



THE INTERNATIONAL EXPERIENCE

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The U.S. Military's "Don't Ask, Don't Tell" Policy

A Reference Handbook

Melissa Sheridan Embser-Herbert

Foreword by Lawrence J. Korb

Contemporary Military, Strategic, and Security Issues



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exact a great toll on the military, service members and their friends and families, and taxpayers. The debate remains over whether or not that toll is reasonable.

Notes

1. Four service members were granted bad conduct discharges. Data were unavailable for 417 service members. U.S. Government Accountability Office, February 2005, *Military Personnel: Financial Costs and Loss of Critical Skills Due to DOD's Homosexual Conduct Policy Cannot Be Completely Estimated*, p. 7.

2. *Ibid.*, p. 20.

3. *Ibid.*

4. *Ibid.*, p. 3.

5. All discharge data obtained from SLDN annual reports.

6. Department of the Army's 91st Division (Training), *Sexual Harassment and Sexual Discrimination*, October 20, 1992, p. 2.

7. Testimony of Captain Guy Richardson, U.S. Marine Corps, at Article 39(a) hearing of SGT Mary Kyle, 1988, quoted in Michelle M. Benecke and Kirstin S. Dodge, "Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals," *Harvard Women's Law Journal*, 1990, p. 232.

8. All biographical material contained in this section was provided by SLDN (www.sldn.org) and appears, edited, with their permission.

9. See Appendix 1 for a summary of the case.

10. <http://alexandertheaverage.blogspot.com/2006/02/brokeback-barracks.html>.

The International Experience

Aaron Belkin and Melissa Sheridan Embser-Herbert

While many nations across the globe have, in the past, had policies that restricted the military service of gay men and lesbians, many have now either completely eliminated them or modified them considerably. Because of the range of policies, it is, indeed, a complex task to track the status of regulations and customs concerning gays and lesbians in armed forces around the world. Some nations have never had a formal ban. In many instances, especially those where homosexuality is not only condemned but also illegal, this is presumed to be because it simply never occurred to them that it was an issue. If a nation essentially denies that homosexuals are among its citizens, there is no need for a policy banning them from military service. In other nations nothing exists to ban all gays and lesbians from military service, but there have been restrictions on the type of service they can perform.

As best as researchers have been able to determine, countries that allow gays—and lesbians, where women serve at all—to serve in the military are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Great Britain, Ireland, Israel, Italy, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, and Switzerland. Other nations which may or may not be included in this list include, for example, Greece, which bans gay officers, but permits enlisted conscripts who are gay to insist on fulfilling their service obligation, and Portugal, which has no formal ban but may screen out gays during the induction process. As noted above, it is incredibly labor-intensive to determine with great accuracy what a country permits or prohibits by law and what really happens on a day-to-day basis. Not only do laws change, but the application of the law may vary from one location or command to another. It is worth noting that this can also be said of the United States. In addition to the discretion granted commanders, one scholar may interpret "Don't Ask, Don't Tell" as prohibiting the service of gays and lesbians and place the United States in the "no open service" column. Another, however, might

interpret the policy as permitting their service, provided that they do not "tell," and place the United States in the "yes" column.¹

Three nations with which the United States is often perceived as having the most in common are Canada, Australia, and Great Britain. Canada and Australia lifted their bans in 1992; Great Britain did so in 2000. Sociologist Charles Moskos, often considered the primary author of "Don't Ask, Don't Tell," said, "No neat and tidy lessons can be drawn from one country to another."² And, during the 1993 Senate hearings, retired Lieutenant General Calvin Waller said that it was a "grave disservice" to draw comparisons between the United States and the armed forces of smaller nations.³ While it is true that it may not be possible to draw "neat and tidy lessons," and many military leaders, politicians, and jurists deride the notion that the United States might learn from other nations, the fact remains that their experiences may be instructive.

The following sections each provide a brief overview of policies concerning gays and lesbians in the armed forces of Canada, Australia, and Great Britain.

Canada⁴

Prior to 1988, the Canadian Forces' (CF) policy on gays and lesbians was published in Canadian Forces Administrative Order (CFAO) 19-20, entitled "Homosexuality—Sexual Abnormality Investigation, Medical Examination and Disposal." This administrative order stated that "service policy does not allow homosexual members or members with a sexual abnormality to be retained in the Canadian forces."⁵ The CF did not permit openly gay men and lesbians to enlist and any soldier later discovered to be gay or lesbian was to be dismissed. The order also required that other military personnel inform on those fellow service members they suspected were homosexual. Investigations of suspected service members' sexual orientation were handled by the Special Investigations Unit of the CF.⁶

After Canada passed the Canadian Human Rights Act (CHRA) in 1978, and later the Canadian Charter of Rights and Freedoms, the policy came under scrutiny by both the judiciary and political bodies. While the CHRA did not explicitly cover sexual orientation, it did require employers to justify their exclusionary or restrictive policies. Although the Charter itself became a part of the Canadian Constitution in 1982, Section 15, the section governing equality, did not come into effect until 1985. The Charter, considered analogous to the U.S. Bill of Rights, also did not include sexual orientation in its enumerated list of prohibited grounds of discrimination. Section 15 of the Charter, did, however, enable the restriction of other forms of discrimination if so ruled by the courts.⁷

In 1985, a review of federal regulations by the Justice Department determined that the CF were potentially in violation of the equal rights provisions of the Charter in a number of areas, including its discrimination against gays and lesbians.⁸ In response to the Justice Department's findings, the Department of National Defence conducted a survey of 6,380 soldiers to assess the potential impact of

a removal of the ban on homosexual soldiers. Not unlike similar surveys done in the United States in the 1990s, the survey found that military personnel, particularly men, were strongly against removing the ban. Service members expressed concern about all aspects of serving with gays and lesbians; 62 percent of male soldiers stated that they would refuse to share showers, undress, or sleep in the same room as a gay soldier, and 45 percent declared that they would refuse to work with gays. Many also stated that they would refuse to be supervised by a gay or lesbian soldier.⁹ The Department of National Defence's Charter Task Force recommended in its final report that the exclusionary policy toward homosexuals be retained, arguing that the unique character and purpose of the armed forces necessitated the restriction of gays and lesbians. Given the aversion toward homosexuals in the military, the report concluded that the "the presence of homosexuals in the CF would be detrimental to cohesion and morale, discipline, leadership, recruiting, medical fitness, and the rights to privacy of other members." It further declared that "the effect of the presence of homosexuals would [lead to] a serious decrease in operational effectiveness."¹⁰

In response to the Final Report, the new Minister of Defence announced that it was his intention to modify the existing policy only slightly. Under the change, the CF would not knowingly enroll homosexuals. If servicemen or women were discovered or announced themselves to be gay, they would be asked to leave, but they would not be dismissed. Those who chose to stay would not be eligible for training courses, security clearances, transfers, promotions, or reenlistment.¹¹ Such an approach, of course, would effectively "dismiss" service members, though the date would simply not be as immediate as with an actual dismissal. The CF had, at that point, already removed the obligation of service members to report on suspicions that another soldier may be homosexual.¹²

In spite of the measures taken by the Department of National Defence, pressure to change the policy on homosexuals continued to increase. As court decisions extended the rights of gays and lesbians under the Human Rights Act and the Charter of Rights and Freedoms, Lieutenant Michelle Douglas and four others filed separate suits against the CF that directly challenged its policy toward homosexuals. In August 1990, the Security Intelligence Committee ruled that the military ban against homosexuals violated the Charter and found in Douglas' favor. In preparing its appeal in the Douglas case, the Department of National Defence concluded that it could not meet the standard of proof required for a "reasonable limitation" argument under the Charter. That is, they could not justify, within the parameters provided by law, the exclusion of gays and lesbians from the armed forces.

While the Chief of the Defence Staff General John de Chastelain privately informed members of Parliament that the ban was about to be lifted late in 1991, the federal government delayed in the wake of an adamant refusal by some Conservative members of Parliament to support the policy change.¹³ Finally, facing a case it knew it could not win and lacking the leadership needed to defend its policy, the Department of National Defence agreed to settle the case against

Douglas in October 1992. In so doing, the military acknowledged that its policy of exclusion violated the Charter of Rights and Freedoms, and it consented to the immediate repeal of that policy.¹⁴

The policy change in October 1992 concerning gay and lesbian soldiers in the Canadian military was not so much an affirmative order as it was the dismantling of existing policy. General de Chastelain issued a press report that declared, "The Canadian Forces will comply fully with the Federal Court's decision. Canadians, regardless of their sexual orientation, will now be able to serve their country without restriction."¹⁵ In a communiqué entitled "Homosexual Conduct," the Chief of Defence revoked CFAO 19-20 and all related interim policies. The military would no longer draw a distinction between its heterosexual and homosexual soldiers. He expressed his "full support" of the Federal Court's decision and stated his expectations of support of the policy change within the chain of command. General de Chastelain also declared that "inappropriate sexual conduct by members of the forces, whether heterosexual or homosexual," was unacceptable.¹⁶

Because the courts provided the impetus for change, senior leaders endorsed the change and encouraged the members' sense of duty. Senior political and military leaders believed that reliance on equal standards for the conduct of gays and heterosexuals was the best chance for success of the policy, since it focused on behavior rather than a transformation of individual values or beliefs. The military made no effort at the time to change individual members' attitudes about homosexuality. Instead, the CF promoted the policy change through unequivocal answers to specific questions about appropriate behavior.¹⁷

In December 1992, the CF issued a new regulation (CFAO 19-36) entitled "Sexual Misconduct." CFAO 19-36 was to be used with an amended version of personal harassment regulations to detail what constituted inappropriate sexual conduct for both homosexual and heterosexual soldiers. Sexual misconduct was defined as "an act which has a sexual purpose or is of a sexual or indecent nature and which . . . constitutes an offence under the Criminal Code or the Code of Service Discipline."¹⁸ Under the personal harassment regulations (CFAO 19-39), sexual harassment was defined as "... a type of personal harassment that has a sexual purpose or is of a sexual nature including, but not limited to, touching, leering, lascivious remarks, and the display of pornographic material."¹⁹

The Canadian military itself did not undertake an initial assessment of the implementation of its new policy concerning homosexuals. Because the idea of allowing gays to openly serve in the military became a volatile issue in the United States soon after Canada's removal of the ban, several analyses were conducted by organizations on behalf of the U.S. Congress and military. These included studies by the National Defense Research Institute (RAND) and the General Accounting Office (GAO), as well as a report by a retired Canadian corporal for the U.S. Army Research Institute. These analyses, as well as journalistic accounts, suggested that the transition was a smooth one. Despite concerns that service members would resign, harassment would increase, and morale would suffer, the reports could find no evidence that any aspect of military life had been negatively affected.

While many heterosexual service members were unhappy with the removal of the ban, they responded professionally in the months following the policy change. Few homosexual soldiers, however, took the opportunity to explicitly state their sexual orientation during this time.

RAND researchers conducted interviews with Canadian military personnel several months after the removal of the ban on gay and lesbian soldiers. They found no evidence that the policy change had had any appreciable effect on any aspect of military life or performance. The officials with whom researchers spoke "... kn[e]w to date of no instances of people acknowledging or talking about their homosexual relationships, no fights or violent incidents, no resignations (despite previous threats to quit), no problems with recruitment, and no diminution of cohesion, morale, or organizational effectiveness."²⁰

Canadian officials offered several reasons for the smooth transition. First, the military leadership had acknowledged the inevitability of the change in policy. Because the process had occurred over time, the military had been able to acculturate itself to the idea of including openly homosexual soldiers. Second, the military adopted a conscious leadership strategy in the implementation phase. Highest priority was given to ensure compliance with the policy change. Military leaders decided that it was not appropriate to try to change the beliefs or attitudes of individual personnel; they did, however, prioritize acceptance of the policy to minimize possible friction. Third, military officials emphasized the fact that the implementation had been accomplished in a low-profile fashion, without numerous public pronouncements or media scrutiny. Finally, officials cited the content of the policy itself as a reason for the smooth change. Officials pointed out that the policy change itself did not formally institute a policy on gay and lesbian conduct; rather, it established new equitable policies that applied to homosexuals and heterosexuals alike.

The GAO analysis of the first six months of Canada's new policy also found no problems associated with the change. In their interviews with members of Parliament, gay advocacy groups, a veterans' umbrella group, the Canadian Human Rights Commission, the Department of National Defence, and the Department of Justice, the researchers could find no one who had received any reports of resignations, lower recruitment, morale or cohesiveness problems, or gay-bashing incidents. In addition, the GAO found no reports of open displays of homosexual behavior.

CF officials reported that the greatest advantage of the change in policy was that gay and lesbian soldiers no longer had to fear being discovered and discharged from the armed forces. These officials felt, however, that many gay and lesbian soldiers would not publicly express their orientation because they would see no advantage in doing so. The military leadership's public support for the removal of the ban and its unified front were cited as significant reasons for the smooth transition.²¹

At the request of the Deputy Chief of Staff of the U.S. Army, the U.S. Army Research Institute for the Behavioral and Social Sciences issued a report in

January 1994 authored by an outside consultant evaluating early outcomes of the lifting of the ban in Canada. The report surveyed all publicly available literature to describe the original impetus to lift the ban as well as the consequences of the 1992 policy change on a broad array of performance outcomes in the CF. In its summary of findings, the report states, "The impact of the policy change has been minimal. Negative consequences predicted in the areas of recruitment, employment, attrition, retention, and cohesion and morale have not occurred in the 6-month period since revocation of the exclusionary policy."²²

Although the Canadian military has never undertaken a formal assessment of the policy change toward sexual minorities, a briefing note on the removal of the ban was written by the section head for Human Rights Policy (a bureau of the Canadian Department of National Defence) in 1995. Two and one half years after the removal of the ban, the note still could not find any indication that the policy change had had a negative effect on the CF. The 1995 note was originally prepared in response to a request for information by U.S. lawyers defending a discharged Navy lieutenant under the U.S. military's policy on homosexuals. Although the CF official was ultimately prohibited from offering an affidavit for the U.S. case, he took the opportunity to share the data he had gathered with the CF command. He wanted to let them know that "[d]espite all the anxiety that existed through the late 80s into the early 90s about the change in policy, here's what the indicators show—no effect."²³

The briefing note also cited a 1993 attitudinal survey on quality of life issues which asked members, among other items, to describe how satisfied they were with the CF's policy on sexual orientation.²⁴ Out of 3,202 respondents, 43.3 percent were either satisfied or very satisfied with the policy, 24.4 percent stated they were neutral, 28.5 percent were either dissatisfied or very dissatisfied, and 3.8 percent had no opinion. The 1995 note compared these findings to a question on employing women in all units and occupations. In response to the question on female involvement, 44.1 percent stated they were either satisfied or very satisfied, 21.0 percent were neutral, 32.9 percent were either dissatisfied or very dissatisfied, and 2.1 percent had no opinion. The Human Rights policy officer noted that acceptance of the military's policy toward gays and lesbians was quite similar overall to attitudes toward the inclusion of women. Analysis of the 1993 survey further revealed that female service members were generally more accepting than males of the sexual orientation policy (although no figures were provided), and senior officers were overall the most dissatisfied (37.5%) and junior noncommissioned officers were the least dissatisfied (25.7%) with the policy. In his conclusion to the 1995 brief, the CF officer declared that "behavioral and conduct data . . . yield little or no evidence to suggest that allowing homosexuals to serve in the Canadian Forces has been problematic, either in terms of their behavior or their treatment by other members."²⁵

The CF removal of the ban on gay and lesbian soldiers occurred only after years of judicial and political struggles. Senior personnel of the Department of National Defence and a sizable number of heterosexual soldiers were worried that

a change in policy would seriously compromise the mission of the CF. Fears of sexual harassment by homosexual soldiers, increasing rates of gay-bashing, resignations, and refusals to work with homosexuals had spurred continuing support for exempting the military from the protections proscribed under the Charter of Rights and Freedoms. Because the CF is entrusted with the fundamental task of putting soldiers' lives on the line to protect the interests of Canadian citizens, both at home and abroad, military personnel were wary of a policy change that they felt could compromise the operational effectiveness of the armed services.

Once the demise of the ban was imminent, however, Chief of the Defence Staff General Chastelain and other military leaders took decisive steps to create a smooth transition. They dissolved any distinction in the regulations between heterosexual and homosexual soldiers. They made it clear that the policy change had the full support of the CF leadership. The Department of National Defence outlined the standards of behavior that would be expected of all military personnel, regardless of sexual orientation, and it widely distributed both the standards and the changes in regulations. Perhaps, most importantly, the military leadership emphasized the distinction between beliefs and behavior. The personal attitudes and decisions of individual soldiers would be respected, but soldiers would be expected to put personal feelings aside to accomplish military objectives and to uphold the law.

In the years since the removal of the ban, the CF has continued to move forward in its full integration of gay and lesbian soldiers, and it has done so as part of a larger effort to reduce harassment and discrimination of all types among its personnel. In these efforts, sexual orientation has been neither singled out nor ignored as a potential source of conflict. Among other objectives, the Standards for Harassment and Racism Prevention (SHARP) program strove to overturn common stereotypes about gays and lesbians, and the CF is now developing more sustained antiharassment training. In keeping with federal mandate, the military has also been amending its regulations to ensure equivalent benefits for same-sex soldiers.

The success of these steps has been borne out by all of the available evidence. An examination of all of the studies conducted in the year after the removal of the ban revealed not a single reported case of resignation, harassment, or violence because of the change in policy. Follow-up with the officials in charge of sexual harassment, sexual misconduct, and human rights complaints have reported few if any incidents related to sexual orientation. Sexual and personal harassment rates actually decreased between 1992 and 1998. In research conducted in 2000, CF officials, military scholars, involved nongovernmental and political leaders, and gay soldiers have all concurred that the removal of the ban has had, to their knowledge, no perceivable negative effect on the military. The issue of gay and lesbian soldiers in the CF has all but disappeared from public and internal military debates.

One interesting footnote concerning the CF policy change is that, in 2003, in response to the approval of same-sex marriage, across Canada, province by province, the Interfaith Committee on Canadian Military Chaplaincy issued

"Interim Guidelines for Canadian Forces Chaplains." Chaplains were instructed to treat all couples with respect and dignity, but given permission to act in accordance with their faith and conscience. While chaplains may refuse to officiate, they are obligated to refer the couple to a chaplain or civilian clergy member who can do so. The guidelines state, "In a real sense the ministry provided by the Canadian Forces chaplains is a witness to the culture in which we live. We respond pastorally, prophetically and compassionately to the changing perspectives of culture as an ecumenical team."²⁶ In May 2005, what is believed to have been the first same-sex wedding on a Canadian military installation took place on Nova Scotia's Greenwood airbase.

While the removal of the ban may not be universally liked among heterosexual soldiers, it does appear to be universally accepted. Despite potential differences, personnel appear to be able to get their jobs done in a manner that does not compromise their effectiveness. For sexual minorities who serve, the change has been less about publicly declaring their sexual or transgender orientation than about being able to do their work well without fear of "being found out" or losing their jobs. The removal of the ban has resulted in a decrease of fear and anxiety and improved access to personnel support systems for soldiers who self-identify as sexual minorities. For the military as a whole, the nondiscrimination policy has also increased its potential pool of qualified recruits.

Australia²⁷

Like the armed forces in many other Anglophone countries, the Australian Defence Forces (ADF) maintained both formal and informal rules proscribing the participation of known homosexuals from 1986 to 1992. Prior to 1986, the ADF did not maintain a formal policy regarding the participation of homosexuals. According to a report by the U.S. General Accounting Office (now the Government Accountability Office), recruits were not formally questioned about their sexual orientation before 1986. However, informal efforts frequently were made to identify and document activities of personnel suspected of homosexual conduct, usually followed by the removal of such personnel from duty. Existing state and federal laws proscribing sodomy and homosexual relations usually were invoked to enforce these actions.²⁸

In the 1980s, as Australia incorporated international human rights accords into its national laws, federal and state governments actively dismantled existing laws against homosexuality and began to ratify new human rights bills that included protection against arbitrary discrimination. As a result, the ADF could no longer justify antihomosexual practices on the basis of territorial laws and was required to issue its own policy. It did so in September 1986, and the ban on homosexual service became an explicit and formal part of ADF instructions.²⁹

In the late 1980s and early 1990s, a number of economic, social, and cultural factors served to undermine the perceived legitimacy and rationale of the ADF ban on homosexual service. To begin, military leaders encountered criticisms of

ADF policies concerning equality of opportunity and racial and ethnic diversity. In 1992, the government examined charges that the ADF was not recruiting a sufficient portion of its soldiers from non-European populations and the result was a major study of the ethnic makeup of the forces.³⁰ Debates over the status and treatment of women in the ADF also influenced the perceived legitimacy of the ban on gay service. Though women had been able to participate in the Australian military for many years, either directly or through auxiliary branches like the Women's Royal Australian Army Corps, they were not allowed to take combat roles until the late 1980s. Smith points out that the three service branches began to face difficulties in retaining qualified personnel: "The ADF thus had a clear incentive to open more positions to women, thereby expanding the pool of potential recruits."³¹

In the years shortly before government and ADF officials considered lifting the ban on homosexuals, Australia adopted several human rights measures into its laws and codes including the International Covenant on Civil and Political Rights (ICCPR). Article 26 of the ICCPR posits the fundamental equality of all human beings and Article 2 addresses each individual's right to equal treatment before the law. Although sexual orientation is not included explicitly in the ICCPR's list of prohibited justifications for discrimination, Australian Human Rights Commissioner Chris Sidoti says that the ICCPR's list was meant to be inclusive rather than exclusive. Therefore, although not explicitly mentioned, sexual orientation is covered by the spirit of the ICCPR and it cannot serve as the basis of discrimination. Opponents of the ADF ban argued that the military was in violation of these human rights provisions in Australian law.

As civil rights considerations came to play an increasingly important role in the Australian political landscape, the ADF encountered a number of social and international trends that changed the understanding of its own mission and its relationship with civilian society. In particular, the end of the Cold War forced the ADF to reevaluate its role as a fighting force and many Australians came to see military service as a temporary occupation rather than a long-term career. Professor Hugh Smith has argued that during the Cold War, many Australians regarded the military as a calling and a lifetime vocation. According to the old mindset, a career in the armed forces meant that military life always took precedence over other priorities. Smith says that according to the new "occupational" mindset of many Australians, however, a military career is "just another job." Except in extraordinary circumstances like combat, soldiers now expect regular working hours, free weekends, pension and benefits, and other freedoms and privileges associated with the civilian world. In the late 1980s and early 1990s, much of Australian society moved toward an occupational outlook on most careers including military service, and just as the rest of Australian society was moving toward greater tolerance and support for individual rights and freedoms, the military found itself needing to adjust.³²

As the center-left/left party in Australian politics, the Labour government that controlled Parliament in the late 1980s and early 1990s faced some disagreement

within its own ranks over social issues such as the lifting of the ban on gays and lesbians in the military. As Rodney Croome points out, some members of Labour's caucus supported "traditional family values" and opposed lifting the ban. Others were traditional progressives, committed to an expansion of what they argued were equal rights for all Australians.

In a 1990 test of the military ban on homosexuals, a servicewoman made a formal complaint to the Australian Human Rights and Equal Opportunities Commission (HREOC) and contended that her discharge had been partially based upon the fact that she was a lesbian. The HREOC asked the ADF to explain the reasoning behind its ban on homosexual service. In February 1992, the Minister for Defence Science and Personnel informed Parliament that the federal government would review the ADF's ban. In June 1992, however, the Defense Minister told Parliament that following the recommendation of the Chiefs of Staff, the Government would not lift the ban.

The Government formed a special party committee to study the matter, to accept submissions from interested groups, and to make policy recommendations for the government. In September 1992, this committee recommended that the ban be dropped "immediately." The caucus committee also recommended that the ADF undertake a survey of members' attitudes and engage in an education campaign as part of the lifting of the ban. Committee members who favored lifting the ban contended that the military was not significantly different from other organizations and thus should not be exempt from antidiscriminatory policy changes being made elsewhere. Those who opposed the removal of the personnel restrictions contended that such a change would hinder the military's operational effectiveness, combat performance, and morale.

In late November 1992, the Cabinet accepted the Caucus Committee recommendation and the government voted to drop the ban on the service of gays and lesbians in the Australian military. Although the Defense Minister and the service chiefs opposed the removal of the ban, the Attorney General, the Health Minister, and the Prime Minister all supported its removal. The Attorney General argued that Australia's policy violated international human rights agreements not to discriminate against people based upon sexual orientation and the Health Minister said that by pushing military members to keep their relationships "underground," the ban contradicted efforts to fight AIDS. Prime Minister Paul Keating then made the decision to accept the policy change and to order its immediate implementation in the entire ADF.

In place of the previous military regulation banning gays and lesbians from service, the government issued a more general instruction on "sexual misconduct policy." Among other provisions, the new instruction referred to unacceptable conduct without making a distinction between homosexuality and heterosexuality. Rather than define what was unacceptable based upon sexual orientation, in other words, the new instruction prohibited any sexual behavior that negatively impacted group cohesion or command relationships, took advantage of subordinates, or discredited the ADF.³³ Thus, for example, "homosexual advances" were

not illegitimate; threatening sexual behavior was. And the policy provided commanders with some latitude to judge whether a certain behavior was acceptable or not in a certain context.

Reaction to the Australian change was swift and severe. The Returned and Services League, Australia's largest veterans group, condemned the policy change and argued that allowing open homosexuals to serve would shatter unit cohesion and lead to a deterioration of trust among soldiers, thus undermining the forces' fighting effectiveness.³⁴ Other opponents raised the specter of AIDS and said that the battlefield practice of direct blood-to-blood transfers would lead to an increased incidence of HIV infection. Even within the military, however, opinion seemed to be somewhat mixed. As of January 1993, however, no members of the ADF had declared themselves to be gay to military authorities. Early reports generated in the immediate aftermath of the policy change indicated that the ADF did not experience any decline in recruiting or combat performance and media attention to the issue largely disappeared approximately six months after the new policy's implementation.

After the lifting of the ban, the ADF introduced a variety of new programs and training courses to enforce and support the provisions of the Defence Instruction on Discrimination, Harassment, Sexual Offences, Fraternisation and other Unacceptable Behavior in the Australian Defence Forces (2000). In 1997, responsibilities for monitoring, education, and enforcement of the instructions were consolidated into the new Defence Equity Organization (DEO) that reports directly to the Defence Personnel Executive (the head of personnel for the ADF).

In June 1993, seven months after the Australian ban on homosexual service was lifted, the General Accounting Office of the United States conducted interviews with ADF officials to document early outcomes associated with the change. The short overview of the policy change concluded with a summary statement based on comments from an "Australian official," who stated that "... although it is too early to assess the results of the revised policy, no reported changes have occurred in the number of persons declaring his or her sexual preference or the number of recruits being inducted. Effects on unit cohesiveness have not yet been fully determined. However, early indications are that the new policy has had little or no adverse impact."³⁵

In February 1996, the United Kingdom Ministry of Defence completed a report documenting the findings of its "Homosexuality Policy Assessment Team" that investigated homosexual personnel policies of a number of foreign militaries. The team sent to Australia met with representatives of the Royal Australian Air Force, Royal Australian Army, and Royal Australian Navy, as well as with Dr. Hugh Smith of the ADF Academy and service psychologists at ADF headquarters in Canberra. Regarding implementation of the policy, the British team reported that service staffs believed that the change had not resulted in any notable problems for military functioning. The opinions of personnel drawn from the services, however, varied in their assessments of potential difficulties arising from the policy change. According to the report, male members of a random

volunteer group from the Royal Australian Air Force were largely against the new policy and believed that open homosexuals would have a negative effect on unit effectiveness. However, personnel drawn from an Army Logistics unit, as well as a Royal Australian Navy group based in Sydney, emphasized equality and nondiscrimination regardless of personal opinions on homosexuality per se.

The DEO serves as the primary ADF unit responsible for development, implementation, training, and support for all policies regarding equity, diversity, and sexual misconduct in the military. Formed in August 1997 during a widespread reorganization of the ADF, the DEO consolidated responsibilities that had been assigned separately to each service branch as well as a human rights policy area within Defence headquarters (now defunct). In addition to supporting the implementation of ministry policies, DEO handles complaints regarding all matters of sexual misconduct including harassment, bullying, and assault, provides an anonymous advice line for service members and commanders, and directs the training and outreach activities of "Equity Advisors" throughout the forces. The director of DEO, Ms. Bronwen Grey, occupied the analogous directorship in Defence headquarters until 1997.

According to an interview conducted with Director Grey in 2000, all available formal and informal evidence regarding outcomes associated with the 1992 policy change suggested that, in spite of early fears of deleterious consequences, the lifting of the gay ban has had no adverse effects on the capability or functioning of the Defence forces: "I have to say, from that point on [the 1992 change], nothing happened. I mean people were expecting the sky to fall, and it didn't. Now, a number of gay people probably didn't come out at that point, but we've had an X.O. of a ship come out and say to the ship's company, 'I'm gay,' and, quite frankly, no one cared."³⁶

When pushed by the interviewer to identify any problems that may have arisen after the ban was lifted, the Director did note that some gay people probably did not feel comfortable revealing their sexual orientation immediately after the change. Nonetheless, she said that a number of individuals had unambiguously come out to peers and commanding officers and that their revelations had no negative consequences for their careers or personal relationships. When asked to clearly specify any other concrete observations of what she termed a virtual "non event," the Director added, "All I can say is, from the organizational point of view, while we were waiting for problems . . . we were ready. Nothing happened. There were no increased complaints or recruiting [problems] at all . . . I mean nothing happened. And it's very hard to document nothing."³⁷

The Australian Human Rights and Equal Opportunities Commission is a statutory body that enjoys a relatively autonomous status in Australian politics that is analogous to courts. The Commission's members are appointed by the government and it receives its budget through the normal budgetary process but it is not accountable to the federal government, the bureaucracy, or political parties. Now retired, Human Rights Commissioner Chris Sidoti had made gay and

lesbian equality one of the priorities of his five-year tenure at the Human Rights Commission. Although Sidoti had little authority to force organizations to change their practices, he was responsible for investigating complaints and suggesting legislative reforms to minimize and eliminate discrimination in Australia. Sidoti, agreeing with most of the observations of military and academic experts, when contacted by Belkin and McNichol, indicated that there had been virtually no significant effects of the policy change on the military.

Systematic evidence concerning the lifting of the Australian ban on gays and lesbians in the military is scarce. Work by Belkin and McNichol attempts to redress the gap by drawing together and comparing the findings and observations of informed observers from a variety of vantage points in the policy domain. Taken together, their data make a convincing and credible case that, notwithstanding uneven and partial implementation of the policy, the 1992 inclusion of self-described gay and lesbian soldiers into the ADF has not led to any perceptible decline in operational effectiveness, morale, unit cohesion, retention, or attrition. In fact, ADF officials and a number of other observers, including commanders and soldiers, believe that changes associated with the policy have contributed to a working environment that is freer from the burdensome and unproductive consequences of mistrust, misunderstanding, and misjudgment that at times compromised the integrity of units in the past. As part of a broader commitment to equity in the ADF, then, the policy change has been a success.

One result of the policy change came about in October 2005 when the ADF extended partner and family benefits to service personnel in same-sex relationships. A separate issue, however, is the extension of benefits to veterans. The partners of gay and lesbian veterans are unable to receive the same benefits provided to the spouses of heterosexual veterans. In one interesting turn of events, while the ADF has taken the progressive step of providing benefits to its personnel in same-sex relationships, the Australian Coalition for Equality notes that civilian same-sex couples do not have the same protections. Under most areas of federal law, such as taxation and social security, there is no recognition for same-sex couples.

While the general consensus in the findings above is clear, a close look at the evidence also reveals a number of concerns. Isolated instances of discrimination and harassment still exist, and some service branches may be less proactive in their policies than others. These difficulties may be even more pervasive among the ranks of heterosexual women, who experience higher rates of harassment than gay males. From the perspective of gay and lesbian soldiers and their allies, the failure of the ADF to extend benefits that are accorded to heterosexual spouses to same-sex partners stands as a reminder of a partially fulfilled mission. At the same time, however, the fact that the debate over gays in the military has shifted away from the question of whether homosexual soldiers undermine military performance also stands as a testament to the success of the inclusive policy.

Great Britain³

Until January 2000, gay and lesbian soldiers were prohibited from serving in the British armed forces. Prior to 1967, British criminal and military law were congruous with respect to male homosexuality—sodomy was illegal and both civilians and soldiers could be imprisoned for homosexual activity. The 1967 Sexual Offences Act decriminalized private, consensual gay male sex for civilians aged 21 and over, but it included an exemption that allowed the British military to continue to prosecute male service members who engaged in gay sex.³⁹ However, while criminal law did not cover same-sex female sex acts, the military was able to discharge lesbians under the offense of general misconduct. Offenses for "homosexuality" were usually charged as "disgraceful conduct of an indecent kind," "conduct prejudicial to good order and military discipline," or more rarely "scandalous conduct by officers."⁴⁰ That is, it was the meaning imputed to homosexuality, rather than a specific prohibition on certain acts, that allowed lesbians to be discharged as well.⁴¹

In the wake of considerable Parliamentary debate on the subject during discussions about the 1991 Armed Forces Bill, the government acknowledged that the military exemption from the 1967 Sexual Offences Act was no longer justifiable. In June 1992, the Ministry of Defense announced an administrative order to immediately halt criminal prosecution for sexual activities that were legal for civilians under the 1967 Act. The British restricted court-martials for homosexuality to those male service members who were found to have had sex in public or with anyone under the age of 21. The legislative reconciliation of military and civilian law occurred later with the passage of the 1994 Criminal Justice Act. The military persisted in maintaining, however, that both male and female homosexuality were incompatible with military service. Gay and lesbian soldiers continued to face discharge if their sexual orientation was discovered.

In 1994, the Ministry of Defense issued Service-wide regulations concerning homosexual soldiers. The new regulations maintained the policy of barring homosexual service, but they standardized policy and provided more detailed protocol. Any recruit who admitted to being gay would not be allowed to enlist, and any service member who was discovered to be homosexual would be discharged from the military. Homosexual sex between adults of consensual age would not be considered a criminal offense, but the military could prosecute a gay or lesbian soldier for otherwise consensual sex if "the act was to the prejudice of good order and Service discipline."⁴² All recruits were to be informed that homosexuals were not allowed to serve in the British armed forces. The 1994 policy made it clear that homosexual orientation as well as homosexual behavior would be a bar to enlistment and service: even if a potential recruit admits to being homosexual, but states that he/she does not at present nor in the future intend to engage in homosexual activity, he/she will not be enlisted.⁴³

In 1994, four service members discharged for homosexuality began a legal challenge in British courts against the military's ban on gay and lesbian soldiers.

Lawyers for the service members invoked the *Wednesbury doctrine* and the European Convention on Human Rights to argue that the privacy rights of the soldiers had been violated. In June 1995, the High Court ruled against the discharged service members on the grounds that the British courts did not have the authority to invoke the European Convention on Human Rights. Justices of the High Court signaled, however, that the policy was unlikely to withstand judgment by the European Court. Britain's Court of Appeals upheld the High Court's decision in November 1995.

A legal advisor for the Ministry of Defense also warned military officials that the British Forces were likely to lose their case with the European Court of Human Rights (ECHR), but the Armed Forces Minister and the three Service Chiefs of Staff were said to strongly support a continuation of the exclusion of homosexuals.⁴⁴ Instead, Defense Ministers ordered a relaxation of the ban. Military police were instructed not to actively search for gay and lesbian soldiers; they were only to act if a problem was drawn to their attention. The Defense Ministers also made it clear that overzealous investigation, surveillance, and harassment would no longer be tolerated.⁴⁵

On September 27, 1999, the ECHR ruled unanimously that the ban on homosexual military service violated the privacy rights of the plaintiffs. Civil servants suggested that a new code of conduct could be put in place earlier than 2001, presumably because considerable work had already been done on it. A week after taking office, the new Secretary of State for Defense Geoffrey Hoon set aside "at least £4m" to cover pending compensation claims by homosexual ex-service members.⁴⁶ The more important question, however, was what model to choose for the new army regulations.

There was considerable opposition from both gay groups and services chiefs to basing the regulations on the American model, which was seen as "a disaster"; services chiefs saw the Dutch and Israeli options as "too liberal."⁴⁷ Stonewall recommended the Australian regulations, which bans heterosexual and homosexual public displays of affection, as a possible model.⁴⁸ In mid-December, Hoon announced that the new code would be published the following month, and that it would govern "sex not sexuality"—a reference to the Australian rules.

With respect to the model that was chosen, Michael Codner of the Royal United Services Institute explained: "I think both sides of the debate saw 'Don't Ask, Don't Tell' as something which hadn't worked, which was unworkable and hypocritical. The internal advice given to service chiefs by the civilian civil service was in favor of another model. . . . But the Australian model was pushed strongly by Australian service chiefs. Their defense attaches were also very proactive in pushing the success of the Australian option. And I think the British service chiefs saw some logic to it. The two forces have a similar structure and ethos."⁴⁹

On January 12, 2000, the Secretary of State for Defense announced the lifting of the ban to the Commons. He declared that the European Court judgment made the ban "not legally sustainable" and proclaimed that a new code of conduct governing personal relationships, based on that of the Australian armed forces, would

be introduced. No legislation was required to effect this change, which went into effect immediately. Discharged homosexuals were also invited to reapply for their jobs. Shadow Defense Minister Iain Duncan-Smith voiced "regret," and he said that if the Conservatives won the next election they would review the decision and allow military chiefs to decide.⁵⁰

In their development of a new policy, the Ministry of Defense emphasized the need for (1) compliance with the ECHR ruling, (2) regulations that were nondiscriminatory; (3) the preservation of operational effectiveness, (4) accordance with the general requirements of the military, and (5) protection of individual rights under the Human Rights Act.⁵¹ Homosexuality is no longer a bar to military service. Gay and lesbian soldiers are not, however, eligible for married accommodations, spousal pension, or other partnership rights. In addition, a code of social conduct establishes rules of behavior that apply equally to heterosexuals and homosexuals. Soldiers, regardless of sexual orientation or sex, are prohibited from engaging in social behavior that undermines, or may potentially undermine, the trust and cohesion, and therefore the operational effectiveness, of the services. Enumerated inappropriate behavior includes unwelcome physical or verbal sexual attention, overfamiliarity with the spouses of other service personnel, displays of affection which might cause offense to others, taking sexual advantage of subordinates, and behavior which damages the marriage or personal relationship of other service personnel. The code of conduct further covers other types of "social misbehavior" that have not been enumerated. Discretion is left up to the commanding officer to determine if behavior constitutes a threat to the cohesion of the unit or the military command chain. Abuse of authority, trust, or rank, or taking advantage of a person's separation, are deemed particularly serious types of misconduct.⁵²

The new guidelines for social conduct are general and involve considerable discretion. The code therefore provides a "service test" for commanding officers to use in their assessment of the need to "intervene in the personal lives of personnel."⁵³ Commanding officers must consider each case in light of the following question: Have the actions or behavior of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service? In the event of an affirmative answer, commanders are instructed to take prompt and decisive action to minimize damage to the effectiveness of the unit. If the misconduct is sufficiently serious, commanders may institute immediate administrative or punitive action. Such action may include a formal warning, official censure, the posting of the parties involved, or other disciplinary action. If the behavior is sufficiently serious, or if the service member has a history of social misconduct, termination of service may occur.

The Ministry of Defense also issued guidelines and speaking notes for commanding officers to help them explain and enforce the new policy. The speaking notes emphasize that the lifting of the ban brings the armed forces into greater concordance with the general society. A person's sexual orientation is to be considered a private matter, and every service member has a right to personal

privacy. Commanders were further advised to stress the continuity of the policy: this change is not a major issue, and you should not make it into one. There have always been homosexuals serving in the armed forces. We do not expect that this change will result in a significant increase in the number of homosexuals coming into the Service.⁵⁴

When the new policy was announced by Secretary of State for Defense Geoff Hoon on January 12, 2000, he highlighted the fact that the chiefs of staff were completely involved in the creation of the new policy and endorsed the changes. Secretary Hoon stated that the code would apply to all members of the Forces, regardless of "service, rank, gender or sexual orientation." He further stressed that the code complemented existing policies, including "zero tolerance for harassment, discrimination and bullying."⁵⁵

The British armed forces fought for a number of years to maintain its policy of excluding openly gay and lesbian soldiers. Even after the outcome of the ECHR case appeared inevitable, the armed forces resisted calls to eliminate the ban. While the Ministry of Defense asked commanders to soften their enforcement of the ban in the months before the decision was handed down, it both refused to alter its basic policy and continued to dismiss soldiers for homosexuality. The last gay soldier was discharged from the military just three days before the ruling that overturned the ban on homosexual service. Service officials argued that the inclusion of open homosexuals would engender distrust, splinter working relationships, damage morale, and even harm operational effectiveness. Efforts to overturn the ban were deemed by some military officials to be inappropriate political meddling in military operations and harmful social engineering.

Once the decision was handed down by the European Court, however, the military acted quickly to put in place a policy that would both accord with the ruling and address effectiveness concerns. The armed forces enacted a new policy within three months of the decision by the European Court. It established a nondiscriminatory mandate that focuses on behavior rather than on personal characteristics. It emphasized the importance of equal application of the new social code of conduct and instructed commanders to intervene in soldiers' personal lives only when operational effectiveness might be compromised. It invited discharged soldiers to reapply and accepted back several former service personnel. The Services also reemphasized the policy of zero tolerance for harassment, bullying, and victimization.

Research by Belkin and Evans, conducted shortly after the ban was lifted, indicated that the Services' own internal assessment at six months found that the new policy had "been hailed as a solid achievement."⁵⁶ There had been no indications of negative effects on recruiting levels. The social code of conduct had been effectively incorporated into the military's training courses. No mass resignations had occurred. There had been no major reported cases of gay-bashing or harassment of sexual minorities. There had been no major reported cases of harassment or inappropriate behavior by gay or lesbian soldiers. There had been no perceived effect on morale, unit cohesion, or operational effectiveness. The new policy was

being well received by soldiers, and the policy change was characterized by a "marked lack of reaction."²⁷

Experts in all fields acknowledged that more work remains to be done, and new obstacles could still emerge. Homophobic attitudes persist throughout the Services, and many soldiers therefore feel the need to remain silent about their personal lives. It is possible that some problems will develop as more gay and lesbian service personnel acknowledge their sexual orientation to colleagues, or if the military relaxes its vigilance against harassment and inappropriate behavior of all kinds. Issues of equality such as pension, accommodation, and partnership rights have yet to be addressed. Still, the distance that has been traveled over the past few years is impressive. Concerns of dire consequences have been replaced by a general recognition that the transition has proceeded smoothly.

Conclusion

The experiences of the three nations profiled in this chapter suggest, at a minimum, five main conclusions. First, the attitudes and threats of service members prior to the elimination of any ban are not an accurate indication of what they will actually do once the ban is lifted. Second, while adequate preparation and training is necessary, making a "big deal" about the change may be counterproductive. Third, changing behaviors should not be confused with changing attitudes. That is, personnel need not change what may be deeply held personal convictions about gay men and lesbians. Rather, what they need to do is act in accordance with policy. Fourth, changes in policy would do well not to just address gays and lesbians, but to address issues of equal treatment for all service personnel. And, fifth, such a change may be far more readily accomplished when the sociopolitical and legal foundations of a nation demand, rather than resist, equal treatment under the law.

Some aspects of the American political process lead observers to believe that the lifting of the ban, while inevitable, may not happen for a number of years. There is no judicial or legislative body conceding that equality within the military is an inevitability to which one should begin adjusting. Rather, the U.S. Supreme Court has, as of this writing, refused to hear a case regarding the military policy on gays and lesbians. And, there is no case law holding that sexual orientation constitutes a class of persons protected by the U.S. Constitution. As such, it is true that there is no perfect model with which to compare the U.S. military.

Some argue that, even if the ban is lifted, change within the institution is more challenging because the U.S. military is a considerably larger and, arguably, a far more insular institution than is the case in Canada, Australia, or Great Britain. Yet, the inherent structure of the institution suggests otherwise. The mission of the military requires that those in the chain of command possess the ability to get subordinates to follow orders even when they don't wish to do so. Additionally, a look at the resistance and ultimate successes of the nations profiled here, suggests that when "Don't Ask, Don't Tell" is eliminated, whether by repeal or judicial

decision, the U.S. military will not suffer the negative repercussions so many have cautioned us about.

Notes

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9. R. A. Zuliani, 1986. "Canadian Forces Survey on Homosexual Issues." Charter Task Force, Department of National Defence, Ottawa.
10. National Defense Research Institute (NDRI), 1993. *Sexual Orientation and U.S. Military Policy: Options and Assessment*. Santa Monica: RAND, p. 76.
11. See Farnsworth (1991), Ulbrich (1993), and Lancaster (1992); Clyde Farnsworth, 1991. "Canada Ending Anti-Gay Rules." *The New York Times* (New York), October 11: A3;

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13. Tim Harper, "Ban on Gays in Military Still in Place, PM Says." *The Toronto Star* (Toronto), October 11, 1991, p. A11.

14. U.P.I., "Canadian Court Says Military Must Accept Gays," October 27, 1992, and Stephen Bindman, "Lesbian Forced to Quit Loses Bid for Old Job: Military Rejects Recommendation to Re-Hire Ex-Air Force Lieutenant," *The Vancouver Sun* (Vancouver), May 11, 1992, p. A3.

15. See also Norma Greenway, 1993. "Clinton Faces Political Bloodbath Over Gays Issue." *The Gazette* (Montreal), January 28: B6.

16. National Defense Research Institute (NDRI), *Sexual Orientation and U.S. Military Policy*, p. 78.

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The War on Terror

On September 11, 2001, the world, as many in the United States understood it, changed forever. Nine days later, in a speech before the U.S. Congress, President George W. Bush said, "Americans are asking: How will we fight and win this war? We will direct every resource at our command . . . to the disruption and to the defeat of the global terror network."¹

During 2001, 1,273 service members were discharged under "Don't Ask, Don't Tell." In the next five years, 3,715 service members would be discharged under this policy. If people are a resource, and they surely are, then the military was not using its every resource to defeat the terror. This chapter examines the reality of "Don't Ask, Don't Tell" at a time when the nation's military, arguably, needs every person who is willing to serve.

Military Personnel

Immediately after 9/11, military recruiting Web sites saw a spike in the number of visitors. What they didn't see was a rise in actual enlistments. Many of those who actually made an inquiry with a recruiter were too old, lacked high school diplomas, had criminal records, or were overweight. In most cases they would not qualify. But, in the months that followed, the military did do well enough to meet its recruiting quotas. In May 2002, for example, the Air Force had already met its target for the year. Since that time, recruitment and reenlistment figures have ebbed and flowed. In 2003, a slumping economy was thought to have helped boost recruiting. Two years later things looked more challenging for the military. In October 2004, the Army began the new fiscal year with only 18.4 percent of the year's target of active duty recruits somewhere in the pipeline. With Reserve and Guard personnel experiencing repeated and lengthy deployments, there are challenges there as well.²