

**Supplemental Information Provided to Response Systems Panel on Sexual Assault on
Department of Defense Victim and Witness Assistance
Lt Col Ryan Oakley, Deputy Director, Office of Legal Policy, Personnel & Readiness
(OUSD(P&R))**

Thank you for the opportunity to appear before the Response System Panel Victim Services Subcommittee on January 9, 2014, to discuss the Department of Defense's policy concerning crime victims' rights and enforcement. The following supplemental information is provided to answer questions raised by the Subcommittee.

I. Consultation between the Victim and Government Counsel

The Subcommittee asked how the Department interprets the right of the victim in accordance with the Federal Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, to consult with an "attorney for the government," in light of the role of the convening authority in the military system. Chiefly, how does the victim interface with the convening authority upon disposition of charges?

Based on Department of Defense policy, consultation with the victim occurs directly with the Government trial counsel assigned to the specific case, under the supervision of the installation staff judge advocate (SJA) or regional legal services office responsible for court-martial prosecution¹ The SJA or Government trial counsel provides legal advice to the Special Court-Martial Convening Authority on all charging decisions, and communicates the victim's views based on consultation with Government trial counsel. In accordance with DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures, paragraph 6.3, the Government trial counsel must consult with the victim and obtain his or her views concerning:

- The decision to pursue charges against the suspected offender
- The decision not to prefer charges
- Dismissal of charges
- Disposition of the offense if other than court-martial
- Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement
- Pretrial agreement (PTA) negotiations, including PTA terms
- Plea negotiations
- Discharge or resignation in lieu of trial by court-martial
- Scheduling of judicial proceedings, including changes or delays, of each pretrial hearing pursuant to Article 32, UCMJ, and each court proceeding that the victim is entitled or required to attend.²

¹ In 2006, the Department of the Navy established Region Legal Service Offices (RLSO) throughout the world, which merged regional and installation SJA offices July 1. The seven RLSOs in the United States and two overseas have combined the SJA function of providing advice and counsel to commanders with the trial counsel function of court-martial prosecution. RLSOs are commanded by an O-6 judge advocate who also serves as the regional legal program director.

² DoD Instruction (DoDI) 1030.2, Victim and Witness Assistance Procedures, June 4, 2004, paragraph 6.3. This DoD issuance is currently being revised and will implement the new FY14 National Defense Authorization Act provisions.

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Furthermore, eligible military members and their adult dependents³ are now entitled to independent legal representation by a Special Victims' Counsel in sexual assault prosecutions. Throughout all stages of the military justice process, Special Victims' Counsel may advocate a victim's interests before commanders, convening authorities, the staff judge advocate, trial counsel, the accused's military defense counsel, and, to the extent authorized by the Manual for Courts-Martial, military judges. By June 24, 2014, the Services must expand their SVC programs to cover offenses under Uniform Code of Military Justice (UCMJ) Articles 120a (Stalking), 120b (Rape and sexual assault of a child), and 120c (Other sexual misconduct). All crime victims who are entitled to legal assistance (under Section 1044 of Title 10, United States Code) also have the right to consult a military legal assistance attorney in accordance with DoD policy, to discuss their rights prior to and throughout the trial process and ensure their needs are addressed.

Furthermore, the Department will also implement Section 1706 of the NDAA, which through the creation of the new Article 60(d), ensures that victims have the opportunity to submit matters to the convening authority before the convening authority takes action on the results of the court-martial.

A December 17, 2010 legal opinion of the Department of Justice's Office of Legal Counsel (DoJ OLC) concluded that consistent with its 2005 guidance, the CVRA is "best read as providing that the rights identified in section 3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment)."⁴ DoJ OLC also stated that the wording of the CVRA's "reasonable right to confer with the attorney for the Government in the case," as contained in 18 U.S.C. § 3771(a)(5) "suggests that the right is intended to apply only once the Government has initiated criminal proceedings."⁵ We believe, however, that our current consultation practices across the Department of Defense go above and beyond this legal standard and provide victims with the opportunity to consult with the Government trial counsel at all stages of the military justice process.

³ Title 10, United States Code, Section 1044.

⁴ See Memorandum for the Acting Deputy Attorney General from John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, "The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004," (December 17, 2010), page 1, and conclusion at 16. The DoJ OLC opinion noted: "The question before us, though, is not whether it would be advisable as a matter of good practice or Departmental policy for Government attorneys to confer with victims pre-charge when appropriate, but whether Congress created a judicially-enforceable right for victims pursuant to which they may compel prosecutors to do so. Nothing in the Act or its legislative history suggested Congress intended such a result." *Id.* at pages 8-10.

⁵ *Id.* at 16. DoJ OLC also states that "limiting the responsibility to confer to a single Government attorney would make sense if the right to confer relates to the issues that arise in the course of a criminal proceeding, such as potential release, the role of the victim and witness in the course of the prosecution, potential plea agreements, sentencing and restitution efforts, for which the prosecuting attorney would be the most natural party to confer with victims." *Id.*, at 9.

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II. Guidance on the Role of Special Victims' Counsel

The Subcommittee also inquired whether the Panel will need to recommend clear guidance on the role of special victims' counsel, or if the DoD will be developing these rules and guidance. We hope the following and forthcoming information will inform the Panel of the substantive guidance, including the rules of practice and procedures for Special Victims' Counsel, that the Military Services plan to implement.

First, by March 26, 2014, the Secretary of Defense is scheduled to provide Congress with a report on the Military Services' initial implementation of their respective Special Victims' Counsel programs.

Second, in order to ensure that military judges (who are only detailed to cases after referral of charges) and convening authorities have clear guidance to rely upon, the Department will make appropriate changes to DoD Instruction 1030.2, Victim and Witness Assistance, as well as recommendations to the President on changes to the MCM. In accordance with Section 1701 of the FY 14 NDAA, the Secretary of Defense will provide implementing MCM changes by December 26, 2014. These changes will incorporate the CVRA's protections into MCM's rules and procedures, to the extent they aren't already a part of our military justice process. The Joint Service Committee on (JSC) Military Justice was also directed to include this amendment as part of its 2014 annual review of the MCM.⁶ Accordingly, the JSC is preparing to address the implementation of Article 6b in its normal 2014 cycle.

We believe the end result of these efforts will provide the Panel with substantive and detailed information on the role and respective standards and procedures for Special Victims' Counsel programs across the Military Services.

⁶ As noted in my testimony, the Acting General Counsel of the Department of Defense originally directed the Joint Service Committee (JSC) on Military Justice, on October 8, 2013, to propose an amendment to the Manual for Courts-Martial to fully address crime victim rights under the CVRA in the MCM.