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Publication Date

2002-05-01

**THE EFFECT OF SODOMY LAWS ON LIFTING THE BAN ON HOMOSEXUAL PERSONNEL:
THREE CASE STUDIES**

MAY, 2002

BY

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ABSTRACT:

This study examines the impact of active sodomy laws on the elimination of bans against homosexual personnel in three different contexts. In each case, a ban against homosexual service was lifted while sodomy laws were still in effect. In two instances—those of Australia and South Africa—sodomy laws were overturned within a few years of the elimination of bans on gay and lesbian personnel in the Australian and South African Defence Forces. In one instance—the Miami Beach Police Department—the state sodomy law has remained in effect long after gays and lesbians have been allowed to serve openly. The evidence clearly suggests that in these two foreign militaries and in a domestic police department, homosexual personnel were successfully integrated into either police or military service despite the existence of an active sodomy law when each respective ban was lifted.

INTRODUCTION:

Among the various rationale offered for continuing the ban against gay, lesbian, and bisexual service members in the U.S. armed forces, is the claim that active sodomy laws in many states, as well as the prohibition against sodomy in military law, make the integration of homosexuals into the armed forces problematic (National Defense Research Institute 1993, 9; Ray 1993, 91-92; Wells-Petry 1993, 136). On its face, the proposition is illogical because many state laws and the sodomy provision of the Uniform Code of Military Justice prohibit “unnatural carnal copulation” with members of the same or *opposite* sex (Uniform Code of Military Justice, Article 125). Yet even if one were to grant that laws prohibiting homosexual and heterosexual sodomy alike were more often targeted at homosexuals, the proposition that existing sodomy laws would have a negative impact on lifting the ban on homosexual service members is still an unproven assertion. This study examines the evidence from two foreign militaries and one American police department to determine the effect of sodomy laws on the elimination of bans against gay and lesbian personnel. In each case, lifting the ban against gay and lesbian personnel occurred when sodomy laws were still in effect. In two cases, sodomy laws were overturned within a matter of a few years after lifting the service ban. In one case, the sodomy law is still on the books and may remain in effect for some time to come. In all three cases, lifting the ban against gay and lesbian personnel occurred successfully despite the fact that anti-sodomy laws were in effect when the ban was eliminated.¹

¹ This study was funded by the generous support of the Richard Nathan Anti-Homophobia Trusts.

I. AUSTRALIA:²

From 1986 to 1992, the Australian military formally prohibited the participation of known homosexuals in the Armed Forces. Before 1986, the Australian Defence Force (ADF) had no formal policy on homosexual service members, and recruits were not asked about their sexual orientation (General Accounting Office, 1993). While no formal policy existed, however, informal procedures were in place such that personnel suspected of homosexual behavior were usually removed from duty (Agostino 2000). ADF officials pointed to state and federal sodomy laws to justify the removal of homosexual personnel (Croome 1992, 9; Livingstone 2000).

In the 1980s, broad legal changes in Australia undermined the informal procedures that the ADF had adopted to handle homosexuality among service members. Specifically, state and national governments repealed anti-homosexual laws and began to enact anti-discrimination measures. As a result, the ADF, no longer able to use territorial laws to support discriminatory practices against homosexuals, was required to draft its own formal policy on homosexuality. In September of 1986, the ADF issued a written policy which formalized its longstanding informal procedures barring homosexual personnel from service (Croome 1992; Smith 1995).

The formal policy had not been in effect for long when the rationale of the ADF ban began to be questioned. Some of these criticisms were broad complaints about equality of opportunity within the military and racial, ethnic, and gender diversity in the service (Smith 1995). The legitimacy of the ADF ban was further weakened by the adoption of a human

² This section relies heavily on research conducted by Jason McNichol and Aaron Belkin. See Belkin and McNichol, *The Effects of Including Gay and Lesbian Soldiers in the Australian Defence Forces: Appraising the Evidence*.

rights plank in the International Convention on Civil and Political Rights (ICCPR). Provisions barring discrimination based on sexual orientation were not articulated in explicit terms, but part of the “spirit” of the law, according to Human Rights Commissioner Chris Sidoti (Sidoti 2000).

In 1990, a servicewoman filed a complaint with the Australian Human Rights and Equal Opportunities Commission, claiming that she was discharged from the ADF because she was a lesbian. The complaint was a serious challenge to ADF policy. Some believe that it was a catalyst which prompted the ADF to review its anti-homosexual policy (UK Ministry of Defence 1996, H1-1; Smith 1995, 544; Croome 1992, 10). The Government formed a special committee to investigate and make recommendations. In September of 1992, this committee urged an immediate repeal of the ban on gay and lesbian personnel (Agence France Presse, 18 September 1992). Two months later, the Government followed the recommendation, voting to end the ban. While the Defense Minister and the Service Chiefs remained steadfast in their opposition to homosexual service, the Attorney General, the Health Minister, and the Prime Minister all supported lifting the ban. Prime Minister Paul Keating ordered that the policy change be immediately implemented in the entire ADF (Agence France Presse, 23 November 1992; United Press International, 23 November 1992; Reuters, 24 November 1992).

The government replaced the policy barring homosexual service with a general instruction on “sexual misconduct policy.” The new policy prohibited unacceptable conduct without making a distinction between homosexuality and heterosexuality. Behavior would be considered unacceptable under the policy, then, if it negatively impacted group cohesion or command relationships, exploited subordinates, or somehow dishonored the armed services (Smith 1995, 545). Threatening sexual behavior, for example, was illegal under the policy

regardless of whether it was homosexual or heterosexual in nature. The introduction of the Defence Instruction on Discrimination, Harassment, and Sexual Offenses, Fraternisation and Other Unacceptable Behavior in the Australian Defence Forces was accompanied by new programs and training courses which explained and supported the new policy.

A study conducted by the Center for the Study of Sexual Minorities in the Military in 2000 found that the elimination of the ban on gay personnel in the ADF did not have negative effects in terms of troop morale, combat effectiveness, recruitment and retention, or other measures of military performance. The policy change was positively evaluated by military officials, commanders, and scholars as contributing to equal opportunity and improving working relationships within the ranks. The new policy was not found to be disruptive to the military overall—officers and enlisted personnel had uneventfully come out to their fellow service members; recruitment and retention rates were unaffected by the new policy. At the time of Belkin and McNichol’s study, it appeared that gender integration posed greater challenges for the ADF than the integration of homosexual personnel (Belkin and McNichol, 2000).

The Australian military successfully integrated gays and lesbians into the ADF several years before sodomy laws were fully eliminated in Australia. Tasmania, one of Australia’s six states, retained its sodomy law until 1997. In 1991, Nick Toonen, a gay resident of Tasmania, filed a complaint about the sodomy law with the United Nations. He argued that the sodomy law “constituted a threat to his life and liberty, violated his privacy and led to constant vilification and threats of physical violence.” In March of 1994, the U.N. Human Rights Commission agreed with Toonen and called on Australia to repeal this law. The Federal Government responded by drawing up legislation to override the Tasmania law. But the

government of Tasmania refused to repeal the law and it remained on the books until May of 1997. While police in Tasmania were increasingly reluctant to use the law to prosecute homosexuals as time went on, there were 46 criminal convictions for sodomy in Tasmania after 1976. Both men and women were convicted under the statute; punishment ranged from monetary fines to prison sentences up to 2 _ years long (Wallace 1994, 4; and IGLHC 1997).

Despite the fact that supporters of the ban pointed to sodomy laws as justification for the anti-homosexual policy, Tasmania's ongoing sodomy law appears to have had very little effect on the lifting of the ADF's ban on gay personnel. Tasmania's law was mentioned during the debate surrounding gays in the Australian military, but mostly by those who wanted the law repealed, according to military scholar Hugh Smith (Smith 2001). Moreover, states David Allen of Australia's GayLawNet, military and defense establishments come under federal law whilst sodomy laws were state laws and so irrelevant in so far as conduct in the military was concerned (Allen 2001). But even barring this distinction, Smith asserts that the Tasmanian law was rarely used. To summarize, the lifting of the ban was a successful policy before Tasmania repealed its sodomy law, and it continued to be an effective policy after the sodomy law was finally eliminated. According to Hugh Smith, the whole question of gays in the Australian military "has disappeared." The ADF is much more preoccupied, according to Smith, "with issues [of] heterosexual harassment and ... the proposal for women in ground combat" (Smith 2001).

II. SOUTH AFRICA:

During the Apartheid era, lesbian and gay South Africans were prohibited from service in the permanent military force.³ Military policy stated that homosexuality was a “behavioral disorder” that undermined discipline, exposed soldiers to the possibility of extortion and created security risks. A 1982 policy directive by General Vilgoen, Head of the Army, stated that “All possible steps must be taken to combat the phenomenon of homosexuality or lesbianism in the Army” (Lewin 2001). If an applicant for the permanent force exhibited a tendency towards homosexuality during the application process, that process was to be suspended (Kotze 2001). Suspected homosexuals already in the force were to be investigated and either discharged or referred for psychological/medical treatment. In some instances, according to a report by the Aversion Project, such treatment included electric shock therapy, hormonal treatment, and even sex-change operations and chemical castration (performed without informed consent). Such human rights abuses against gays and lesbians in the SADF have only recently come to light and were the subject of a large scale investigation by the Aversion Project (Lewin 2001, van Zyl 1999, Harvey 2000, Mail and Guardian 2000).⁴

The political and social processes that brought an end to the system of Apartheid in South Africa brought dramatic changes for gay and lesbian South Africans as well. Gay rights organizations such as the National Coalition for Lesbian and Gay Equality (NCLGE) had a fairly close relationship with the African National Congress, according to Evert Knoesen of the

³ According to Lindy Heinecken, “This policy pertained only to permanent force or service volunteers, not to conscripts as it was believed that ‘claiming’ to be gay would be used to avoid national service. Thus, gay conscripts has to be accommodated, but were not appointed in leadership positions or posts where they had access to sensitive information. The general trend was to place such persons in ‘more suitable posts’ such as catering or as medical orderlies.” (Heinecken 1999).

⁴ A complete version of the Aversion Project’s investigation into human rights abuses against gays in the SADF can be found at www.mask.org.za/Sections/AfricaPerCountry/southafrica/aversion.html.

Lesbian and Gay Equality Project (Knoesen 2001).⁵ The ANC formally recognized gay and lesbian equality in 1992 and that policy became part of the interim Constitution adopted in December 1993. When a final version of the new Constitution was adopted in May of 1996, it explicitly prohibited discrimination based on sexual orientation (Palmberg 1999, 272-3).

While the new Constitution was being created, the South African Defence Forces (SADF) began a comprehensive review of many of their policies. The National Coalition of Lesbian and Gay Equality formed a consortium to lobby the Department of Defence for a variety of changes. NCLGE allied itself with the trade union movement, for example, and lobbied for workers rights within the defense forces.⁶ The consortium also lobbied for the lifting of the military's ban on gay and lesbian personnel (Knoesen 2001).

In response to such lobbying as well as to the constitutional changes then underway, the SADF formally issued a policy in 1996 which stated that "the SADF shall not discriminate against any members on the grounds of sexual orientation." According to this policy, recruitment and promotion decisions were to be made without reference to sexual orientation, and the SADF stated that it was not concerned with the sexual behavior of any of its personnel so long as such behavior was lawful and did not affect cohesion or morale. Scholar Lindy Heinecken writes that the policy maintains that "any sexually atypical or immoral behavior that could detrimentally affect *esprit de corps* or morale . . . or affect . . . military discipline or effectiveness is subject to disciplinary action." But this policy applies equally to heterosexual and homosexual behavior (Heinecken 1999).

⁵ NCLGE is now called The Lesbian and Gay Equality Project. At the time of this interview, Knoesen was the Equal Rights Project Coordinator.

⁶ At that time, military personnel were excluded from labor legislation.

In 1999, Heinecken's assessment was that the right of gays and lesbians to serve in the South African military was a "silent right" because so few gays in the military had come out. But Evert Knoesen of the Lesbian and Gay Equality Project, assessing the situation more recently, asserts that a significant number of gays and lesbians in the SADF have come out and have subsequently advanced in their careers. In contrast to the Apartheid era, gays and lesbians have begun to perceive of military service as a career option, and new recruits are more open about their sexuality than in the past (Knoesen 2001).

The SADF has taken several steps to implement the new policy on gays and lesbians in the armed services. Initially, the Department of Defence revised the Military Discipline Code to "ensure that there [were] no clashes with the Constitution" (Brummer 1996). In 1998, the Department of Defence created its own policy on equal opportunity and affirmative action, "taking its cue from the stipulations of the Constitution" (Kotze 2001). The senior officer responsible for equal opportunity and the head of a gender unit were charged with handling all policy matters relating to gays and lesbians within the Department of Defence (Evans 2001). The SADF has just recently completed a large survey of attitudes and perceptions towards gays and lesbians within the military. The results of that survey indicate that gays and lesbians may still suffer some discrimination within the military. As a result, the Department of Defence is now in the process of drafting a more specific policy on sexual orientation. The intention of the new policy will be to eliminate remaining vestiges of discrimination towards homosexuals in the SADF.

But generally sources indicate that the results of lifting the ban have been very positive. Colonel Kotze, Senior Staff Officer for Equal Opportunity, asserts that there has been improvement in attitudes towards lesbians and gays in the military in recent years (Kotze

2001). Heinecken reports that in the South African military (as in the United States) commanders found that gay service members conducted themselves professionally and “their sexual preference did not detract from their ability to perform their work successfully” (Heinecken 1999). Lewin reports that “recent informal discussions with gay and lesbian permanent force members indicated that they feel much more comfortable now that they are protected” (Lewin 2001). Finally, Knoesen asserts that lifting the ban has had no impact whatsoever on ‘mission readiness’—a term that covers cohesion, morale, recruitment, and performance.

The South African military formally lifted its ban against gay and lesbian personnel two years before its sodomy law was overturned in court. Prior to 1998, South Africa had harsh sodomy laws. Sodomy was a Schedule 1 offense—like rape and murder—and punishable by life imprisonment (McNeil 1998).⁷ And, in contrast to the situation in the United States, the South African sodomy laws were not just symbolic statements of anti-gay prejudice.⁸ Into the early 1990s, there were up to 200 sodomy convictions per year in South Africa. While sodomy laws were less regularly enforced in the post-Apartheid era, the last sodomy conviction occurred in 1996. That conviction led to the court case *NCLGE v. Minister of Justice* (Knoesen 2001). To the surprise of the NCLGE, Justice Minister Dullah Omar upheld the sodomy law (McNeil 1997). But then, in 1998, the High Court ruled that the sodomy laws were unconstitutional (McNeil 1998, Albertyn, 1998).⁹

⁷ The same ruling struck down Section 20A of the Sexual Offenses Act, “which outlawed any behavior ‘at a party’—defined as any gathering of two or more men—that led to sexual gratification.” McNeil, 1998.

⁸ By stating that American sodomy laws are primarily symbolic, I do not mean to negate the fact that they are occasionally enforced, as in the *Bowers v. Hardwick* case.

⁹ For the full text of the judgment, see www.concourt.gov.za/judgments/1998/gayles.pdf.

As in the Australian case, experts agree that the sodomy law had virtually no impact on the lifting of the ban against gays and lesbians in the South African military. Theoretically, Knoesen asserts, it was possible that a soldier convicted of a sodomy offense could be expelled from the military after the ban on homosexual personnel had been lifted. But this did not occur and the sodomy law remained a non-issue in the South African context (Knoesen 2001).

III. POLICE DEPARTMENTS IN THE U.S.: MIAMI BEACH, FLORIDA

In the 1980s and 1990s, numerous police departments around the country lifted bans that had prohibited gay and lesbian officers from serving. Some departments drafted anti-discrimination policies that included sexual orientation. In 1993, Paul Koegel studied six departments around the country that had implemented such non-discrimination policies. While American police departments are different from the U.S. military in some aspects, there are also many points of similarity. Koegel noted that police departments share the following characteristics with the U.S. military: Hierarchical organization; high levels of risk; occupations defined as public service for public safety; and, finally, individuals worked as team members and wore uniforms (Koegel 1996, 133).

In the police departments that he studied, Koegel found that allowing gay and lesbian officers to serve openly was not very disruptive to unit cohesion and performance. Very few officers came out, but those who did were usually socially accepted. “When they were not,” Koegel writes, “social disruptions did not interfere with [officers] doing their jobs” (Koegel 1996, 139). Koegel found that gay officers were “sensitive to the climate in which they worked,” and behaved “in ways that [were] designed neither to shock nor to offend” (Koegel 1996, 140). Finally, Koegel found that while there were some incidences of hostility towards

gay and lesbian police, that hostility was mitigated by interaction, by the fact that gay officers tended to be overachievers, and by an atmosphere of professionalism where individuals thought of themselves as officers first, and as gay or straight second (Koegel 1996).

The findings of Koegel's national study closely parallel the situation in the Miami Beach Police Department, a department which exists in a state with an active sodomy law. In the early 1990s, as a result of concerns about police entrapment, a gay political organization in Dade County, Florida initiated a series of meetings with the Miami Beach Police Department. At that time, the department had a new chief who was receptive to the concerns of the gay and lesbian community. Members of Miami Beach's gay community were invited to conduct sensitivity training with police officers; the chief appointed a liaison to the gay and lesbian community; and, finally, the community worked with the department to draft a non-discrimination policy. The police department's non-discrimination policy was in place before the city of Miami Beach had added sexual orientation to its own human rights ordinance, and members of the police department testified about the success of the policy when the city was considering broadening its ordinance to include sexual orientation (Burhke 1996, Officer 2 2001).

Resistance to the Miami Beach Police Department's new policy was mitigated by the Chief's support for the new policy. "He was tough and demanding," one officer commented, and some "people have had to change their thinking" on the issue. The policy has not led to mass disclosures in the department. Currently, only two officers are out in the department. There have been moments of tension in the department—one was when some Miami Beach officers (both gay and straight) went to Washington, D.C. to participate in the 1993 March on Washington (for gay and lesbian equality). The officers received press in local papers and

some officers felt the incident reflected poorly on the department. One officer describes this moment as a time when she was “crushed” by the way in which her fellow officers handled the issue of gays and lesbians on the force (Officer 2 2001).

But there have been other moments when she has been “elated.” When she (an out lesbian) had cancer, her co-workers donated over 1000 hours of sick leave to her. She adds that there is an HIV-positive officer in the department, and there is “no one who wouldn’t run to help him out.” When a local attorney initiated a campaign to get the HIV-positive officer off the street, the police union supported the officer (Officer 2 2001). Another out gay officer describes the environment in the Miami Beach Police Department as “very good” for gay and lesbian officers. Echoing Koegel’s finding that gay and lesbian officers are generally sensitive to their work environments, this Miami Beach officer adds that “gays and lesbians must help create an environment for themselves that is positive” (Officer 1 2001).

According to this officer, the only impact of the department’s anti-discrimination policy on department cohesion, recruitment, performance or morale has been positive. It has “made other officers aware of discrimination” based on sexual orientation, he explained (Officer 1 2001). When asked about the impact of the department’s policy on gay officers on cohesion, morale, and performance, another officer said simply, “When it comes to doing a job, people do it” (Officer 2 2001). Across the state, notes the President of Florida LEGAL, Florida’s association of gay and lesbian police officers, “gay and lesbian officers consistently achieve above-average performance” and are respected as good officers by their peers (Newby 2001).

Miami Beach allows its gay and lesbian officers to serve openly despite the fact that Florida is a state with a sodomy law. It is not exceptional in this regard. 16 states still have sodomy laws on the books, and virtually every major city in the country now allows gay and

lesbian officers to serve (ACLU 2001, New York Times 1992).¹⁰ Some police departments in states with sodomy laws go further in actually recruiting gay and lesbian officers. [Pheifer 1994, The Plaindealer 1993]. When a deputy with the Orange County, Florida Sheriff's Department was fired for being gay in the early 1990s, the sheriff's office used the existence of the state's sodomy law as a justification (Wolfson and Mower 1994).¹¹ But despite its use to justify employment discrimination in this instance, the Florida sodomy law is almost never used. One Florida Police Chief (who is particularly sensitive to gay and lesbian issues) was not even aware that the state still had such a law (Chief 2001). All parties interviewed agree that the sodomy law has had "absolutely no impact" on the implementation of the policy allowing gays and lesbians to serve openly, either in Miami Beach or other in other Florida police departments that have lifted their bans. The sodomy law "has never been raised as a consideration," concluded one Miami Beach officer (Newby 2001, Officer1 2001, Officer 2 2001, Chief 2001).

IV. CONCLUSION:

In the American context, some have argued that the existence of state and military sodomy laws bolsters the ban against homosexual personnel in the U.S. military. Yet from either a practical or a legal standpoint, sodomy laws have no bearing on this issue. As in

¹⁰ Kansas, Missouri, Oklahoma, and Texas all have same-sex sodomy laws; Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah, and Virginia all have laws which prohibit same and opposite sex sodomy. The status of sodomy statutes in Massachusetts (same and opposite sex), Michigan (same and opposite sex), and Missouri (same sex only) is currently unclear (ACLU 2001).

¹¹ "The Court implicitly rejected such arguments (as well as the implication that private consensual sexual conduct could be criminalized), and found that the anti-gay discrimination violated the state constitutional right

Australia, state sodomy laws have little meaning for the U.S. military, which is governed by federal law. Moreover, 11 of the 16 remaining state sodomy laws apply equally to heterosexual and homosexual sex (ACLU 2001). This is also true of the sodomy provision in the Uniform Code of Military Justice (UCMJ).¹² And studies show that at least 75% of heterosexuals engage in oral sex, conduct also prohibited by the UCMJ (Jacobson, 54). Thus, in the U.S. military and in all but 5 states, sodomy statutes are no more relevant to homosexual than to heterosexual conduct. The notion that sodomy statutes somehow support the ban on homosexual personnel in the military is erroneous.

But even more to the point, the three cases examined above demonstrate that it is entirely possible to lift bans on homosexual personnel while sodomy laws are still in existence. Consider that bans against gay personnel were lifted: 1) In Australia, where sodomy statutes were (as in the US) seldom enforced; serving predominantly as symbolic statements of anti-gay prejudice; 2) in South Africa, where sodomy statutes were enforced and where lifting the ban was a radical change that occurred within a military institution with a virulently homophobic past; and 3) in an American police department in a Southern state with a sodomy law that had been recently used against a gay officer, where change in departmental policy preceded broader changes in municipal policy towards gays and lesbians, and where the state's sodomy law is still on the books with no evidence that it will be overturned in the near future. These three vastly different contexts, then, provide clear and convincing evidence that sodomy laws have had no impact whatsoever on the lifting of bans against gay and lesbian personnel.

to privacy. Ultimately, after a four-year struggle, the deputy won his job back.” Fordham Urban Law Journal, page 1035.

¹² The Cox Commission (sponsored by the National Institute of Military Justice) recently recommended that the military repeal the sodomy statute of the UCMJ. See press release from the Servicemembers Legal Defense Network at www.sldn.org/templates/press/record.html.

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