their statements, indicated that homosexuality, by itself, would not be sufficient cause to proceed with the release of a homosexual. At present, CFAO 19-20 defines a homosexual as "one who has a sexual propensity for persons of one's own sex". By CFAO 19-20, as now written, there is no requirement to establish the fact that the individual had engaged in homosexual acts: there is only the requirement to establish with reasonable certainty that the member is

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a homosexual. In view of the statements made by the Assoc MND and the CDS, it is apparent that a more stringent test must now be applied before a homosexual is released under the provisions of CFAO 19-20.

11. What that more stringent test must be is a matter of judgement. Returning to the statement made by the Assoc MND on 15 Apr 86, he said that it would be behaviour that could result in a dismissal. Further, he agreed with Mr. Robinson that it would be inappropriate behaviour by the individual, whether homosexual or heterosexual. It can be argued that "inappropriate behaviour" means something more than just simple homosexual activity between consenting adults and it is quite likely that Mr. Robinson so interpreted the reply. However, it can also be argued that from the CF perspective homosexual activity is itself inappropriate behaviour and that once the presence of that activity is established, the provisions of CFAO 19-20 should apply. Support for the latter argument is found in the decisions of the CDS in four cases subsequent to the Assoc MND's statement. In each of those cases the presence of current or recent homosexual activity was established and the CDS approved release. It does not appear that any attempt was made to distinguish between appropriate and inappropriate homosexual behaviour: instead, it appears that current or recent homosexual activity was itself judged to be inappropriate behaviour and cause for release.

12. It is concluded that the CDS interpreted the Assoc MND's qualification that inappropriate behaviour was required before a member could be released for homosexuality to mean that there had to be substantive evidence of current or recent homosexual activity. While that interpretation could be challenged by Mr. Robinson or others as narrow and self-serving, it is not unreasonable and it is not inconsistent with what the CDS said on 17 Jun 86. Thus, it is suggested that the "more stringent test" be the requirement to provide evidence that shows with reasonable certainty that the individual is or was engaged in recent homosexual activity.

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DISCIPLINARY VS. ADMINISTRATIVE ACTION

13. In his memorandum of 22 Aug 86 (Flag C), DG Charter in para 3 identifies a concern about proceeding with administrative action to effect release without first conducting disciplinary proceedings. While his comments are specific to a particular case, they need to be considered in the context of a general policy for dealing with homosexuals.

14. Present policy in this regard, as contained in CFAO 19-20, is as follows:

"Normally, disciplinary action should not be taken. However, the CO shall consider such action, particularly when the subject's sexual propensity or behaviour could scandalize other members and bring discredit on the CF, or when an offence under the Criminal Code of Canada is alleged to have been committed."

This policy is long-standing and recognizes that in most cases involving homosexual behaviour, even when an offence is alleged to have been committed, it is normally in the best interest of the service and the individual to waive disciplinary proceedings. However, DG Charter appears to take issue with this when he says "In the absence of substantiated evidence given under oath before a service tribunal, it is highly questionable that there are legitimate grounds for departing from the C&P process that is normal for conduct that is substandard but that the CO does not consider warrants the laying of charges."

15. Disciplinary and administrative actions are separate and distinct processes. There is no necessary linkage between the two except in specific cases where administrative action follows as a direct consequence of disciplinary action (eg: the making of entries in a conduct sheet; administering the recovery of a fine; etc). By itself, administrative action can take many

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forms. When it is directed at unacceptable conduct that has not been the subject of disciplinary processes, it is normally, but does not always need to be, progressive in nature and takes a member through stages of informal counselling and formal C&P before resulting in a release decision. However, that sort of approach is not indicated in the case of homosexuality and it is not considered repugnant to proceed directly to the release stage in such a case provided there is reasonable certainty that the member is a person to whom CFAO 19-20 applies. DPLS reviews each case in detail and provides that assessment. In so doing, he judges the quality of the evidence and provides an informed legal opinion. As far as the member is concerned, his rights are not violated. Subject to certain limitations contained in CFAO 15-2, he has the opportunity to respond in writing to a Notice of Intent to Recommend Release; he has access to the redress of grievance system; and he can pursue the matter through the courts.

16. It is concluded that the observation of DG Charter in para 3 of his 22 Aug 86 memorandum is not applicable to the general policy concerning disciplinary proceedings for homosexuals.

POTENTIAL CONSEQUENCES OF INACTION

17. It is recognized that the CTF will submit its report by 1 Oct 86 and that a policy change could follow. However, given the sensitivity of the issue, it is possible that a definitive decision on the CF policy on homosexuality may not be forthcoming for some time. There are potentially adverse legal, operational and administrative consequences if the application of the present policy remains suspended.

18. Should the report of the CTF recommend the maintenance of present policy, and should that recommendation be accepted, the interim retention of members who are known to have engaged in homosexual activity could jeopardize the basis for that policy.

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Specifically, the argument could be made that if the CF could tolerate the presence of such members for an extended interim period without serious adverse effect, the basis for the policy is suspect. On the other hand, should there be serious adverse effect it could be manifest as an impact on operational effectiveness which is clearly undesirable. Administratively, there are a number of potential complications ranging from ensuring the safety of individuals who would normally have been processed for release to communicating the status of policy to the field.

19. It is concluded that it is undesirable to leave this issue in suspense and that present policy should be clarified.

OTHER DEVELOPMENTS

20. Although it pre-dates the statements of the Assoc MND and the CDS to the Parliamentary Committees, a recent message concerning medical aspects of HTLV-III control is relevant to a consideration of this issue. On 10 Feb 86 ADM(Per) released CANFORGEN 004 (Flag D). Among other things, that message amended CFAO 19-20 by deleting the requirement for a person subject to the Code of Service Discipline, on becoming aware or suspecting that a member of the CF is a homosexual, to report the matter to the CO. The effect of that change was to remove a reporting requirement that some might find offensive and to place a greater emphasis on homosexual acts as opposed to the condition of homosexuality. It is noteworthy that para 5 of that message contained this enjoinder:

"It is emphasized that the remainder of CFAO 19-20 continues in effect, and that the policy reflected in that order to the effect that persons who engage in homosexual acts will not be enrolled or retained in the Canadian Forces remains unchanged notwithstanding anything contained in this message."

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21. A further development is more recent. In response to a letter from a solicitor writing on behalf of a former service member, the present Assoc MND on 18 Aug 86 (Flag E) stated that "I fully support the position taken by Canadian Forces authorities to maintain the "status quo" until such time as further studies have demonstrated that a change in Canadian Forces policy can be made without adversely affecting its overall operational effectiveness." The policy referred to in the letter is the policy on homosexuality.

22. Although the present Assoc MND may not have had the opportunity to consider in detail the statement made by his predecessor on 15 Apr 86, it is assumed that he would be generally aware of Mr. Andre's position. In any event, the letter at Flag D is unequivocal in its support for maintenance of the present policy at this time.

OPTIONS

23. Two basic options are available for consideration:

- a. defer all decisions on homosexuals except those for whom disciplinary action has been taken; and
- b. continue with the application of present policy suitably modified to accommodate the statements by the Assoc MND and the CDS.

DEFER DECISIONS

24. One option is to defer all decisions except where disciplinary action has been taken. This is, in effect, the present status of policy application since the DG Charter memorandum of 22 Aug 86. No cases have been presented to the CDS for decision since that time. However, there are already six cases pending direction on how they are to be processed and the backlog of cases can be anticipated to increase steadily.

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25. This option would meet DG Charter's concerns, at least in part, and would be consistent with a broad interpretation placed on the statement made by the Assoc MND on 15 Apr 86. However, it carries the potential adverse consequences discussed in paras 17 to 19 inclusive above. If adopted, formal notification should be provided to the field including instructions and/or guidance on the appropriate action to take when members are known to have engaged in homosexual acts and, in particular, when elements of an offence are present.

26. If a definitive policy statement could be anticipated on or about 1 Oct 86, following the submission of the CTF report, this option would be acceptable. However, it is possible that a definitive statement will be delayed and with delay this option becomes less and less attractive.

APPLY PRESENT POLICY SUITABLY MODIFIED

27. The second option is to continue with the application of CFAO 19-20 suitably modified to conform with the statements made on the subject by the Assoc MND and the CDS. In effect, that is what was being done until the receipt of the DG Charter memorandum of 22 Aug 86. The significant modifications to policy and procedure are:

- a. an individual is not released simply by virtue of being confirmed as a homosexual. There has to be reasonable certainty that he has engaged in recent homosexual activity; and
- b. the approval authority for release rests with the CDS personally.

28. This option avoids the potential adverse consequences associated with deferring all action on homosexuals and is consistent with actions taken since

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Mr. Andre's statement on 15 Apr 86. However, the acceptability of this option rests on an interpretation of two words - "inappropriate behaviour". As has been discussed, "inappropriate behaviour" can be interpreted in the context of the CF as recent or current homosexual activity. However, it is acknowledged that this interpretation could be challenged and DND could be accused of bad faith. Nevertheless, it is suggested that it is a reasonable interpretation having regard to all the circumstances.

29. If this option is accepted, it is for consideration whether a formal amendment to CFAO 19-20 is required at this time. A proposed replacement CFAO (Flag F) has been drafted and DPLS favours its early publication. However, it is suggested that the publication of this replacement CFAO, in advance of a decision on the recommendations contained in the report of the CTF, could be seen as an attempt to influence or pre-judge that decision. It is considered that it is better not to issue a formal amendment or replacement for CFAO 19-20 at this time.

CONCLUSION

30. There is a choice to be made between deferring the processing of active homosexuals for release (except in those few cases where disciplinary action precedes administrative action) and continuing with processing subject to appropriate modification to the interpretation of present policy (emphasis placed on homosexual acts rather than on the condition of homosexuality). In view of all the factors, the latter course is preferred.

RECOMMENDATION

31. It is recommended that:
- a. recommendations for the release of homosexuals continue to be processed;

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- b. DPLS be required, in his review of these recommendations, to ensure with reasonable certainty that the individual has been engaged in recent homosexual activity;
- c. final approval remain with the CDS; and
- d. no formal amendment to CFAO 19-20 be made at this time.

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