

Department of Defense Legal Services Agency

Reporting and Investigating Military Complaints of Sexual Harassment in the Department of Defense

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Executive Summary

The military justice system is in the midst of an unprecedented review of investigative, legal, and command assets. Sexual misconduct is at the forefront of these examinations. The Department of Defense (DoD) recognizes that sexual harassment is inextricably linked to sexual assault along a continuum of harm.¹ The response to sexual harassment allegations must be holistically reviewed within this larger context so that assets to address it can be appropriately allocated and tasked.²

This paper reviews the current military response to sexual harassment complaints required by legislation, DoD policy, and Service policy. The current DoD response is command driven: commanders determine whether and how to investigate an allegation, whether to substantiate a complaint, and what action to take as a result. This paper reviews ongoing DoD efforts to change the response to sexual harassment in light of the Independent Review Commission on Sexual Assault in the Military (IRC)³ results. The IRC⁴ recommendations on sexual harassment, as approved by the Secretary of Defense and pending implementation by DoD, are at Appendix H-1.⁵

Despite these important changes, gaps remain in DoD's effort to fully address sexual harassment. This paper identifies those gaps and presents three potential issues for the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) to consider:

- Whether sexual harassment reporting systems should be modeled after the sexual assault reporting system and whether such a structure would sufficiently account for barriers—similar to those found in sexual assault cases—that prevent Service members from reporting.
- Whether it is feasible and advisable for independent, trained investigators to investigate all complaints of sexual harassment and not just those submitted formally.
- Whether the involvement of legal advisors, with specialized training and experience in handling sexual misconduct, should be mandated at the complaint stage for sexually harassing conduct that could constitute a criminal offense or regulatory violation, to ensure that such offenses are appropriately investigated and resolved.

¹ Independent Review Commission on Sexual Assault in the Military, *HARD TRUTHS AND THE DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 4* (July 2021) [IRC Report], available at <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF>.

² *Id.* at App. A. Appendix A contains the IRC recommendations that cut across more than one line of effort.

³ Memorandum from Secretary of Defense, "Subject: Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military," App. A-6 (Sept. 22, 2021) [SecDef Implementation Memo] available at <https://media.defense.gov/2021/Sep/22/2002859809/-1/-1/0/DOD-ACTIONS-AND-IMPLEMENTATION-TO-ADDRESS-SEXUAL-ASSAULT-AND-SEXUAL-HARASSMENT-IN-THE-MILITARY.PDF>.

⁴ The Secretary of Defense established the IRC to conduct a review of sexual assault and sexual harassment in the military. Memorandum from Secretary of Defense, "Subject: Immediate Actions to Counter Sexual Assault and Harassment and the Establishment of a 90-Day Independent Review Commission on Sexual Assault in the Military" (Feb. 26, 2021) [SecDef IRC Establishment Memo], available at <https://media.defense.gov/2021/Feb/26/2002590163/-1/-1/0/APPROVAL-OF-MEMO-DIRECTING-IMMEDIATE-ACTIONS-TO-COUNTER-SEXUAL-ASSAULT-AND-HARASSMENT.PDF>.

⁵ SecDef Implementation Memo, *supra* note 3, at App. A (Department leadership is authorized to revise the recommendations contained in Appendix A). Appendix H-1 contains selected recommendations from Appendix A of the SecDef Implementation Memo pertaining to sexual harassment.

I. Introduction

To address the “persistent and corrosive problems” of sexual assault and sexual harassment in the military, the Secretary of Defense established the IRC to conduct a 90-day review of these challenges.⁶ The resulting report found the need to address sexual assault and sexual harassment as one problem manifest in a continuum of harm that begins with sexual harassment and escalates to sexual assault.⁷ The IRC cautioned that “while sexual harassment may be a precursor to sexual assault in the military environment, the experience of victims should not be discounted, or seen as ‘less serious.’ Service members who experience sexual harassment can also suffer from post-traumatic stress disorder, depression, anxiety, and other health impacts, including suicide.”⁸ The IRC expressed concern that DoD sexual harassment policies “entirely miss this connection with sexual assault[.]”⁹

DoD’s sexual harassment response is based on its prohibition of any harassing conduct regulated within the Military Equal Opportunity (MEO) realm.¹⁰ With few exceptions,¹¹ the chain of command resolves sexual harassment allegations through administrative investigations or low-level command leadership actions.¹² In contrast, the DoD response to sexual assault is based on the criminality of such conduct.¹³ All allegations of adult sexual assault known to the chain of command, regardless of severity, are fast-tracked to specially trained members of military criminal investigative organizations (MCIOs) for a full criminal investigation.¹⁴ As the IRC noted, sexual harassment policies have few parallels with sexual assault policies.

⁶ SecDef IRC Establishment Memo, *supra* note 4, at 1.

⁷ IRC Report, *supra* note 1, at 4.

⁸ *Id.* at 22 (notes omitted).

⁹ *Id.* at 23.

¹⁰ Dep’t of Def., Instruction 1020.03, “Harassment Prevention and Response in the Armed Forces” § 3.1 (Feb. 8, 2018, Change 1 Effective Dec. 29, 2020) [DoDI 1020.03], *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/102003p.PDF?vevt> (governing retaliation, reprisal, and harassment, including “discriminatory harassment, sexual harassment, hazing, bullying, and stalking”); Dep’t of Def., Instruction 1350.02, “DoD Military Equal Opportunity Program,” § 1.2.a(6) (Sept. 4, 2020), *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/135002p.pdf?ver=2020-09-04-124116-607> (requiring DoD, through the MEO program, to respond to sexual harassment incidents using the procedures outlined in DoDI 1020.03).

¹¹ The DoD IG receives and investigates allegations of senior official misconduct. Dep’t of Def., Directive 5106.01, “Inspector General of the Department of Defense (IG DoD)” § 5.v (Apr. 20, 2012, Incorporating Change 2, Effective May 29, 2020), *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510601p.pdf?ver=2020-05-29-143946-603>.

¹² DoDI 1020.03, *supra* note 10, at §§ 4.1, 4.4.

¹³ Dep’t of Def., Instruction 5505.18, “Investigation of Adult Sexual Assault in the Department of Defense” § 1.2 (Mar. 22, 2017, Incorporating Change 2, Effective Jan. 31, 2019) [DoDI 5505.18], *available at* <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550518p.pdf?ver=2018-02-13-125046-630> (requiring MCIOs to initiate criminal investigations into all adult sexual assault allegations of which they become aware if there is credible information of a crime and a DoD nexus). “Sexual assault” offenses include rape, sexual assault, aggravated sexual contact, abusive sexual contact, in violation of Article 120, UCMJ; other sexual misconduct, in violation of Article 120(c), UCMJ; and attempts to commit any of the above offenses, in violation of Article 80, UCMJ. *Id.* at 15 (Glossary).

¹⁴ *Id.* at §§ 1.2.a, 2.2.b, 3.2.c. MCIOs and supporting DoD law enforcement must be properly trained to conduct sexual assault investigations. *Id.* at § 3.3. The MCIOs are the U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations. *Id.* at 15 (Glossary). *See also* Dep’t of Def., Instruction 6495.02, “Sexual Assault Prevention and Response: Program Procedures,” encl. 4, at ¶¶ 1.a, d, e(1), f (Mar. 28, 2013, Incorporating Change 5, Apr. 9, 2021), *available at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/649502_vol1.PDF (requiring commanders to immediately report sexual assault information to an MCIO for investigation).

The IRC concluded that DoD's sexual harassment response system is deficient. There is vast underreporting of sexual harassment incidents,¹⁵ in part because victims "do not trust the command to protect them from the negative consequences of reporting"¹⁶ and victims "do not trust the command to ensure that their complaints are properly investigated and acted upon."¹⁷ The IRC noted the dichotomy of a system in which the command both allows the environment permissive of sexual harassment and decides whether sexual harassment occurred and what the appropriate disposition might be.¹⁸

This paper reviews the current DoD response to sexual harassment in the military,¹⁹ explaining the distinction between civilian and military procedures and providing the statutory definition of sexual harassment in the military. The military addresses sexual harassment with a command response based on legislation; expanded by DoD policy, which creates a formal response structure embedded within the DoD MEO Program and governed by DoD harassment response policy; and finally, implemented by the Services, which establish processes for the command to respond to allegations made to commanders, supervisors, the Inspectors General (IGs), the MEO Office, and staff designated to receive harassment complaints.

This paper also describes DoD's ongoing internal efforts to adapt its sexual harassment policies in light of the IRC's recommendations.²⁰ These efforts include creating special victim prosecutors (SVPs), who make prosecution decisions on substantiated complaints; initiating separation actions for substantiated complaints; making sexual harassment an enumerated offense under the Uniform Code of Military Justice (UCMJ); requiring that investigations be conducted by independent, trained investigators; expanding victim services;²¹ addressing sexual harassment in the cyber domain; expanding the Catch a Serial Offender Program (CATCH) to victims of sexual harassment;²² reviewing policies that address sexual harassment responses; and developing and implementing metrics for tracking and reporting sexual harassment complaints.

¹⁵ IRC Report, *supra* note 1, App. B-25–26 (reviewing data on sexual harassment reporting and concluding that "the titanic delta between experience rates and reporting rates begs to be addressed"). Appendix B, "Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System," contains the IRC discussion and recommendations on accountability.

¹⁶ *Id.* at App. B-29.

¹⁷ *Id.*

¹⁸ *Id.* at App. B-27.

¹⁹ This paper is limited to the DoD response to Service member allegations of sexual harassment committed by other Service members; however, any studies on the military response to sexual harassment should include the Coast Guard response.

²⁰ SecDef Implementation Memo, *supra* note 3, at App. A-6.

²¹ Efforts to expand victim services include a recommendation to immediately make sexual harassment victims eligible for SAPR services and to implement a "no wrong door approach" to victims' efforts to seek assistance: that is, if a victim goes to the wrong place for services, a trained contact will actively help them get to the correct place. IRC Report, *supra* note 1, Apps. A-1, E-33 to E-34. Appendix E contains the IRC discussion and recommendations on victim care and support, including Recommendation 4.3a to implement the No Wrong Door Approach. *Id.* at App. E-33 to E-34.

²² The CATCH a Serial Offender Program allows information from restricted reports of sexual assault to be confidentially provided to MCIOs so that they can undertake serial offender matching. *Id.* at App. E-27. The CATCH program procedures are established in DoDI 5505.18, *supra* note 13, at § 3.6.

Despite these ongoing efforts to improve the military response to sexual harassment, significant issues remain unaddressed. The paper concludes by identifying some gaps that might benefit from further review and assessment by an independent advisory committee composed of experts in the area of addressing sexual misconduct. Currently the DAC-IPAD is the only such advisory committee, and it may wish to consider the following issues:

- Whether sexual harassment reporting systems should be modeled after the sexual assault reporting system and whether such a structure would sufficiently account for barriers—similar to those found in sexual assault cases—that prevent Service members from reporting.
- Whether it is feasible and advisable for independent, trained investigators to investigate all complaints of sexual harassment and not just those submitted formally.
- Whether the involvement of legal advisors, with specialized training and experience in handling sexual misconduct, should be mandated at the complaint stage for sexually harassing conduct that could constitute a criminal offense or regulatory violation, to ensure that such offenses are appropriately investigated and resolved.

A. Background

Sexual harassment in the civilian workplace is prohibited by civil law²³ and it is redressed: in the workplace by employers; by the U.S. Equal Employment Opportunity Commission;²⁴ or in civil court. Remedies for victims include financial compensation and restorative workplace actions. Sexual harassment is not generally a criminal offense under state or federal law; however, the conduct can bring the offender into the criminal justice system when it also meets the elements of a recognized crime, such as sexual assault, sexual battery, or stalking.²⁵

The IRC identified some significant differences between the civilian and military responses to sexual harassment:

Service members are not covered by the protections of Title VII of the Civil Rights Act of 1964 (Pub L. 88-352), which means they cannot take legal action to stop harassment or get restitution for harassment from their employer. Nor can they simply quit their jobs; in fact, doing so is a criminal offense. They are therefore left to work within the closed system(s) created for them by DoD and/or their Service.²⁶

²³ Civil Rights Act of 1964, § 7, 42 U.S.C. §§ 2000e *et seq.* (1964). Title VII of the Civil Rights Act of 1964, as amended, “prohibits employment discrimination based on race, color, religion, sex, and national origin.” “Title VII of the Civil Rights Act of 1964,” editor’s note, U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>. “Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964.” “Fact Sheet: Sexual Harassment Discrimination,” U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/fact-sheet/facts-about-sexual-harassment>.

²⁴ The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal laws prohibiting discrimination, including harassment. It is authorized to investigate charges of discrimination against employers and to file lawsuits to protect individual rights. “Overview,” U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/overview>.

²⁵ Marlene Lenthag, “Cuomo Report: Could He Face Criminal Charges?,” ABC News (Aug. 5, 2021), *available at* <https://abcnews.go.com/US/cuomo-report-face-criminal-charges/story?id=79263190>.

²⁶ IRC Report, *supra* note 1, App. B-26 (notes omitted).

B. Sexual Harassment in the Military Defined

Title 10 U.S.C. § 1561, which establishes the basic framework for the military response to sexual harassment, defines “sexual harassment” as:

- (1) Conduct (constituting a form of sex discrimination) that—
 - (A) involves unwanted sexual advances, requests for sexual favors, and deliberate or repeated offensive comments or gestures of a sexual nature when—
 - (i) submission to such conduct is made either explicitly or implicitly a term or condition of a person’s job, pay, or career;
 - (ii) submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person; or
 - (iii) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creates an intimidating, hostile, or offensive environment; and
 - (B) is so severe or pervasive that a reasonable person would perceive, and the victim does perceive, the environment as hostile or offensive.
- (2) Any use or condonation, by any person in a supervisory or command position, of any form of sexual behavior to control, influence, or affect the career, pay, or job of a member of the armed forces or a civilian employee of the Department of Defense.
- (3) Any deliberate or repeated unwelcome verbal comment or gesture of a sexual nature in the workplace by any member of the armed forces or civilian employee of the Department of Defense.²⁷

DoD policy clarifies that:

- There is no requirement for concrete psychological harm to the complainant for behavior to constitute sexual harassment. Behavior is sufficient to constitute sexual harassment if it is so severe or pervasive that a reasonable person would perceive, and the complainant does perceive, the environment as hostile or offensive.
- Sexual harassment can occur through electronic communications, including social media, other forms of communication, and in person.²⁸

Some Service policies provide examples of sexual harassment to explain acceptable versus unacceptable behaviors.²⁹

²⁷ 10 U.S.C. § 1561. *Compare* National Defense Authorization Act for Fiscal Year 2022 [FY22 NDAA], Pub. L. No. 117-81, § 543, 135 Stat. 1541 (2021) (amending 10 U.S.C. § 1561 and replacing the definition of sexual harassment with conduct constituting the new offense of sexual harassment under Article 134, UCMJ). *See also*, FY22 NDAA §539D (requiring the President to amend Part IV of the Manual of Courts-Martial to include sexual harassment as a stand-alone offense punishable under Article 134, UCMJ and establishing the elements of that offense). *See* Appendix I (§ 539D, excerpt from FY22 NDAA). *See* Appendix J (§ 543, excerpt from FY22 NDAA).

²⁸ DoDI 1020.03, *supra* note 10, at 22 (Glossary).

²⁹ Dep’t of the Navy, SECNAVINST 5300.26E, “Department of the Navy Policy on Sexual Harassment” encl. 5 (May 28, 2020) [SECNAVINST 5300.26E], *available at* <https://www.secnave.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5300.26E.pdf>.

C. Regulation of Sexual Harassment in the Military

The military response to sexual harassment focuses on taking corrective action to address the complaint or taking disciplinary action against the offender. Each Service prohibits sexual harassment through punitive orders or regulations:³⁰ that is, a violation of the regulatory provisions governing sexual harassment can be prosecuted at a court-martial or result in administrative corrective or disciplinary action. Commanders have the full range of disposition options available for substantiated allegations of sexual harassment: criminal charges, non-judicial punishment, administrative action, or no action.³¹

Criminal Prosecution

The National Defense Authorization Act for Fiscal Year 2022 (FY22 NDAA) requires the President to criminalize sexual harassment as a specified Article 134, UCMJ offense by January 26, 2022;³² a requirement fully supported by the Secretary of Defense.³³ Prior to this new offense, incidents of sexual harassment have been prosecuted under existing UCMJ provisions, including: Article 92 (failure to obey an order or regulation); Article 93 (cruelty and maltreatment); Article 117a (wrongful broadcast or distribution of intimate visual images); or generally under Article 134 (service discrediting conduct or conduct prejudicial to the good order and discipline in the Armed Forces).³⁴ The standard for conviction at a court-martial is “beyond a reasonable doubt.”³⁵

³⁰ *Id.* at § 5.c(5); Dep’t of the Army, Army Reg. 600-20, “Army Command Policy” § 7-7.e (July 24, 2020; rev. Sept. 1, 2020) [AR 600-20], available at <https://www.armyresilience.army.mil/ard/images/pdf/Policy/600-20%20Army%20Command%20Policy.pdf>; Dep’t of the Air Force, Department of the Air Force Instruction 36-2710, “Equal Opportunity Program” § 2.1 (June 18, 2020) [DAFI 36-2710], available at <https://www.af.mil/Portals/1/images/eeo/dafi36-2710.pdf>; Dep’t of the Navy, OPNAVINST 5300.13, “Navy Sexual Harassment Prevention and Response Program Manual” ch. 1, ¶ 2.k (July 24, 2017) [OPNAVINST 5300.13], available at <https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5300.13.pdf>; Dep’t of the Navy, Marine Corps Order 5354.1F, “Marine Corps Prohibited Activities and Conduct (PAC) Prevention and Response Policy” § 6.a.1 (Apr. 20, 2021) [MCO 5354.1F], available at <https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf>. See Department of the Air Force Guidance Memorandum (DAFGM) to Department of the Air Force Instruction (DAFI) 36-2710, “Equal Opportunity Program” (Sept. 2021) (redesignating AFI 36-2710 as DAFI 36-2710).

³¹ Rule for Courts-Martial [R.C.M.] 306(c), Manual for Courts-Martial, United States (2019 ed.) [MCM]. Unlike for cases of sexual assault, command disposition authority for sexual harassment has not been reserved for the O-6 or higher level commander. Memorandum from Secretary of Defense, “Subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases” (Apr. 20, 2012), available at https://dacipad.whs.mil/images/Public/10-Reading_Room/00_WhatNew/SecDef_Memo_Withholding_Initial_Disposition_Authority_20120420.pdf.

³² See FY22 NDAA § 539D, *supra* note 27. See Appendix I.

³³ SecDef Implementation Memo, *supra* note 3, App. A-6 (“Recommendation 1.6: Expedite processing of proposed Executive Orders regarding military justice, including those currently awaiting issuance related to sexual assault, sexual harassment, and other special victim crimes.”).

³⁴ 10 U.S.C. § 892 (UCMJ, Art. 92) (Violation of a lawful order or regulation); 10 U.S.C. § 893 (UCMJ, Art. 93) (Cruelty and Maltreatment); 10 U.S.C. § 917 (UCMJ, Art. 117a) (Wrongful broadcast or distribution of intimate visual images); and 10 U.S.C. § 934 (UCMJ, Art. 134) (Service discrediting conduct).

³⁵ R.C.M. 918 (c), MCM, *supra* note 31.

Non-Judicial Punishment (NJP)

Non-judicial punishment is a means by which a commander can take disciplinary action for minor criminal offenses.³⁶ If handled by NJP, sexual harassment incidents are normally charged under Article 92—Violation of a lawful general regulation. The standard of proof at NJP is not uniform across the Services: the Army uses a beyond a reasonable doubt standard; the Navy and Marine Corps use a preponderance of the evidence standard; and the Air Force does not have a standard.³⁷ DoD has taken initial steps to impose the “preponderance of the evidence” standard across all Services by drafting a proposed executive order.³⁸

Administrative Actions

In response to substantiated allegations of sexual harassment, commanders frequently take administrative action,³⁹ including initiating administrative separation, letters of reprimand, adverse evaluation reports, counseling, training, recommendation against reenlistment, and relief for cause. The Navy and Marine Corps require mandatory administrative separation processing for some substantiated complaints of sexual harassment.⁴⁰ Recently, the Secretary of Defense directed the Services to establish a mandatory involuntary separation process for all Service members with substantiated sexual harassment allegations.⁴¹

³⁶ 10 U.S.C. § 815 (UCMJ, Art. 15). Punishments include reduction to the lowest enlisted grade, “correctional custody for 30 days; restriction for 60 days; arrest in quarters for 30 days; extra duty for 45 days; forfeitures of one-half of one month’s pay for three months; and detention of one-half of one month’s pay for two months.” REPORT OF THE MILITARY JUSTICE REVIEW GROUP, Part I, 211 (2015), available at https://ogc.osd.mil/Portals/99/report_part1.pdf.

³⁷ *Id.* at 212.

³⁸ SecDef Implementation Memo, *supra* note 3, App. A-9 (“Recommendation 1.7c: [Revised] The Joint Service Committee on Military Justice has drafted a proposed Executive Order to establish a preponderance of the evidence standard for non-judicial punishment.”).

³⁹ Dep’t of Def., SAPRO, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2020, Appendix F: Sexual Harassment Assessment [FY20 SAPRO Report, App. F], available at https://www.sapr.mil/sites/default/files/Appendix_F_Sexual_Harassment_Assessment_FY2020.pdf. See also *infra* at Section III, Table 8. This PDF only contains the appendix providing sexual harassment data.

⁴⁰ SECNAVINST 5300.26E, *supra* note 29, at § 5.d(3). The first substantiated incident of sexual harassment requires initiation of an administrative separation action if the sexual harassment involved “(a) Action, threats, or attempts to influence another’s career or job in exchange for sexual favors. (b) Rewards in exchange for sexual favors. (c) Physical contact of a sexual nature which, if charged as a violation of the UCMJ, could result in punitive discharge.” *Id.* An incident is substantiated if “there has been a court-martial conviction or if the Commanding Officer determines that sexual harassment has occurred.” *Id.*

⁴¹ SecDef Implementation Memo, *supra* note 3, App. A-5 (“Recommendation 1.2: [REVISED] Independent, trained investigators for sexual harassment and mandatory initiation of involuntary separation for all substantiated complaints.”).

II. Service Member Sexual Harassment Complaint Processing: Reports and Investigation

A. Statutory Requirements for the Response to Military Sexual Harassment Complaints⁴²

Command Investigations

Title 10 U.S.C. § 1561, which governs sexual harassment complaints made to commanding officers, requires that:

A commanding officer or officer in charge of a unit, vessel, facility, or area of the Army, Navy, Air Force, or Marine Corps who receives from a member of the command a complaint alleging sexual harassment by a member of the armed forces . . . shall carry out an investigation of the matter in accordance with this section.⁴³

Immediate Actions

The officer receiving the complaint has 72 hours from receipt of the complaint to:

- Notify the “next superior officer in the chain of command who is authorized to convene a general court-martial” of the complaint by forwarding “the complaint or a detailed description of the allegation”
- Start the investigation
- Inform the complainant that the investigation has started⁴⁴

Duration of Investigation

The investigation must be completed within 14 days.⁴⁵

Report on Investigation

The officer receiving the complaint must:

- “Submit a final report on the results of the investigation, including any action taken as a result of the investigation,” to the general court-martial convening authority (GCMCA) “within 20 days after the date the investigation was commenced; or”
- “Submit a report on the progress made in completing the investigation” to the GCMCA “within 20 days after the date the investigation was commenced and every 14 days thereafter until the investigation is completed and, upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation,” to the GCMCA.⁴⁶

⁴² Appendix A-1 (Diagram of the complaint process and command actions required by 10 U.S.C. § 1561).

⁴³ 10 U.S.C. § 1561. *Compare* FY22 NDAA § 543, *supra* note 27 (amending 10 U.S.C. § 1561 to require commanding officers receiving formal complaints of sexual harassment to direct an independent investigation of the complaint and establishing an effective date of December 26, 2023 for the amendment).

⁴⁴ 10 U.S.C. § 1561.

⁴⁵ *Id.*

⁴⁶ *Id.*

B. DoD Requirements for Processing Service Member Sexual Harassment Complaints⁴⁷

DoDI 1020.03

The DoD harassment prevention and response program⁴⁸ implements the 10 U.S.C. § 1561 requirements for sexual harassment complaints and requires Service prevention and response programs to:⁴⁹

- Ensure that harassment complaints are “investigated in an impartial and timely manner”;⁵⁰
- Provide information on submitting complaints to (1) the appropriate commander or supervisor,⁵¹ (2) the Inspector General’s office (IG office), (3) the Military Equal Opportunity (MEO) office, or (4) staff designated by the Military Service to receive harassment complaints;⁵² and
- Establish “procedures for commanders and supervisors to receive, respond to, investigate, and resolve harassment complaints[.]”⁵³

Sexual Harassment Complaint Processing Requirements

DoDI 1020.03 requires complaints to be processed pursuant to § 1561 and includes the following additional requirements:

- Within 72 hours of the complaint’s receipt, provide the complainant information about the process; victim support resource availability, on- and off-base; and appeal rights;⁵⁴
- Conduct a legal sufficiency review on all reports of investigation;⁵⁵ and
- Provide the complainant the substantiation determination when the investigation is complete.⁵⁶

⁴⁷ See Appendix B-1 (Diagram of the complaint process required by DoDI 1020.03).

⁴⁸ The IRC questioned whether this policy effectively establishes a comprehensive DoD-wide program, since the Services’ implementation of DODI 1020.03 is different enough that Service members across the Services have “vastly different experiences.” IRC Report, *supra* note 1, at 28.

⁴⁹ DoDI 1020.03, *supra* note 10, at § 3.

⁵⁰ *Id.* at § 2.4.a(3). A complaint is “[a]n allegation of harassment made by a Service member to a commander, supervisor, the inspector general’s office, MEO office, or staff designated by the Military Service to receive harassment complaints.” *Id.* at 30 (Glossary).

⁵¹ *Id.* at 23 (Glossary) (A supervisor is “[a] commissioned officer, non-commissioned officer or DoD civilian employee in a supervisory or command position.”).

⁵² *Id.* at § 2.4.b(3).

⁵³ *Id.* at § 2.4.b(4).

⁵⁴ *Id.* at § 4.4.c.

⁵⁵ *Id.* at § 4.4.e.

⁵⁶ *Id.* at § 4.4.c.

Complaints

- A Service member can make a sexual harassment complaint to their commander, supervisor, the IG office, MEO office, or staff designated to receive complaints.⁵⁷ The specific requirements for processing sexual harassment complaints apply.
- A complaint may be submitted anonymously. Anonymous complaints are those “received by a commanding officer or supervisor, regardless of the means of transmission, from an unknown or unidentified source, alleging harassment.”⁵⁸ If sufficient information is available, the commanding officer or supervisor must initiate an investigation.⁵⁹ The specific requirements for processing sexual harassment complaints apply to anonymous complaints.
- A Service member can make an informal complaint to “a person in a position of authority within the Service member’s organization or outside the Service member’s organization.”⁶⁰ These complaints should be addressed at the lowest appropriate level.⁶¹ The commander or officer in charge has discretion to investigate these complaints.⁶²

Categories of Complaints

For the purpose of data collection and reporting, harassment complaints are categorized as anonymous, formal, or informal.⁶³ In addition to anonymous complaints, discussed above, DoDI 1020.03 provides for:

- Formal complaints.⁶⁴ Allegations submitted in writing by the complainant to the staff designated to receive formal complaints. In addition, informal complaints that the commander elects to investigate are categorized as formal complaints.
- Informal complaints.⁶⁵ Allegations not processed or resolved as a formal complaint through the office designated to receive harassment complaints.

⁵⁷ See *infra* notes 80, 83, 86, and 89 and Table 1, Service Programs for Preventing and Responding to Sexual Harassment, for information on the staff designated to receive sexual harassment complaints. DoD policy is unclear on whether the sexual harassment complaint process is limited to sexual harassment allegations made to the individuals and organizations specified in the definition of “complaint” or pertain to any sexual harassment allegations.

⁵⁸ DoDI 1020.03, *supra* note 10, at 19 (Glossary).

⁵⁹ *Id.* at § 4.6.

⁶⁰ *Id.* at 21 (Glossary) (An informal complaint is an “allegation, made either orally or in writing, that is not processed or resolved as a formal complaint through the office designated to receive harassment complaints.”).

⁶¹ *Id.* at § 4.1.

⁶² *Id.* at 20 (Glossary) (Formal complaints include “an informal complaint which the commanding officer . . . determines warrants an investigation.”); *but see id.* at § 4.4 (appearing to require investigations if the complaint is made to the commander, supervisor, the IG, the MEO office, or staff designated to receive complaints). DoDI 1020.03 does not address whether the discretionary investigations must comply with 10 U.S.C. § 1561.

⁶³ *Id.* at § 1.2.d (requiring the glossary definitions to be included in the Services’ implementing policies).

⁶⁴ *Id.* at 20 (Glossary) (A formal complaint is “[a]n allegation submitted in writing to the staff designated to receive such complaints in Military Department operating instructions and regulations; or an informal complaint, which the commanding officer or other person in charge of the organization determines warrants an investigation.”).

⁶⁵ *Id.* at 21 (Glossary). See also *supra* note 60 (defining informal complaint).

Section 532 of the FY21 NDAA requires DoD to establish a process for confidential reporting of a sexual harassment complaint outside the immediate chain of command.⁶⁶ This new requirement has not yet been implemented by DoD.

Investigations of Sexual Harassment Complaints

Even though sexual harassment can be criminally prosecuted, violations of punitive regulations are not normally investigated by law enforcement, unless the alleged conduct amounts to a recognized criminal offense.⁶⁷ For example, harmful or offensive touching could be both sexual harassment and criminal assault. Commanders lacking the investigative authority of law enforcement or the IG cannot conduct criminal investigations; instead, they conduct commander's inquiries or administrative investigations into sexual harassment complaints.⁶⁸

The Services' individual instructions establish procedures and standards for administrative command investigations,⁶⁹ including the appointment of an investigating officer (IO) to investigate the allegation, interview witnesses, collect evidence, and prepare a report with findings and recommendations. The IO is generally a Service member with no investigation experience or any "unique training on sexual harassment, discrimination, or trauma-informed techniques," and they may be in the complainant's or offender's unit.⁷⁰

⁶⁶ National Defense Authorization Act for Fiscal Year 2021 [FY21 NDAA], Pub. L. No. 116-283, § 532, 134 Stat. 3388 (2021).

⁶⁷ Dep't of Def., Instruction 5505.16, "Investigations by DoD Components" § 3.1 (June 23, 2017) [DoDI 5505.16], available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550516_dodi_2017.pdf?ver=2017-07-03-133802-227 (Criminal allegations must be referred to law enforcement; if law enforcement declines, the command can investigate.). Criminal "[i]nvestigations into alleged or apparent violations of law [are] undertaken for purposes which include the collection of evidence in support of potential criminal prosecution." *Id.* at 7 (Glossary). MCIO Investigations take precedence over commander-directed investigations, which may not interfere with or hinder criminal investigations. Dep't of Def., Instruction 5505.03, "Initiation of Investigations by Defense Criminal Investigative Organizations" § 5.c (Mar. 24, 2011, Incorporating Change 2, Feb. 13, 2017) [DoDI 5505.03], available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550503p.pdf?ver=2019-08-13-083329-373>. DoD has not implemented procedures for the investigation of the new criminal offense of sexual harassment. FY22 NDAA §543, *supra* note 27.

⁶⁸ DoDI 5505.16, *supra* note 67, at §§ 1.2.a and b. Administrative investigations "presume the allegations under investigation, if substantiated, are not reasonably expected to result in criminal prosecution." *Id.* at 7 (Glossary). Commander-directed inquiries are "[a]dministrative fact-finding procedures to gather, analyze, and record relevant information about matters of primary interest to command authorities. Commanders . . . use the inherent authority of command to authorize administrative inquiries and investigations conducted outside of inspector general channels." *Id.* Law enforcement authority is established by statute, granted by the Secretary of Defense, or provided to the Inspector General by the Inspector General Act of 1978, as amended. *Id.* at § 1.2.a. See R.C.M. 303 (Preliminary inquiry into reported offenses), MCM, *supra* note 31.

⁶⁹ Dep't of the Army, Army Reg. 15-6, "Procedures for Investigating Officers and Boards of Officers" (Apr. 1, 2016) [AR 15-6], available at https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r15_6.pdf; Dep't of the Air Force, "Commander-Directed Investigation (CDI) Guide" (June 1, 2018) [AF CDI Guide], available at <https://www.af.mil/LinkClick.aspx?fileticket=tHPrwyT73OY=&portal>; Dep't of the Navy, JAGINST 5800.7G, *Manual of the Judge Advocate General* (Jan. 15, 2021) [JAGMAN], available at <https://www.secnav.navy.mil/doni/SECNAV%20Manuals1/5800.7G.pdf>.

⁷⁰ IRC Report, *supra* note 1, at App. B-28.

All Services use “preponderance of the evidence” as the standard to substantiate administratively investigated allegations.⁷¹ that is, the IO’s conclusions concerning the allegations must be supported by “a greater weight of evidence than supports a contrary conclusion.”⁷² The commander can approve, disapprove, modify, or add to the investigating officer’s findings and recommendations.⁷³

DoD sexual harassment policy adds specific procedures for sexual harassment investigations pursuant to 10 U.S.C. § 1561 and DoDI 1020.03, as set forth above, and prohibits the Services from limiting commanders’ inherent discretion “to appropriately investigate harassment and take corrective action to ensure unit cohesion and warfighting effectiveness.”⁷⁴ Otherwise, DoD defers to the Services for the establishment of procedures for commanders and supervisors to conduct timely and impartial investigations of sexual harassment complaints.⁷⁵

C. Service Policies on the Response to Service Members’ Sexual Harassment Complaints

Service Sexual Harassment Programs

Each Service has created a program that establishes procedures controlling how commanders receive, respond to, and investigate sexual harassment complaints.⁷⁶ As set forth in Table 1 below, the Army has combined sexual assault and sexual harassment in the same prevention and response program, while the other Services have linked their sexual harassment prevention and response programs to their Equal Opportunity (EO) or Military Equal Opportunity programs. The IRC expressed concern that embedding sexual harassment within EO and MEO programs results in a lack of support services, because designated response personnel are not specialized in sexual harassment and “are equipped only to receive complaints and support commanders in resolving complaints.”⁷⁷

⁷¹ AR 15-6, *supra* note 69, at § 3-10.b; JAGMAN, *supra* note 69, at § 0207.a(2); AF CDI Guide, *supra* note 69, at § 1.4.

⁷² AR 15-6, *supra* note 69, at § 3-10.b.

⁷³ *Id.* at § 2.8.b(3)(a); JAGMAN, *supra* note 69, at § 0209.f(2)(a); AF CDI Guide, *supra* note 69, at § 3.2.2.

⁷⁴ DoDI 1020.03, *supra* note 10, at § 1.2.g. *See also* DoDI 5505.16, *supra* note 67, at § 3.3 (recognizing the inherent authority of a commander to conduct a commander-directed inquiry provided it does not interfere with or hinder a criminal investigation).

⁷⁵ DoDI 1020.03, *supra* note 10, at § 2.4.b(4). An “investigation” is defined as “[a]n examination into allegations of wrongdoing or misconduct.” *Id.* at 21 (Glossary).

⁷⁶ *See generally id.* at §§ 2.4.a, 2.4.b, 2.4.b(4) (requiring the Service Secretaries to establish military harassment prevention and response programs that include “[p]rocedures for commanders and supervisors to receive, respond to, investigate, and resolve harassment complaints”).

⁷⁷ IRC Report, *supra* note 1, at 23, note 52 (The IRC posits that these response personnel are not able to provide victim advocacy, address safety needs, or identify helpful behavioral health services.).

Table 1: Service Programs for Preventing and Responding to Sexual Harassment

Service Program	Overview
Air Force Equal Opportunity Program. ⁷⁸	Responds to allegations of all forms of unlawful discrimination, harassment, and reprisal, including sexual harassment. ⁷⁹ Equal opportunity practitioners (EO practitioners) are designated to receive sexual harassment complaints. ⁸⁰
Army Sexual Harassment/ Assault Response and Prevention Program (SHARP). ⁸¹	Responds to allegations of sexual assault and sexual harassment. ⁸² Brigade sexual assault response coordinators (SARCs) are designated to “accept and process informal, formal, and anonymous sexual harassment complaints.” ⁸³ Complainants are entitled to SHARP victim advocate (VA) services. ⁸⁴
Navy Sexual Harassment Prevention and Response Program. ⁸⁵	Responds only to sexual harassment complaints. Command climate specialists (CCS) and Command Managed Equal Opportunity (CMEO) program managers are designated to process sexual harassment complaints for the command. ⁸⁶
Marine Corps Military Equal Opportunity (MEO) program. ⁸⁷	Prohibited activities and conduct (PAC) (sexual harassment, discrimination, harassment, hazing, bullying, dissident and protest activities, and wrongful distribution or broadcasting of intimate images) are combined in one policy. ⁸⁸ EO representatives (EOR) and EO advisors (EOA) receive PAC complaints. ⁸⁹

⁷⁸ DAFI 36-2710, *supra* note 30, at § 4.1.2 (The EO Practitioner must refer third parties—including commanders, supervisors, and co-workers—to report to their chain of command.). The EO office does not report these contacts as sexual harassment complaints on AF Form 1587. *Id.* at § 4.6. The Air Force sexual harassment complaint process is provided at Appendix C-1.

⁷⁹ *Id.* at § 1.1.

⁸⁰ *Id.* at § 1.3.29. EO Practitioners, staff sergeant (E-5) or above, are in the EO career field and receive EO training. *Id.* at § 8.2.1.

⁸¹ AR 600-20, *supra* note 30, at §§ 7-1, 7-2. (This policy implements the Army SHARP Program, executed by the Army Resilience Directorate, and separate from the Equal Opportunity and Military Equal Opportunity Programs.) The Army sexual harassment complaint process is provided at Appendix D-1.

⁸² *Id.* at § 7-2. Soldiers may seek guidance on how to directly address sexual harassment from sources other than the chain of command and the SARC but “actions and resolutions external to the commander or full-time brigade SARC will not be tracked or documented by the SARC, or entered into ICRS [the Integrated Case Reporting System].” *Id.* at § 7-8.b.

⁸³ *Id.* at § 7-5.y. Brigade SARCs provide assistance and support to complainants.

⁸⁴ Victim advocates cannot receive or process complaints. *Id.* at §§ 7-5.bb, 5.bb(1), 5.bb(15). SHARP VAs are NCOs (E-6 or higher) or DA civilians (GS-9 or higher) who provide nonclinical “crisis intervention, referrals, and ongoing emotional support” to sexual harassment victims. *Id.* at §§ 7-5.bb and bb(4).

⁸⁵ OPNAVINST 5300.13, *supra* note 30. If there is a conflict between OPNAVINST 5300.13 and SECNAVINST 5300.26E guidance, SECNAVINST guidance is used. The Navy sexual harassment complaint process is at Appendix E-1.

⁸⁶ *Id.* at App. B. (A CCS has completed the Defense Equal Opportunity Management Institute (DEOMI) Equal Opportunity Advisor Course and is the command subject matter expert on the processing of harassment, sexual harassment and unlawful discrimination; a CMEO Program Manager is a command member with at least 8 years of service and in the grade of E-6.)

⁸⁷ MCO 5354.1F, *supra* note 30, at § 4. The Marine Corps sexual harassment complaint process is provided at Appendix F-1.

⁸⁸ *Id.* at § 3. The PAC policy recognizes wrongful distribution or broadcasting of an intimate image is also a crime under Article 117a, UCMJ, and if punitive action is pursued, the convening authority should consult with the SJA. *Id.* at encl. 2, ch. 1, ¶ 9.d.

⁸⁹ *Id.* at encl. 2, ch. 3, ¶¶ 14.a and b; *id.* at App. A-7 (The Equal Opportunity Advisor (EOA) is the Marine Corps subject matter expert (SME) on all PAC matters. They receive special training on “the dynamics of human relations and command climate.”).

Formal Reports

In compliance with the 10 U.S.C. § 1561 requirements and DoD policy, the Services have established formal reporting systems that manage how sexual harassment complaints are received and investigated. To submit a formal report, the complainant must complete and sign their Service’s designated form for making sexual harassment complaints. All formal reports are provided to the commander for review and investigation using Service-specific processes, none of which require coordination or consultation with the legal advisor before the commander selects an appropriate method of investigation.⁹⁰

These processes are not uniform across the Services. In the Air Force, an EO practitioner investigates formal reports, prepares the report of investigation, and makes recommendations on disposition. In all other Services, the command conducts or initiates the investigation. In the Navy and Marine Corps, commanders investigate by informal inquiry or Command Directed Investigation (CDI). The Army requires a qualified investigating officer from outside the subject’s brigade-sized element and a CDI if the report of investigation is to be used for adverse administrative action. Service-specific formal reporting processes are detailed below in Table 2.

Table 2: Service Formal Reports of Sexual Harassment

Air Force	<p>Formal complaints are written sexual harassment allegations submitted to the EO practitioner on AF Form 1587 and processed IAW 10 U.S.C. § 1561.⁹¹ The installation commander is notified of the complaint within 72 hours and directs a complaint clarification,⁹² which is a sexual harassment investigation conducted by an EO practitioner:</p> <ul style="list-style-type: none"> • The EO practitioner must consult the SJA prior to gathering information and making the substantiation determination.⁹³ • The installation SJA reviews the report for legal sufficiency. • The installation commander submits the final report to the GCMCA.⁹⁴ <p>Hotline complaints⁹⁵ go to the responsible installation commander for action. For formal complaints, the EO practitioner conducts the complaint clarification and forwards it to the MAJCOM/A1 as the final approving authority instead of to the installation commander.⁹⁶</p>
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⁹⁰ *Id.* at encl. 2, ch. 3, ¶¶ 7, 16 (requiring CJA/SJA consultation prior to dismissing a complaint but otherwise only recommending consultation prior to determining how to investigate a complaint).

⁹¹ DAFI 36-2710, *supra* note 30, at 132 (Glossary) and § 4.27.

⁹² *Id.* at 132 (Glossary) (Complaint Clarification—Process of gathering information regarding a formal equal opportunity complaint to determine whether credible evidence exists and/or that unlawful discrimination has occurred.”). If the complaint alleges sexual harassment and other forms of misconduct, the installation commander will refer the formal complaint to the command or the IG for investigation. *Id.* at § 4.27.2.1.

⁹³ *Id.* at §§ 4.15.1,4.15.3, 4.15.4.

⁹⁴ *Id.* at § 4.27.2.4.

⁹⁵ *Id.* at § 4.28 (The Air Force Unlawful Discrimination Harassment, and Sexual Harassment Hotline is operated by EO for Air Force personnel to report sexual harassment allegations to the proper authorities.).

⁹⁶ *Id.* at § 4.28 (If the Service member uses the EO processes, or the complaint is anonymous, a CDI is conducted using the CDI processes with the Major Command (MAJCOM)/Directorate of Manpower and Personnel (A1) as the final approving authority.).

<p>Army</p>	<p>A formal written complaint is submitted on DA Form 7746.⁹⁷ The BDE SARC immediately refers the complaint to the BDE commander,⁹⁸ who advises the complainant of the consequences of making a false complaint and swears the complainant to the statement in the formal complaint.⁹⁹ The BDE commander initiates the investigation, but disposition and resolution are at the command level.¹⁰⁰</p> <p>Investigations are conducted IAW 10 U.S.C. § 1561, DoDI 1020.03, and the following processes:</p> <ul style="list-style-type: none"> • “If sufficient information exists to permit the initiation of an investigation, commanders will appoint IOs from outside the subject’s assigned brigade-sized element to conduct sexual harassment complaint investigations under AR 600-20, chapter 7.”¹⁰¹ • “Sexual harassment complaint investigations will comply with processing timelines established by AR 600-20.”¹⁰² • “IOs must meet qualifications specified in chapter 2 of AR 15-6.”¹⁰³ • The investigation must comply with AR 15-6 if the report of investigation is to be used as the basis for administrative action.¹⁰⁴ • IOs must meet with a legal advisor and SARC prior to conducting the investigation.¹⁰⁵ • A legal review is required prior to commander action on the findings and recommendations contained in the report of investigation.¹⁰⁶
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⁹⁷ AR 600-20, *supra* note 30, at § 7-8.e(1).

⁹⁸ *Id.* at § 7-8.n(2) (If the complainant and subject are in different units, the complaint is elevated to the first commander having command authority over both.).

⁹⁹ *Id.* at § 7-8.n(4).

¹⁰⁰ *Id.* at § 7-8.f(3).

¹⁰¹ Secretary of the Army, Memorandum on Army Directive 2021-16, “Immediate Actions to Improve Sexual Harassment/ Assault Response and Prevention Program” (May 5, 2021) [AD 2021-16], *available at* https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN32360-ARMY_DIR_2021-16-000-WEB-1.pdf (The first general officer in the command may approve a limited exception.). This change appears to eliminate the option of resolving the complaint through commander’s inquiry and to require resolution through AR 15-6 investigations.

¹⁰² *Id.* The processes established for formal investigations of sexual harassment now apply to all command investigations of sexual harassment complaints. In the absence of the processing requirements of AR 600-20, *supra* note 30, command investigations are governed by AR 15-6, *supra* note 69.

¹⁰³ AD 2021-16, *supra* note 101. *See also* AR 15-6, *supra* note 69, at §§ 2-3. AR 15-6 requires that IOs selected be the best qualified “by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament.” They must be “impartial, unbiased, objective, and have the ability to complete the investigation in a timely manner.” *Id.* at 2-3.a. Finally, they must be commissioned officers, warrant officers, and Army civilian employees (GS-11 or above), unless military exigencies require the appointment of a non-commissioned officer in the grade of E-7 or above. *Id.* at 2-3.b.

¹⁰⁴ AR 600-20, *supra* note 30, at § 7-8.n(7).

¹⁰⁵ *Id.* at § 7-8.n(9).

¹⁰⁶ *Id.* at §§ 7-8.o and p.

<p>Navy</p>	<p>Formal reports¹⁰⁷ are submitted by complainants or witnesses in writing on a NAVPERS 5354/2 or by other authorized means.¹⁰⁸</p> <p>Formal complaints are processed IAW 10 U.S.C. § 1561, DoDI 1020.03, SECNAVINST 5300.26E, and JAGINST 5800.7F¹⁰⁹ and must be provided to the commander within 24 hours.¹¹⁰</p> <ul style="list-style-type: none"> • The sexual harassment report must be processed by the alleged offender’s command.¹¹¹ • Investigations are conducted at the local command IAW JAGINST 5800.7F.¹¹² The IO must be senior to the complainant and the harasser,¹¹³ and must be trained on Navy policy on sexual harassment and investigative methods and processes.¹¹⁴ • Investigations may consist of an informal inquiry.¹¹⁵ • The IO must consult with a CCS, and the CCS must conduct a compliance review.¹¹⁶ • The completed investigation has a legal sufficiency review prior to command action.¹¹⁷
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¹⁰⁷ OPNAVINST 5300.13, *supra* note 30, at App. B. Navy policy uses the term “report” instead of “complaint” to mean “an allegation of sexual harassment.”

¹⁰⁸ *Id.* at ch. 4, ¶ 2 (The Navy recognizes any of the following methods to file a formal sexual harassment report: (1) Article 1150, Redress of Wrong Committed by a Superior (other than the commander); (2) Article 138, Complaints of Wrongs against the Commander; (3) NAVPERS 1626/7 Report and Disposition of Offenses; (4) contacting the IG; (5) communicating with elected officials, Article 1155; and (6) any other means of communication that the commander deems appropriate.).

¹⁰⁹ *Id.* at ch. 4, ¶¶ 1.d and e. *See also* SECNAVINST 5300.26E, *supra* note 29, at § 5.b(5).

¹¹⁰ OPNAVINST 5300.13, *supra* note 30, at ch. 4, ¶ 3.a.

¹¹¹ *Id.* at ch. 4, ¶ 1.g.

¹¹² *Id.* at ch. 4, ¶ 1.e.

¹¹³ JAGMAN, *supra* note 69 at § 0206.b(1).

¹¹⁴ SECNAVINST 5300.26E, *supra* note 29, at § 5.c(3) (Department of Navy “personnel called upon to conduct or review investigations into alleged incidents of sexual harassment must receive training in DON policy on sexual harassment and investigative methods and processes.”).

¹¹⁵ *Id.* at § 5.c(5).

¹¹⁶ OPNAVINST 5300.13, *supra* note 30, at ch. 4, ¶ 1.e.

¹¹⁷ *Id.*

Marine Corps	<p>Formal complaints are submitted by complainants¹¹⁸ on a completed NAVMC Form 11512 requesting commander-directed resolution,¹¹⁹ forwarded to the subject’s commander or to the EO advisor¹²⁰ to forward to the commander.¹²¹ The commander assesses the complaint to accept or dismiss it,¹²² and, if accepted, whether to initiate an inquiry or investigation.¹²³</p> <p>Formal complaints are investigated IAW 10 U.S.C. § 1561, DoDI 1020.03, JAGINST 5800.7G, and the following MCO 5354.1F provisions:</p> <ul style="list-style-type: none"> • The commander (O-5 or above) should consult with EOA and the CJA/SJA prior to conducting an inquiry or investigation.¹²⁴ • The IO¹²⁵ must consult the EOA;¹²⁶ the completed investigation must receive an EOA advisory opinion;¹²⁷ and a legal sufficiency review by the SJA. • The commander reviews the completed report¹²⁸ and based on the preponderance of the evidence standard, determines to substantiate the complaint or not.¹²⁹ <p>The commander then determines the appropriate resolution process:¹³⁰ conflict management¹³¹ or complaint resolution.¹³²</p>
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¹¹⁸ MCO 5354.1F, *supra* note 30, at App. A-4 (A complainant is “an aggrieved Service member who makes a claim or assertion alleging prohibited activities and conduct via a completed NAVMC Form 11512[.]”).

¹¹⁹ *Id.* at encl. 2, ch. 3, ¶¶ 1, 3, 12, 14; encl. 2, ch. 5, ¶ 1 (The NAVMC Form 11512 can be submitted to a commander, the chain of command, a supervisor, the EO Office or an alternate agency, such as the IG or a SARC.). The term “commanders” means “Marine Force Commanders, Commanding General, Officers in Charge in the grade of O-5/O-6, and slated O-5/O-6 Commanding Officers.” *Id.* at App. 1-3. The chain of command is defined as “The succession of commanding officers from a superior to a subordinate through which command is exercised.” *Id.* at App. A-3.

¹²⁰ *Id.* at encl. 2, ch. 3, ¶ 3, and App. A-7.

¹²¹ *Id.* at ch. 5, ¶ 1 (“Formal PAC complaints submitted outside the chain of command to alternative agencies,” such as the IG or SARC, are forwarded to the EOA for processing.). *See also id.* at ch. 3, ¶ 3 (directing supervisors to immediately forward complaints to the subject’s commander or designee for processing).

¹²² *Id.* at ch. 3, ¶ 16 (“A commander with jurisdiction over the subject of the complaint, in consultation with the supporting EOA and CJA/SJA, may determine that dismissal of a complaint is appropriate.”). Appropriate reasons for dismissal include: (1) lack of jurisdiction; (2) lack of merit if the facts as alleged do not constitute a violation of law, rule, or regulation; (3) being duplicative; (4) claim of institutional discriminatory practices/policies; (5) failure to cooperate, at any stage of the proceeding; (6) lateness (commanders may decline allegations made more than 90 days after the conduct); (7) voluntary withdrawal.

¹²³ *Id.* at ch. 3, ¶¶ 3.15, 17.

¹²⁴ *Id.* at ch. 3, ¶¶ 5, 7.

¹²⁵ The IO should be from a different unit than the subject. *Id.* at ch. 5, ¶ 3.c.

¹²⁶ *Id.*

¹²⁷ *Id.* at ch. 5, ¶ 4.e.

¹²⁸ *Id.* at ch. 5, ¶ 4.f.

¹²⁹ *Id.* at ch. 5, ¶ 3.e.

¹³⁰ *Id.* at ch. 3, ¶ 3.3.

¹³¹ *Id.* at ch. 3, ¶¶ 3.17, 18; ch. 4, ¶ 1. Conflict management is a mediation process, facilitated by an EOA, to informally resolve interpersonal conflicts at the lowest level. The commander determines if this process is appropriate after assessing the complaint and investigating if more information is needed. A “Commander’s PAC Complaint Assessment Tool” guides commanders in determining whether a violation has occurred and whether informal corrective measures are appropriate. *Id.* at ch. 3, ¶ 18.

¹³² Complaint resolution is the process used by the commander if more information is needed or if conflict management does not provide an appropriate resolution. *Id.* at ch. 5, ¶ 1.

Informal Reports

DoDI 1020.03 requires an informal complaint process for harassment complaints.¹³³ The Service informal complaint processes, described in Table 3 below, focus on resolving complaints at the lowest level, even if they are investigated.

Table 3: Service Informal Reports

Air Force	An informal complaint is made to an EO practitioner requesting to resolve the allegation informally. ¹³⁴ The EO practitioner must document the complaint on AF Form 1587-1 and inform the commander of the complaint within 24 hours ¹³⁵ and the “command responsibility to investigate the complaint under 10 U.S.C. § 1561.” ¹³⁶ The command will process any resulting investigation as a CDI. ¹³⁷
Army	An informal complaint is made to a BDE SARC requesting to resolve the complaint informally, without filing a written complaint on DA Form 7746. ¹³⁸ The BDE SARC can help clarify the complaint and provide information on support services to help resolve the complaint. ¹³⁹ Resolution is at the lowest level and no investigation is required unless the commander learns of the complaint. ¹⁴⁰
Navy	The Navy informal resolution option ¹⁴¹ allows the complainant to address their allegations directly with the subject, a member of the chain of command, ¹⁴² CMEO, or the CCS may facilitate the resolution. ¹⁴³
Marine Corps	Commanders may consider a Service member’s request to use the informal conflict management process as the best means to resolve the complaint. ¹⁴⁴

¹³³ DoDI 1020.03, *supra* note 10, at 20 (Glossary) (defining a formal complaint as including any informal complaint the command elects to investigate.).

¹³⁴ DAFI 36-2710, *supra* note 30, at 133 (Glossary). Informal resolution options include using the chain of command for informal complaint resolution, oral or written direct communication with the offender, intervention by a co-worker, or use of the facilitation process. Facilitation may not be appropriate for sexual harassment complaints if the complaint is reserved for command administrative or Uniform Code of Military Justice actions. *Id.* at §§ 4.2.4 and 4.5.

¹³⁵ *Id.* at § 4.2.4. DAFI 36-2710 does not address whether a commander’s inquiry or a full administrative investigation is required by the command, or what level of command must investigate.

¹³⁶ *Id.*

¹³⁷ *Id.* at § 4.10.

¹³⁸ AR 600-20, *supra* note 30, at § 7-8.m(1).

¹³⁹ *Id.* at §§ 7-5.y, 7-8.m. Support services that can help resolve issues, both on and off-post, include “health care, counseling, . . . chaplains, legal assistance, and unit or installation trained mediators for alternative dispute resolution.” *Id.* at § 7-8.m(6)(c)2.

¹⁴⁰ *Id.* at § 7-8.f(2). Commanders who receive or become aware of a formal or informal complaint of sexual harassment will initiate an AR 15-6 investigation. *Id.* at ch. § 7-6.b. *See also* AD 2021-16, *supra* note 101.

¹⁴¹ SECNAVINST 5300.26E, *supra* note 29, at encl. 6. A formal complaint should be filed if (1) the behavior does not stop or is not resolved; (2) direct resolution is not reasonable; (3) the behavior is criminal or quid pro quo sexual harassment.

¹⁴² *Id.* at encl. 6.

¹⁴³ OPNAVINST 5300.13, *supra* note 30, at ch. 3, ¶ 1.b. CCS or CMEO coordination is required to document informal resolution.

¹⁴⁴ MCO 5354.1F, *supra* note 30, at ch. 3, ¶¶ 17 and 18, and encl. 2 (“Commander’s PAC Complaint Assessment Tool”).

Anonymous Reports

All Services uniformly require sexual harassment complaints received from an unknown or unidentified source, via any means, to be delivered to the appropriate commander who will investigate the complaint if enough information is provided to support an investigation. One difference between the Services is that the Army, Air Force, and Marine Corps identify a specific level of command to investigate anonymous complaints, while the Navy does not. Service-specific processes are provided in Table 4 below.

Table 4: Anonymous Reports of Sexual Harassment

Air Force	The EO Office forwards anonymous allegations to the appropriate commander ¹⁴⁵ for a CDI IAW 10 U.S.C. § 1561 and DAFI 36-2710. The anonymous complaint is documented by the EO practitioner on AF Form 1587.
Army	Anonymous complaints are referred to the subject's BDE (O-6) commander. ¹⁴⁶ The complaint is entered into the ICRS ¹⁴⁷ and the commander investigates using the formal complaint processes. ¹⁴⁸
Navy	When the CCS or CMEO program manager receives an anonymous complaint, they consult with the commander who then initiates an investigation using the formal report processes. ¹⁴⁹
Marine Corps	Anonymous complaints ¹⁵⁰ are forwarded to the subject's commander in the grade of O-5 or above, and the commander is required to initiate an inquiry or investigation IAW 10 U.S.C. § 1561 and MCO 5354.1F. ¹⁵¹

¹⁴⁵ DAFI 36-2710, *supra* note 30, at §§ 1.3.28 and 4.1.3. DAFI 36-2710 does not specify a particular level of command for receipt of anonymous complaints; however, the AF CDI guide provides that a CDI is normally initiated by a Squadron (O-5) level or higher commander. AF CDI Guide, *supra* note 69, at § 1.2.

¹⁴⁶ AR 600-20, *supra* note 30, at § 7-8.1(1) (Anonymous complaints may be submitted in any manner, some common methods are through hotlines, email, or official telephone lines.).

¹⁴⁷ *Id.* at § 7-8.1(2).

¹⁴⁸ *Id.* at § 7-8.1(3). *See also* AD 2021-16, *supra* note 101, at § 5.a.

¹⁴⁹ OPNAVINST 5300.13, *supra* note 30, at ch. 5, ¶¶ 2.a and b. *See also* SECNAVINST 5300.26E, *supra* note 29, at § 5(d)(3).

¹⁵⁰ MCO 5354.1F, *supra* note 30, at App. A. Common sources of anonymous reports include hotlines, advice lines, electronic mail, or official telephone lines. Anonymous complaints may also be submitted to the Naval Criminal Investigative Service (NCIS) Web and App Tip Line. This tip line is “a partnership between NCIS and the Marine Corps that provides a safe, discreet, and anonymous option to report allegations of PAC.” *Id.* at ch. 3, ¶ 14.d(5).

¹⁵¹ *Id.* at ch. 3, ¶ 14.d.

Reports to Commanders or Supervisors Outside of the Sexual Harassment Program

Recognizing commanders’ inherent duty to investigate misconduct and preserve good order and discipline in their units, DoD sexual harassment policy directs the Services to “ensure commanders have the discretion to appropriately investigate harassment and take corrective action to ensure unit cohesion and warfighting effectiveness.”¹⁵² The Services differ in their response to sexual harassment complaints made to the command when complainants do not want to file a formal report. Marine Corps commanders receiving a direct sexual harassment complaint do not have to initiate an investigation unless the complainant submits a formal written request; however, all other Services require commanders to investigate reports made directly to them.

The roles of the chain of command (other than the commander) in sexual assault reports and in sexual harassment reports also differ significantly. Supervisors must report sexual assault allegations to the commander, who will forward the allegations to an MCIO for investigation. For sexual harassment reports, however, supervisors may or may not be required to pass those reports along to commanders; and even if they are required to inform commanders of the sexual harassment complaint, commanders are not necessarily required to investigate. The Service-specific processes for such reports are detailed in Table 5 below.

Table 5: Reports to Service COs/Supervisors Not Submitted as Formal Complaints

Air Force	<p><u>Reports to Commanding Officers</u></p> <p>Oral or written sexual harassment allegations made to the commander (and not submitted to the EO Office) are resolved by the command with CDI procedures:¹⁵³ the commander consults with an EO to determine if the allegations meet the definition of sexual harassment; if so, a CDI is conducted IAW the requirements of 10 U.S.C. § 1561;¹⁵⁴ and the commander provides investigation and reporting information to the EO practitioner to track the sexual harassment complaint.¹⁵⁵</p> <p><u>Reports to Supervisors</u></p> <p>Commanders, managers, and supervisors must investigate complaints;¹⁵⁶ however, AF policy does not address whether supervisors, including NCOs, must report sexual harassment complaints to the commander to investigate.</p>
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¹⁵² DoDI 1020.03, *supra* note 10, at § 1.2.g. *See also* DoDI 5505.16, *supra* note 67, at § 3.3 (recognizing the inherent authority of a commander to conduct a commander-directed inquiry).

¹⁵³ DAFI 36-2710, *supra* note 30, at § 4.10. DAFI 36-2710 does not specify the level of command or type of investigation to investigate complaints; however, the policy refers to unit-level command responsibilities, such as a requirement to “provide a written memorandum to the EO Office regarding the substantiation determination for all complaints handled by the unit, including for Commander Directed Investigations.” *Id.* at §§ 1.3.28 and 4.1.3.

¹⁵⁴ *Id.* at § 4.10. *See also* 10 U.S.C. § 1561.

¹⁵⁵ DAFI 36-2710, *supra* note 30, at § 4.10.

¹⁵⁶ Dep’t of the Air Force, Air Force Policy Directive 36-27, “Equal Opportunity Program” § 3.1 (June 18, 2020), *available at* https://static.e-publishing.af.mil/production/1/af_a1/publication/afpd36-27/afpd36-27.pdf (“Commanders, managers, and supervisors shall promptly, thoroughly and impartially investigate complaints, and take appropriate corrective action when a violation is found, including disciplinary action, if warranted.” AFPD 36-27 requires the EO Office to advise complainants of the right to an investigation IAW 10 U.S.C. § 1561 without linking the § 1561 procedures to manger/supervisor investigations.).

<p>Army</p>	<p><u>Reports to Commanding Officers</u>¹⁵⁷</p> <p>Commanders “learning of an act of sexual harassment within the commander’s purview to investigate from the complainant, victim, or a third party”¹⁵⁸ will investigate in accordance with DoDI 1020.03, AR 600-20, and AD 2021-16.¹⁵⁹</p> <p>Commanders who receive or become aware of a formal or informal complaint of sexual harassment will initiate an AR 15-6 investigation.¹⁶⁰ Commanders may not assess credibility as a precursor to initiating command investigations into complaints of sexual harassment.¹⁶¹</p> <p><u>Reports to Supervisors</u></p> <p>Supervisors are not required to report Service members’ complaints of sexual harassment to commanders.¹⁶² If a complainant’s desired remedy for an instance of sexual harassment “can be achieved through leadership actions, peer intervention, counseling, or training,” complainants may request direct resolution from anyone in a supervisory position, including NCOs and officers not in command. Coordination with the SARC is not required.¹⁶³</p>
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¹⁵⁷ AR 600-20, *supra* note 30, at § 1-6.a (“A commander is a commissioned or warrant officer (WO) who, by virtue of grade and assignment, exercises primary command authority over a military organization or a prescribed territorial area that is recognized as a ‘command’ under pertinent official directives[.]”).

¹⁵⁸ *Id.* at 212 (Glossary) (A third party is defined as “[a] person or organization that attempts to present allegations on behalf of another individual.”).

¹⁵⁹ *Id.* at § 7-5.o(28). *See also* AD 2021-16, *supra* note 101.

¹⁶⁰ *Id.* at § 7-6.b. *See also* AD 2021-16, *supra* note 101.

¹⁶¹ *Id.* at § 7-6d.

¹⁶² AR 600-20, *supra* note 30, at §§ 7-8.e, m(3), m(5). *Compare* § 7-9a(4), explicitly requiring supervisors to immediately inform the soldier’s commander if they become aware of a sexual assault involving a soldier.

¹⁶³ *Id.* at § 7-8m(5). *See also* AD 2021-16, *supra* note 101. AD 2021-16 does not explicitly require investigation of complaints made to the chain of command.

<p>Navy</p>	<p><u>Reports to Commanding Officers</u></p> <p>Reports made directly to the commander by a complainant must be processed using the formal reporting procedures.¹⁶⁴</p> <p><u>Reports to Supervisors</u>¹⁶⁵</p> <p>Service members are encouraged to report sexual harassment incidents,¹⁶⁶ including reporting incidents to their chain of command to be handled informally.¹⁶⁷ The command must coordinate with the CCS or CMEO to document the report without the requirement to investigate.¹⁶⁸ Appendix D, Informal Resolution System, notes that when a supervisor is approached by a complainant, they should take action and inform the chain of command.¹⁶⁹ The chain of command is instructed to know when to get involved and to give the informal resolution system a chance to work.¹⁷⁰ SECNAVINST 5300.26E requires all reported sexual harassment incidents with enough information to be investigated;¹⁷¹ however, it does not establish procedures for investigation of incidents reported to the chain of command.¹⁷²</p>
<p>Marine Corps</p>	<p><u>Reports to Commanding Officers</u></p> <p>Service member complaints to the commander or EOA outside the formal complaint process, or third party complaints to the commander,¹⁷³ are not required to be investigated. Commanders can initiate an inquiry or investigation to maintain good order and discipline, and if an inquiry or investigation is initiated, it will follow the PAC process using NAVMC Form 11512 for documentation.¹⁷⁴</p> <p><u>Reports to Supervisors</u></p> <p>Supervisors are not required to inform commanders of sexual harassment complaints made to them, unless the complainant wants to use the formal reporting process to request command resolution.¹⁷⁵</p>

¹⁶⁴ OPNAVINST 5300.13, *supra* note 30, at ch. 3, ¶ 1.a.

¹⁶⁵ *Id.* at App. B (“Supervisor. Anyone who has subordinates, regardless of paygrades or ranks who is approached by a complainant, alleged offender, or third party, or who himself or herself observes sexual harassment or unacceptable behavior.”).

¹⁶⁶ SECNAVINST 5300.26E, *supra* note 29, at encl. 3, ¶ 4.d.

¹⁶⁷ OPNAVINST 5300.13, *supra* note 30, at ch. 3, ¶ 2.

¹⁶⁸ *Id.* at ch. 3, ¶ 1.a. SECNAVINST 5300.26E does not clearly alter this provision.

¹⁶⁹ *Id.* at App. D-4, ¶ 4.s(2).

¹⁷⁰ *Id.* at App. D-4, ¶ 5.e.

¹⁷¹ SECNAVINST 5300.26E, *supra* note 29, at ¶ 5.c(5) (requires reported incidents to be investigated and resolved at the lowest level. Investigations may consist of informal inquiries and do not need to comply with 10 U.S.C. § 1561, unless applicable.).

¹⁷² *Id.* at encl. 3, ¶ 3.a(4) (requiring legal sufficiency reviews only for “reports of investigation of formally resolved complaints”).

¹⁷³ MCO 5354.1F, *supra* note 30, at ch. 3, ¶ 2 (Third parties may include relatives, friends, co-workers.).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at ¶ 4.b(7); ch. 3, ¶¶ 1, 3, 12, 14.

Reports to the IG

All Services require sexual harassment complaints against senior officials to be referred to the IG for investigation; with other complaints referred or routed as set forth in Table 6 below.

Table 6: Reports to the IG

	Senior Officials	Others
Air Force	<ul style="list-style-type: none"> Senior official (O-7 and above and Senior Executive Service (SES)) complaints referred to AF IG.¹⁷⁶ O-6/O-6-select complaints require a complaint clarification by the EO and notification to the IG.¹⁷⁷ Installation commander and vice commander complaints coordinated with the MAJCOM EO, IG, and JA, to determine the complaint process.¹⁷⁸ 	<p>Sexual harassment complaints to the IG, including the IG Hotline, are referred to the EO for complaint clarification or to the command for a CDI.¹⁷⁹</p> <p>Complaints referred to the EO are documented on AF Form 1587 and a complaint clarification is conducted.¹⁸⁰ The completed complaint clarification is forwarded to the SJA for a legal review and then to the IG for further action.¹⁸¹</p>
Army	O-6 promotable or above are referred to the IG for investigation. ¹⁸²	Soldiers referred to a full-time brigade SARC to file a formal complaint. ¹⁸³
Navy	Flag officers and SES complaints are referred to the Navy IG for action. ¹⁸⁴	
Marine Corps	O-7 selects and above and SES complaints are referred to the Marine Corps IG. ¹⁸⁵	Formal complaints are forwarded to the EOA for processing. ¹⁸⁶

¹⁷⁶ DAFI 36-2710, *supra* note 30, at §§ 4.22, 4.25.

¹⁷⁷ *Id.* at § 4.23 (The clarification report, legal sufficiency review, and all other actions and statements are provided to the IG.).

¹⁷⁸ *Id.* at § 4.24.

¹⁷⁹ Dep't of the Air Force, Air Force Instruction 90-301, "Inspector General Complaints Resolution" § 2.3 and Table 3.7 (Dec. 28, 2018, Incorporating Change 1, Sept. 30, 2020), *available at* https://static.e-publishing.af.mil/production/1/saf_ig/publication/afi90-301/afi90-301.pdf (the IG system should only be used when there is evidence EO mishandled the matter).

¹⁸⁰ DAFI 36-2710, *supra* note 30, at § 4.29.4.

¹⁸¹ *Id.* at § 4.29.4 (This provision governs the process for conducting complaint clarifications on EO-related allegations referred from the IG but does not specify whether a different process applies to allegations of sexual harassment.).

¹⁸² AR 600-20, *supra* note 30, at § 7-8.1 (DoDI 1020.03 and 10 U.S.C. § 1561 timelines do not apply to the IG.).

¹⁸³ *Id.* at § 7-5. *See also* AD 2021-16, *supra* note 101. AR 600-20 does not address who coordinates the SARC referral. It is unclear whether AD 2021-16 requires these complaints to be investigated if sufficient information is provided.

¹⁸⁴ OPNAVINST 5300.13, *supra* note 30, at ch. 2, ¶ 3.b.

¹⁸⁵ MCO 5354.1F, *supra* note 30, at 4.b(5)(a). "Senior Official (defined as O-7 (select) and above, current or former members of the Senior Executive Service (SES)/equivalent, and current or former civilian Presidential appointees)." *See also* Dep't of Defense Directive 5505.06, "Investigations of Allegations Against Senior DoD Officials," Glossary (June 6, 2013, Incorporating Change 1, Effective Apr. 28, 2020), *available at* <https://www.dodig.mil/Portals/48/DoDD%20550506%2004-28-2020.pdf>.

¹⁸⁶ *Id.* at encl. 2, ch. 5 ¶ 1.

III. Fiscal Year 2020 Data on Sexual Harassment Reports

The Sexual Assault Prevention and Response Office (SAPRO) is statutorily required to report sexual harassment data annually on formal and informal reports, including the number of substantiated and unsubstantiated reports, a synopsis of each substantiated report, and the action taken on each substantiated report.¹⁸⁷ The DoD annual report for FY20 on sexual assault includes an appendix with the Services and the National Guard Bureau (NGB) sexual harassment data for formal, informal, and anonymous complaints.¹⁸⁸ The report explains that after a commander-directed investigation, complaints are substantiated or unsubstantiated;¹⁸⁹ however, the Services and NGB methodology to categorize and collect substantiation data is not described. Such information is important for the informal complaint data, as only Air Force policy required investigation of informal complaints throughout FY20.¹⁹⁰ Because the Services do not have a common standard for what is considered a reportable complaint, there is uncertainty about the accuracy of reported sexual harassment incidents.

In the FY20 report, DoD reported 720 formal complaints were resolved, with 61% substantiated; 740 informal complaints were resolved, with 32% substantiated; and 25 anonymous complaints were resolved, with 56% substantiated.¹⁹¹

Table 7: FY 2020 Resolved Sexual Harassment Complaints¹⁹²

FY20 Resolved	Formal (720)	Informal (740)	Anonymous (25)
Substantiated	442 / 61%	240 / 32%	14 / 56%
Unsubstantiated	250 / 35%	450 / 61%	11 / 44%

Note: The substantiated and unsubstantiated resolved complaint totals do not sum to 100%. Excluded are: 28 formal resolved complaints (dismissed, referred out, or withdrawn); and 50 informal resolved complaints (unknown, inconclusive, withdrawn, or dismissed).¹⁹³

¹⁸⁷ National Defense Authorization Act for Fiscal Year 2018, Pub. L. No 115-91, § 537, 131 Stat. 1283 (2017). This sexual harassment reporting requirement started with the report required on March 1, 2020.

¹⁸⁸ FY20 SAPRO Report, App. F, *supra* note 39, at 4. SAPRO definitions for informal, formal, and anonymous complaints are consistent with DoDI 1020.03 definitions. NGB sexual harassment policies were not reviewed for this paper. Observations on the data are based solely on reviewing DoD and Service policy.

¹⁸⁹ *Id.* at 2.

¹⁹⁰ SECNAVINST 5300.26E, *supra* note 29, at ¶5(5). Department of the Navy policy did not require an investigation for all reported incidents of sexual harassment until May 28, 2020. Army policy did not require investigation of informal complaints until AD 2021-16 became effective on May 5, 2021.

¹⁹¹ FY20 SAPRO Report, App. F, *supra* note 39, at 4–5.

¹⁹² *Id.* at 4–5. Service policies for processing informal sexual harassment complaints are inconsistent, affecting the data reliability.

¹⁹³ *Id.* at 5.

DoD reported 997 corrective actions taken in FY20 for substantiated sexual harassment incidents from informal, formal, and anonymous complaints. General or special court-martial prosecutions for sexual harassment incidents were rare, only 12, with the remaining 985 substantiated sexual harassment incidents disposed of through non-judicial punishment or administrative actions.¹⁹⁴

Table 8: Corrective Action Administered to Sexual Harassment Offenders in FY 2020¹⁹⁵

	NJP	Admin Action	Unknown	Other	Pending	SCM	SPCM	GCM
Formal ¹⁹⁶ (N=720)	347 (48%)	243 (34%)	69 (10%)	28 (4%)	19 (3%)	6 (1%)	7 (1%)	1 (<1%)
Informal ¹⁹⁷ (N=254)	51 (20%)	140 (55%)	11 (4%)	37 (15%)	8 (3%)	3 (1%)	1 (<1%)	3 (1%)
Anonymous ¹⁹⁸ (N=23)	9 (39%)	10 (43%)	4 (17%)	0	0	0	0	0

Note: More than one type of corrective action can be administered to each offender.

The Services also reported the nature of sexual harassment found in the substantiated complaints. For each type of complaint (formal, informal, or anonymous), the nature of sexual harassment was consistent, ranging from 51% to 59% for complaints involving crude or offensive behavior, and ranging from 40% to 44% for complaints involving unwanted sexual attention.¹⁹⁹

Table 9: Nature of Sexual Harassment for FY 2020 Substantiated Complaints²⁰⁰

Type of Sexual Harassment*	Formal (720 resolved)	Informal (740)	Anonymous (25)
Crude/offensive behavior	51% (343 of 676)	59% (214 of 363)	58% (11 of 19)
Unwanted sexual attention	44% (300 of 676)	40% (146 of 363)	42% (8 of 19)
Sexual coercion	5% (33 of 676)	1% (3 of 363)	0

* Each substantiated complaint may involve more than one type of harassment.²⁰¹

The Table 8 and 9 data raise the question of why sexual harassment complaints are categorized as formal or informal when the severity of the incident appears to have no bearing on the category.²⁰²

¹⁹⁴ *Id.* at Exhibits 3–5: “Exhibit 3: Corrective Actions Administered to Substantiated Offenders in Formal Complaints”; “Exhibit 4: Corrective Actions Administered to Substantiated Offenders in Informal Complaints”; and “Exhibit 5: Corrective Actions Administered to Substantiated Offenders in Anonymous Complaints.”

¹⁹⁵ *Id.* Table 8 is a compilation of the data presented in Exhibits 3–5 and the explanatory notes.

¹⁹⁶ *Id.* at 11. Under formal complaint procedures: 720 total corrective actions taken for 433 substantiated offenders.

¹⁹⁷ *Id.* at 11. SAPRO used a different metric—the number of first-time offenders—to calculate the corrective action under the informal complaint procedures. There was no explanation for why the total number for all offenders was not calculated (as was done for the formal and anonymous complaint procedures). Under informal complaint procedures: of 243 sexual harassment offenders, 162 were first-time offenders with 134 first-time offenders receiving some form of corrective action.

¹⁹⁸ *Id.* at 11. Under the anonymous complaint procedures: out of the 16 offenders, 23 corrective actions were taken.

¹⁹⁹ *Id.* at 9.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² See also IRC Report, *supra* note 1, at App. B-26, note 35 (noting there is no data to support a finding that “lower level allegations” are those categorized as informal complaints.).

IV. Recent Developments in the Military Response to Sexual Harassment

A. Legislative Actions

As previously noted, § 532 of the FY21 NDAA requires DoD to establish a process for confidential reporting of sexual harassment complaints outside the immediate chain of command and for DoD to develop a plan to access confidential reports to track serial offenders.²⁰³ DoD has not yet released an implementation plan for a confidential reporting process or tracking system.

Also previously noted, on December 27, 2021, the FY22 NDAA was enacted with two sections requiring changes to the military response to sexual harassment. First, § 543 requires the President to establish sexual harassment as a separate criminal offense by January 26, 2022.²⁰⁴ Policy governing the reporting and investigation of criminal sexual harassment allegations has not been published.

Second, § 539D amends 10 U.S.C. §1561 in three significant ways: (1) commanding officers are only required to investigate formal sexual harassment complaints; (2) commanding officers must direct independent investigation of those complaints; and (3) sexual harassment is redefined as that conduct constituting the offense of sexual harassment.²⁰⁵ These amendments to 10 U.S.C. §1561 are not effective until December 26, 2023. However, the Secretary of Defense is required to submit a report on implementation preparations to Congress by December 26, 2022.²⁰⁶

B. Independent Review Commission Recommendations

In its report, the IRC identified problems with the processing of sexual harassment complaints in the military and made detailed recommendations for improvements.²⁰⁷ Two issues identified included: the underreporting of sexual harassment and a lack of confidence in the command to appropriately investigate and resolve complaints.²⁰⁸

On September 22, 2021, the Secretary of Defense approved the IRC recommendations, with some revisions, and established timelines for the Services to provide implementation plans for the approved recommendations.²⁰⁹ Several recommendations have the potential to significantly affect reporting and investigation of sexual harassment complaints.

²⁰³ FY21 NDAA, *supra* note 66, at § 532.

²⁰⁴ FY22 NDAA, *supra* note 27, at § 543.

²⁰⁵ FY22 NDAA, *supra* note 27, at § 539D.

²⁰⁶ *Id.*

²⁰⁷ IRC Report, *supra* note 1, at 32–37.

²⁰⁸ *Id.* at App. B-25–29.

²⁰⁹ SecDef Implementation Memo, *supra* note 3.

Improving Investigations

The IRC found that sexual harassment complaint investigators may not be trained as investigators or have the specialized, trauma-informed training needed to handle special victim cases.²¹⁰ The IRC recommended placing the investigation of formal reports of sexual harassment in the hands of trained, independent investigators, outside the chain of command.²¹¹ The IRC also recommended that this independent investigator be authorized to make the substantiation determination and be required to refer all substantiated sexual harassment complaints to a special victim prosecutor (SVP) for a prosecution decision. The IRC requested that DoD prioritize the determination of “who should serve as investigators for formal sexual harassment complaints outside of the chain of command, taking into account the comfort level of victims in talking to investigators and the capacity of each proposed group to understand and investigate sexual harassment cases (see Recommendation 1.2).”²¹²

The Secretary of Defense approved the recommendation for “independent, trained investigators for sexual harassment and mandatory initiation of involuntary separation for all substantiated complaints.”²¹³ While the amendments to 10 U.S.C. §1561 require commanders receiving formal complaints of sexual harassment to forward the complaint to an independent investigator, the terms “formal complaint” and “independent investigator” are not defined.²¹⁴

Removing Prosecutorial Decisions in Sexual Harassment Cases from the Command

The IRC noted that commanders charged with investigating and adjudicating sexual harassment complaints are also responsible for a command climate permissive of sexual harassment.²¹⁵ The IRC concluded that sexual harassment is a complex special victim crime that requires all critical case decisions to be made by a highly trained special victim prosecutor independent from the chain of command. The IRC advised that SVPs should make the prosecutorial decisions in the following special victim cases: (1) all cases investigated and substantiated by sexual harassment independent investigators, (2) MCIO-investigated cases that the SVP determines to be special victim cases, and (3) other cases, such as command-investigated cases, that the Secretary of Defense determines should be referred to the SVP to establish whether the case is a special victim case.²¹⁶ According to the IRC, SVP determinations of whether a case is a special victim case should be made “as early in the investigative process as is practicable.”²¹⁷

²¹⁰ IRC Report, *supra* note 1, at App. B-28.

²¹¹ *Id.* at App. B-24, 30, 38. (IRC Recommendation 1.2: “Independent, trained investigators for sexual harassment and mandatory initiation of involuntary separation for all substantiated complaints.” IRC Recommendation 1.4: “Professionalize career billets for military justice practitioners and military criminal investigators.” The IRC suggested that the determination of who should serve as investigators should take into account whether victims would be comfortable talking to the investigator and the capacity of the investigator to understand and investigate sexual harassment cases.)

²¹² *Id.* at 38–39.

²¹³ SecDef Implementation Memo, *supra* note 3, at 5.

²¹⁴ FY22 NDAA, *supra* note 27, at § 543. See Appendix J-1.

²¹⁵ IRC Report, *supra* note 1, at App. B-27.

²¹⁶ *Id.* at App. B-14.

²¹⁷ *Id.* at App. B-17.

The Secretary of Defense supports removing the prosecutorial decision from the command and placing it with an SVP for sexual assaults and related crimes, but he has not identified which crimes he considers related to sexual assaults.²¹⁸

Section 533 of the FY22 NDAA does not include sexual harassment as a crime over which the special trial counsel has prosecution authority.²¹⁹

Initiating an Involuntary Separation Action for All Substantiated Complaints of Sexual Harassment

The IRC recommended that separation action be initiated for all cases involving substantiated sexual harassment complaints, but explained that a limited category of cases should include a process for attempted rehabilitation.²²⁰ The Secretary of Defense approved a requirement for the initiation of involuntary separation for all substantiated cases of sexual harassment but has not addressed whether the mandated processing will include any exceptions.²²¹

Reviewing Military Sexual Harassment Response Policy and Structure

The IRC determined that DoD policy and structure has subsumed sexual harassment within other forms of harassment and discrimination and that no one entity is specifically responsible for, or specialized in, sexual harassment response.²²² The IRC recommended a “review of all policies and structures tasked with addressing elements of the military’s sexual harassment response,” observing that such review should be coordinated with sexual assault prevention and response (SAPR) policies to reflect the established place of sexual harassment on the sexual assault continuum of harm.²²³ Although the Secretary of Defense approved the recommendation as written, whether, and to what degree, the review will be coordinated with SAPR policies to appropriately reflect the continuum of harm is unknown.²²⁴

²¹⁸ SecDef Implementation Memo, *supra* note 3, at 5 (“Recommendation 1.1: [Revised] Establishment of Offices of Special Victims Prosecutors and removing prosecution of sexual assaults and related crimes out of the military chain of command.”).

²¹⁹ FY22 NDAA, *supra* note 27, at § 533 (specifying the covered offenses over which a special trial counsel has authority to prefer or refer charges). See FY22 NDAA, *supra* note 27, at § 531 (amending 10 U.S.C. § 824 to establish special trial counsel with prosecution authority over covered offenses).

²²⁰ IRC Report, *supra* note 1, at App. B-30–31.

²²¹ SecDef Implementation Memo, *supra* note 3, at 5.

²²² IRC Report, *supra* note 1, at 23.

²²³ *Id.* at 23, 32, and App. A-1 (The full cross-cutting recommendation reads, “DoD should immediately make sexual harassment victims eligible for SAPR services and undertake a review of all policies and structures tasked with addressing elements of the military’s sexual harassment response.”).

²²⁴ *Id.* See also SecDef Implementation Memo, *supra* note 3, at 5, and *supra* note 223 for the full text of approved cross-cutting recommendation 1.

V. Gaps in the Military Sexual Harassment Response and Proposed Research Questions

A. The Reporting of Sexual Harassment

The current, pending, and anticipated structures for reporting sexual harassment complaints must be reconciled and simplified. The current system recognizes formal, informal, and anonymous complaints, although it is often unclear into which category a report will fall. Two additional reporting systems must be established: the confidential reporting system and the criminal reporting system.²²⁵

DoD must develop a simple, comprehensive reporting system to handle all allegations on the continuum of harm. Sexual assault and sexual harassment victims have similar reporting concerns that present barriers to reporting: fear of retaliation, reprisal, or ostracism; fear of punishment for collateral misconduct; lack of confidentiality; fear of damage to their military career; reluctance to get the offender in trouble; and the belief that nothing will happen to the offender if they do report.²²⁶ These concerns have been factored into the recently established system that allows restricted and unrestricted reports of alleged sexual assault.²²⁷ Although the sexual assault reporting system requires individuals within the victim's chain of command to report incidents of which they are made aware to the commander for investigation by an MCIO; the sexual harassment reporting system does not. The feasibility and advisability of adapting the sexual assault reporting system to sexual harassment reporting should be examined.

B. Investigation of Sexual Harassment Reports

The IRC recommended, and the Secretary of Defense approved, the creation of an independent, trained investigative body for conducting sexual harassment investigations; however, two key issues remain: who should conduct the investigations and what complaints should they investigate?

DoD should establish an independent review committee to conduct a study to determine the necessary and appropriate skills for sexual harassment investigators, including whether they should investigate instances of cyber harassment and technology-facilitated sexual harassment. Based on the independent review committee's assessment of the necessary skill set, DoD can identify who should conduct the investigations.

A committee independent from DoD should review and assess whether the independent, trained investigators should be authorized and required to investigate all sexual harassment complaints. The IRC suggests allowing the victim the choice of filing a formal report of sexual harassment that triggers a full investigation by the independent, trained investigator or having their command address their sexual harassment complaint.²²⁸

²²⁵ DoDI 5505.16, *supra* note 67, at § 3.1.c; FY21 NDAA §532, *supra* note 66.

²²⁶ IRC Report, *supra* note 1, at 10–11. *See also id.* at App. B-29 (finding sexual harassment victims “do not trust the command to protect them from the negative consequences of reporting” and citing negative consequences, such as encouragement “to drop the matter, and being treated worse by their co-workers, avoided, or even blamed for the problem” (footnote omitted)).

²²⁷ Appendix G-1 depicts the streamlined, DoD-wide reporting and investigation structure to respond to sexual assault reports.

²²⁸ IRC Report, *supra* note 1, at App. B-30. *See also*, FY22 NDAA, *supra* note 27, at §543 (amending 10 U.S.C. §1561 to require a commanding officer who receives a formal complaint of sexual harassment to direct an independent investigation of the complaint). *Compare* 10 U.S.C. §1561 (requiring a commanding officer who receives a complaint of sexual harassment to conduct or initiate an investigation into the complaint).

Limiting independent investigations to formal reports²²⁹ and leaving all other reports to the command for investigation would not address the IRC finding that complaints handled by the unit have the lowest substantiation rate and that victims do not trust their command to appropriately investigate and resolve complaints.²³⁰

Unlike sexual assault, which is a purely criminal offense, sexual harassment will continue to straddle the divide between criminal offense and administrative misconduct, along with other offenses such as nonconsensual distribution of intimate images which is both a criminal offense under Article 117a, UCMJ, and prohibited conduct under harassment regulations. According to the 2020 SAPRO report, there were 331 total allegations of nonconsensual distribution of private sexual images, with 293 of those allegations related to a sexual harassment incident.²³¹ Of the 331 allegations, only 33 allegations were substantiated, while 258 were unsubstantiated.²³²

C. Legal Review of Sexual Harassment Reports Prior to Investigation

The IRC determined sexual harassment complaints to be so complex that only an SVP should make critical decisions about the case, including the charging decision.²³³ The IRC also stated that SVP determinations of whether a case was a special victim case should be made “as early in the investigative process as is practicable.”²³⁴ Yet, DoD and the Services do not mandate consultation with legal counsel who are special victim qualified prior to determining how to investigate a sexual harassment allegation. A recent DoD IG report flagged the lack of involvement by specially trained prosecutors at the investigative stage of sexual assault cases as potentially detrimental to those investigations.²³⁵

²²⁹ Although SAPR policy establishes procedures for sexual assault victims to make unrestricted or restricted reports of sexual assault in writing to SARCs and SAPR VAs using the official form, most other disclosures of sexual assault incidents result in an investigation by MCIOs. Incidents made known to law enforcement, the chain of command, and commanders are referred to MCIOs for investigation. In contrast, because not all sexual harassment incidents meet the elements of a sexual harassment criminal offense, many incidents are resolved administratively. Absent a policy that requires the chain of command to report incidents they become aware of to the command for investigation in accordance with 10 U.S.C. § 1561, these reports may never be investigated.

²³⁰ IRC Report, *supra* note 1, at App. B-26.

²³¹ FY20 SAPRO Report, App. F, *supra* note 39, at 6 (There were a total of 189 formal complaints, 140 informal complaints, and 2 anonymous complaints).

²³² *Id.* (In addition to the substantiated and unsubstantiated complaints, 25 complaints were pending resolution, 6 were dismissed, 5 were referred, 2 were inconclusive, and 2 were withdrawn).

²³³ IRC Report, *supra* note 1, at 19.

²³⁴ *Id.* at App. B-17.

²³⁵ Dept. of Defense Office of Inspector General, DoDIG-2022-035, “Evaluation of Special Victim Investigation and Prosecution Capability Within the Department of Defense” (Nov. 10, 2021), *available at* https://media.defense.gov/2021/Nov/10/2002891359/-1/-1/1/DODIG-2022-035_.REDACTED.PDF. While required, consultation with a legal advisor was not occurring in 58% of cases (*id.* at 32), legal assets were insufficient (*id.* at 33), and the investigative phase may have been hampered by a lack of specially trained prosecutors (*id.* at 34).

Criminal sexual harassment allegations may be investigated by law enforcement;²³⁶ formal complaints of sexual harassment may be investigated by independent, trained investigators; and all other sexual harassment complaints may be investigated by command investigations – all without consideration of the severity of the harassing conduct or an assessment by a specially trained legal advisor. Another issue for potential study is whether it is feasible and advisable to require that sexual harassment complaints and allegations be reviewed by special victim qualified counsel at the complaint stage to assist the command, independent investigators, and law enforcement in determining whether to investigate the complaint as an administrative or criminal offense.²³⁷

D. Proposed Research Questions for the DAC-IPAD

Based on these identified gaps, three potential areas could benefit from review by an independent advisory committee composed of members with expertise in the investigation, prosecution, and defense of sexual misconduct offenses:

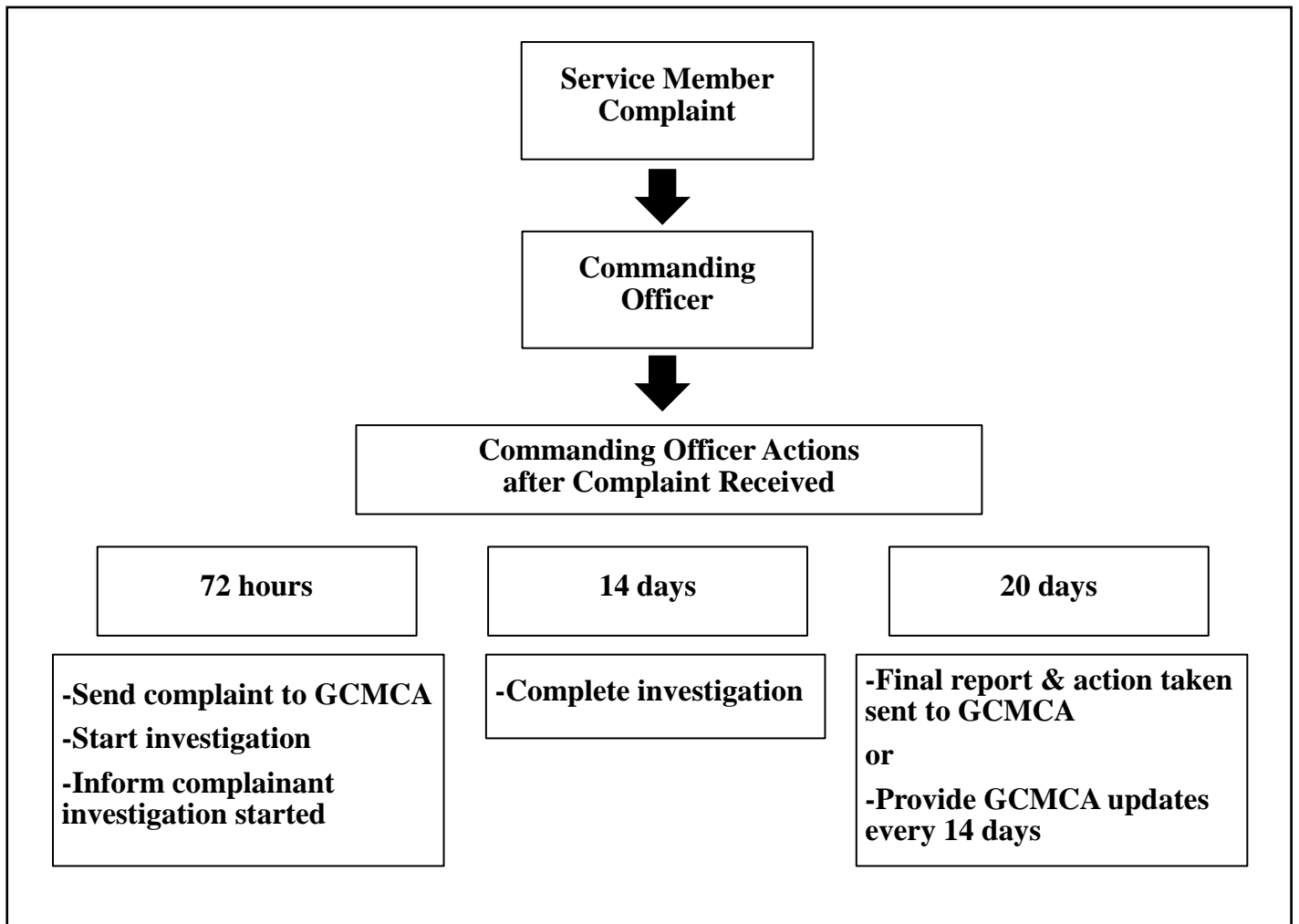
- Whether sexual harassment reporting systems should be modeled after the sexual assault reporting system and whether such a structure would sufficiently account for barriers—similar to those found in cases of sexual assault—that prevent Service members from reporting.
- Whether it is feasible and advisable for independent, trained investigators to investigate all complaints of sexual harassment and not just those submitted formally.
- Whether the involvement of legal advisors, with specialized training and experience in handling sexual misconduct, should be mandated at the complaint stage for sexually harassing conduct that could constitute either a criminal offense or a regulatory violation, to ensure that such offenses are appropriately investigated and resolved.

²³⁶ DoDI 5505.03, *supra* note 67, at § 5.c (requiring commanders to promptly refer criminal allegations to a defense criminal investigative organization or law enforcement organization).

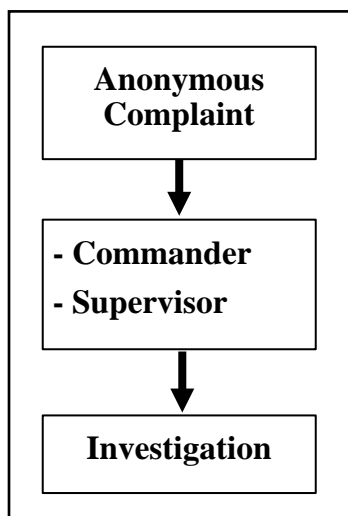
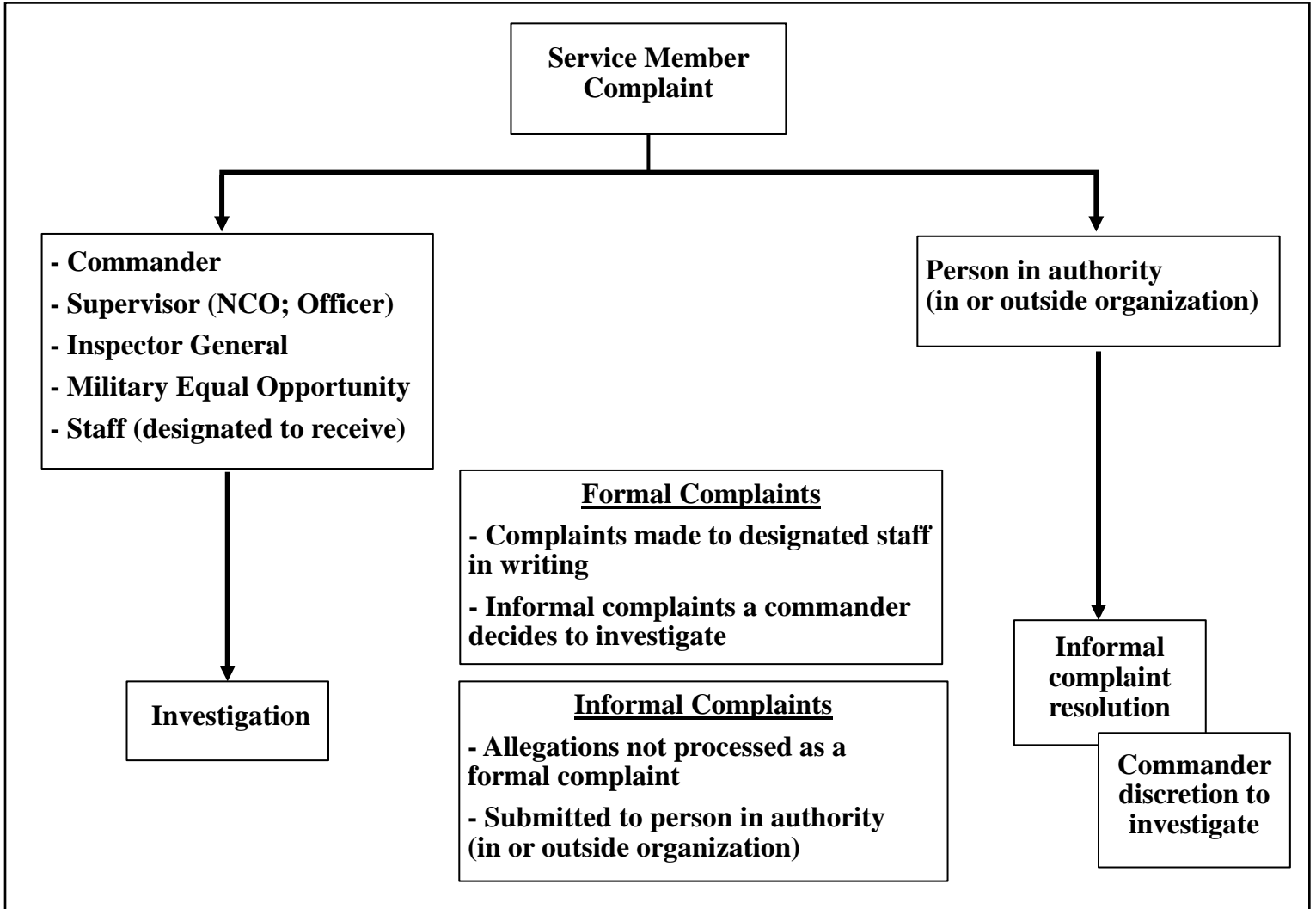
²³⁷ DoDI 5505.16, *supra* note 67, at §§ 3.1.c and d.

Appendix A. Sexual Harassment Complaints and Commanding Officer Actions

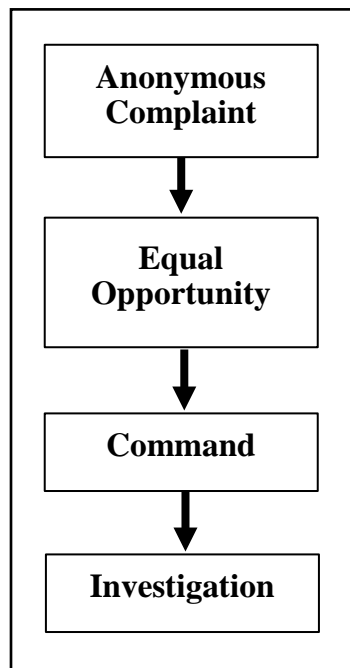
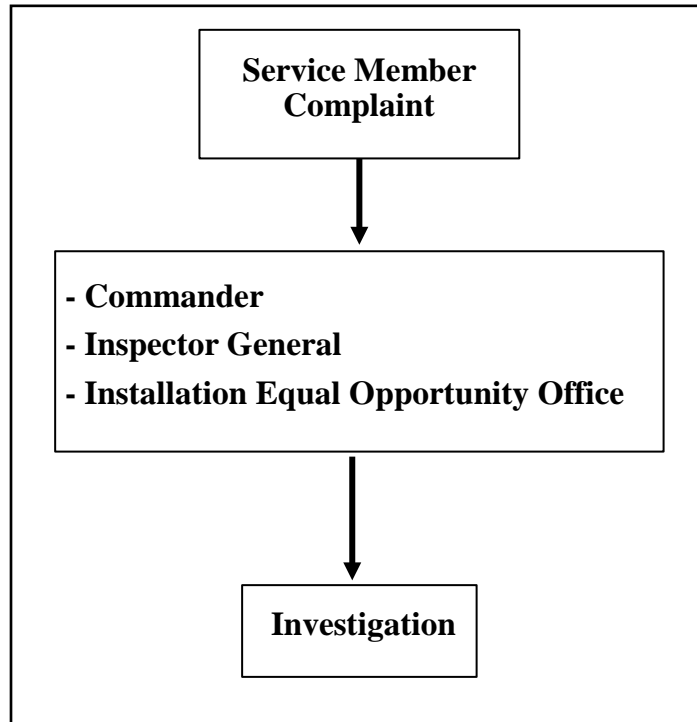
(10 U.S.C. § 1561)



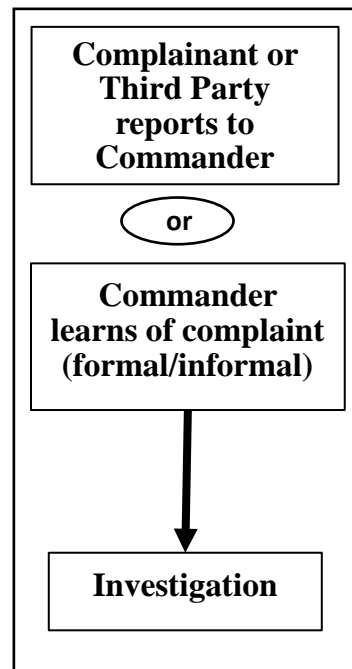
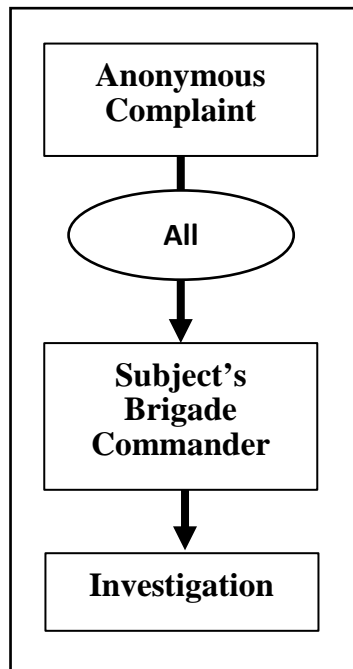
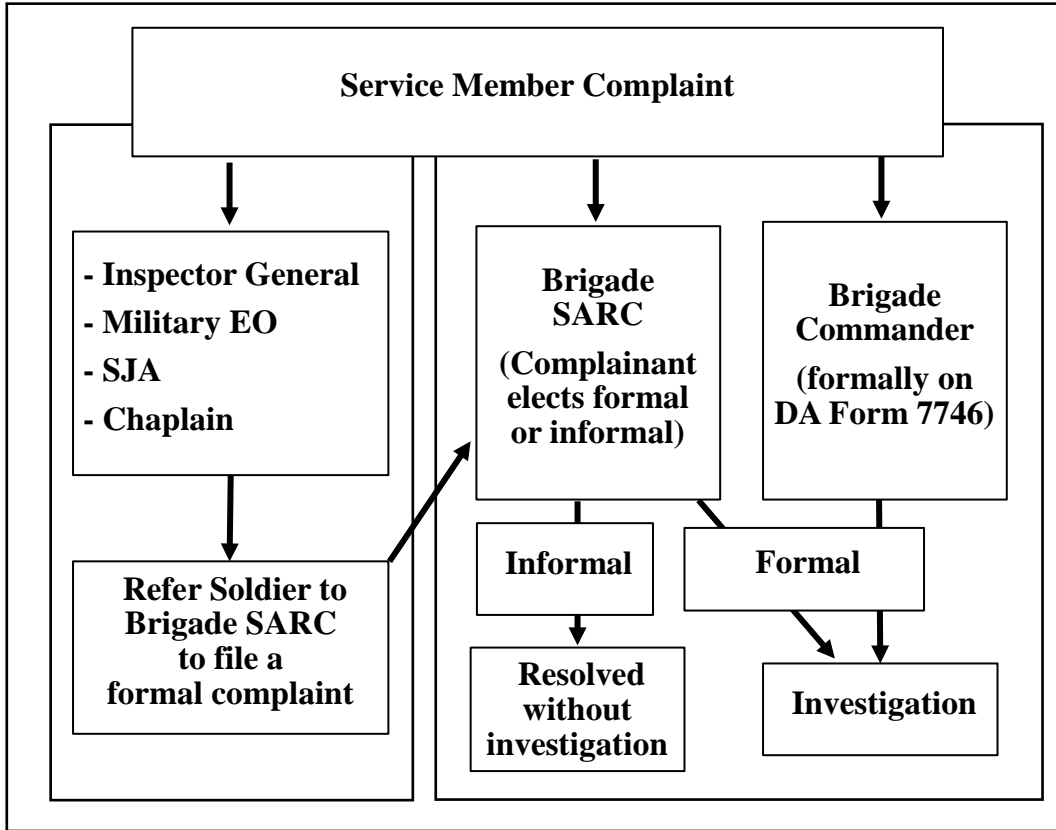
Appendix B. Sexual Harassment Complaints (DoDI 1020.03)



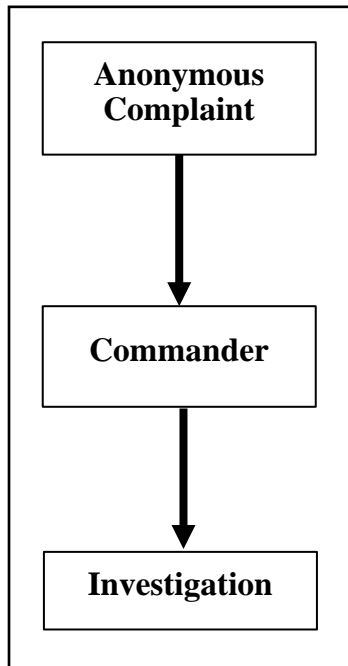
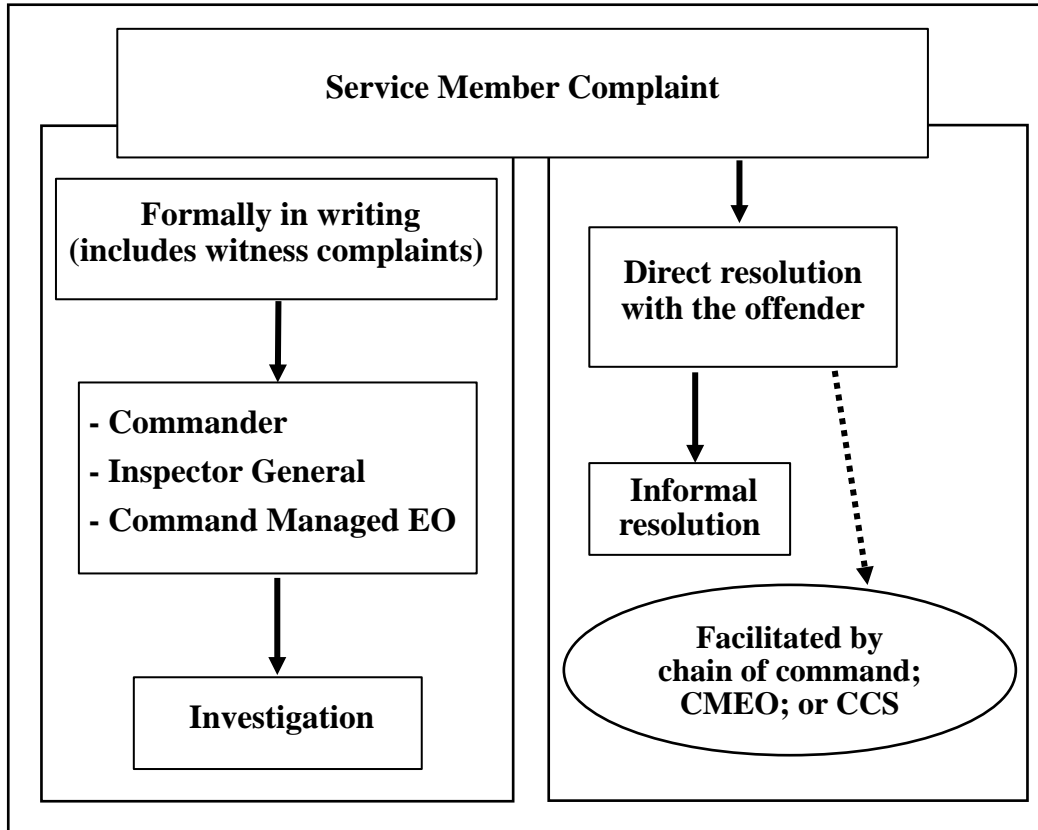
Appendix C. U.S. Air Force Sexual Harassment Complaints



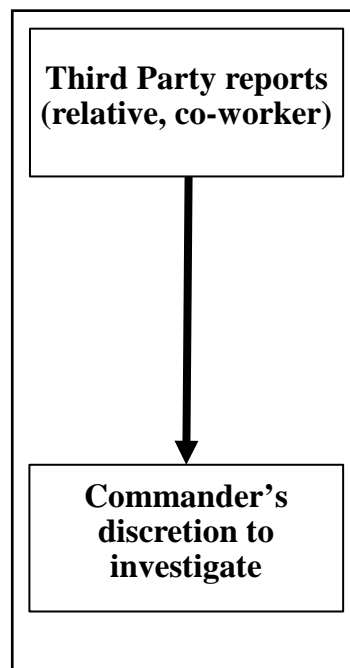
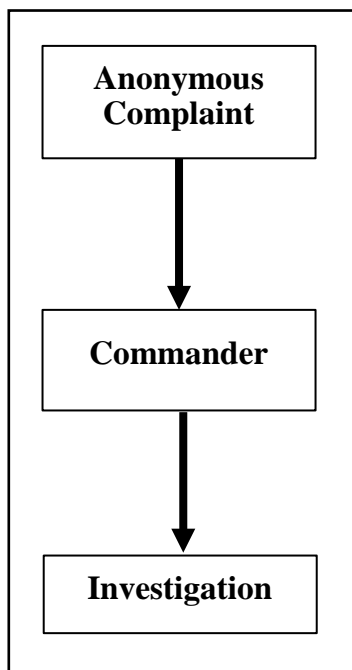
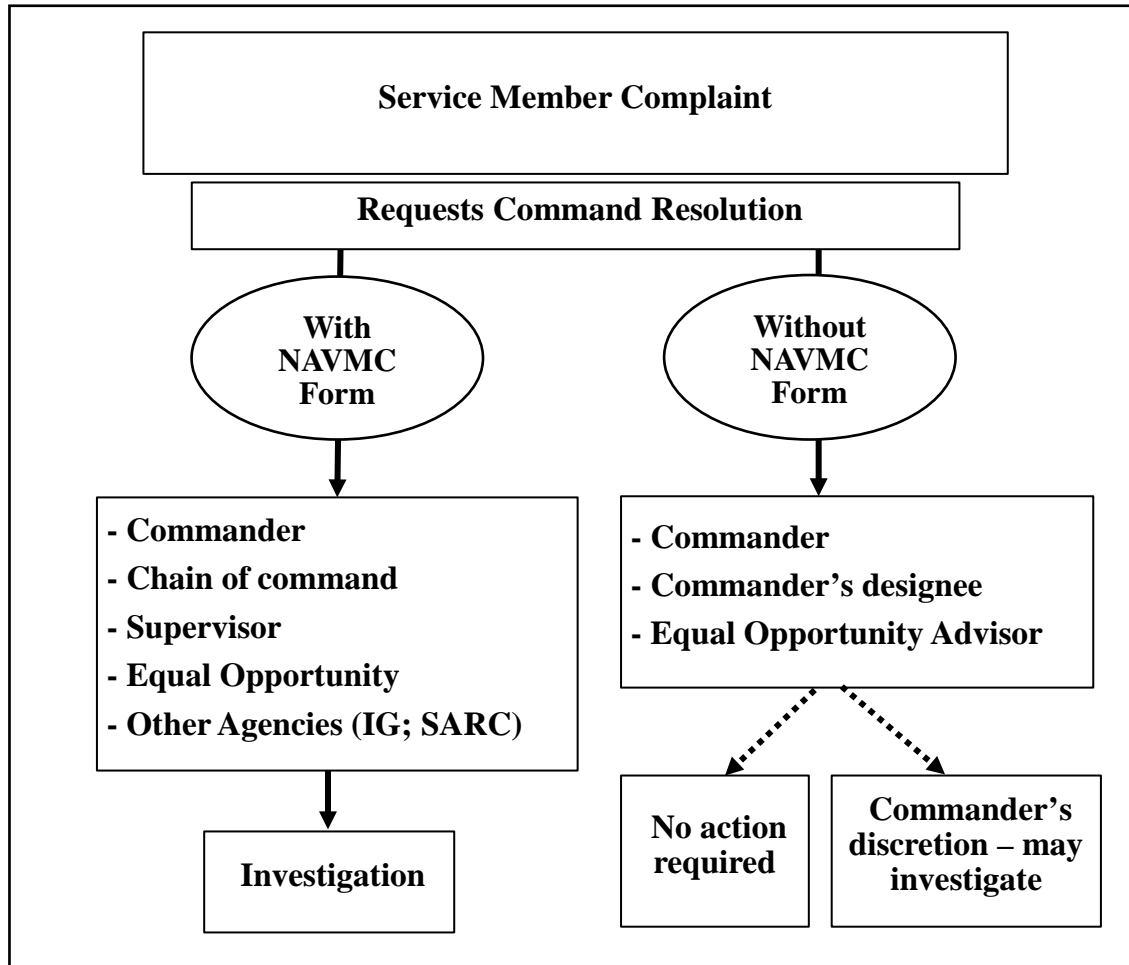
Appendix D. U.S. Army Sexual Harassment Complaints



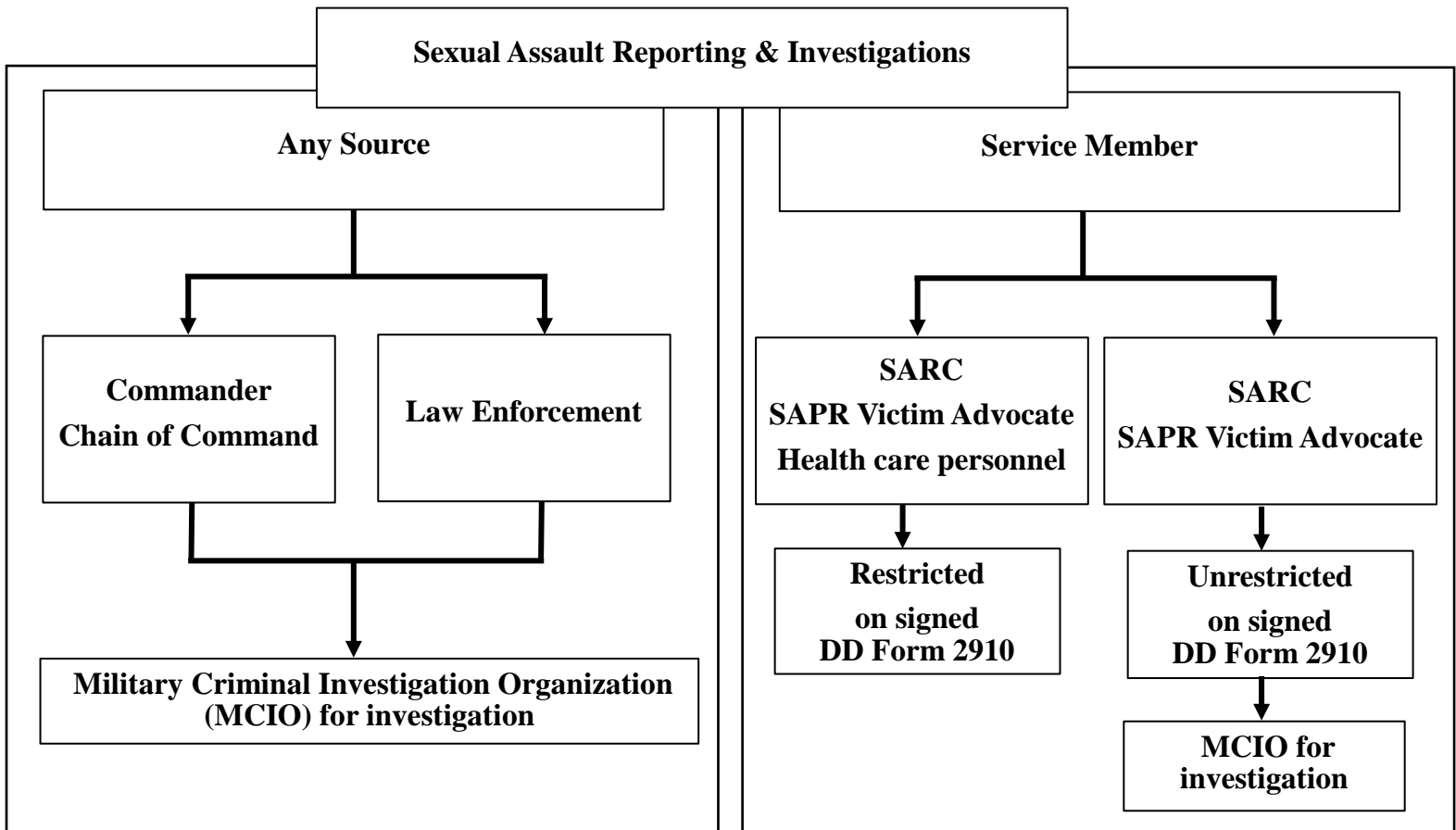
Appendix E. U.S. Navy Sexual Harassment Complaints



Appendix F. U.S. Marine Corps Sexual Harassment Complaints



Appendix G. Military Sexual Assault Reporting & Investigation



Appendix H. IRC Recommendations on Sexual Harassment as Approved by DoD

IRC Recommendations on Sexual Harassment Approved by DoD for Implementation

The following are selected from the recommendations set out in Appendix A of the Secretary of Defense's memorandum "Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military" (Sept. 22, 2021); they are subject to revision by the Department's leadership.

Cross Cutting Recommendation 1: DoD should immediately make sexual harassment victims eligible for SAPR services and undertake a review of all policies and structures tasked with addressing elements of the military's sexual harassment response.

Cross Cutting Recommendation 2: DoD must undertake a comprehensive approach to professionalizing, strengthening, and resourcing the workforce for SAPR across the board.

Cross Cutting Recommendation 4.e: DoD should ensure the WGRA¹ and WGRR² publish sexual harassment prevalence data by race and ethnicity, sexual orientation, and gender identity.

Cross Cutting Recommendation 4.g: DoD should require the Services and the National Guard Bureau to publish data for all sexual harassment complaints.

Recommendation 1.1: [REVISED]³ Establishment of Offices of Special Victims Prosecutors and removing prosecution of sexual assaults and related crimes out of the military chain of command.

Recommendation 1.2: [REVISED] Independent, trained investigators for sexual harassment and mandatory initiation of involuntary separation for all substantiated complaints.

Recommendation 1.4: Professionalized career billets for military justice personnel handling special victim crimes.

Recommendation 1.6: Expedite processing of proposed Executive Orders regarding military justice, including those currently awaiting issuance related to sexual assault, sexual harassment, and other special victim crimes.

Recommendation 1.7 c: [REVISED] The Joint Service Committee on Military Justice has drafted a proposed Executive Order to establish a preponderance of the evidence standard for non-judicial punishment.

¹ Independent Review Commission on Sexual Assault in the Military, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military* Appendix B-25 and note 28 (July 2021) [hereinafter IRC Report], available at <https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF> (The Workplace and Gender Relations Survey of Active Duty Members (WGRA) is "[c]onducted by the DoD Office of People Analytics as part of congressionally mandated gender relations surveys of active duty members. See Title 10 U.S. Code Section 481."). [Defense Legal Services Agency (DSLA) staff note.]

² *Id.* at App. A-4, note 15 (The Workplace and Gender Relations Survey of Reserve Component Members (WGRR) "captures key insights as to the estimated prevalence and characteristics of sexual assault, sexual harassment, and gender discrimination in the Reserve component, Service member attitudes and beliefs vis-à-vis these issues, and perceptions of unit climate.") The key insights stated for WGRA are similar to those for WGRR. *Id.* at Appendix A-4, note 15. [DSLA staff note.]

³ [REVISED] indicates a recommendation where the Department has made a revision or slight modification to the original IRC recommendation to ensure effective implementation within the Department.

Appendix H. IRC Recommendations on Sexual Harassment as Approved by DoD

Recommendation 3.1: USD(P&R) should codify in policy and direct the development and implementation of metrics related to sexual harassment and sexual assault as part of readiness tracking and reporting.

Recommendation 3.3 c: Hold Service members appropriately accountable who engage in cyber harassment and other forms of technology-facilitated sexual harassment and sexual assault.

Recommendation 4.1 a: Move SARCs and SAPR VAs from the command reporting structure.

Recommendation 4.1 b: Eliminate collateral duty for SARCs and SAPR VAs, with exceptions for ships, submarines, and isolated installations.

Recommendation 4.1 c: Explore the co-location of SAPR and SHARP with other special victim services, such as FAP, to improve coordination, collaboration, and consistency in victim support.

Recommendation 4.2 a: Increase access to and visibility of civilian community-based care.

Recommendation 4.2 b: Authorize Service members to access the full spectrum of VA services for conditions related to military sexual assault and sexual harassment confidentially, and without a referral.

Recommendation 4.2 c: Expand access to CATCH⁴ to include victims of sexual harassment and enable Service members to self-service access to CATCH.

Recommendation 4.3 a: Implement the No Wrong Door approach to sexual harassment, sexual assault, and domestic abuse across the Services and NGB.

Recommendation 4.3 b: Institute a “Commander’s Package” from the SAPR VA with recommendations for victim care and support.

Recommendation 4.3 e: Study the methods our allies have used to make amends to survivors, including restorative engagement to acknowledge harm, and potential victim compensation.

Recommendation 4.4 a: Establish a Defense Sexual Assault and Sexual Harassment Center of Excellence that administers a core curriculum of trauma and response trainings for all SAPR VAs and SARCs, chaplains, and other response personnel.

⁴ The CATCH a Serial Offender Program is a program allowing information from Restricted Reports of sexual assault to be confidentially provided to MCIOs to allow for serial offender matching. IRC Report, *supra* note 1, at Appendix E-27 [DSLA staff note].

Appendix I. FY22 NDAA § 539D Excerpt

Provision establishing sexual harassment as a general punitive article

Pub. L. No. 117-81, SEC. 539D, 135 Stat. 1541 (2021) – INCLUSION OF SEXUAL HARASSMENT AS GENERAL PUNITIVE ARTICLE

SEC. 539D. INCLUSION OF SEXUAL HARASSMENT AS GENERAL PUNITIVE ARTICLE.

(a) IN GENERAL.—Not later than 30 days after the date of the enactment of this Act, the President shall—

(1) prescribe regulations establishing sexual harassment, as described in this section, as an offense punishable under section 934 of title 10, United States Code (article 134 of the Uniform Code of Military Justice); and

(2) revise the Manual for Courts-Martial to include such offense.

(b) ELEMENTS OF OFFENSE.—The regulations and the revisions to the Manual for Courts-Martial required under subsection (a) shall provide that the required elements constituting the offense of sexual harassment are—

(1) that the accused knowingly made sexual advances, demands or requests for sexual favors, or knowingly engaged in other conduct of a sexual nature;

(2) that such conduct was unwelcome;

(3) that, under the circumstances, such conduct—

(A) would cause a reasonable person to believe, and a certain person did believe, that submission to such conduct would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements;

(B) would cause a reasonable person to believe, and a certain person did believe, that submission to, or rejection of, such conduct would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements; or

(C) was so severe, repetitive, or pervasive that a reasonable person would perceive, and a certain person did perceive, an intimidating, hostile, or offensive working environment; and

(4) that, under the circumstances, the conduct of the accused was—

(A) to the prejudice of good order and discipline in the armed forces;

(B) of a nature to bring discredit upon the armed forces; or

(C) to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

Appendix J. FY22 NDAA § 543 Excerpt

Provision amending 10 U.S.C. §1561

Pub. L. No. 117-81, SEC. 543, 135 Stat. 1541 (2021) – INDEPENDENT INVESTIGATION OF COMPLAINTS OF SEXUAL HARASSMENT

SEC. 543. INDEPENDENT INVESTIGATION OF COMPLAINTS OF SEXUAL HARASSMENT.

(a) IN GENERAL.—Section 1561 of title 10, United States Code, is amended to read as follows:

“§ 1561. Complaints of sexual harassment: independent investigation

“(a) ACTION ON COMPLAINTS ALLEGING SEXUAL HARASSMENT.—

A commanding officer or officer in charge of a unit, vessel, facility, or area of the Army, Navy, Air Force, Marine Corps, or Space Force who receives from a member of the command or a civilian employee under the supervision of the officer a formal complaint alleging a claim of sexual harassment by a member of the armed forces or a civilian employee of the Department of Defense shall, to the extent practicable, direct that an independent investigation of the matter be carried out in accordance with this section.

“(b) COMMENCEMENT OF INVESTIGATION.—To the extent practicable, a commanding officer or officer in charge receiving such a formal complaint shall forward such complaint to an independent investigator within 72 hours after receipt of the complaint, and shall further—

“(1) forward the formal complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial; and

“(2) advise the complainant of the commencement of the investigation.

“(c) DURATION OF INVESTIGATION.—To the extent practicable, a commanding officer or officer in charge shall ensure that an independent investigator receiving a formal complaint of sexual harassment under this section completes the investigation of the complaint not later than 14 days after the date on which the investigation is commenced, and that the findings of the investigation are forwarded to the commanding officer or officer in charge specified in subsection (a) for action as appropriate.

“(d) REPORT ON INVESTIGATION.—To the extent practicable, a commanding officer or officer in charge shall—

“(1) submit a final report on the results of the independent investigation, including any action taken as a result of the investigation, to the next superior officer referred to in subsection (b)(1) within 20 days after the date on which the investigation is commenced; or

“(2) submit a report on the progress made in completing the investigation to the next superior officer referred to in subsection (b)(1) within 20 days after the date on which the investigation is commenced and every 14 days thereafter until the investigation is completed and, upon completion of the investigation, then submit a final report on the results of the investigation, including any action taken as a result of the investigation, to that next superior officer.

Appendix J. FY22 NDAA § 543 Excerpt

“(e) SEXUAL HARASSMENT DEFINED.—In this section, the term ‘sexual harassment’ means conduct that constitutes the offense of sexual harassment as punishable under section 934 of this title (article 134) pursuant to the regulations prescribed by the Secretary of Defense for purposes of such section (article).”.

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 80 of title 10, United States Code, is amended by striking the item relating to section 1561 and inserting the following new item:

(c) EFFECTIVE DATE.—The amendments made by subsections (a) and (b) shall—

(1) take effect on the date that is two years after the date of the enactment of this Act; and

(2) apply to any investigation of a formal complaint of sexual harassment (as defined in section 1561 of title 10, United States Code, as amended by subsection (a)) made on or after that date.

(d) REGULATIONS.—Not later than 18 months after the date of the enactment of this Act the Secretary of Defense shall prescribe regulations providing for the implementation of section 1561 of title 10, United States Code, as amended by subsection (a).

(e) REPORT ON IMPLEMENTATION.—Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on the preparation of the Secretary to implement section 1561 of title 10, United States Code, as amended by subsection (a).

Appendix K. Acronyms and Abbreviations

A1	U.S. Air Force Directorate of Manpower and Personnel
AD	Army Directive
AFPD	Air Force Policy Directive
AR	Army Regulation
BDE	brigade
CATCH	Catch a Serial Offender Program
CCS	command climate specialist
CDI	Command Directed Investigation
CJA	command judge advocate
CMEO	Command Managed Equal Opportunity
DA	Department of the Army
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DAFGM	Department of the Air Force Guidance Memorandum
DAFI	Department of the Air Force Instruction
DEOMI	Defense Equal Opportunity Management Institute
DoD	Department of Defense
DoDD	Department of Defense Directive
DoDI	Department of Defense Instruction
DSLAA	Defense Legal Services Agency
EEOC	U.S. Equal Employment Opportunity Commission
EO	Equal Opportunity
EOA	equal opportunity advisor

Appendix K. Acronyms and Abbreviations

EOP	equal opportunity practitioner
EOR	equal opportunity representative
FY	fiscal year
GCM	general court-martial
GCMCA	general court-martial convening authority
ICRS	Integrated Case Reporting System
IG	inspector general
IO	investigating officer
IRC	Independent Review Commission on Sexual Assault in the Military
JA	judge advocate
JAG	Judge Advocate General
JAGINST	JAG Instruction
JAGMAN	Judge Advocate General Manual
MAJCOM	Major Command
MCIO	military criminal investigative organization
MCM	Manual for Courts-Martial
MCO	Marine Corps Order
MEO	Military Equal Opportunity
NAVMC	Navy Marine Corps
NAVPERS	Navy Personnel
NCIS	Naval Criminal Investigative Service
NCO	noncommissioned officer
NDAA	National Defense Authorization Act

Appendix K. Acronyms and Abbreviations

NGB	National Guard Bureau
NJP	non-judicial punishment
OPNAVINST	Chief of Naval Operations Instruction
PAC	prohibited activities and conduct
R.C.M.	Rule for Courts-Martial
SAPR	sexual assault prevention and response
SAPR VA	victim advocate
SAPRO	Sexual Assault Prevention and Response Office
SARC	sexual assault response coordinator
SCM	summary court-martial
SHARP	Sexual Harassment/Assault Response and Prevention Program
SJA	staff judge advocate
SME	subject matter expert
SPCM	special court-martial
SVP	special victim prosecutor
UCMJ	Uniform Code of Military Justice
U.S.C.	U.S. Code
USD(P&R)	Under Secretary of Defense for Personnel and Readiness
VA	Department of Veterans Affairs
VA	victim advocate
WGRA	Workplace and Gender Relations Survey of Active Duty Members
WGRR	Workplace and Gender Relations Survey of Reserve Component Members

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