



THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

MINUTES OF MAY 15, 2020, PUBLIC MEETING

AUTHORIZATION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“the Committee” or “DACIPAD”) is a federal advisory committee established by the Secretary of Defense in February 2016 in accordance with section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 and section 537 of the NDAA for FY 2016. The Committee is tasked to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces based on its review of such cases on an ongoing basis.

EVENT

The Committee held its seventeenth public meeting on May 15, 2020, from 11:00 a.m. to 3:00 p.m. At this meeting the Committee conducted final deliberations on the DAC-IPAD *Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military* and the DAC-IPAD’s response to the Department of Defense *Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims*. The Committee received updates from the DAC-IPAD Case Review, Policy and Data Working Groups.

LOCATION

The meeting was held via teleconference.

MATERIALS

A verbatim transcript of the meeting and preparatory materials provided to the Committee members prior to and during the meeting are incorporated herein by reference and listed individually below. The meeting transcript and materials received by the Committee are available on the website at <https://dacipad.whs.mil>.

PARTICIPANTS

Participating Committee Members

Ms. Martha S. Bashford, Chair
Major General Marcia M. Anderson, U.S.
Army, Retired
The Honorable Leo I. Brisbois
Ms. Kathleen B. Cannon
Ms. Margaret A. Garvin
The Honorable Paul W. Grimm
Mr. A. J. Kramer
Ms. Jennifer G. Long

Mr. James P. Markey
Dr. Jenifer Markowitz
Chief Master Sergeant of the Air Force
Rodney J. McKinley, Retired
Brigadier General James R. Schwenk, U.S.
Marine Corps, Retired
Dr. Cassia C. Spohn
Ms. Meghan A. Tokash
The Honorable Reggie B. Walton

Committee Staff

Colonel Steven Weir, U.S. Army, Staff
Director
Ms. Julie Carson, Deputy Staff Director
Dr. Alice Falk, Technical Editor
Ms. Theresa Gallagher, Attorney-Advisor
Ms. Nalini Gupta, Attorney-Advisor
Ms. Amanda Hagy, Senior Paralegal
Ms. Patricia Ham, Attorney-Advisor
Mr. Glen Hines, Attorney-Advisor

Mr. Chuck Mason, Attorney-Advisor
Ms. Marguerite McKinney, Analyst
Ms. Meghan Peters, Attorney-Advisor
Ms. Stacy Powell, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Attorney-Advisor
Ms. Kate Tagert, Attorney-Advisor
Mr. Dale Trexler, Chief of Staff

Service Representatives

Major Paul Ervasti, U.S. Marine Corps, Military Justice Policy and Legislation Officer, Judge Advocate Division
Ms. Janet K. Mansfield, U.S. Army, Chief, Programs Branch, Criminal Law Division, Office of the Judge Advocate General
Mr. James S. Martinson, U.S. Navy, HQE, Criminal Law Division, Office of the Judge Advocate General
Captain Vasilios Tasikas, U.S. Coast Guard, Chief, Office of Military Justice
Ms. Asha Vaghela, Senior Civilian Military Justice Attorney, Air Force Legal Operations Agency
Captain Josephine VanDriel, U.S. Air Force, Chief, Victim and Witness Policy

Other Participant

Mr. Dwight Sullivan, Designated Federal Officer (DFO)

MEETING MINUTES

The DFO opened the public meeting at 11:00 a.m. Chair Martha Bashford provided opening remarks welcoming those in attendance and explained the purpose of and agenda for the meeting.

DAC-IPAD Staff Presentation to Committee, Committee Deliberations, and Committee Vote on the DRAFT DAC-IPAD Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military

Chair Martha Bashford prefaced the discussion by stating that the DAC-IPAD members had not had the opportunity to receive in-person testimony within the short time frame required for the report. She explained that the staff conducted research on the topic and sought input from individual Committee members and subject matter experts. She expressed that the staff masterfully distilled the key issues in the draft report for the Committee's consideration. She stated that the Committee reviewed the report at an administrative session in order to make technical edits and identify substantive questions for deliberation at the public meeting.

Colonel Steven Weir, DAC-IPAD Staff Director, began the discussion and explained that the House Armed Services Committee tasked the DAC-IPAD to address whether there is an adequate mechanism in the court-martial process to represent the best interest of minor victims of an alleged sex-related offense. He explained that the purpose of the report is to evaluate the advisability and feasibility of establishing a process under which a guardian ad litem may be appointed to represent the interests of a child who is a victim of an alleged sex-related offense (as defined in Section 1044e(g) of Title 10 of the United States Code) who has not attained the age of 18 years at the time of the alleged offense.

Ms. Eleanor Vuono, DAC-IPAD Attorney-Advisor, explained how the staff conducted research for the report and identified the gaps in services currently provided to child victims of sex-related offenses in the military. The staff, at the direction of the Committee, sent out a request for information to the Military Services' Family Advocacy Programs, military judges, and Special Victims' Counsel (SVC) and Victims' Legal Counsel (VLC) Program Managers to understand the range of support for child victims of sexual offenses. The responses showed that an array of services are provided to children, including representation by an attorney.

However, Ms. Vuono noted several gaps in services. First, non-military dependent children are ineligible for SVC/VLC services, though the Military Services reported they can make exceptions upon request. The Army data showed that 39% of the reported sexual offenses in 2018 and 2019 involved alleged victims who were ineligible for SVC services. The other Military Services did not provide eligibility data.

The second gap identified was utilization of the SVC or VLC program. The data received from the Military Services indicated that of the eligible child victims, only approximately 10% of child victims utilized the SVC or VLC programs.

The third gap was lack of expertise of the attorneys who represent child victims. Ms. Vuono noted that representing children requires specialized training on sexual assault and child advocacy. She stated that the SVC and VLC receive some specialized training, but it might not be sufficient.

The fourth gap is that some children may not have a supportive parent, family member or guardian to assist them through the process. She stated that currently there is not a dedicated victim advocate assigned to the child. While there is authority in Article 6b, UCMJ, to designate someone to assume

the rights of the child, there is no requirement in the statute that directs the representative to act in the child's best interest.

Next, Ms. Nalini Gupta, DAC-IPAD Attorney-Advisor, briefed the Committee regarding the question of whether all child victims need the same services. She reviewed three potential scenarios that may arise in cases involving children who are victims of a sexual offense. She explained that two of the three scenarios adequately provide services to the child victim. However, the third scenario involves a military dependent child victim who is not able to direct their own representation and does not have supportive family members. She noted that two questions were raised by Committee members at the administrative meeting. Judge Grimm asked about a scenario involving a child who could express their own interest and direct their own representation, but who did not have a supportive family member and therefore stops cooperating with the prosecution. Mr. Kramer asked about how to define a supportive and non-supportive parent.

Judge Paul Grimm commented that the scenarios and materials prepared by the DAC-IPAD staff were exceptional and highlighted the pressure points that can occur sometimes in these cases. He stated that in his experience in these types of cases, there can be a problematic dynamic in the family when the accused is the sole economic source of survival. He asked if the victim has pressure put on them as a consequence and withdraws their claim, how does the attorney determine the client's wishes and the client's best interest. Ms. Jenifer Long agreed with Judge Grimm and added that there are several other variables, such as direct interference or intimidation, that can cause caregivers to be non-supportive and can put pressure on the child to recant. She emphasized the importance of understanding the factors that may cause a caregiver to be non-supportive.

Ms. Meg Garvin commented if there is an SVC or VLC appointed and the minor has the capacity to direct their representation, but it appears they are being manipulated by a parent, the SVC or VLC must figure out a way to separate the client from the situation, determine the child's interests, and act on them. She stated that the appointment of a different 6b representative would be an option in this type of situation, or the appointment of a guardian ad litem.

Mr. A.J. Kramer expressed concern about the assumption that any minor who is appointed a guardian ad litem is not competent, and noted that the lawyer would be bound by the minor's decisions anyway. He added that if the person is competent to make decisions according to the lawyer, then there is no need for a guardian ad litem.

Ms. Patty Ham, DAC-IPAD Attorney-Advisor, responded to Mr. Kramer's question stating that the military judge has a great deal of discretion in determining whether to appoint an Article 6b representative to assume the rights of the victim. She stated that the judge would consider whether to appoint an Article 6b representative; who that person should be; whether there is good cause to replace that person; and whether a hearing should be held on any of these matters. She added that the staff's research revealed that if a child has the capacity to exercise their rights under Article 6b, there is no need to have someone do that for them.

Ms. Eleanor Vuono, DAC-IPAD Attorney-Advisor, explained that the report contains factual findings that indicate the difficult pressures on a child victim. She added that the staff learned from advocates in the field that adding a victim advocate or a social worker to the SVC/VLC team may assist in avoiding the conflict between a child victim's expressed interest and their best interest.

Chair Bashford directed the Committee through deliberations on the report. Ms. Garvin highlighted to the Committee that based on her understanding of the literature around the subject and her experience working with child victims, developmental capacity of the child—not chronological age—should be a determinative factor. Ms. Ham responded that Ms. Garvin’s comment is reflected in Model Rule of Professional Conduct 1.14 as well as the American Bar Association (ABA) initiatives described in detail in the report. She added that these initiatives give guidance to the attorney on how to determine if a client has diminished capacity or partially diminished capacity. Mr. Kramer noted that the law states that individuals 18 years old or younger are not subject to certain penalties, adding that the challenge of determining capacity or competency is handled on a case by case basis. He expressed concern that the guardian ad litem appointment presumes that the lawyer can’t determine the best interest of the client because the client is not competent, and so the question becomes whether that applies to everyone under 18 years of age or not. Ms. Garvin responded that the report reflects that the ABA has provided guidance for lawyers to navigate the issue based on capacity rather than competency. She provided additional context stating that the court may not always name a guardian ad litem, but may appoint someone to brief the court on the best interest of the minor.

Potential Recommendation 1

It is not advisable or necessary to establish a process in the military justice system under which a guardian ad litem may be appointed to represent the best interests of a child victim of an alleged sex-related offense in a court-martial.

The Committee briefly discussed the recommendation and expressed concerns regarding its appropriateness and placement within the report. Chair Bashford recommended, and the Committee agreed, to look at the other recommendations first and then come back to Recommendation 1.

Potential Recommendation 2

The Secretaries of the Military Departments enhance funding and training for SVC/VLC appointed to represent child victims of sex-related offenses, including authorization to hire civilian HQE with experience and expertise in representing child victims, including expertise in child development, within the SVC/VLC programs.

Recommendation 2 and the related findings were approved unanimously by the Committee.

Potential Recommendation 3

The Judge Advocates General of the Military Services and SJA to the Commandant of Marine Corps develop a cadre of identifiable SVC/VLC who have specialized training, experience, and expertise in representing child victims of sex-related offenses by utilizing military personnel mechanisms such as Additional Skill Identifiers.

Recommendation 3 and the related findings were approved unanimously by the Committee.

Potential Recommendation 4

The Department of Defense Office of the Inspector General and the Secretaries of the Military Departments assess whether the Military Criminal Investigative Organizations and Family Advocacy Programs are providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported, and take necessary corrective action.

Judge Reggie Walton stated he agreed with the recommendation, but expressed concern that it doesn't address the situation involving a child of tender age who is not going to be able to comprehend advice. The Committee agreed to add language to Recommendation 8 and its alternative to ensure that an Article 6b representative, if necessary, is appointed as early in the process as possible.

Recommendation 4 and the related findings as amended were approved unanimously by the Committee.

Potential Recommendation 5 and Alternate

Congress amend 10 U.S.C. § 1044e to expand SVC/VLC eligibility to any child victim of a sex-related offense committed by an individual subject to the UCMJ. Alternate: The Judge Advocates General and SJA to the Commandant of the Marine Corps establish guidance and procedures to routinely grant SVC/VLC services upon request to non-eligible child victims of sex-related offenses by authorizing exceptions to policy.

The Committee briefly discussed the recommendation and its alternate. It was noted that Recommendation 5 made sense if the intent is to educate about the availability of the service.

Recommendation 5 to expand eligibility and all of the alternate Recommendation 5's findings, were approved unanimously by the Committee.

Potential Recommendation 6

Congress amend the UCMJ to authorize the military judge to direct appointment of SVC/VLC for a child victim of a sex-related offense in very limited circumstances where there is no supportive parent or guardian.

General Schwenk noted that the limitation is when there is no supportive parent or guardian which brings up the issue of what it means to be supportive. He suggested revising the recommendation to replace "in very limited circumstances where there is no supportive parent or guardian" with "when the court finds that the child's interests are not otherwise adequately protected." Mr. Dwight Sullivan recommended that the reference to UCMJ be replaced with Article 6b, UCMJ.

After additional discussion later in the meeting, the Committee further amended Recommendation 6 to add additional language revising Article 6b, UCMJ, to address the military judge's authority to appoint a guardian ad litem in those cases where the judge determines it is appropriate with the final recommendation as follows:

Congress amend the UCMJ to authorize the military judge to direct the appointment of an SVC/VLC for a child victim of a sex-related offense and/or of an independent best interest advocate to advise the military judge when they find that the child's interests are not otherwise adequately protected.

Recommendation 6 and its associated findings, as amended, were approved unanimously by the Committee.

Potential Recommendation 7

The Secretary of Defense and the Secretaries of the Military Departments develop a Child Victim Advocate capability within each of the Services to support child victims of sexual offenses. Embed

the Child Victim Advocate within the SVC/VLC programs to ensure the child's legal interests are fully represented and protected.

Ms. Vuono suggested the Committee consider an edit to the sixth of the seven findings to read "...child victim cannot express an interest and/or there is not a supportive parent..." that would allow for either of those cases. Ms. Ham noted that to clarify this edit, language was added that would enable the SVC/VLC to make a substituted judgement determination for the client who lacks capacity.

Recommendation 7 and the related findings, as amended, were approved unanimously by the Committee.

Potential Recommendation 8 and Alternate

Congress amend Article 6b, UCMJ, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests. Alternate: Congress amend Article 6b, UCMJ, to require any representative who assumes the rights of the victim shall act in the victim's "best interest."

Chair Bashford asked for clarification regarding the difference between Recommendation 8 and alternate Recommendation 8. Ms. Ham explained that Recommendation 8 presumes the parent is acting in their child's interest and it would also make it part of the statute. She stated that the alternate recommendation is intended to address someone other than a parent who is appointed but may not have the expertise to determine what is the child's best interest.

Recommendation 8 and the related findings were approved unanimously by the Committee.

The Committee then returned to the discussion of Recommendation 1. The Committee members discussed their concern that the recommendation should address the military judge's authority to appoint a GAL when deemed appropriate, and their desire to ensure funding is appropriated. The Committee agreed with several revisions, including changing Recommendation 1 to become Recommendation 8 (and shifting the numbers of the other recommendations up by one) and adding language that a Military GAL program is unnecessary so long as Recommendations 1 through 7 are approved by the Department of Defense. Additionally, the Committee added language to the introduction of the report expressing that the DAC-IPAD is fully aware that Recommendations 1 through 8 will require additional funding and personnel by the Department of Defense and noting that the DAC-IPAD feels strongly that the additional funding and personnel will afford the protections needed for minors who are the victims of sexual assault committed by members of the Armed Forces.

Recommendation 1 and the related findings, as amended, were approved unanimously by the Committee.

Colonel Weir explained that an executive summary and a conclusion would be added to the report along with the changes and sent to the Committee members for any technical changes.

The report, as amended, and subject to the addition of the executive summary and conclusion, was unanimously approved by the Committee.

Committee Deliberation and Vote on the DAC-IPAD Response to the Department of Defense Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims

Ms. Terri Saunders, DAC-IPAD Attorney-Advisor, explained that the impetus for the Department of Defense report and the DAC-IPAD's response was a provision in the 2020 National Defense Authorization Act. She stated that the legislation asked DoD to look at the feasibility and advisability of a DoD policy that would permit a Service member, or adult military dependent, victim of sexual assault to maintain the restricted reporting option, regardless of who made the disclosure of the sexual assault. The legislation also required DoD to coordinate with the DAC-IPAD in its study. Ms. Saunders provided background on the issue and stated that in the DAC-IPAD's 2019 Third Annual Report, the Committee made the recommendation that DoD establish a working group to determine whether this was feasible, and provided guidance. She added that the recommendations in the DoD report expand the restricted reporting options, but in most instances the new policy doesn't allow the victim to request that the investigation be discontinued, even when it's a restricted report. Ms. Saunders explained that the DAC-IPAD's review acknowledges the expansion of restricted reporting options afforded by the new DoD policy, but also notes that it does not address allowing a victim to request the investigation be discontinued, except in limited circumstances.

Ms. Saunders explained that the DAC-IPAD response includes a recommendation that mirrors the original DAC-IPAD recommendation, with the exception that under this recommendation, rather than recommending a working group, DoD should now establish the policy and it outlines specific circumstances that should be taken into account. She added that the recommendation is intended to speak to only those situations in which the victim never intended to report. She pointed out that the SVC and VLC programs oppose the requirement for the victim to consult with them prior to requesting the investigation be terminated. She stated that they prefer that the victim only be encouraged to consult with them. The Committee agreed that the language in the DAC-IPAD response should be revised to say "the victim should be offered a referral to, and encouraged to meet with a Special Victim Counsel or Victims' Legal Counsel before signing a statement requesting the investigation be discontinued." General Schwenk pointed out that DoD wrote in their report that "Victims may request to decline to participate with an investigation. The victim's declination to participate has no compulsory effect on the investigation. However, in situations where victim testimony is required to identify the suspect and/or essential to the furtherance of the case, the victim's declination to participate will most likely result in the investigation being terminated." He asked that the DAC-IPAD response letter or the recommendation point out that DoD has implemented only one of the two situations recommended by the DAC-IPAD for not going forward with an investigation. He noted one is an unidentified suspect and the other is an uncooperative victim. The members agreed and Ms. Saunders stated she would add language to address the concern.

The report, as amended, was passed unanimously by the Committee.

Case Review Subcommittee Update

Ms. Theresa Gallagher, DAC-IPAD Attorney-Advisor, reported that the Case Review Subcommittee was drafting the data report and anticipates having a draft report available for deliberation at the August meeting. Colonel Weir added that the Case Review Subcommittee has drafted a 45-page data report and is in the process of compiling approximately 100 pages of data. He reported that the data is in the final multivariate and bivariate analysis phase.

Policy Subcommittee Update

Ms. Meghan Peters, DAC-IPAD Attorney-Advisor, reported that the Policy Subcommittee continued its review of Articles 32, 33, and 34, UCMJ, and the issues around the preliminary hearing, the referral process, and the charging process as outlined in the annual report. She stated that in order to expand on the first review of the Article 32 documents, the staff is undertaking a review of all Article 32, UCMJ, hearings in which a preliminary hearing officer found no probable cause for hearings held in FY14 through FY19. She added that they also are reviewing all Article 32, UCMJ, documents regardless of the probable cause determination to assess the thoroughness of the report; whether witnesses were called; who the witness was; and if the victim testified. Ms. Peters stated that in order to understand analogous procedures in federal and state courts, the staff are arranging interviews with federal and state practitioners. She encouraged members of the subcommittee to submit names of individuals to interview, and for members to participate in those interviews. Ms. Peters explained that they would also interview military practitioners including defense counsel, staff judge advocates, convening authorities, and preliminary hearing officers. She stated that the report is anticipated to be issued in 2021.

Data Subcommittee Update

Mr. Chuck Mason, DAC-IPAD Attorney-Advisor, updated the Committee on the status of the implementation of a new database and stated that they are in the process of developing requests for proposals to approach different companies for submissions. He shared that in the meantime, they are compiling FY19 cases into a spreadsheet in order to provide the Committee with a report.

Meeting Wrap-Up and Public Comment

Colonel Weir reported that there were no requests to make public comments. He advised the Committee that until further advisement from the Secretary of Defense, the operations of the DAC-IPAD would continue in telework status and meetings would be by teleconference. He thanked the Committee and the staff for their hard work under the current circumstances. He advised that the next public meeting is scheduled for August 21, 2020.

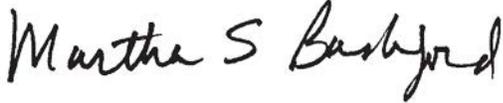
Chair Bashford reported to the other Committee members that after the February meeting she and members of the staff met with the Secretary of Defense, the Secretary of the Army, the Acting Secretary of the Navy, and the Secretary of the Air Force to brief them on the work of the Committee.

With no further comments or issues to address, the meeting concluded.

The DFO closed the public meeting at 2:56 p.m.

CERTIFICATION

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



Martha Bashford
Chair

MATERIALS

Meeting Records

1. Transcript of May 15, 2020, Committee Public Meeting, prepared by Neal R. Gross and Co., Inc.

Read Ahead Materials Provided Prior to and at the Public Meeting

1. PowerPoint Slide Presentation Prepared by DAC-IPAD Staff Providing an Overview of Guardians ad Litem in Criminal Cases and Potential DAC-IPAD Recommendations
2. Draft Potential Guardian ad Litem Findings and Recommendations for DAC-IPAD Deliberations
3. Draft *Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces Report on the Advisability and Feasibility of Establishing a Guardian ad Litem Appointment Process for Child Victims of an Alleged Sex-Related Offense in the Military*
4. *Department of Defense Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims*
5. Draft DAC-IPAD Letter to the Secretary of Defense Providing the Committee's Input and Recommendation Regarding the *Department of Defense Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims*