

# **OPEN SERVICE AND OUR ALLIES**

**A REPORT ON THE INCLUSION OF OPENLY GAY AND LESBIAN  
SERVICEMEMBERS IN U.S. ALLIES' ARMED FORCES**



**Columbia Law School  
Sexuality & Gender Law Clinic  
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## EXECUTIVE SUMMARY

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In the wake of the Obama Administration's pledge to repeal "Don't Ask, Don't Tell" in the United States, the Columbia Law School Sexuality & Gender Law Clinic undertook to review how allies of the United States moved from a policy of banning gay and lesbian servicemembers from serving in the armed forces to a policy of allowing these servicemembers to serve openly ("open service"). Through the review, which this report documents, we aim to provide information about the decision to implement open service, and the mechanics of the transition to open service in Australia, Canada, Israel and the United Kingdom. In addition to addressing concerns about the effect of open service on unit cohesion and morale, this report also includes information about how the militaries of Australia, Canada, Israel and the United Kingdom implemented their open service policies on the ground. This report examines, as well, the ways in which U.S. soldiers have worked as part of multinational forces with members of other militaries that have open service policies.

*Open Service and Our Allies* shows that no significant problems have arisen as a result of a transition to open service. Notably, not one country studied in this report has made any changes to its housing or bathrooms. Moreover, although all the countries studied in this report have reported scattered incidents of harassment, this report also shows that there has been no pervasive discrimination against or harassment of gay and lesbian servicemembers. While some countries achieved a successful transition through educational and sensitivity training, others have not addressed harassment of gay and lesbian servicemembers in their trainings. The common thread, instead, has been an emphasis on strong leadership and a clear statement of the behavior that is expected of servicemembers. This report also shows that none of the countries studied have experienced a decline in unit cohesion or morale. To the contrary, many of the countries studied have seen an increase in morale due to a servicemember's increased ability to focus on work rather than hiding their sexual orientation and a decrease in paranoia and suspicion as a result of the new open environment.

Overall, this report shows that the transition to open service in Australia, Canada, Israel, and the United Kingdom was smooth, although not always flawless, and provides some insight into what such a transition might look like in the United States.

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# I. INTRODUCTION

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## *A. Background*

The “Don’t Ask, Don’t Tell” law, in place since 1993, prohibits openly gay and lesbian individuals<sup>1</sup> from serving in any of the United States military forces. Congress enacted this policy in a move away from the previous military policy that declared “homosexuality is incompatible with military service.”<sup>2</sup> In January 2010, President Obama and several high-ranking military officials called for the repeal of “Don’t Ask, Don’t Tell.” Congressional hearings have been held and a Pentagon report is expected to be issued in late 2010 to examine how implementation of a new, open policy would take place.

## *B. Purpose*

This report is intended to illustrate to Congress and other interested parties how the United States military might go about implementing the repeal of the current “Don’t Ask, Don’t Tell” ban by examining the experiences of four U.S. allies. These allies, Australia, Canada, Israel, and the United Kingdom, all had similar bans in effect and have since removed them. Through concrete examples from these allies’ experiences, this report demonstrates how the transition to open service has proceeded elsewhere and how it would likely proceed in the United States.

## *C. Methodology*

This report studies the process of integration of openly gay and lesbian servicemembers into the militaries of Australia, Canada, Israel, and the U.K. We selected these countries because each had informal or formal prohibitions against openly gay and lesbian people serving in the armed forces, and each engages in military operations similar to those of the U.S. armed services. Each of these countries has removed its prohibition at some point in the course of the last three decades.

The issues-based analysis here, with particular attention to unit cohesion, living conditions, training of servicemembers, sexual harassment and anti-discrimination policies, and relationship recognition, likewise tracks concerns that have arisen in discussions of “Don’t Ask, Don’t Tell.” These issues are among the most important determinants of effective transition to open service and will be integral to the implementation of “Don’t Ask, Don’t Tell”’s repeal.

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<sup>1</sup> We have chosen to refer to gay, lesbian, and bisexual individuals and servicemembers as “gay and lesbian” collectively.

<sup>2</sup> Department of Defense Directive 1332.14, “Enlisted Administrative Separations,” January 28, 1982 (hereby cancelled).

The report is based on three sources of information. First, we rely on documents published by the ministries of defense in the respective countries addressing the transition and current policies regarding lesbian and gay servicemembers. Second, we have extracted information published in newspapers and other periodicals, accessed either through their websites or through LexisNexis, an online database. Third, we use information gathered from interviews with current and former servicemembers from the respective countries. These interviews have been conducted in person, over the telephone or by written response to a questionnaire drafted by the authors of this report.<sup>3</sup>

The questionnaire asks a range of open-ended questions regarding the issues covered in this report. It is worded to elicit information without influencing the opinion of the respondents. A sample questionnaire is attached to the report as Appendix A. The questionnaire was circulated among current and former servicemembers in Australia, Canada, Israel and the U.K. through various channels of contact.

This report is the independent academic work of the Sexuality & Gender Law Clinic of Columbia Law School. It is not funded in any part by any outside agency or organization.

#### *D. Roadmap*

As noted above, this report traces the experiences of Australia, Canada, Israel, and the U.K. through their transition and addresses five specific areas of concern: unit cohesion, living quarters, education and training, sexual harassment and anti-discrimination policies, and relationship recognition. The report also includes a separate section describing multinational forces in which American soldiers serve alongside countries that allow openly gay and lesbian individuals to serve. Finally, the report includes recommendations for the United States culled from the results of the research just described.

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<sup>3</sup> In the United Kingdom, a Directive was issued by the Deputy Chief of Defence Staff prohibiting servicemembers from answering the questionnaire. *U.K. Department of Defence Directive*, dated March 9, 2010 (on file with authors). The Columbia Law School Sexuality & Gender Law Clinic submitted an appeal letter to the Directive, which remained pending at the time this report was issued. *Columbia Law School Sexuality & Gender Law Clinic Response Letter to U.K. Directive*, dated April 13, 2010 (on file with authors). As a result of the Directive, we were unable to carry out as many interviews of U.K. servicemembers as of servicemembers from other countries studied in this report.

## II. HISTORICAL AND POLITICAL BACKGROUND

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This section provides background information on the bans on open service previously in place in Australia, Canada, Israel, and the U.K. and discusses the history and circumstances under which these bans were lifted.

### A. Australia

In 1986, the Australian Defence Force officially implemented a ban on gay and lesbian personnel serving openly in the military. The military put forth four justifications for the ban: 1) negative impact on morale; 2) need to protect minors; 3) concern about public health, namely, the risk of HIV infection; and 4) concern about national security.<sup>4</sup>

In 1990, Anita Van Der Meer, a junior naval officer, was reported by one of her peers as being involved in a same-sex relationship. The navy subsequently threatened her with discharge for being a lesbian. To preserve her employment, she denied the charge, which caused great emotional turmoil for her. Recalling her experience, she said, "It was very traumatic for me, but I still had the cooperation of my supervisors and my peers...In the end, I had more support than I expected."<sup>5</sup>

After she denied the charge, Van Der Meer brought a complaint against the Australian Defence Force to the Australian Human Rights and Equal Opportunity Commission, an organization outside of the military created by Parliament in 1986.<sup>6</sup> The Commission did not have the authority to lift the ban itself, but as a result of Van Der Meer's complaint, it put pressure on the government to do so.<sup>7</sup> However, veterans' groups, such as the Returned and Services League and Armed Forces of Australia, strongly opposed the proposal to lift the ban.<sup>8</sup> Many servicemembers within the military protested as well: surveys done during this time indicated at one point that approximately 80% of servicemembers opposed lifting the ban.<sup>9</sup> Nonetheless, the Cabinet, after much debate, lifted the ban in November 1992.<sup>10</sup>

The transition to open service in Australia proved to be largely uneventful. As discussed in detail in Parts III and VI of this report, military officials reported no significant increases in harassment by or of gay and lesbian servicemembers.<sup>11</sup> In

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<sup>4</sup> Hugh Smith, *The Dynamics of Social Change and the Australian Defence Force*, 21(4) ARMED FORCES & SOCIETY 531, 544 (1995).

<sup>5</sup> David Crary, *U.S. Allies Embrace Gay Military Personnel*, HUFFINGTON POST, July 13, 2009, at [http://www.huffingtonpost.com/2009/07/13/us-allies-embrace-gay-mil\\_n\\_231075.html](http://www.huffingtonpost.com/2009/07/13/us-allies-embrace-gay-mil_n_231075.html); William Branigan, *Military Adjusting to New Policy Allowing Homosexual Troops*, WASHINGTON POST, March 30, 1993, at A6.

<sup>6</sup> Branigan, *supra* note 5.

<sup>7</sup> Smith, *supra* note 4, at 544-45.

<sup>8</sup> *Id.* at 545.

<sup>9</sup> *Id.*

<sup>10</sup> Branigan, *supra* note 5.

<sup>11</sup> See notes 40-57, 120-131 and accompanying text.

fact, unit cohesion and morale reportedly improved because gay and lesbian servicemembers could develop relationships built on trust and honesty more profoundly with their fellow soldiers.<sup>12</sup> To facilitate the transition and maintain a well-ordered work environment, the Defence Gay and Lesbian Information Service, an organization recently formed by gay and lesbian servicemembers, provides information to all personnel about Australian Defence Force policies relating to gay and lesbian personnel.<sup>13</sup> Also, gay and lesbian servicemembers, with Australian Defence Force's non-funded approval, have marched in three annual Sydney Mardi Gras parades as well as gay pride parades in Brisbane and Melbourne.<sup>14</sup>

### B. Canada

Before Canada lifted its ban on gay and lesbian servicemembers in the military, it had a policy against "knowingly hiring or promoting lesbians or gays."<sup>15</sup> However, in 1992, a lawsuit initiated by Michelle Douglas, a former servicemember who was honorably discharged from the Canadian military for being a lesbian, led to the lifting of the ban.<sup>16</sup> On October 27, 1992, Canada's Federal Court ruled in *Michelle Douglas v. Canada* that barring gay men and women from military service violated the Charter of Rights and Freedoms in a landmark verdict that prompted more openly gay men and women to join the ranks of the Canadian Army, Air Force and Navy.<sup>17</sup>

To implement the removal of the ban on gay men and women serving openly in the Canadian military and to ensure a smooth transition, Canada took several steps. Primary among these was that military leaders stressed that all servicemembers had to act in accordance with the new rule, regardless of their personal beliefs or values. This move was consistent with military protocol, which regularly requires servicemembers to comply with military rules regardless of their views. By describing the ban as a change to the way servicemembers must *behave* (i.e., no discrimination, unequal treatment, or harassment of individuals solely because they are gay) rather than a change to what servicemembers must *believe*, the transition was more easily made.<sup>18</sup>

In addition to emphasizing that the policy focuses on changes in behavior as opposed to changes in individual beliefs, the Canadian military also issued a "Post-

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<sup>12</sup> *Id.*

<sup>13</sup> Defence Gay and Lesbian Information Service website, [http://www.defglis.com.au/about\\_us.php](http://www.defglis.com.au/about_us.php).

<sup>14</sup> Defence Gay and Lesbian Information Service Newsletter, "Farewell from our Secretary," April 19, 2010, at 2, available at [http://www.defglis.com.au/Newsletters/DEFGLIS\\_Newsletter\\_\(2-2010\).pdf](http://www.defglis.com.au/Newsletters/DEFGLIS_Newsletter_(2-2010).pdf).

<sup>15</sup> Stephen Bindman, *Military to Lift its Ban on Gays, Lesbians*, THE TORONTO STAR, October 10, 1991, at A1.

<sup>16</sup> Anne Swardson, *Canada: No Problem with Gays in Ranks; Military's Restrictions Lifted Last Fall*, WASHINGTON POST, July 6, 1993, at A8.

<sup>17</sup> Michelle Douglas v. Canada, [1993] 1 F.C. 264, [1992] F.C. Lexis 160 (October 27, 1992). See also Tobi Cohen, *Canada quietly marks anniversary for gays in military while U.S. debate rages*, THE CANADIAN PRESS, October 24, 2009.

<sup>18</sup> *Id.*

Announcement Action" by the Assistant Deputy Minister of Personnel<sup>19</sup> to provide military leaders with guidance to "communicate the rationale for the change, encourage its acceptance, and respond to the personal concerns of the Canadian Forces' members."<sup>20</sup> In addition, the military also disseminated a Canadian Forces ("CF") Personnel Newsletter, which is distributed to all active servicemembers, describing the policy change.<sup>21</sup> The "Post-Announcement Action" and the Newsletter brought the policy to the ground in an accessible way by showing, tangibly, how the policy would work.<sup>22</sup> This demonstration turned out to be very important to ensuring a smooth transition for the servicemembers.<sup>23</sup>

In sum, the steps taken by then Chief of Defence General de Chastelain and other military leaders to create a smooth transition included:

- (1) Eliminating any distinction in the regulations between heterosexual and gay, lesbian and bisexual soldiers.<sup>24</sup>
- (2) Making it clear that the policy change had the full support of the CF leadership. In fact, General de Chastelain, who was chief of the Canadian Defence Staff at the time of the policy change and later served as Canada's ambassador to the United States, 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."<sup>25</sup>
- (3) Outlining the standards of behavior that would be expected of all military personnel, regardless of sexual orientation, and widely distributing both those standards and the changes in regulations.<sup>26</sup>
- (4) Emphasizing the distinction between beliefs and behavior.<sup>27</sup>
- (5) Encouraging respect for personal attitudes and decisions of individual soldiers, but expecting soldiers to put personal feelings aside to accomplish military objectives and to uphold the law.<sup>28</sup>

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<sup>19</sup> MAJ Yvette C. Hopkins, *Out of the Closet: Addressing Policy Options*, Ft. Leavenworth, KS: School of Advanced Military Studies, at 22, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA393883&Location=U2&doc=GetTRDoc.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 21.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Swardson, *supra* note 16.

<sup>27</sup> Georgetown University Law Center Panel, "Don't Ask, Don't Tell: An International Perspective," Comments of Michelle Douglas, March 12, 2008, available at <http://www.youtube.com/watch?v=TEmSDmuk-J8>.

<sup>28</sup> Luke Fisher, *Armed and Gay*, MACLEAN'S, May 24, 1993, at 14.

### C. Israel

When Israel was founded in 1948, it did not have any restrictions on gay and lesbian soldiers serving in the military. In 1983, however, the military changed its policy to prevent gay and lesbian servicemembers from serving in intelligence positions. The Israeli military restricted these servicemembers' access to intelligence positions under the theory that their sexuality would "prove to be a security hazard."<sup>29</sup> At that time, gay and lesbian servicemembers were not excluded from holding any other positions.

However, the Israeli military did not enforce the restriction on gay and lesbian servicemembers in the intelligence services,<sup>30</sup> and in 1993, the prohibition on gay and lesbian servicemembers serving in intelligence positions was repealed. That year, the Knesset subcommittee that dealt with gay and lesbian rights held a conference to highlight inequality under Israeli law.<sup>31</sup> At this conference, Uzi Even, a former Colonel in the Israeli military, testified that he had lost his rank and his security clearance when his sexual orientation was discovered.<sup>32</sup> Colonel Even, who had conducted classified military research for fifteen years, testified that he was not a security threat because he was open about his sexual orientation.<sup>33</sup> His testimony garnered significant attention and led the Knesset's military committee to remove the restrictions of the 1983 policy.<sup>34</sup>

Currently, the Israeli military does not make any effort to identify gay servicemembers. However, gay servicemembers likewise often do not reveal their sexuality to their commanding officers and their fellow soldiers until they are well established in the military.<sup>35</sup>

### D. United Kingdom

In September 1999, the European Court of Human Rights ruled that the U.K. Government's policy prohibiting all gay military personnel, whether open or closeted, from serving in the armed forces was illegal.<sup>36</sup> In January 2000, the British government lifted the prohibition and began allowing openly gay and lesbian people to serve in the armed forces.<sup>37</sup>

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<sup>29</sup> United States General Accounting Office Report, *Homosexuals in the Military: Policies and Practices of Foreign Countries*, June 19, 1993, at 38, 41, available at <http://dost.stanford.edu/regulations/GAO.pdf> (hereafter "GAO Report").

<sup>30</sup> *Id.* at 40-41.

<sup>31</sup> *Id.* at 40.

<sup>32</sup> Aaron Belkin & Melissa Levitt, *Homosexuality and the Israel Defense Forces: Did Lifting the Gay Ban Undermine Military Performance?* 27(4) ARMED FORCES & SOCIETY 541, 543 (2001).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 544.

<sup>35</sup> GAO Report, *supra* note 29, at 42.

<sup>36</sup> *Lustig-Prean and Beckett v. U.K.*, 29 Eur. Ct. H.R. 548 (2000); *Smith and Grady v. U.K.*, 29 Eur. Ct. H.R. 493 (1999).

<sup>37</sup> *Mod Ends Its Ban On Gays In The Military*, BIRMINGHAM POST, Jan. 13, 2000, at 6.

Attitudes in the armed forces have changed dramatically since the removal of the prohibition. Gay and lesbian servicemembers are now well integrated in the armed forces. Six months after the ban was lifted, the Ministry of Defence issued a confidential report that stated:

There is widespread acceptance of the new policy. It has not been an issue of great debate. In fact, there has been a marked lack of reaction. Generally there has been a mature, pragmatic approach which allowed the policy to succeed. The change in policy has been hailed as a solid achievement.<sup>38</sup>

In what many gay service personnel see as a mark of official acceptance, members of the Navy were permitted to march in uniform at the annual Gay Pride march in London in 2006, the first time any Armed Service had granted such permission. The Royal Air Force followed a year later, and the Army allowed uniforms to be worn in the parade in 2008.<sup>39</sup> It is a sign of the significant change in the outlook of the army since the lifting of the ban in the last decade.

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<sup>38</sup> Ben Summerskill, *It's Official: Gays Do Not Harm Forces*, THE OBSERVER, November 19, 2000, at 5.

<sup>39</sup> Tom Coghlan, *The fuss of ten years ago seems somewhat bizarre*, TIMES (LONDON), January 16, 2010, at 101.

### III. UNIT COHESION, MILITARY PERFORMANCE, AND MORALE

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This section examines the extent to which the transition to open service had consequences for unit cohesion and morale in the armed forces of Australia, Canada, Israel, and the U.K. In all cases, no negative effect on military cohesion and morale was reported after the ban was lifted. In fact, unit cohesion and morale were reported to have improved significantly in these countries after the transition to open service. This improvement in morale and unit cohesion has been attributed to a deeper relationship of honesty and trust that developed among servicemembers after the transition to open service, which has enabled all military personnel to maintain their focus on their professional duties within the military.

#### A. Australia

After November 1992, when the ban was lifted, reports from military officials indicated that the transition was largely a non-event and that controversy over the lifting of the ban soon disappeared.<sup>40</sup> Lieutenant Colonel Ray Martin, a 37-year-old army officer, said,

We're a conservative institution, and there is some residual angst with the policy...[but] there haven't been any adverse effects that we're aware of...it's been a seamless transition as far as I can see.<sup>41</sup>

Likewise, Greg Austin, a senior Defense Department staff member, said, "The effect in the armed forces has been negligible so far."<sup>42</sup> Neil James of the Australian Defense Association, a security think tank, recalled,

Everyone said, "Good heavens, that's a bit of a surprise" and after five minutes the conversation reverted back to football...After a while it was met with a collective yawn.<sup>43</sup>

In 2000, Bronwen Grey, then-Director of the Defense Equity Organisation, an internal military office that monitors and enforces the sexual harassment and anti-discrimination policies of the Australian military, stated that the transition was a "non-event" and had no adverse impact on military cohesion or performance. When her interviewers asked her to describe specific observations, she replied, "All I can say is...[n]othing happened...And it's very hard to document nothing."<sup>44</sup> One

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<sup>40</sup> *Many U.S. Allies Accept Gays in Military and Find Brouhaha Here Baffling*, CHICAGO TRIBUNE, January 28, 1993, at 2.

<sup>41</sup> Branigin, *supra* note 5.

<sup>42</sup> *Id.*

<sup>43</sup> Crary, *supra* note 5.

<sup>44</sup> Aaron Belkin & James McNichol, *The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence*, Center for the Study of Sexual Minorities in the Military, September 19, 2000, available at [http://www.palmcenter.org/files/active/0/Australia\\_Final\\_Report.pdf](http://www.palmcenter.org/files/active/0/Australia_Final_Report.pdf) (hereafter Belkin & McNichol, Australian Defense Forces).

servicemember who did experience some harassment based on his sexual orientation stated, "The problem I had, while major to me, had no bearing on overall unit cohesion or morale."<sup>45</sup>

In addition, both the United States and Great Britain observed that Australia's open service transition incurred no negative consequences. Seven months after the ban was lifted, the United States General Accounting Office ("GAO") interviewed Australian Defence Force officials to inquire about the nature of the transition. The 1993 report noted that

no reported changes have occurred in the number of persons declaring his or her sexual preference or the number of recruits being inducted...early indications are that the new policy has had little or no adverse impact [on unit cohesiveness].<sup>46</sup>

In February 1996, the U.K. Ministry of Defence also researched the personnel policies of foreign militaries after a transition to open service. The delegation, which traveled to Australia to conduct its review, reported that Australian military personnel believed that "the change had not resulted in any notable problems for military functioning."<sup>47</sup>

Even opponents agree that there has been no adverse effect on military performance or morale. Retired Major General Bill Crews, the former President of the Returned and Services League, a veterans' organization in Australia, said,

I was there in the early days...I thought there'd be a continuing problem because of prejudice that exists in parts of the community. I don't see any evidence now that homosexuals are in any way discriminated against...A homosexual can be just as effective a soldier as a heterosexual.<sup>48</sup>

Major General Peter Phillips, President of the Returned and Services League in 2000, echoed, "[Gays serving in the military has] not been an issue. The Defence Forces have not had a lot of difficulty in this area."<sup>49</sup>

Indeed, unit cohesion among Australian servicemembers has improved substantially by the lifting of the ban. Military personnel interviewed by Aaron Belkin, Associate Professor of Political Science at the University of California, Santa Barbara, and by the authors of this report indicated that open service has enhanced unit cohesion,

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<sup>45</sup> Questionnaire Response of Troy Jorgensen, April 7, 2010 (on file with authors).

<sup>46</sup> GAO Report, *supra* note 29, at 19.

<sup>47</sup> *Report of the Homosexuality Policy Assessment Team*, United Kingdom Ministry of Defence (1996) (on file with authors).

<sup>48</sup> Crary, *supra* note 5.

<sup>49</sup> Belkin & McNichol, Australian Defense Forces, *supra* note 44, at 27.

military performance and morale.<sup>50</sup> Specifically, the interviewed personnel reported that open service has allowed gay servicemembers to "spend less time monitoring their comments and more time focusing on their work."<sup>51</sup> In addition, the sexual orientation of Australian military personnel "becomes integrated as one aspect of who they are, taken no more or less seriously than other aspects of their lives."<sup>52</sup> According to those interviewed, open service has also fostered an environment more sensitive to the equal treatment and opportunity of women and ethnic minorities, as well as gay servicemembers.<sup>53</sup>

During a 2008 panel at the Georgetown University Law Center entitled, "'Don't Ask, Don't Tell': An International Perspective," Chief Petty Officer Stuart O'Brien, a current servicemember who is also Chairperson of the Defence Gay and Lesbian Information Service and has served for over twenty years, stated,

Has [the transition to open service] had any impact? No. In fact, I think...[b]ecause I can be honest with myself, I can be honest with everybody, so it's made me a better person.<sup>54</sup>

Other Australian servicemembers have also observed that open service has allowed "a stronger bond [among peers] to occur," because members can feel free to be themselves and "not put on a false façade."<sup>55</sup> O'Brien has also noted that, when working alongside U.S. military personnel in Baghdad, Iraq in 2006,

[U.S. military personnel] valued the work that I did and that's all that it comes down to at the end of the day. Sexuality has nothing to do with anything any more within the services.<sup>56</sup>

And, one servicemember emphasized the importance of trusting the competence and professionalism of other military personnel to unit cohesion:

[Open service] allows members to be honest. Trust is an integral part to any team oriented organization, as we need to trust the person next to us to do their job...if someone can hide this part of [their] life, it raises the question of what else they can lie about. In my experience

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<sup>50</sup> *Id.* at 32, 34. See also Questionnaire Response of Chief Petty Officer Stuart O'Brien, March 25, 2010 (on file with authors). ("Morale within units has improved and unit cohesion is at its[] highest. Our personnel seem to be more relaxed and more honest with each other, allowing ever[y] member to get on with their core duties.")

<sup>51</sup> Belkin & McNichol, Australian Defense Forces, *supra* note 44, at 32, 34.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Georgetown University Law Center Panel, "Don't Ask, Don't Tell: An International Perspective," Comments of Stuart O'Brien, available at <http://www.youtube.com/watch?v=TEmSDmuk-J8>.

<sup>55</sup> Questionnaire Responses of Nathan Howarth and Michael Purdon, April 7, 2010 (on file with authors).

<sup>56</sup> Crary, *supra* note 5.

servicemembers are more concerned with whether the person next to them can do their [job] competent[ly] and effective[ly].<sup>57</sup>

### B. Canada

According to the U.S. Government Accountability Office (“GAO”), unit cohesion, military performance, and morale have not been negatively affected since the ban was lifted in the Canadian Forces.<sup>58</sup> Since General de Chastelain issued the order in 1992 declaring that gay servicemembers in the Canadian Forces could serve openly, and restored the full rank of all those that had been subject to difficult conditions, no change in military performance has been found.<sup>59</sup>

Undertaken months after General de Chastelain’s open service order to determine the effects of the open service policy, the GAO analysis found no resignations, no assaults, no sexual orientation-based hate crimes, and no problems involving recruitment, morale, or cohesion as a result of the policy change.<sup>60</sup> In addition, the GAO analysis indicated that Canadian Department of National Defence (“DND”) officials and representatives of gay advocacy groups considered the lifting of the ban to be a great advantage because gay and lesbian servicemembers no longer had to fear being discovered and discharged from the military.<sup>61</sup>

In addition to the findings of the GAO report, a number of Canadian servicemembers who have spoken about the lifting of the ban found no significant effect on unit cohesion, military performance or morale. “We would not have been able to prove that homosexuality had that deleterious effect on cohesion and morale that everyone talked about,” said Daniel E. Munro,<sup>62</sup> a retired brigadier general who serves as Director General for Personnel Policy in the Canadian Forces. “Basically, we realized that we didn’t have the evidentiary foundation...It just wasn’t there. I mean, you can’t use the old cohesion and morale arguments just based on folklore. You have to be able to prove this stuff.”<sup>63</sup> Further, according to Michelle Douglas, former servicemember of the Canadian Forces who was involved in a landmark case around lesbian and gay equality rights in the Canadian Military,

Since General de Chastelain’s order, every report, every analysis, every study that’s looked at the effect of this decision and the order,

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<sup>57</sup> Questionnaire Response of Phil Murphy, April 7, 2010 (on file with authors).

<sup>58</sup> GAO Report, *supra* note 29, at 32.

<sup>59</sup> Georgetown University Law Panel, comments of Michelle Douglas, *supra* note 27 (“General de Chastelain’s order gave servicemembers back-pay and restored their dignity.”)

<sup>60</sup> GAO Report, *supra* note 29, at 32.

<sup>61</sup> *Id.*

<sup>62</sup> No information is publicly available regarding Daniel E. Munro’s current position, but his position at the time of the statement was Director General for Personnel Policy in the Canadian Forces.

<sup>63</sup> John Lancaster, *Many Allies Allow Gays in the Military; Canada, Australia Are Latest to Drop Exclusionary Policy*, WASHINGTON POST, November 30, 1992, at A1.

has found that none of those dire predictions were realized, just as has happened in Australia and in the UK.<sup>64</sup>

Moreover, Douglas noted that, "there was no violence, no reduction in recruitment, no harassment and no one quit."<sup>65</sup> And according to General de Chastelain himself, sexual orientation has not proven to be indicative of one's performance in the military: "The Canadian Forces of today believe an individual's sexual orientation is irrelevant to whether or not that individual can perform his or her job."<sup>66</sup> Finally, as Major-General Lewis MacKenzie put it: "The impact on operational effectiveness is nil."<sup>67</sup>

In addition to servicemembers speaking out about the non-effect of the policy change on unit cohesion and morale, some servicemembers indicated that perhaps the change was for the better. Former servicemember Corporal Barbara Hamilton stated that, "a strict heterosexual environment must have *negatively* influenced unit cohesion."<sup>68</sup>

In fact, since the lifting of the ban, the Canadian Forces have found an increase in effective performance. Before the ban was lifted, soldiers had difficulty advancing in their careers because rules barred the promotion of gay servicemembers. Now that the ban has lifted, without having to worry about being discharged, gay servicemembers are, with increasing frequency, rising in their ranks.<sup>69</sup> Luc Cassivi is an example of a servicemember who has risen significantly in ranking since the lifting of the ban.<sup>70</sup> When Cassivi joined the Canadian Navy in 1983, he did not speak about his sexual orientation; now Cassivi is the highest-ranking sailor aboard HMCS Ville de Quebec, a commander in the Navy, and no longer feels the need to hide who he is:

I've been openly gay for a number of years. My friends and my co-workers know it and it surely has not been an impediment for me progressing. Once the rules changed, so did the culture. Opportunities began to surface. These days, success is dictated by performance.<sup>71</sup>

Thus, since gay servicemembers in the Canadian Forces no longer have to fear discovery and discharge, they can dedicate their energy to their performance.<sup>72</sup>

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<sup>64</sup> Georgetown University Law Panel, comments of Michelle Douglas, *supra* note 27.

<sup>65</sup> *Id.*

<sup>66</sup> Stephen Bindman, *Military's No-Gay Rule Under Fire in Court*, THE TORONTO STAR, October 27, 1992, at A21.

<sup>67</sup> David Pugliese, *Eggleton Spitting Bullets Over Gay Army Remarks*, HAMILTON SPECTATOR, November 19, 1997, at B2.

<sup>68</sup> Questionnaire Response of Barbara Hamilton, March 17, 2010 (on file with authors).

<sup>69</sup> Cohen, *supra* note 17.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> GAO Report, *supra* note 29, at 32.

Though problems still exist for gay servicemembers in the Canadian Forces, some of whom feel isolated and face negative reactions to their sexual orientation,<sup>73</sup> all reports indicate that unit cohesion and morale remain strong, years after the lifting of the ban.

### C. Israel

Recent studies have found no negative effect on unit cohesion or morale as a result of allowing gay military personnel to serve openly. Reuven Gal, the former Director of the Israeli Institute for Military Studies, found that,

[homosexuals'] presence, whether openly or clandestinely, has not impaired the morale, cohesion, readiness, or security of any unit. Perhaps the best indication of this overall perspective is the relative smoothness with which the most recent June 1993 repeal of the remaining restrictions on homosexuals was received within the IDF and in Israeli society as a whole.<sup>74</sup>

Similarly, a 1999 study of seventeen soldiers in the Israeli Defense Forces ("IDF") found that only two of the seventeen reported that they would have a problem serving under a gay or lesbian commander, and only three soldiers reported being concerned about showering with gay or lesbian soldiers.<sup>75</sup> One female soldier, who served from 1993-1996, stated that she experienced no problems as a result of her sexual orientation. She was amazed to discover that "people either thought [her] sexual orientation was cool or were indifferent to it."<sup>76</sup>

In fact, reports indicate that military effectiveness and morale has improved by allowing gay and lesbian servicemembers to serve openly. A recent article in *Foreign Policy* magazine by Danny Kaplan, an expert on the Israeli military, determined that allowing gay and lesbian soldiers to serve openly has actually increased military effectiveness. In addition, the article concludes that policies prohibiting open service negatively affected military effectiveness and morale. Prohibiting gay and lesbian soldiers from serving openly has the counterproductive effect of creating an atmosphere of paranoia and suspicion, in which

everyone becomes suspected of being gay...When intimacy and sexuality—which are, like it or not, key features of masculine military

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<sup>73</sup> *Gay Troops Living Isolated Lives*, CALGARY SUN, July 23, 2006, at 22.

<sup>74</sup> Aaron Belkin, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?*, at 111 (citing Reuven Gal, *Gays in the Military: Policy and Practice in the Israeli Defense Forces*, in *GAYS AND LESBIANS IN THE MILITARY* (W.J. Scott & S.C. Stanley, eds. 1994)). Belkin article available at <http://www.carlisle.army.mil/usawc/Parameters/03summer/belkin.pdf>.

<sup>75</sup> *Id.*

<sup>76</sup> Susan Taylor Martin, *Will Israeli Army Success Sway U.S. Policy on Gays?*, ST. PETERSBURG TIMES, January 8, 2007.

culture—cannot be negotiated, cannot be told and discussed, they may be turned inwards, transformed into an urge to hunt fellow soldiers.<sup>77</sup>

Open service also improves morale and military effectiveness by reinforcing the fundamental importance of military service. In Israel, not serving is generally looked down upon, both because of the security risks faced by Israel and because military service in Israel is compulsory. Eliav Lieblich, a former Captain in the Israeli army, observes that because military service is so fundamental, the repeal of the prohibition on gay and lesbian servicemembers has served to “reinforce the democratic nature of the state” and that it is the “responsibility of the commanders to educate their people about basic democratic principles.”<sup>78</sup> The repeal of restrictions on open service has thus not only had no negative effect on military effectiveness and morale, but has had the additional positive effect of reinforcing both the importance of military service and important democratic values.

#### *D. United Kingdom*

Studies conducted in 2000 show that the repeal of the prohibition against gay and lesbian people serving openly in the United Kingdom’s military has had no perceived effect on morale, unit cohesion or operational effectiveness. In 2000, six months after lifting the ban, the Ministry of Defence (“MOD”) issued an internal report about the effect of the policy change. The report stated that the introduction of openly gay service people into the military has had no adverse effects on the operational effectiveness of the forces. In addition, the assessment found that the effect on morale has been non-existent.<sup>79</sup> In January 2010, a spokesperson for the Ministry of Defence confirmed that the repeal of the ban on gay and lesbian servicemembers in the Armed Forces had had “absolutely no impact at all on operational effectiveness.”<sup>80</sup>

In July 2009, for the first time in its history, the cover of the British Army’s official publication, *Soldier* magazine, featured an openly gay trooper. Trooper James Wharton, clad in his dress uniform, is pictured complete with his medal for service in Iraq, next to the headline “Pride.”<sup>81</sup>

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<sup>77</sup> Danny Kaplan, *They’re Here, They’re Queer, It’s No Big Deal*, FOREIGN POLICY, February 3, 2010, available at

[http://www.foreignpolicy.com/articles/2010/02/03/theyre\\_here\\_theyre\\_queer\\_its\\_no\\_big\\_deal](http://www.foreignpolicy.com/articles/2010/02/03/theyre_here_theyre_queer_its_no_big_deal).

<sup>78</sup> Questionnaire Response of Captain Eliav Lieblich, Israel Defense Forces, March 3, 2010 (on file with authors).

<sup>79</sup> Summerskill, *supra* note 38.

<sup>80</sup> Coghlan, *supra* note 39.

<sup>81</sup> Terri Judd, *How The Forces Finally Learnt To Take Pride*, THE INDEPENDENT, July 27, 2009, at 10.

## IV. LIVING QUARTERS

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This section discusses the effect lifting the ban has had on each militaries' living quarters and shows that, for all countries, no changes were made in living quarters, excepting the U.K.'s slight revision to its housing policy to recognize same-sex couples in the military.

### A. Australia

Australia's military did not change its policy on housing or bathrooms and showers after its transition to open service.<sup>82</sup> Currently, according to several Australian Defence Force military personnel, the rooms in barracks housing for basic training have up to four, non-partitioned beds. In all barracks and other on-base housing, toilets and showers are generally partitioned with either doors or curtains.<sup>83</sup> This has not changed in any way since the lifting of the ban in Australia. In fact, the sexual-orientation-awareness training that the Australian Department of Defense created for military personnel notes,

[t]here are and always have been homo- and bisexual personnel living, sleeping and showering with others of the same gender without anyone knowing of their orientation. Disclosure of that orientation will not result in a sudden shift from discretion to blatant flaunting. Why would it?<sup>84</sup>

### B. Canada

Living quarters in the Canadian Forces have not changed since the lifting of the ban, with the result that gay and heterosexual servicemembers continue to share living quarters.<sup>85</sup> Before the ban was lifted, a Canadian Charter Task Force ("CTF") undertook to assess the probability of adverse effects from lifting the ban.<sup>86</sup> The CTF's concern was that Canadian Force members live and work in close proximity (they share common latrine and shower facilities) and that the close living quarters might invite sexual advances by gay servicemembers toward heterosexual members.<sup>87</sup> According to the report of Dr. Franklin C. Pinch, of Human Resources

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<sup>82</sup> Australian Government, Department of Defence, Defence Equity Organisation, Training, "Understanding Homosexuality: Creating an Inclusive Environment for Gay, Lesbian, and Bisexual Personnel," Module 6: Work Together (2003), available at [www.defence.gov.au/fr/ARE/training.htm#10](http://www.defence.gov.au/fr/ARE/training.htm#10) (hereafter "Understanding Homosexuality Training"); Questionnaire Response of Chief Petty Officer Stuart O'Brien, March 25, 2010 (on file with authors).

<sup>83</sup> *Id.* See also Questionnaire Response of Dion Chandler, Troy D. Jorgensen, Phil Murphy, Michael Purdon, and Nathan Howarth, Australian Defence Force, April 7, 2010 (on file with authors).

<sup>84</sup> Understanding Homosexuality Training, *supra* note 82.

<sup>85</sup> Swardson, *supra* note 16.

<sup>86</sup> Franklin C. Pinch, *Perspectives on Organizational Change in the Canadian Forces*, U.S. Army Research Institute for the Behavioral and Social Sciences 16 (January 1994), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA277746>.

<sup>87</sup> *Id.* at 18-19.

Consulting, the CTF studies undertaken found that the “alternative of providing four separate sets of accommodation and hygiene facilities (especially in the navy), might be possible, but not practical.”<sup>88</sup>

Notably, notwithstanding these concerns and additional concerns about shared living quarters that were raised initially when the ban was lifted, over a decade has passed without any amendment to living quarters policies, and no reports have been found that indicate problems with the Canadian Forces’ living quarters since the lifting of the ban.<sup>89</sup>

### C. Israel

According to interviews with Israeli servicemembers, no changes were instituted to the barracks, showers, or toilets after the repeal of the prohibition on gay and lesbian servicemembers.<sup>90</sup> Israeli military housing is segregated based on sex and differs depending on where the servicemember is located and on their career stage. Israel has both closed bases, where people live on the base, and open bases, where servicemembers return to their own homes at night. Thus, for many Israeli soldiers living on open bases, the amount of time living in barracks is minimal—especially during peacetime.<sup>91</sup>

For servicemembers who live on closed bases, and thus in military housing, the living conditions vary between tents containing between five and twenty beds, barracks containing between five and seven beds, and field tents holding two soldiers.<sup>92</sup> No walls in the barracks separate individual soldiers’ sleeping space.<sup>93</sup> However, toilets are partitioned and showers are usually separated by a wall, though a common entrance is accessible by all.<sup>94</sup> Israel’s open service policy did not lead to any changes in these housing conditions.

### D. United Kingdom

Much of the discussion surrounding the repeal of the prohibition against gay and lesbian servicemembers concerned issues of privacy in shared accommodations and showers.<sup>95</sup> However, when the transition to open service was implemented, those issues quickly faded into insignificance.

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<sup>88</sup> *Id.*

<sup>89</sup> Swardson, *supra* note 16.

<sup>90</sup> Questionnaire Response of Captain Eliav Liebllich, Israel Defense Forces, March 3, 2010 (on file with authors); Questionnaire Response of Anonymous Staff Sergeant, Israel Defense Forces, March 2, 2010 (on file with authors); Interview with First Sergeant Eli Kaplan-Wildman, Israel Defense Forces, in New York, NY, March 1, 2010.

<sup>91</sup> GAO Report, *supra* note 29, at 43.

<sup>92</sup> Questionnaire Response of Captain Eliav Liebllich, Israel Defense Forces, March 3, 2010 (on file with authors).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Ministry of Defence, Report of the Homosexual Policy Assessment Team (February 1996) (on file with authors).

Servicemembers who are not married or in civil partnerships are usually housed in Single Living Accommodation ("SLA"). From a photograph on the website of the Ministry of Defence, it appears that individuals have considerable privacy in the SLA,<sup>96</sup> even while sharing common showers and bathrooms. No significant changes to this arrangement have been made following the transition to open service, and no publicly available reports indicate that the use of common showers and bathrooms by gay and non-gay servicemembers has presented significant or systemic problems. Shared showers and bathrooms did not present a problem for couples' and families' housing, because couples and families are typically allotted units that have their own bathrooms.

The housing policy for couples was affected by the introduction of the Civil Partnerships Act of 2004, when married quarters were renamed Service Family Accommodation. Currently, service personnel who are married or in a civil partnership or who have custody of children are entitled to Service Families Accommodation.<sup>97</sup> In sum, at present, gay and lesbian servicemembers are entitled to the same housing facilities as their heterosexual counterparts.

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<sup>96</sup> Ministry of Defence, Photo of Single Living Accommodation, <http://www.mod.uk/DefenceInternet/MicroSite/DE/WhatWeDo/Accommodation/ProjectSlamsingleLivingAccommodationModernisation.htm> (last visited April 6, 2010) (on file with authors).

<sup>97</sup> Ministry of Defence Service Family Accommodation, Report by the Comptroller and Auditor General, March 18, 2009, *available at* [http://www.nao.org.uk/publications/0809/service\\_families\\_accommodation.aspx](http://www.nao.org.uk/publications/0809/service_families_accommodation.aspx).

## V. EDUCATIONAL AND TRAINING PROGRAMS

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The introduction of educational and training programs has been an important step in the transition to open service for several of the countries surveyed. Training has taken the form of general programs covering all issues of equality as well as more specialized programs targeting issues of sexual orientation discrimination. These programs are reported to have contributed in some measure to changing the attitudes of military personnel towards gay and lesbian servicemembers.

### A. Australia

Throughout the nearly two decades since the ban was lifted in Australia, the Australian Defence Force, through the office of the Defence Equity Organisation, has gradually implemented training programs on sexual orientation, as well as other diversity issues, for all military personnel. A few months after the ban was lifted in 1992, some services within the Australian Defence Force made efforts to integrate training and education; for example, Commodore Richard R.W. Gates, a Royal Australian Navy official, recalled that Navy officials implemented a training program entitled "Good Working Relationships."<sup>98</sup>

Currently, the Defence Equity Organisation takes responsibility for monitoring, educating, and enforcing the sexual harassment and anti-discrimination policies of the Australian military, which now include harassment or discrimination on the basis of sexual orientation.<sup>99</sup> The Defence Equity Organisation reports directly to the head of personnel for the Australian Defence Force<sup>100</sup> and "handles complaints regarding all matters of sexual misconduct including harassment, bullying, and assault, provides an anonymous advice line for servicemembers and commanders, and directs the training and outreach activities of 'Equity Advisors' throughout the forces."<sup>101</sup>

Within the Australian Defence Force, all military and civilian personnel must undergo the Annual Equity Awareness Training, which covers a broad range of topics, including issues of gender, sexuality, race and age within the military.<sup>102</sup> In addition, since 2003 the Australian Defence Force has an online training program to educate servicemembers about gay and lesbian personnel. This training is not

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<sup>98</sup> Belkin and McNichol, Australian Defense Forces, *supra* note 44, at 20.

<sup>99</sup> See Defence Equity Organisation website, <http://www.defence.gov.au/fr/default.htm>.

<sup>100</sup> Australian Defence Force, Defence Equity Organisation, *Defence a Bully-Free Workplace; A Guide to Fair Leadership and Discipline in the Australian Defence Force; Defence Workplace Equity and Diversity Plan: 2007-2009*; and *Guide to Equity and Diversity in Defence* (on file with authors).

<sup>101</sup> *Id.*; see also Georgetown Law Center Panel, Comments of Stuart O'Brien, *supra* note 54.

<sup>102</sup> Questionnaire Responses of Stuart O'Brien, Phil Murphy, Dion Chandler, Nathan Howarth, and Michael Purdon March 25, 2010, April 7, 2010 (on file with authors).

mandatory, but it was created so that managers and supervisors could speak with sensitivity to issues affecting gay and lesbian personnel.<sup>103</sup>

The comprehensive training presentation first gives background information about sexual orientation and identity. It then shows why harassment and discrimination against gay and lesbian servicemembers is a detriment to the military. It also describes why allowing gay and lesbian personnel to disclose their sexual orientation in the military is important to unit cohesion and morale, and offers advice for servicemembers, presumably those who are uncomfortable with open service, on how to serve alongside gay and lesbian personnel.<sup>104</sup>

### *B. Canada*

Education and training sessions within the Canadian military did not change significantly after the ban was lifted. Under General John de Chastelain, the Canadian Forces modified already existing harassment guidelines, started attitudinal training programs, and set up new methods of handling complaints when it transitioned to open service.<sup>105</sup> The training sessions did not focus solely on gay issues.<sup>106</sup> Instead, they were aimed at reinforcing the importance of sensitivity generally and the position that harassment will not be tolerated in any instance – “It allows people to see that this is the military program, that it’s not just a nice thing to do. We have zero tolerance for harassment, whether it’s sexual, gender or ethnic,” said Colonel Edward Nurse, commander of a Canadian Forces Base.<sup>107</sup> However, the mandatory training sessions did use words like gay and lesbian to give concrete examples to integrate the policy objectives and to aid in understanding of the new policy.<sup>108</sup>

In addition to training sessions, the National Defence Headquarters issued a “Questions and Answers” sheet for use within the Canadian Forces that explained the change in policy through questions and answers about appropriate behavior.<sup>109</sup> The sheet addressed a range of concerns, such as:

Q31: Will such activities as dancing, hand holding, embracing between same/sex members be accepted at social functions?

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<sup>103</sup> Questionnaire Response of Stuart O’Brien, March 25, 2010 (on file with authors) (“[I]t is designed to give Managers/Supervisors more inclusive terms (such as partner rather than wife or husband) and give them a little more knowledge in relation to the Gay & Lesbian Community”).

<sup>104</sup> See Understanding Homosexuality Training, *supra* note 82.

<sup>105</sup> Swardson, *supra* note 16.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Georgetown University Law Panel, comments of Michelle Douglas, *supra* note 27.

<sup>109</sup> Hopkins, *supra* note 15, at 19.

A31: Standards of conduct for homosexual members will be the same as those for heterosexual members. Common sense and good judgment will be applied and required of all members.<sup>110</sup>

Significantly, the “Questions and Answers” sheet sets out the logistics of how the shift in policy would affect the composition of the military. To the extent that soldiers were concerned that the lifting of the ban would create complications or leave servicemembers unsure of their actions, the sheet served as a reference for individuals’ questions and provided clear responses using concrete examples.

In sum, Canada made slight alterations to their existing training sessions to integrate the new policy and provided guidebooks such as the “Questions and Answers” sheet to clarify what the new rules would mean for soldiers on the ground.

### *C. Israel*

While the Israeli military does provide training to address abusive treatment and harassment of certain populations, such as women, it has not provided any special education or training related to addressing harassment or abusive treatment of gay or lesbian servicemembers.<sup>111</sup> The Israeli military chose not to provide such educational or training courses because it has not found that any problems have arisen related to gay and lesbian servicemembers in the military, and thus the training is unnecessary.<sup>112</sup>

An expert on the Israeli military has attributed the success of Israel's transition to an open military, at least in part, to the military authorities’ ability to prevent “sexual orientation [from] becoming a source of disruption by treating it as a fact of life rather than a problem to be addressed.”<sup>113</sup> The lack of special training and the implication that gay and lesbian soldiers serving openly is not an issue have resulted, overall, in the successful integration of gay and lesbian soldiers into military units.<sup>114</sup>

### *D. United Kingdom*

The Ministry of Defence developed Equality and Diversity Schemes (“EDS”), first introduced in 2006, to promote race, disability, sexual orientation and gender equality.<sup>115</sup> In addition, the Joint Equality and Diversity Training Centre, which is

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<sup>110</sup> *Id.*

<sup>111</sup> Questionnaire Response of Captain Eliav Lieblich, Israel Defense Forces, March 3, 2010 (on file with authors).

<sup>112</sup> GAO Report, *supra* note 29, at 43.

<sup>113</sup> Kaplan, *supra* note 77.

<sup>114</sup> *Id.*

<sup>115</sup> The EDS have been revised and are now in force until 2011. Ministry of Defence, Equality and Diversity Schemes, 2008-2011, at 8, *available at*

part of the U.K. Defence Academy, provides training to Equality and Diversity Advisers and their Assistants, training for senior Service personnel and training services to individual units to meet the requirements of Commanding Officers.<sup>116</sup> It appears that the main training provider for the staff, DB Learning, is in the process of integrating equality and diversity issues across a range of their training products to mainstream equality and diversity into every aspect of Defence business.<sup>117</sup>

According to a former servicemember, all Army personnel receive training on equality and diversity issues, which includes issues faced by gay and lesbian servicemembers. This is first carried out in recruit training. All soldiers then receive annual awareness training as part of their annual training cycle. This training, which is carried out by military staff in the unit who have attended the Equality and Diversity Advisers Course, generally consists of watching a DVD or a film explaining the services' policy, showing several examples of good and bad behavior, and asking the training audience to discuss what they saw.<sup>118</sup>

In addition, the U.K. armed forces also use a variety of media to educate servicemembers about their policies on equality and diversity. For example, the armed forces publish the Royal Navy's Diversity and Equality Newsletter. Where appropriate, officials in the Ministry of Defence also contribute information to articles and give interviews in the wider media. The armed forces also engage in a range of promotional, recruitment and outreach activities, including annual sponsorship of Gay Pride events, youth initiatives and building links with community associations.<sup>119</sup>

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<http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/PersonnelPublications/EqualityAndDiversity/EqualityAndDiversityPolicy/EqualityDiversityScheme.htm> (last visited April 6, 2010).

<sup>116</sup> Ministry of Defence, Equality and Diversity Schemes, 2008-2011, at A-15, *available at* <http://www.mod.uk/NR/rdonlyres/98E4EAB6.../eqdivschemes20082011.pdf>.

<sup>117</sup> *Id.* at A-14.

<sup>118</sup> Telephone Interview with an anonymous former servicemember (Mar 29, 2010).

<sup>119</sup> Ministry of Defence, Equality and Diversity Schemes, *supra* note 116.

## VI. SEXUAL HARASSMENT AND ANTI-DISCRIMINATION POLICIES

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Sexual harassment of servicemembers has long been a major concern in the armed forces. In response to the shift to open service, the military branches studied here modified their existing prohibitions against sexual harassment. The revised sexual harassment policies focus on inappropriate acts instead of the sexual orientation of the persons allegedly engaging in these acts. While changes in official policy have been effective as a general matter, occasional incidents of harassment towards gay and lesbian military personnel remain. In response to these isolated incidents, military personnel have worked to create accessible systems of reporting and effective means of discipline.

### A. Australia

Sexual harassment and discrimination policies in the Australian Defence Force played a central role in overturning the ban on gay and lesbian servicemembers in the military. Prior to the ban's being lifted, the military's sexual harassment policy banned so-called "homosexual conduct," making it grounds for discharge.<sup>120</sup> In the course of lifting the ban, the government changed its code of conduct to base discharge on "unacceptable sexual behavior," no matter whether applied to gay or straight personnel.<sup>121</sup> A government statement observed, "[The policy] gives commanders sweeping powers and firm guidelines for disciplinary measures."<sup>122</sup>

Less than a year after the ban was lifted, then-Defense Department's Information Director, Brigadier Adrian D'Hage, said,

We now have a policy that's based on sexual propriety in the workplace. We will still discharge homosexuals, but not because of sexual preference. It will be because of sexual harassment.<sup>123</sup>

In the years immediately following the lifting of the ban, some isolated incidents of harassment and discrimination were reported. For example, one officer's sexual orientation was presumed to be gay, although he did not reveal it himself, and "some adverse reactions occurred."<sup>124</sup> Also, an enlisted man complained that an officer had tried to kiss him, and the officer was discharged for "unacceptable sexual behavior."<sup>125</sup> During the 1993 Congressional hearings on the potential repeal of the ban on gays in the U.S. military, U.S. Marine Corps Colonel Frederick Peck testified that Australians he spoke to said that gay and lesbian personnel would likely not come out for fear of experiencing "barracks justice" and an

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<sup>120</sup> GAO Report, *supra* note 29, at 19; Smith, *supra* note 4, at 545.

<sup>121</sup> Smith, *supra* note 4, at 545.

<sup>122</sup> *Id.*

<sup>123</sup> Branigin, *supra* note 5.

<sup>124</sup> Smith, *supra* note 4, at 545-546.

<sup>125</sup> Branigin, *supra* note 5.

"inhospitable environment...to step forward."<sup>126</sup> In addition, in 2000, when Aaron Belkin and Jason McNichol interviewed Dr. Katerina Agostino, professor of the Department of Sociology at Macquarie University in Sydney, she stated,

There is a senior naval officer that I know who's very good at what he does, but he's been unable to get promotion...He was [] told that there's nothing wrong with being gay, you just can't look so gay.<sup>127</sup>

Some of the servicemembers interviewed for this report mentioned that they had experienced or observed harassment on the basis of sexual orientation as well.<sup>128</sup>

Overall, however, there is very little evidence that sexual harassment or discrimination on the basis of sexual preference has been a widespread or pervasive problem in the Australian Defence Force. Immediately after the ban was lifted, senior Defence official Greg Austin noted that

There have been more instances of unacceptable heterosexual than homosexual behavior...There are more men out there trying to rape women than trying to rape men.<sup>129</sup>

Moreover, as of 2000, sexual orientation-related complaints made up less than 5% of the total complaints the Australian Defence Force received related to sexual harassment, bullying, and other forms of sexual misconduct. In addition, of the 1,400 calls received in 2000 by a hotline administered by the Australian Defence Force to assist managerial personnel in handling potential misconduct, only 1.21% related to sexual orientation complaints.<sup>130</sup>

Lastly, all the servicemembers interviewed for this report who had observed or experienced harassment emphasized the accessibility of the remedial measures the Australian Defence Force makes available to military personnel. When faced with an incident of harassment, servicemembers have several options for redressing their grievances, including calling a Defence Equity adviser or calling the Defence Equity hotline, reporting the harassment to superiors, contacting the Defence Gay and Lesbian Information Service for a referral, or requesting a formal inquiry into the incident.<sup>131</sup>

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<sup>126</sup> Pilita Clark, *U.S. Gulf War Hero Backs Gay*, SYDNEY MORNING HERALD, May 13, 1993, at 7.

<sup>127</sup> Belkin and McNichol, *Australian Defense Forces*, *supra* note 44, at 25.

<sup>128</sup> Questionnaire Responses of Michael Purdon, Nathan Howarth, Troy Jorgensen, April 7, 2010 (on file with authors).

<sup>129</sup> Branigin, *supra* note 5.

<sup>130</sup> Belkin and McNichol, *Australian Defense Forces*, *supra* note 44, at 3. More recent statistics are not publicly available.

<sup>131</sup> Questionnaire Responses of Nathan Howarth, Michael Purdon, Troy Jorgensen, April 7, 2010 (on file with authors).

## B. Canada

Sexual harassment and anti-discrimination policies in the Canadian Forces did not undergo any significant changes after the lifting of the ban. However, after the ban was lifted, the Canadian Forces issued a new regulation (CFAO 19-36) entitled "Sexual Misconduct,"<sup>132</sup> which revised versions of general policy on personal relationships and harassment, and this was intended to provide clear policy and guidance on what constituted inappropriate sexual behavior and conduct by all military servicemembers.<sup>133</sup> The order applied to gay and straight servicemembers equally, such that sexual harassment policies did not differ according to one's sexual orientation.

In addition to the new regulation, the Department of National Defence implemented a program known as Standards for Harassment and Racism Prevention ("SHARP") in 1996 to deal with all sexual harassment.<sup>134</sup> The Canadian Forces managed to smoothly integrate the SHARP regulations into the already existing sexual harassment policy by drafting the SHARP section on sexual harassment and sexual misconduct using gender-and orientation-neutral terms in describing specific behavior that would be classified as harassment or misconduct.<sup>135</sup>

The SHARP program produced many positive results. For example, a Canadian Forces survey conducted in 1998 on harassment found that the SHARP training program had substantially increased awareness of the policy against harassment. In 1998, 97% of the Canadian Forces' personnel surveyed stated that they were aware that the Canadian Forces had a harassment policy, compared to 84% of women and 80% of men in 1992. The survey further revealed that three-quarters of the respondents had a harassment advisor for their unit.<sup>136</sup>

In addition to the positive results of the SHARP program, statistics collected by the Canadian military showed no correlation between homosexuality and offensive conduct.<sup>137</sup> These studies led members of the military police staff in charge of maintaining statistics on offenses committed by military members to conclude that homosexuality has not been a contributing factor in matters of conduct and discipline.<sup>138</sup> According to their statistics, of the 905 assault cases for the period from November 1992 to the present, none could be identified as involving attacks

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<sup>132</sup> Hopkins, *supra* note 19, at 23.

<sup>133</sup> K.W.J. Wenek, D. National Defence Headquarters (August 1995). Document was obtained from the archives of the Palm Center, University of California, Santa Barbara.

<sup>134</sup> Leadership in the Canadian Forces, Leading the Institution, at 109-110, *available* at <http://www.cda-acd.forces.gc.ca/cfli-ilfc/lea/doc/LeadingtheInstitution-English.pdf>.

<sup>135</sup> Hopkins, *supra* note 19, at 24.

<sup>136</sup> Belkin & McNichol, *Effects of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence*, The Center for the Study of Sexual Minorities in the Military, at 11 (hereafter Belkin & McNichol, Canadian Forces) (citing survey conducted by Major J.E. Adams-Roy).

<sup>137</sup> Wenek, *supra* note 133.

<sup>138</sup> *Id.*

on gay personnel.<sup>139</sup> Further, the staff that is in charge of the administration of human rights complaints filed by military members with the Canadian Human Rights Commission reported that, from November 1992 to the present, only three of the 213 complaints were based on sexual orientation, two of which pertained to differential treatment and releases which occurred *prior* to the policy change.<sup>140</sup> Military personnel responsible for dealing with military grievances that come to the attention of National Defence Headquarters expressed confidence that no more than a dozen of the approximately 2,000 grievances handled in the past three years have included sexual orientation as a significant element of the grievance.<sup>141</sup>

Further, according to Megan MacLean, a spokeswoman for Canada's Department of National Defence, gay and lesbian people serve in all three branches of the military and since the 1992 policy change, incidents of discrimination and harassment have been "extremely rare."<sup>142</sup> However, many gay and lesbian personnel serving in the military shortly after the ban was lifted said that they still routinely encountered prejudice.<sup>143</sup> According to a lesbian corporal who preferred to remain anonymous, "because of the macho mind-set of the army, gay men must have had a more difficult time than women, especially in the field."<sup>144</sup> Still, according to then-Chief of Defence staff, John Rogers Anderson, there is little, if any, active resistance to the new rules.<sup>145</sup> While Admiral Anderson agreed that more senior officials likely opposed the new policy than tolerated it, he believed that they understood that no wavering on the policy would be tolerated.<sup>146</sup> Harassment or discrimination of any kind would be punished and individuals like Master Corporal Mike Simic, who expressed disagreement at the time with gay men and women being allowed to serve in the military, said his attitude was to "grin and bear it...There's a lot of the military that's out of your hands. The policy is very clear."<sup>147</sup>

The blanket requirement that harassment would not be tolerated by or against any servicemember reinforced that the transition did not require an overhaul of the already existing system, but involved reemphasizing already existing obligations toward all individuals. Further, even though harassment still occurs, the fact that Canada no longer has a ban on gay personnel serving in the military serves as a constant reminder that the Canadian Forces are committed to treating all servicemembers equally, and that harassment of any kind, including harassment of gay soldiers, will not be tolerated.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Cohen, *supra* note 17.

<sup>143</sup> Fisher, *supra* note 28.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Swardson, *supra* note 16.

### C. Israel

The Israeli military regulates the behavior of its soldiers through prohibitions on sexual activity occurring in the barracks.<sup>148</sup> In addition, the Israeli military prohibits relationships between officers and their subordinates.<sup>149</sup> These prohibitions drew no distinction between sexual acts of same- or different-sex couples even before the service restrictions were lifted, and thus did not need to be altered after the Israeli military opened access to all positions to gay and lesbian soldiers.<sup>150</sup>

Since the repeal of the restrictions on gay and lesbian soldiers, there has been no significant problem of discrimination against gay and lesbian soldiers, nor have there been significant problems of harassment by or of gay and lesbian soldiers.<sup>151</sup> A formal study of harassment complaints, undertaken at the behest of the Knesset, found that none of the cases of harassment were based on sexual orientation.<sup>152</sup> Studies by political scientist Aaron Belkin have found similar results. After an interview with thirty-five experts, soldiers, and officers, Belkin uncovered only a handful of cases involving sexual orientation-based harassment.<sup>153</sup> An extensive review of Israeli newspapers also uncovered no stories of gay soldiers being denied promotions as a result of their sexual orientation.<sup>154</sup> This was confirmed by a board member of Israel's primary gay rights organization, who stated in an interview that he did not know of any cases in which a gay soldier was denied benefits, promotions, or assignments because of sexual orientation.<sup>155</sup>

In addition, Brigadier-General Uri Shoham, the military's judge advocate general, stated that he could remember only a few cases of harassment based on sexual orientation, and that such cases are rare. He further stated that he had never had to deal with a case of sexual orientation-based harassment as a military lawyer.<sup>156</sup>

In general, little evidence is available of harassment occurring on the basis of sexual orientation because individual commanders generally handle these types of claims.<sup>157</sup> However, while some evidence of harassment exists — such as a female officer's observation that, while there was no discrimination in her unit, "rumors (usually from the news) do show the existence of some problems in closed units (where one lives on base)" — most of the commanders questioned in studies on the

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<sup>148</sup> Clyde Haberman, *Homosexuals in Israeli Army: No Official Discrimination, but Keep it Secret*, NEW YORK TIMES, February 21, 1993.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Belkin and Levitt, *supra* note 32, at 547; Belkin, *supra* note 74, at 112.

<sup>152</sup> Lee Walzer, *BETWEEN SODOM AND EDEN: A GAY JOURNEY THROUGH TODAY'S CHANGING ISRAEL* 135 (New York: Columbia Univ. Press 1999).

<sup>153</sup> Belkin, *supra* note 74, at 112.

<sup>154</sup> Belkin and Levitt, *supra* note 32, at 554.

<sup>155</sup> *Id.* (citing Personal Communication with Raanan Gabbay (April 9, 2000)).

<sup>156</sup> *Id.*

<sup>157</sup> Belkin and Levitt, *supra* note 32, at 546.

issue have reported that they could not recall any examples of harassment of gay or lesbian soldiers.<sup>158</sup>

#### *D. United Kingdom*

The transition to allowing gay and lesbian servicemembers to serve in the armed forces was supported by the military's policies against sexual harassment and discrimination. The new code of conduct that replaced the ban on gay and lesbian servicemembers in the forces was neutral as to sexual orientation, and instead forbade touching, displays of affection and relationships across the ranks. The code was intended to restrict "sex, not sexuality," and applied to all servicemembers.<sup>159</sup> Because the focus has been placed on inappropriate behavior instead of sexual orientation, sexual orientation has not become a source of antagonism as some had feared. The forces treat sexuality as a private matter, and military recruits are no longer asked their sexual orientation.<sup>160</sup> Gay service personnel may rely on the code of conduct for support in the event of harassment or bullying. Expressions of hostility toward gay servicemembers are treated as grounds for disciplinary action.<sup>161</sup> Further, all servicemembers know that they have recourse if they witness or experience inappropriate comments or actions.

The policies of the Ministry of Defence specifically target inappropriate behavior, rather than sexual orientation. The social conduct policy of the Ministry of Defence prescribes that 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.<sup>162</sup> Enumerated inappropriate behavior includes unwelcome sexual attention in the form of physical or verbal conduct, over-familiarity with the spouses or partners of other service personnel, displays of affection that might cause offense to others, behavior that damages or puts at risk the marriage, civil partnership or personal relationships of service personnel or civilian colleagues within the wider defense community, misuse of rank and taking advantage of subordinates, probing into a person's private life and relationships, and other types of "social misbehavior." Deference is given to the commanding officer to determine if behavior constitutes a threat to the efficiency or operational effectiveness of the service.<sup>163</sup>

With respect to discrimination, cases of discrimination based on sexual orientation have been few in number. According to Lieutenant-Colonel Colin Bulleid of the

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<sup>158</sup> *Id.* (quoting an Anonymous Communication, March 27, 2000).

<sup>159</sup> Jack Mathieson, *New Code To Replace Forces' Ban On Gays*, EVENING NEWS, November 15, 1999, at 5.

<sup>160</sup> Tom Kelly, *Gay Sailors, The Navy Needs You*, DAILY MAIL, February 3, 2006, at 21.

<sup>161</sup> Coghlan, *supra* note 39.

<sup>162</sup> UK Ministry of Defence, Armed Forces Code of Social Conduct Policy Statement, *available at* <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/ArmedForcesCodeOfSocialConductPolicyStatement.htm> (last visited April 24, 2010).

<sup>163</sup> *Id.*

British Army Equality and Diversity policy branch, expressions of homophobia in the Army are now restricted to "the odd prat who behaves inappropriately."<sup>164</sup>

However, the U.K. Ministry of Defence ("MOD") has taken several steps to ensure that where there are problems, measures are in place to combat them. The Employment Equality (Sexual Orientation) Regulations of 2003, which came into force on December 1, 2003, outlaw discrimination on the grounds of sexual orientation in employment and vocational training. To further the goals of the Regulations, the MOD has an entire organizational structure to protect equality and diversity. In addition, soldiers can report to a number of departments or specialist officers to raise concerns about harassment. All Army units at the battalion level and upwards have an Equality and Diversity Adviser appointed who is normally at captain or major rank. Aggrieved servicemembers can approach the Adviser with their complaint. Complaints can also be raised through the formal complaints process. The MOD has also appointed a Service Personnel Complaints Commissioner to ensure that complaints of bullying, harassment or discrimination are dealt with properly.<sup>165</sup> The appointment of the Commissioner is another indicator of the commitment of the Ministry of Defence to ensuring equality among servicemembers. In the words of the first Service Personnel Complaints Commissioner, Dr. Susan Atkins:

The Armed Forces and MOD have signalled their commitment to having a rigorous, independent and transparent scrutiny of the complaints system. They have also understood the need for an alternative route of access for Service personnel and their families. I shall hold them to their word. I am determined to ensure that all Service men and women and their families have confidence in the complaints process and are treated properly.<sup>166</sup>

The Royal Military Police now has Lesbian and Gay Liaison Officers appointed on all the large military bases. These military police officers have attended training on lesbian and gay issues with the civilian police. They, along with other military police, are available to investigate bullying or harassment of any sort which is deemed serious enough to merit a criminal investigation, for example if an assault had taken place.<sup>167</sup>

Other measures to ensure equality include the LGBT Forum. The LGBT Forum, which is a Departmental diversity forum, comprises volunteers who represent the

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<sup>164</sup> Ben Macintyre, *Obama Is Out Of Step On Gays In The Military*, TIMES (LONDON), October 15, 2009, at 29.

<sup>165</sup> UK Ministry of Defence News, *First Ever Service Personnel Complaints Commissioner Appointed*, November 7, 2007, available at <http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/FirstEverServicePersonnelComplaintsCommissionerAppointed.htm> (last visited April 24, 2010).

<sup>166</sup> *Id.*

<sup>167</sup> Telephone Interview with an anonymous former servicemember, U.K. Armed Forces (March 29, 2010).

interests of LGBT staff in the Department.<sup>168</sup> In addition, a website funded by both the MOD and private sources also provides information for lesbian and gay servicemembers needing assistance. The Armed Forces also have their own web site, which provides information to LGBT personnel. The site is owned and run privately although it does now receive some MOD funding.<sup>169</sup>

Dave Small, a former Navy Warrant Officer who left service five years ago, observed,

Like any big organization, at certain times you are going to come across problems. But the services certainly have strong processes in place, which they are encouraging their staff to take up, if you are subjected to bullying or harassment, they want to know. The last five years has been more about letting this policy make a difference and not be just a piece of paper. That is why we have seen these big changes.<sup>170</sup>

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<sup>168</sup> Ministry of Defence, LGBT Forum, *available at* <http://www.mod.uk/DefenceInternet/AboutDefence/WhatWeDo/Personnel/EqualityAndDiversity/LGBT/> (last visited April 6, 2010).

<sup>169</sup> <http://www.proud2serve.net>.

<sup>170</sup> Judd, *supra* note 81.

## VIII. RELATIONSHIP RECOGNITION

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This section discusses how the militaries in Australia, Canada, Israel, and the U.K. have recognized same-sex couples in terms of employment benefits and access to social functions. In general, all of the countries studied in this report have adopted some policies to recognize the relationships of gay and lesbian servicemembers. While all of the countries in this report have chosen to recognize same-sex relationships, they have chosen to do this in different ways, either through extending employment benefits to the servicemembers' partners, through acceptance of gay and lesbian servicemembers and their partners at military social events and ceremonies, or both.

### A. Australia

In general, little information is available on how the Australian military has handled relationship recognition other than as regards marriage-related benefits. In 1993, Brigadier Adrian D'Hage speculated, "No doubt we will have a first test when someone wants to bring his boyfriend to the regimental dance."<sup>171</sup> One servicemember noted that it was somewhat of an issue:

I took my ex-partner to the work Christmas party...I [told] my boss beforehand that I was going to do it. And he just looked at me with a bit of a pained expression and said, "I expect you to behave."<sup>172</sup>

However, another officer, Stuart O'Brien, stated that he has never had a problem with the recognition and treatment of his partner at official military events:

My partner was made most welcome at all events, dinners, formal functions, even my Admiral's wife took my partner un[d]er [her] wing while I was working at one function. I have heard this same story told over and over by friends. So no issues at all.<sup>173</sup>

Other servicemembers report that they have shared Officer O'Brien's experience; even those who have not had the opportunity to bring a same-sex partner to a military social event do not express concern that other military personnel would react adversely, and in fact anticipate that their partners would be made to feel welcome and accepted into the military community.<sup>174</sup> One officer mentioned that "I sincerely believe that...if...an obvious negative response...occur[red], this would not be tolerated in any way, shape or form."<sup>175</sup>

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<sup>171</sup> Branigin, *supra* note 5.

<sup>172</sup> Belkin and McNichol, Australian Defense Forces, *supra* note 44, at 32.

<sup>173</sup> Email from Officer Stuart O'Brien, March 19, 2010 (on file with authors).

<sup>174</sup> Questionnaire Responses of Michael Purdon, Dion Chandler, Nathan Howarth, April 7, 2010 (on file with authors).

<sup>175</sup> Questionnaire Response of Nathan Howarth, April 7, 2010 (on file with authors).

Australia has also recently recognized same-sex couples within the military. Although Australian federal law does not recognize same-sex couples' marriages, the relationships of same-sex couples are considered "de facto" relationships, and a servicemember in a same-sex relationship is entitled to the same benefits as married personnel.<sup>176</sup>

### B. Canada

When Canada lifted its ban on gay men and lesbians serving in the military, it also initiated recognition of the same-sex partnerships of gay and lesbian servicemembers.<sup>177</sup> In June 1996, the Canadian Federal Human Rights Tribunal issued an order requiring that the same medical, dental, and other benefits be provided to gay and lesbian couples as were provided to heterosexual couples.<sup>178</sup> These benefits include: compassionate leave; leave without pay for spousal accompaniment on military, foreign service, or isolated post assignment; and relocation entitlements.<sup>179</sup> In addition, since September 2003,<sup>180</sup> military chaplains have been allowed to bless same-sex unions and to perform these ceremonies on a military base.<sup>181</sup>

### C. Israel

Since the repeal of the prohibition on gay and lesbian servicemembers, the Israeli army has made some adjustments to its procedures related to relationship recognition. In particular, the Israeli army recognizes soldiers' same-sex partners as bereaved next-of-kin in the event of the soldier's death.<sup>182</sup> These surviving partners are eligible for benefits, although they receive less compensation than spouses of soldiers generally receive.<sup>183</sup>

The Israeli army has also allowed gay and lesbian servicemembers to be accompanied by their partners at events, as any other servicemember could be accompanied by a different-sex spouse. For example, at events such as promotions and ceremonies, many gay officers will be accompanied by their partner.<sup>184</sup> No major problems have been reported as a result of this policy. One woman, a soldier in the Israeli Defense Forces, discussed the possibility of bringing her

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<sup>176</sup> Australian Government, Department of Defence, Defence Instructions (General), Interdependent Relationships, *available at* <http://www.defence.gov.au/dpe/pac/>; Georgetown Law Center Panel, Comments of Stuart O'Brien, *supra* note 50; Questionnaire of Chief Petty Officer Stuart O'Brien, March 25, 2010 (on file with authors).

<sup>177</sup> Hopkins, *supra* note 19, at 26.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 27.

<sup>180</sup> Wikipedia entry about Same Sex Marriage in Canada, [http://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_Canada](http://en.wikipedia.org/wiki/Same-sex_marriage_in_Canada).

<sup>181</sup> Telephone interview with Michelle Douglas speaking in her personal capacity (transcript on file with authors).

<sup>182</sup> Crary, *supra* note 5.

<sup>183</sup> Walzer, *supra* note 152, at 138.

<sup>184</sup> Crary, *supra* note 5.

partner to a social event on base with her commander. Her commander recommended that she not hide her sexual orientation and promised that he would support her if any problems arose as a result of her decision to bring her partner.<sup>185</sup>

#### *D. United Kingdom*

The U.K. military has similarly permitted gay and lesbian servicemembers to bring their partners to official events. For “semi-official” functions, the Ministry of Defense announced rules in 2000 that allowed the President of each “Mess” dining unit to exercise discretion in allowing gay or lesbian servicemembers to attend Mess events, as they do for all Mess guests.<sup>186</sup>

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<sup>185</sup> Walzer, *supra* note 152, at 133.

<sup>186</sup> Judd, *supra* note 81.

## IX. MULTINATIONAL FORCES

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This section examines multinational forces in which U.S. servicemembers train and fight alongside allies from countries that allow open service. These findings provide additional concrete evidence that American soldiers have not exhibited the behavior nor shown the deterioration in productivity and cohesion that has been feared by proponents of the “Don’t Ask, Don’t Tell” policy.

### A. U.N. Peacekeeping Forces

The experiences of U.N. Peacekeeping forces provide a clear picture of how American servicemembers interact with openly gay soldiers. Importantly, no serious problems have occurred, notwithstanding the fact that U.S. personnel assigned to U.N.-controlled peace operations “work closely with personnel from other nations,” many of which allow openly gay service.<sup>187</sup>

Officials interviewed from the Department of Peacekeeping Operations (“DPKO”) at the U.N. in 2002 and 2003 did not know of any policy with respect to sexual orientation for personnel in U.N. peacekeeping operations, and “could not think of any instance in a mission when this became an issue, whether in regard to differences in policy among the various Troop Contributing Countries (TCC’s), command and control, integration, or personnel/administrative conflicts.”<sup>188</sup> However, since only problems of serious magnitude warrant attention, minor issues could have arisen and been handled locally.<sup>189</sup> These DPKO officials also noted that “no departing Force Commander and Chief Military Observer has ever mentioned the issue in an end-assignment report, [which is] where more general observations and recommendations to DPKO are shared.”<sup>190</sup>

Soldiers serving in multinational forces are regulated, for the most part, by their particular nation’s regulations. However, universal standards of conduct, drafted by the U.N., apply to all peacekeeping forces. Peacekeepers, known as “Blue Helmets,” must carry a card with them at all times enumerating the ten rules of the U.N. Code of Personal Conduct. Rule number seven demands that soldiers “[s]how military courtesy and pay appropriate compliments to all members of the mission, including other United Nations contingents regardless of their creed, gender, rank or origin.”<sup>191</sup> Notwithstanding the official policy of non-discrimination, Jan Koller, President of U.N. Gay Lesbian or Bisexual Employees (UNGLOBE) writes “internally, in spite of claims of non-discrimination, the U.N. does not extend any benefits such

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<sup>187</sup> Geoffrey Bateman and Sameera Dalvi, *Multinational Military Unites and Homosexual Personnel*, Report Commissioned by UC Santa Barbara: Center for the Study of Sexual Minorities in the Military, at 9, Feb. 1, 2004, available at <http://escholarship.org/uc/item/Otj9033f>.

<sup>188</sup> *Id.* at 13.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> U.N. Standards of Conduct, *Ten Rules: Code of Personal Conduct For Blue Helmets*, available at <http://cdu.unlb.org/UNStandardsOfConduct/TenRulesCodeofPersonalConductForBlueHelmets.aspx>.

as visas, insurance, etc...to same sex partners, nor does it have any policies specifically dealing with discrimination based on sexual orientation.”<sup>192</sup>

In addition, sexual relations between consenting adults who are U.N. staff, U.N. volunteers, U.N. police, military observers and contingents are not prohibited, provided that they do not contravene applicable (national) codes of conduct for specific categories of personnel.<sup>193</sup>

Further, in addition to their own domestic training, the U.N. also requires TCCs to provide further training in U.N. rules and policies to their peacekeeping soldiers – including the zero-tolerance policy with respect to sexual harassment and abuse of local populations and training about their additional responsibilities as representatives of the international community.<sup>194</sup>

Anecdotal evidence suggests that working alongside openly gay servicemembers as part of a multinational force has not been an issue for U.S. soldiers. Stuart O’Brien of the Royal Australian Navy<sup>195</sup> worked under a U.N. mandate with both U.S. and U.K. sailors in 1999 before the U.K. ban was lifted. He reported that his fellow sailors knew he was openly gay and that “[t]here were no dramas whatsoever.”<sup>196</sup> He “repeatedly emphasized that focusing on common goals helped the sailors negotiate cultural differences” when differences arose between U.S. and Australian crewmembers. Moreover, despite it being well-known that O’Brien was gay – Australian colleagues asked about his male partner in front of U.S. servicemembers and made other references to his sexuality – no U.S. sailors complained or expressed any concern about working with him.<sup>197</sup>

## B. NATO

In general, NATO forces do not work as closely together as U.N. Peacekeeping forces. One study notes that “[t]he two corps in which U.S. personnel serve are multinational in name only and are clearly non-integrated.”<sup>198</sup> Personal contact between forces is limited to a small number of senior exchange officers. To the extent that troops do work together, “NATO does not set policies of any kind for its member states, but encourages standardization to promote effective military

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<sup>192</sup> Bateman and Dalvi, *supra* note 187, at 13.

<sup>193</sup> UN Peacekeeping PDT Standards, *Core Pre-Deployment Training Materials, 2nd ed.*, at 28 (2009) available at <http://www.peacekeepingbestpractices.unlb.org/PBPS/Library/CPTM%20Unit%204%20Parts%201-2%20Dec%202009.pdf>

<sup>194</sup> Michael Fleshman, *Tough UN line on peacekeeper abuses*, 19(1) AFRICA RENEWAL 16 (2005), available at <http://www.un.org/ecosocdev/geninfo/afrec/vol19no1/191peacekeep.htm>.

<sup>195</sup> Referred to at length in the above sections on Australia’s transition to open service.

<sup>196</sup> Bateman and Dalvi, *supra* note 187, at 22.

<sup>197</sup> *Id.* at 23.

<sup>198</sup> *Id.* at 8.

cooperation."<sup>199</sup> Standardization Groups ("STANAGs") work to mitigate the most extreme differences between member countries' military policies.

NATO's respect for national sovereignty requires de facto support for gay and lesbian servicemembers who serve in integrated NATO missions.<sup>200</sup> Within NATO, Norway, the Netherlands, Belgium, Spain, and Canada permit same-sex couples to marry. Nine other countries - the U.K., France, Germany, Slovenia, the Czech Republic, Denmark, Hungary, Iceland and Luxembourg - allow same-sex couples to register their partnerships and enjoy many of the same rights and obligations. Portugal recognizes unregistered cohabitation, which provides limited rights. However, no STANAGs formally address issues of gay personnel, which can be taken to indicate that U.S. soldiers serving beside openly gay forces has not been a pressing problem.

### *C. Coalition Forces in Iraq and Afghanistan*

As part of the coalition forces in Iraq and Afghanistan, U.S. soldiers have fought for years alongside troops from twenty-two of the approximately twenty-four countries that allow gay servicemembers to serve openly.<sup>201</sup> This service includes both training and combat. General Gregory S. Newbold, a vice-president at the Potomac Institute, reports that U.S. and British forces "have trained together a great deal, so that relationship is a very easy one to carry into combat."<sup>202</sup>

Importantly, no one has reported that the presence of openly gay and lesbian members of other countries' militaries has had a negative effect on the ability of U.S. troops to serve effectively.<sup>203</sup> For example, referring to gay soldiers under his command, Glenn Truitt, a former submarine officer and graduate of the U.S. Naval Academy, said "[t]he homosexual men I knew in the military were much more professional about their sexuality than the heterosexuals, if only because they had to be" to gain full acceptance.<sup>204</sup> The ability of U.S. soldiers to serve alongside openly gay and lesbian servicemembers from other countries in the Iraq war "demonstrates that the morale and cohesion of our forces is simply not affected by the presence of openly gay soldiers."<sup>205</sup>

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<sup>199</sup> *Id.* at 9.

<sup>200</sup> *Id.* at 12.

<sup>201</sup> For a list of countries in the Coalition, see <http://www.centcom.mil/en/countries/coalition>. There is some debate as to exactly which countries currently allow service by openly gay people - see <http://www.palmcenter.org/files/active/0/CountriesWithoutBan.pdf>.

<sup>202</sup> Press Release, Palm Center, *Researchers See No Problems When U.S. Troops Fight With Gay-Friendly British* at 1, May 14, 2003, available at [http://www.palmcenter.org/press/dadt/releases/researchers\\_see\\_no\\_problems\\_when\\_u\\_s\\_troops\\_fight\\_with\\_gay\\_friendly\\_british\\_zero\\_impact\\_seen\\_on\\_combat\\_capab](http://www.palmcenter.org/press/dadt/releases/researchers_see_no_problems_when_u_s_troops_fight_with_gay_friendly_british_zero_impact_seen_on_combat_capab) (hereafter Palm Center Press Release).

<sup>203</sup> Stacey L. Sobel, *The Mythology of a Human Rights Leader: How the United States Has Failed Sexual Minorities at Home and Abroad*, 21 HARV. HUM. RTS. J. 197, 204 (2008).

<sup>204</sup> Palm Center Press Release, *supra* note 202, at 2.

<sup>205</sup> *Id.* (statement by Former U.S. Rep. Martin Meehan, a Massachusetts Democrat and at the time a senior member of the House Armed Services Committee).

## **X. RECOMMENDATIONS FOR THE UNITED STATES**

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Drawing from the practices and policies of Australia, Canada, Israel, and the United Kingdom, the following four recommendations are aimed to facilitate a smooth transition to open service in the United States:

### *A. Educational and Training Programs*

Programs on equality education and training proved vital to most of the countries in a successful transition to open service and would likely do so in the U.S. Training programs that address sexual orientation could form part of general equality training programs that already target gender, race, religion, and age discrimination. These programs should be made mandatory for all service personnel to address clearly and comprehensively the need for fair treatment throughout the armed forces, regardless of servicemembers' sexual orientation. In addition to this general programming, a more specialized educational program on sexual orientation discrimination and the issues faced by gay and lesbian service personnel could be administered to managerial and supervisory personnel.

### *B. Anti-Discrimination Policies*

The successful integration of gay and lesbian servicemembers into the U.S. armed forces will depend in part on how secure these servicemembers feel in the performance of their duties vis-à-vis other servicemembers. Anti-discrimination policies are essential to ensure that gay and lesbian servicemembers are treated equally. All service personnel, irrespective of their sexual orientation, should have access to a complaints mechanism when a breach of the anti-discrimination policy occurs. In addition, to ensure that the anti-discrimination policy is implemented on the ground, army units at the battalion level upwards should have an Equality Adviser. The Equality Adviser would be the first point of contact for a discrimination complaint.

### *C. Sexual Harassment Policies*

The armed forces already have policies against inappropriate conduct, including sexual harassment. As long as these policies apply equally to all members without regard to sexual orientation, they do not require revision. If they refer to the sexual orientation of parties, these policies should be revised to focus on the inappropriate act, rather than the sexual orientation of the party committing the act.

### *D. Gay Pride Activities*

Since the armed forces have traditionally excluded gay and lesbian servicemembers, there could be cultural barriers in the forces to integration of these servicemembers. By taking measures such as supporting gay pride events, encouraging lesbian and gay affinity groups within the military, and engaging with the media in welcoming gay and lesbian servicemembers, the armed forces can facilitate this integration.

## **XI. CONCLUSION**

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The overwhelming weight of our evidence points in one direction. Even though some concerns existed over allowing gay and lesbian soldiers to serve openly in the countries reviewed here, they were and continue to be effectively addressed. Through meaningful education and training programs, strong anti-discrimination policies, and clear reporting measures, the fears espoused by those opposed to lifting the ban, including, for example, loss of unit cohesion or military readiness, never came to pass. Not only were these fears unfounded, but even more compellingly, the experiences of our allies show that allowing open service increased the morale and military performance of those gay and lesbian servicemembers previously forced to hide their sexual orientation and likewise enhanced the performance of their military friends and colleagues.