



Memo for the Pentagon Working Group
Encouraging Candid Communications From Service Members
While Mitigating Risk of Separation Under “Don’t Ask, Don’t Tell”

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The Pentagon Working Group (PWG) has recognized the dilemma of obtaining candid information from military members about “don’t ask, don’t tell” when communication of that information could lead to investigation and separation under the policy. If service members reveal they are gay during the review process, they have made a statement concerning their sexual orientation that is prohibited by 10 U.S.C. § 654 (b)(2). The impact of “don’t ask, don’t tell” on the accuracy of the review process, however, is even greater than its role in discouraging candid communication from gay service members; straight service members must also consider whether talking about their experience serving with gay colleagues will expose someone to risk of separation by revealing knowledge of prior statements, conduct, or marriages that are also prohibited under § 654 (b). It’s not only the statements that gay service members (whether openly gay or not) may make to researchers that potentially put them at risk of separation. The full range of information shared by any service member concerning their knowledge of prior conversations, events, or relationships may also put persons at risk of separation.

This risk also impacts the usefulness and accuracy of the study process itself. If gay service members believe they cannot speak freely without legal risk, the PWG will be denied information important to the task. If straight service members suspect that their disclosures could be used to identify gay colleagues, they may choose to speak guardedly, vaguely, or not at all. The PWG would receive a false picture of how information about sexual orientation is already being handled within the military. In addition, the more the PWG attempts to address the risk by stripping out information that could possibly be used to identify a gay service member (places, times, units, colleagues, etc.), the less value it will have for purposes of the study.

The PWG does not intend that candid communication with researchers should trigger investigation and separation under “don’t ask, don’t tell,” and it will likely assure persons interviewed that their statements will not be used for that purpose, as Secretary of the Army, John McHugh has recently done. Yet the PWG has no legal authority to grant

protection from later enforcement of the policy. **This is not a promise the PWG has the power to keep, whatever good intentions they may have.** Service members have no legal assurance that researchers will maintain confidentiality of information throughout the review process, and they have no legal assurance that information subsequently coming to the attention of commanders, whether first-, second-, or third-hand, will not be used to enforce the policy. When the issue is a guarantee of immunity to service members who may be “outed” as a result of the study process, one needs to be able to point to something in the law or regulation itself that limits what otherwise would be a commander's full discretion to enforce. Without it, lawyers would not be comfortable advising service members to speak freely.

The PWG is operating under a statutory and regulatory regime that grants great discretion to military commanders in enforcing “don’t ask, don’t tell.” Many commanders will understand the importance of immunity for candid disclosures and will act accordingly if they learn of those disclosures, but some will not. In order to protect service members from the review process and the information it generates, **immunity must be expressly granted under the authority of the statute or its implementing regulations. Anything short of that exposes gay service members to some risk of separation, notwithstanding the good faith of the PWG.**

The Secretary of Defense has authority under § 654 to devise implementing regulations for the enforcement of the policy (“under regulations prescribed by the Secretary of Defense”). The Secretary has just completed a review of those regulations in an effort to modify enforcement in a manner that is fairer to service members and more legally defensible under the Constitution. **In order to ensure that the PWG gets full, candid information from its ongoing review, the Secretary should also revise the Department’s implementing regulations (DODI 1332.14; DODI 1332.30) to expressly reference the ongoing review and prohibit commanders from using information disclosed as a direct or indirect result of the PWG’s activities to enforce “don’t ask, don’t tell.” He should issue clear regulatory direction prohibiting commanders from relying on same-sex statements, conduct, or marriages that become known as a direct or indirect result of study activities for purposes of either initiating investigation or supporting separation.** This is the firmest guarantee of protection that DOD itself can make without the involvement of Congress. Without a change to the regulations that specifically addresses use of this information, the matter is left to an individual commander's discretion.

The implementing regulations already control the use of information by commanders in “don’t ask, don’t tell” proceedings, and therefore this new regulation would not be novel. The regulations have always prohibited commanders from initiating investigations under § 654 based on information that was not “credible” or was received from sources who were not “reliable,” and the Secretary’s most recent changes further restrict what is considered credible and reliable. These rules would not be of any help, of course, in controlling misuse of PWG disclosures, because it would be difficult to argue in many cases that the information disclosed was not credible or the sources were not reliable. The reason the PWG wants to hear the information is because it is credible and reliable.

The clearest authority, of course, to ensure that service members would not be separated from the military as a result of their cooperation with the PWG would be either 1) a suspension/moratorium of the policy approved by Congress or 2) use of the President's "stop-loss" authority by executive order under 10 U.S.C. § 123 and § 12305.

In conclusion, it will be difficult to determine in advance how much the study itself will affect or change the way service members talk about issues of sexual orientation, suggesting that protections from misuse of information should be written as broadly as possible. This review will generate a substantial level of attention and conversation about "don't ask, don't tell" and its effect on the military, inevitably putting people at risk. Given that no one wants study-generated chatter to lead to unintentional witch-hunts, all stakeholders in this process have an obligation to take whatever steps are within their authority to ensure that individual service members are not placed at risk.