

December 17, 2007

The Honorable Robert M. Gates
Office of the Secretary
U.S. Department of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000

Dear Dr. Gates:

I write on behalf of the American Psychological Association and its more than 148,000 members and affiliates to request the establishment of policy by the Department of Defense regarding psychotherapist-patient privilege in administrative separation proceedings on the basis of homosexual conduct. On October 7, 1999, the White House issued Executive Order 13140, which called for the Manual for Courts-Martial to be amended to add, among other items, the following provision:

Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

We request that the Department of Defense amend the administrative separation policies on the basis of homosexual conduct (including, but not limited to, those in DEP'T OF DEFENSE DIRECTIVE 1332.14, Enlisted Administrative Separations, and DEP'T OF DEFENSE DIRECTIVE 1332.40, Separation Procedures of Regular and Reserve Commissioned Officers) to apply this rule, and its accompanying definitions, to administrative separation proceedings on the basis of homosexual conduct, as well as Courts-Martial proceedings. Evidence revealed during confidential communication between a patient and her or his mental health provider is no more appropriate in an administrative proceeding than in a criminal proceeding, and use of such evidence is a violation of the clearly recognized right to a psychotherapist-patient privilege.

This recommended change and clarification in policy is not unprecedented; several comparable policies are already in place. For example, the Department has a policy holding that statements about sexual orientation made in personnel security interviews may not be used for the purposes of administrative separation (*See, e.g.* MEMORANDUM FOR SECRETARIES OF THE MILITARY

DEPARTMENTS ASSISTANT SECRETARY OF DEFENSE FOR COMMAND, CONTROL, COMMUNICATIONS AND INTELLIGENCE, Subject: Implementation of “Policy Guidelines on Homosexual Conduct in the Armed Forces” in Personnel Security Investigation and Adjudication, para. 4; EXECUTIVE ORDER 12968, part 3 section 3.1). In addition, other privileges such as attorney/client (*See, e.g.* ARMY REGULATION 27–26, Legal Services, Rules of Professional Conduct for Lawyers, Rule 1.6), and clergy/penitent (*See, e.g.*, AIR FORCE MANUAL 52-103, *Chaplain Service Readiness Manual*, attachment 10; Manual for Courts Martial, part III, para. 503(b)(2)) have been extended to the administrative context. The Department also has policies to protect information regarding HIV status gathered during epidemiologic assessment interviews (*see, e.g.*, DEP’T OF DEFENSE INSTRUCTION 6485.01, para. 6.5) and information provided in the psychotherapeutic context by victims of sexual assault (*See, e.g.*, DEP’T OF DEFENSE MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS, ET AL., March 16, 2005, Subject: Confidentiality Policy for Victims of Sexual Assault (JTF-SAPR-009); DEP’T OF DEFENSE DIRECTIVE 6495.01, para. 4.6).

In addition, confusion exists as to the role of psychologists in enforcement of the Departmental policy on homosexual conduct. In April 1998, the Department issued a report entitled *Review of the Effectiveness of the Application and Enforcement of the Department of Defense’s Policy on Homosexual Conduct in the Military*, which said that “We found that none of the Services require health care professionals to report information provided by their patients unless, in the judgment of the health care professional, it is necessary to do so...” However, reports abound of psychotherapists who are unclear on their rights and responsibilities, with some believing they are required to report such disclosures, while others understand that they are required to keep them confidential. We recommend that the Department clarify its policies (including administrative separation policies) to make clear that psychologists and their assistants are barred by a psychotherapist-patient privilege from disclosing statements about sexual orientation made in health and mental health settings. Possible language that the Department could consider is as follows:

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient’s mental or emotional condition. Therefore, psychotherapists or an assistant to the psychotherapist shall not report information obtained in the context of a health care relationship about a service member’s sexual orientation to the command, or for purposes of initiating administrative separation.

The perception of confidentiality between patients and mental health professionals is crucial to a climate in the military that encourages service members to seek appropriate health and mental health treatment. This change would improve access to mental health services for all service members. Under current policy, service members may be afraid to discuss their sexual orientation with their therapist or the therapist may be afraid to ask the client about his or her sexuality, thus impeding the provision of basic health care to service members.

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Furthermore, the establishment of the policies recommended above would alleviate ethical and professional conflicts for psychologists and other professionals. Private, confidential conversations between a health care provider and a patient are not conversations that the law on homosexuality and military service were designed to prevent. However, an unclear policy puts psychologists in jeopardy of severe ethical dilemmas that will hamper their professional performance.

Thank you for your consideration of this issue. The American Psychological Association looks forward to working with you to ensure the adoption of these changes that are critically necessary to the effective provision of mental health services to our service men and women. Please do not hesitate to contact Dr. Clinton Anderson with our APA Public Interest Directorate at (202) 336-6037 or canderson@apa.org, if you have any questions or would like any additional information.

Sincerely,

Sharon Stephens Brehm, PhD
President

CC:

The Honorable David S. C. Chu, PhD
Under Secretary for Personnel and Readiness

The Honorable Michael L. Dominguez
Principal Deputy Under Secretary for Personnel and Readiness