

MEMORANDUM

1456-2 (D Law/HRI)

2 Dec 86

DJAG/L

DRAFT AMENDMENT TO CFAO 19-20

1. As requested, I have reviewed the draft amendment to CFAO 19-20. I am concerned that there are several aspects of the order that are of questionable legality. In addition, the policy basis for the CFAO may need to be clarified.

2. The first paragraph refers to "persons in respect of whom there are indications of sexual activity involving persons of their own gender." In my opinion, this phrase is too vague to qualify as a lawful basis of distinction. The Ontario Court of Appeal, in Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984) 5 D.L.R. (4th) 766, determined that provisions that are too vague cannot qualify as limits, reasonable or otherwise, under section 1 of the Charter. Therefore, if an argument was made that the CFAO violates Charter rights such as freedom of association or freedom of conscience, it is unlikely that a section 1 defence could be successfully mounted using this wording if the complainant made out a prima facie case.

3. "Indications of sexual activity involving persons of their own gender" could be construed broadly enough to encompass a female putting her arm around another female or two males going out for a night on the town and getting sexually involved with two females, separately but in each others presence. On the other hand, it could be interpreted restrictively so as to include only the most blatant homosexual acts. The problem is not necessarily the interpretation that will be given to the provision but rather the interpretation that can be given.

4. I am unsure as to the policy decision reflected in the CFAO. Is it intended that only acts be prohibited or is a homosexual orientation also covered? In my view, either position is liable to run into difficulties in the future if the CHRA is amended to include sexual orientation as a prohibited ground of discrimination. If this occurs, it is likely that the tribunals and courts will determine

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that the expression of the orientation as well as the orientation itself is protected. The argument would be that it would be senseless to protect sexual orientation while prohibiting the major way in which that orientation is expressed. As a result, the right to engage in homosexual acts could be included under the heading of "sexual orientation" and the CF would have to justify the prohibition of acts to the same extent that it would have had to justify release of those with a homosexual orientation if the policy related to orientation.

5. As I understand the problem, the difficulty with enrolling or retaining homosexuals in the CF lies in the area of morale. Because of the lack of respect given homosexuals in Canadian society in general, those who are in units containing homosexuals feel that they are tarred with the same brush with the resulting reduction of personal pride and sense of self-worth. This creates a morale problem in that the individuals of units with homosexuals believe that they are the subject of ridicule from other members of the CF. It can also lead to confrontation with the homosexual individual as the cause of the problem and with individuals from other units if they ridicule members of the unit because of the accepted presence of a homosexual. As long as the lack of respect for homosexuals exists in society in general, this morale difficulty will exist in the CF.

6. An additional concern is the lack of privacy. Males and females are segregated in situations where it is necessary to be undressed in front of others such as in shower facilities. This is done because of the natural sexual attraction between males and females and the invasion of privacy resulting from a forced display of the body to another individual who may be sexually attracted in a situation where the attraction is not reciprocal. To permit homosexuals of either sex to use the same facilities as heterosexuals would be equivalent to forcing male and female heterosexuals to use such facilities together. Being put on display in this way reduces the individual's sense of self-worth once again. He or she becomes a sexual object. As a result, further morale problems are generated.

7. If the above comments are valid, then the Forces opposition to homosexuals lies in the orientation rather than in the actions. Even if no action is taken by a known

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homosexual, the morale problems are still created. In addition, the homosexual might not actively participate in a sexual act with another but may still disturb morale by making offers, showing homosexual literature or encouraging others to consider homosexual activity.

8. In light of the above comments, the CF would probably be in just as strong a legal position if the policy required the release of those with a homosexual orientation as it would if it only required release of those involved in homosexual acts. In either case, the CF will have to defend its policy against challenges under the CHRA (if sexual orientation is included) or possibly under the Charter. However, I understand that to maintain the emphasis on sexual orientation may not be politically acceptable.

9. As discussed, to resolve the issue it may be preferable to amend CFAO 19-20 to prohibit "conduct of a sexual nature in relation to a person of the same gender". This wording is also in danger of being considered too vague. This might be resolved by defining "conduct of a sexual nature" as "sexual acts, offers or requests relating to sexual acts, advocacy of sexual acts, provision of descriptions or depictions relating to sexual acts except in the cause of duty, or other conduct of a like nature that would promote or tend to promote sexual acts."

10. As a final comment, paragraph 12 of the draft order would seem to be contrary to the provisions of paragraph 9(b). Paragraph 12 appears to require a 4C voluntary release when requested even if the individual has been involved in criminal conduct. Is this the intent of the paragraph? If such a release is permitted, the provisions applicable to other types of release, such as restrictions on re-enrolment, would not apply.

11. In summary, if the basic reason for the Forces' policy is the impact on morale and cohesion, in my view, this ground can only be presented to a tribunal or court in a convincing manner if the policy directly attempts to address the cause of the morale problem, i.e. the homosexual orientation. As you are aware, it would be an uphill battle to convince a tribunal or court in any case. However, if only acts or activities are covered then the underlying morale problem will not be resolved. The homosexual orientation could be proven either by proof of acts or statements or actions of the individual such as frequent attendance at homosexual bars, statements to friends, etc.

*R.A. McDonald*

R.A. McDonald

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D Law/HRI

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