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Where We Are Today—Current Policies and Procedures

This chapter provides an overview of current DoD and Service policies and programs that address or have direct relevance to sexual assault. Appendix D provides a list of relevant policies. Specific policies can be accessed by hyperlink.

Following enactment of the Victim and Witness Protection Act of 1982, Victim and Witness Assistance policies were established across DoD to assist victims of crime through investigation, prosecution and confinement of the offender. Guidance requires that particular attention be paid to victims of serious, violent crime, including sexual assault. All of the services have policies and procedures for implementing Victim Witness Assistance Program (VWAP) requirements. Officers and employees engaged in the detection, investigation and prosecution of crime and in the confinement of offenders ensure that victims are accorded their rights under federal law. These include rights to:

- ❑ Be treated with fairness and respect for dignity and privacy.
- ❑ Be reasonably protected from the offender.
- ❑ Be notified of court martial proceedings.
- ❑ Be present at all public court proceedings unless the court determines that testimony by the victim would be materially affected.
- ❑ Confer with the government attorney.
- ❑ Receive available restitution.
- ❑ Be provided information about conviction, sentencing, imprisonment, and release of the offender.

Specific policies relating to sexual assault have not been promulgated for DoD-wide application. Joint Commands rely upon their Service Executive Agents to develop and implement sexual assault policy and to provide services for victims assigned to these commands.

The Department of the Navy (DON) has published Navy-wide policies requiring a standardized sexual assault prevention and victim assistance program. For the purposes of this chapter, DON refers to Secretary of the Navy requirements that apply to both the Navy and Marine Corps. Policies are implemented through a stand-alone program in the Navy, the Sexual Assault Victim Intervention Program (SAVI), and through provision of specialized victim advocacy and assistance to sexual assault victims within the Marine Corps Family Advocacy Program (FAP).

Prevention

Currently, DoD has no policy requiring a standard approach in preventing sexual assault. However, the UCMJ requires each enlisted member be briefed on the UCMJ, including the articles on sexual assault upon entrance on active duty, after 6 months, and upon re-

enlistment. The Army currently requires sexual assault awareness and response training for Drill Sergeants and Initial Entry Training soldiers. The Air Force includes rape awareness, reporting, and prevention information in basic training and officer training, commander's courses and at the First Sergeant's Academy. DON requires sexual assault awareness and prevention programs at both junior and senior levels and at key career progression points for officers and enlisted.

Navy implementation includes:

- ❑ Annual mandatory general military training (GMT) that is coordinated or implemented at the installation or command level by SAVI-designated staff.
- ❑ Dissemination of sexual assault related video and/or briefing materials by Naval Education and Training Command.
- ❑ Special emphasis on personal avoidance of risk and incorporation of sexual assault awareness into Navy substance abuse prevention education.
- ❑ Commanding officers are required to institute and publicize a means of informing the chain of command of situations that may place individuals at risk of sexual assault.

Marine Corps implementation includes:

- ❑ Annual follow-on training to E1-E7, O2-O3 and WO1-CWO2 during unit battle skills training.
- ❑ Sexual assault briefings by victim advocates to commands upon request that include information on myths, risk factors, and referral services.
- ❑ Sexual assault reporting and prevention briefings to all incoming Marine Corps Commanders (O-5 and O-6), using multi-disciplinary briefers.

While standardized prevention programs are not specifically required by the Air Force, sexual assault prevention efforts may be addressed at the installation, major command (MAJCOM) or service level through a multidisciplinary group known as the Integrated Delivery System (IDS). At the installation level, the core IDS is composed of representatives from Family Advocacy Programs, Life Skills (behavioral health), medical, chaplains, family support, child and youth programs, and health and wellness. Other representatives from security, safety, and the judge advocate's office provide support and participate as required. They report to the Community Action Information Board (CAIB), chaired by the installation commander, the Vice Commander at MAJCOM, and the Assistant Vice Chief of Staff at headquarters Air Force. The IDS and CAIB monitor the health and well being of their populations, targeting prevention and intervention services that are tailored to local community needs.

Reporting

Privacy concerns are frequently cited as a barrier to sexual assault reporting. In accordance with the Privacy Act, there are DoD and Service-level policies that govern the maintenance, storage, retrieval, and disclosure of personal information maintained in any DoD system of records. These policies state that personal information may be disclosed without the individual's consent to DoD officials who have a need to know in the performance of their

assigned duties. It should be noted that these privacy protections would apply to both a victim and an alleged offender.

While these policies do not specifically require disclosure of an alleged sexual assault to the command, both active duty and DoD civilian service providers have generally interpreted knowledge of an alleged crime to meet the threshold of a commander's need to know to maintain good order and discipline. Service members are also taught from their initial appointment or enlistment in the military that all military members should report to the chain of command any offenses that come to their attention. In the case of sexual assault, Navy SAVI-recommended protocols (for medical, family service center, victim advocate and command personnel) include notification to NCIS if a sexual assault that falls under military jurisdiction is alleged. Conversely, these protocols specifically afford a victim of sexual assault the option of reporting to civilian authorities if the assault does not fall under military jurisdiction (i.e., the assault did not occur on military property and the offender is not affiliated with the military.)

To meet requirements under the Health Insurance Portability and Accountability Act, DoD has also issued policies specific to the disclosure of protected health information. This could include care provided in military treatment facilities to victims of sexual assault. However, several exceptions could be applied that would permit disclosure of protected health information without authorization by a sexual assault victim. The policy also states that covered healthcare entities are responsible for compliance with DoD Privacy Act Program regulations that are described in the first paragraph. While disclosure of an alleged sexual assault is permitted without the victim's consent under existing DoD privacy policies, there is nothing that specifically mandates reporting if not otherwise required by law.

In the end, there is considerable latitude in DoD and Service privacy policies for different interpretation and application between individuals, organizations, and military medical departments. However, in our review of DoD and Service policies, we noted no explicitly stated mandate to report sexual assault to command unless it involves alleged child maltreatment or spouse abuse.

While DoD and Service VWAP policies afford crime victims the right to be treated with respect for their privacy, these policies do not provide victims any assurance that information will not be disclosed without their permission. Army policy specifically protects the identity of sexual assault victims in police blotter entries. Navy and Air Force policy requires commanders to be sensitive to victim privacy by expressly limiting need to know personnel and by reporting trend data without identifying information. Air Force policy provides specific guidance on how commanders and others should handle investigative material.

Information is typically viewed as confidential when it is communicated in private with the expectation that it will not be disclosed routinely to third parties without the individual's permission. Privilege provides legal protection from disclosure of communications between specified individuals. Jurisdictions vary as to which communications are considered privileged, whether the privilege extends to written communications and work product, and what exceptions may apply.

There are few regulations within DoD or the Services that assure individuals, particularly military members, that their communications will be confidential or privileged. There are several types of privileged communications recognized by the Military Rules of Evidence (MRE) that might apply when a service member reports that she or he is a victim of sexual assault. These include those made to clergy and those between a lawyer and client or between a psychotherapist and patient.

Under MRE 503 a person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a chaplain or chaplain's assistant if the communication is made as a formal act of religion or as a matter of conscience. In practice, there has been variance among the Services' Chaplains Corps and between chaplains and the legal community with respect to the application of this privilege. The DoD Chaplains Board is currently working on standardizing the application of the privilege within and across the Services and developing associated regulations. In any case, communications between chaplains and victims of sexual assault are generally considered to provide the greatest assurances of confidentiality within DoD or the Services. For victims who do not choose to disclose to military authorities, chaplains may be an avenue for getting confidential, spiritual guidance and advice.

MRE 513 provides a limited privilege with respect to communications between psychotherapists (or their assistants) and patients. Psychotherapists include licensed psychiatrists, psychologists, or clinical social workers that hold credentials to provide services in any military healthcare facility. Communications are considered confidential in cases arising under the UCMJ, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. The rule does not specify what is meant by "cases arising under the UCMJ." There are also a number of exceptions to privilege including:

- ❑ When the communication is evidence of spouse abuse, child abuse or neglect.
- ❑ When federal or state law or service regulation imposes a duty to report information contained in a communication.
- ❑ When the patient's mental or emotional condition makes the patient a danger to self or others.
- ❑ If the communication clearly contemplated the future commission of a fraud or crime.
- ❑ When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission.
- ❑ When admission or disclosure of a communication is constitutionally required.

As with DoD and Service privacy policies, there is considerable room for interpretation and application of the privilege, with no clear assurances within the military system that a victim of sexual assault may seek confidential information or assistance from a psychotherapist.

For victims of sexual assault not seeking confidential disclosure, there are numerous avenues for reporting within the military services. These include DoD and Service Inspector Generals, command, installation security, criminal investigative agencies, legal, medical, representatives, chaplains, family services, FAP and, where available within the military,

victim advocates. VWAP policy addresses the need for good coordination and communication between responders, as does the DON policy on sexual assault.

Response

Safety and Protection

Under federal law and DoD VWAP regulations, sexual assault victims have the right to be reasonably protected from the accused. This includes protection from threat, harm or intimidation from the accused or people acting in concert with or under the control of the accused. These requirements are included in Service VWAP policies, with Service-specific augments. The Air Force has detailed policy and procedures to ensure threatened airmen can be moved when a credible threat is validated. Although this is usually implemented in extreme cases, the Threatened Airman Program is a tool for command. Commanders may also impose military protective orders, arrange separate living and working conditions. Army commanders may include temporary assignment/attachment or permanent reassignment. If both the victim and accused are assigned to the same command, Navy SAVI policy instructs commanders to consider temporary reassignment of either the victim or accused until the case is legally resolved and/or the victim is out of danger and states that the victim's desires should receive preferential consideration.

As a tool for commanders, DoD has recently promulgated a standard Military Protective Order form (e.g., DD Form 2873). Under the attached Privacy Act Statement, the principal purpose of the form is to “document commanding officers’ orders and members’ understanding thereof to avoid all manner of contact with specified individuals against whom members are alleged, or are confirmed to have committed, domestic violence, child abuse, and any other crime, as stipulated in the terms and conditions of the orders.”

Care for Victims

Under federal law and DoD and Service VWAP policies, crime victims have the right to be treated with fairness and respect for dignity and privacy. Current policies require a multi-disciplinary approach by VWAP service providers including criminal investigators, chaplains, judge advocates, unit commanders, and personnel from law enforcement, corrections, family services, and the emergency department. The Services are required to ensure that providers receive training to assist them in complying with VWAP requirements. All of the services require specialized sexual assault training for specific key responders.

While all Services provide multiple avenues for supporting and caring for sexual assault victims that include medical, behavioral health, chaplains, and family services, a single program or dedicated agency to coordinate sexual assault victim care is not currently required by DoD policy. Navy SAVI policy requires installation commanders to designate a program coordinator to provide overall program management, while the Army requires the medical command to coordinate care through Sexual Assault Review Boards (SARB) at each installation. The Air Force recognized the importance of victim care and established an interim victim support liaison requirement while they assess their existing support networks.

The Navy's SAVI program has developed victim-sensitive commanders' guidelines and response protocols for chaplains, NCIS investigators, Command Duty Officers, Command

Victim and Witness Assistance Coordinators, Judge Advocates, victim advocates, and responders from medical and family services. Commanders are also required to establish procedures command personnel should take in responding to sexual assault incidents and ensure personnel receive training to execute procedures effectively.

Medical requirements and protocols pertaining to sexual assault have been promulgated in the Air Force, Army and Navy. (Medical services to Marine Corps members are provided through the Navy.) These policies typically address sensitivity to sexual assault victims, timeliness of care, collection of forensic evidence, provision of general medical care, and availability of mental health resources for victims. All military departments require written consent of sexual assault victims prior to general medical examination or collection of forensic evidence. Provision of medical care or behavioral health care is not predicated upon their participation in the criminal justice response in any of the Services. Sexual assault training requirements for medical personnel are specifically delineated in DON and the Army. The Air Force recently encouraged medical service leaders to build effective partnerships (through the use of Memoranda of Understanding) with community sexual assault agencies. Navy SAVI and Air Force policies specifically address the availability of medical services for sexual assault victims in the deployed environment.

Behavioral health services for mental health sequelae arising from or exacerbated by sexual assault are available to victims within all Service medical departments or through referral to TRICARE providers in the community. Accessibility and availability of care may be limited both in and out of the military. Concerns about mandatory reporting and lack of privacy when utilizing military services may inhibit victims from freely seeking assistance. Current record keeping policies require at least minimal documentation of military behavioral health contact in the member's medical record. DON family service centers offer brief, solution-focused counseling to victims if appropriate to their presenting status. Documentation of this counseling is separate from the medical record, although still governed by Privacy Act requirements. Navy SAVI policy requires installation commanders to identify an agency or facility to provide psychological and supportive counseling for sexual assault victims.

With respect to victim advocacy, Section 534 of Public Law 103-337, National Defense Authorization Act for FY95 (October 5, 1994) required DoD to revise policies and regulations specific to the VWAP, FAP and Equal Opportunity (EO) Program to establish victim advocate programs within each of the military departments. Under this law, victim advocate programs are required to provide assistance to members of the Armed Forces and their dependents who are victims of crime, intrafamilial abuse, and discrimination or harassment. As required, the Victim and Witness Assistance Council established by DoD is responsible for coordinating and overseeing the implementation of victim advocate programs. The military departments are directed to establish similar councils. Those working in victim advocate programs are required to principally serve the interests of a victim by initiating action to provide:

- ❑ information on available benefits and services.
- ❑ assistance in obtaining those benefits and services.
- ❑ other appropriate assistance.

The Army and Air Force do not currently have designated programs to provide advocacy for sexual assault victims and are meeting requirements through VWAP, particularly through VWAP liaison personnel. The Marine Corps provides installation civilian and volunteer advocates for sexual assault victims through the FAP. Advocates are activated by installation police and are on call 24/7, responding within 30 minutes of a report. They provide crisis intervention, emotional support, and information on and referral to support services. With the victims' agreement, an advocate will accompany them to investigatory interviews, medical exams, legal appointments, and court proceedings. Navy policy requires installation commanders to develop and implement a highly responsive sexual assault victim advocate program through the use of trained volunteers or available civilian resources or a combination of both. Afloat commands are required to have trained advocates on board and available during deployments if a civilian agency is used to provide advocacy on the installation. Assistance provided by SAVI advocates is as described for Marine Corps victim advocates.

Investigation and Prosecution

The Services require their respective military justice functions to perform in strict accord with the U.S. Constitution, the UCMJ, and implementing regulations. This includes protecting the rights of both the victim and the accused. The MCM and Chapter 3 of this report provide further discussion of the administrative, disciplinary, and judicial options available to commanders under the UCMJ.

In fulfilling this obligation, the Services are resourced with legal assets, military police, and criminal investigators, specifically United States Army Criminal Investigation Division (USACID), Navy Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). Trained investigators also exist in military police forces within all of the Services, although these assets may not be available to all commands or at all installations.

Service criminal investigative agencies are also responsible for liaison and coordination with other Federal, state, local or foreign law enforcement agencies. All Services have security force and criminal investigation regulations that detail procedures for handling criminal matters. The handling of sex crimes is described in the Services' procedural manuals. These manuals recognize the sensitivity of sexual assault and the need for specialized skills and techniques in investigating this category of crime.

In all Services, commanders are required to report allegations of serious offenses to their respective criminal investigative agency. Investigations of serious offenses like rape are typically conducted by USACID, NCIS, and AFOSI. Service and case-specific variations may occur with respect to whether less serious indecent assaults are investigated by the criminal investigative agency or referred back to the command or security force investigators.

Additionally, due to resources and other priorities, local civilian agencies may decline to initiate some investigations that the military criminal investigative agencies would be required by policy to investigate. Under current USACID, NCIS, and ASOSI investigative policies, reports of sexual assault are assigned a case number at the time the report is made, regardless

of the merits of the facts presented or when the facts of the case are ultimately determined to be insufficient to establish a crime occurred. Also, investigative databases often limit removal of a reported case from the system once it goes into the database. This results in all allegations, proven or disproved, being incorporated into the database. This process in each of the military departments should be considered in any statistical comparison of rates of incidence with civilian jurisdictions.

In prosecuting these offenses, crime victims may be compelled to testify through subpoena or military order, although this seldom occurs within the military justice system, especially in sexual assault cases. The Services recognize the sensitivity of sexual assault and do not compel an unwilling victim to participate in investigation or prosecution. Nevertheless, participation by sexual assault victims in the criminal justice process is strongly encouraged in VWAP and Service policies and practices. Service criminal investigation manuals afford victims choices with respect to their participation. These choices include options of having an advocate or other trusted person present during the interview or of submitting an initial statement in writing in lieu of interview. Processes for informing victims of how investigation and case disposition may be adversely impacted or limited if they decline to participate and procedures for documentation of their decision are also discussed. Navy protocols require all key responders to ensure that all options available to the victim with respect to their participation in the criminal justice process have been discussed

System Accountability

The responsible Inspector General assures compliance with DoD and service VWAP requirements through the inspection process. Service medical departments are accredited with respect to the provision of professional medical and behavioral health services. Services provided in family centers undergo periodic review and accreditation in the Army and DON. Navy IG, component commanders, and immediate superiors in command are also required to incorporate an assessment of SAVI requirements into their inspection programs. The Air Force IG has specifically initiated a special interest item on sexual assault deterrence and response.

All Services have specific guidelines and system accountability detailing their response to sexual assault investigations. Navy and Army policies provide for processes that specifically foster system accountability with respect to management and coordination of sexual assault response.

Commander, Navy Personnel Command is responsible for management and implementation of the SAVI Program. Navy SAVI policy also requires installation commanders to establish a SAVI Program Coordination Committee that is composed of medical, Trial Service Office, base security, NCIS, chaplain and family service representatives. The purpose of the committee is to facilitate program execution and coordination among key responders. Case-specific review/oversight is not a required function or routinely conducted in practice.

Army medical policy requires the establishment of a multidisciplinary Sexual Assault Review Board (SARB) at each installation where there is a medical command. The SARB is required to meet quarterly and is composed of representatives from clinical services, emergency medicine, nursing, social work, pathology, obstetrics and gynecology, patient administration,

staff judge advocate, USACID, military police and the chaplains. Responsibilities of the SARB include case review to assess handling and disposition of each case relevant to required medical protocols, annual review, and approval of sexual assault protocols, and a determination of needs and provision of sexual assault awareness training for medical personnel.

With respect to command reporting and accountability, all of the Services have special incident reporting requirements that require commanders to report serious crimes such as sexual assault to the chain of command. DoD also requires the Services to collect and forward statistical information on criminal incidents for which the military has exclusive jurisdiction or military authorities coordinate with civilian authorities. Forwarded data is maintained centrally within the Department of Defense in the Defense Incident Based Reporting System (DIBRS). System requirements were originally developed to meet uniform federal crime reporting requirements, but have evolved over time to meet additional statutory requirements and to respond to internal and external requests for statistical data on criminal offenses and other high-interest issues within DoD.

DIBRS is structured to collect administrative, offense, property, victim, offender/arrestee, commander's action, results of trial and corrections data. DIBRS requires data to be submitted in five functional areas including law enforcement, criminal investigations, commander's actions, judicial functions, and corrections. Current reporting in all five functional areas is variable across the services. None of the services are transmitting to DIBRS across all five functional areas, although a Service's functional database may be fully operational.

Separate from DIBRS requirements and systems, the Navy and Marine Corps are required to maintain integrated, victim-focused databases to analyze demographic, victim support and offense and disposition trends, and to evaluate and develop effective programs and assess command climate with respect to identification and prevention of sexual assault. Data submission in the Marine Corps has been the responsibility of the Marine Corps' victim advocates, with input from key responders. Within the Navy, commanders have been required to meet sexual assault reporting requirements since 1998 by including SAVI required data elements in special incident reporting message traffic. A Situation Report (SITREP) is required within 24 hours of report for any alleged sexual assault. Continuation reports are required on a monthly basis to provide new, revised or previously missing information, until a final message is forwarded that reports official resolution of the case. Data forwarded does not include personal identifiers of the victim or accused.