

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



**MEETING AND
REFERENCE MATERIALS**

**PUBLIC MEETING
May 15, 2020
ARLINGTON, VIRGINIA**

**Defense Advisory Committee on Investigation, Prosecution, and Defense
of Sexual Assault in the Armed Forces (DAC-IPAD)**

17th PUBLIC MEETING AGENDA

May 15, 2020

Teleconference

Dial-In: 410-874-6300, Web Pin: 450-506-218

- 11:00 a.m. – 11:10 a.m.** **Public Meeting Begins – Welcome and Introduction**
- *Designated Federal Officer Opens Meeting*
 - *Remarks of the Chair*
- 11:10 a.m. – 12:30 p.m.** **DAC-IPAD Staff Presentation to Committee, Committee Deliberations, and Committee Vote on the DRAFT DAC-IPAD Report on the Feasibility and Advisability of Establishing a Process Under Which a Guardian Ad Litem May Be Appointed to Represent the Interest of a Victim of an Alleged Sex-Related Offense Who Has Not Attained the Age of 18 Years**
(1 hour 20 minutes)
- *Ms. Eleanor Vuono, DAC-IPAD Attorney-Advisor*
 - *Ms. Patty Ham, DAC-IPAD Attorney-Advisor*
 - *Ms. Nalini Gupta, DAC-IPAD Attorney-Advisor*
- 12:30 p.m. – 1:00 p.m.** **Lunch Break**
- 1:00 p.m. – 2:00 p.m.** **Committee Deliberation and Vote on the DAC-IPAD Response to the Department of Defense Report on Preservation of Restricted Report Option for Adult Sexual Assault Victims**
(1 hour)
- *Ms. Meghan Peters, DAC-IPAD Attorney-Advisor*
 - *Ms. Terri Saunders, DAC-IPAD Attorney-Advisor*
- 2:00 p.m. – 2:15 p.m.** **Policy Working Group Update**
(15 minutes)
- *Ms. Meghan Peters, DAC-IPAD Attorney-Advisor*
 - *Ms. Terri Saunders, DAC-IPAD Attorney-Advisor*

**Defense Advisory Committee on Investigation, Prosecution, and Defense
of Sexual Assault in the Armed Forces (DAC-IPAD)**

17th PUBLIC MEETING AGENDA

- 2:15 p.m. – 2:30 p.m.** **Case Review Working Group Update**
(15 minutes)
- *Ms. Kate Tagert, DAC-IPAD Attorney-Advisor*
 - *Ms. Theresa Gallagher, DAC-IPAD Attorney-Advisor*
 - *Mr. Glen Hines, DAC-IPAD Attorney-Advisor*
- 2:30 p.m. – 2:45 p.m.** **Data Working Group Update**
(15 minutes)
- *Mr. Chuck Mason, DAC-IPAD Attorney-Advisor*
- 2:45 p.m. – 3:00 p.m.** **Meeting Wrap-Up and Public Comment**
(15 minutes)
- *Colonel Steven Weir, U.S. Army, DAC-IPAD Staff Director*
- 3:00 p.m.** **Public Meeting Adjourn**



Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

Guardian ad Litem Draft Report
May 14, 2020
Preparatory Session



DAC-IPAD Task

Evaluate the advisability and feasibility of establishing a process under which a guardian ad litem (GAL) may be appointed to represent the interests of a child victim of an alleged sex-related offense in a court-martial.



Approach to Task

1. What services does the military currently provide to child victims of sex-related offenses?
2. What do civilians do?
 - Methods of representation
 - ABA
 - State and federal statutes and practices
3. Based on research, are there any gaps in services, and, if so, is a GAL the best practice to fill them?
4. Do all child victims require the same approach?
5. How do we find answers to these questions (methodology)?



Scenarios

- Child A:
 - 12yo dependent
 - Alleges sexual abuse by Army stepfather
 - Reports to CID, child requests SVC
 - Child has capacity to enter into attorney-client relationship and direct representation



Scenarios

- Child B:
 - 3yo military dependent
 - Alleges sexual abuse by Marine stepfather
 - Mother contacts NCIS, requests VLC
 - Child does not have capacity to direct representation
 - Supportive mother assists SVC
 - Mother designated by military judge to exercise child's crime victim rights under Article 6b



Scenarios

- Child C:
 - 3yo military dependent
 - Alleges sexual abuse by stepfather, Navy sailor
 - Mother reports to NCIS, initially requests VLC
 - Child not capable of directing representation
 - Mother decides child is lying about allegations
 - Stops responding to VLC
 - Child has no other supportive family members

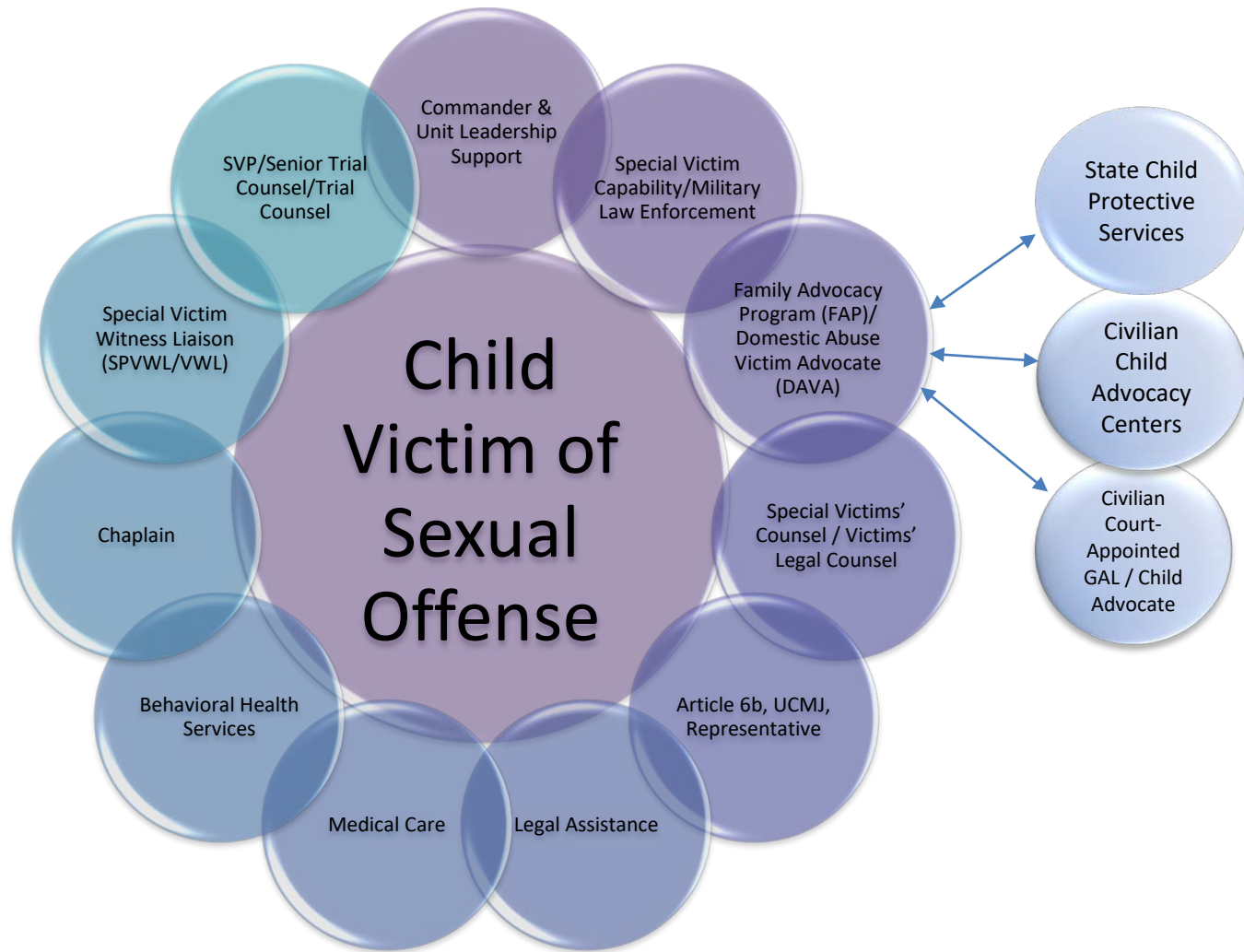


Approach to Task

1. **What services does the military currently provide to child victims of sex-related offenses?**
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Current Services – dependent victims





Military Service Data

Child victims, Art. 6b Designees, GAL

	Total Child Victims 2018 & 2019	Total Represented by SVC/VLC	Total Not Represented by SVC/VLC	Total Article 6b Representatives	Total GALs Appointed
Army	787	73 (9%)	714 (91%)	17 (2%)	1 (<1%)
Navy	181	28 (15%)	153 (85%)	17 (9%)	0
Marine Corps	144	15 (10%)	129 (90%)	22 (15%)	2
Air Force	231	-	-	30 (13%)	1
Coast Guard	5	0 (0%)	5 (100%)	0	0
Totals	1,348	116 (about 10%)	1,001 (about 90%)	69 (5%)	4 (<1%)



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Civilian Practice

Models of Representation for Child Victims

- **Guardian ad litem Model**
 - GAL makes an independent assessment of the best interests of the minor
 - 5 potential roles in criminal cases
- **Client-directed Representation Model**
 - Lawyer represents child's expressed interests
 - Substituted judgment for impaired children



Civilian Practice

ABA Policies and Initiatives

- Civil child abuse and neglect proceedings
- Child victims in criminal justice system
- MRPC 1.14 (Client with diminished capacity)
 - Military adoption of Rule and Comment



Civilian Practice

State and Federal Statutes/Practices

- Federal laws
 - CAPTA
 - 18 USC 3509
- State laws
- Practical example - SCCA



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Are there gaps in services?

- Non-dependent child victims are ineligible for SVC
- No SVC for majority, regardless of eligibility
 - Approximately 10% of child victims utilize SVC
 - Army numbers show ineligible/eligible breakdown
- Limited SVC experience/expertise with child victims
- Child victims of sex-related offenses who have no supportive parent or family member
 - No dedicated victim advocate for child victims
 - No requirement Art. 6b designee act in child's interest



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5. How do we find answers to these questions?



Do all child-victims require the same approach?

- Child A
 - Capacity to direct representation
- Child B
 - No capacity to direct representation
 - Supportive parent
- Child C
 - No capacity to direct representation
 - No supportive parent



Potential Recommendation #1

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



Potential Recommendation #2

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



Potential Recommendation #3

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

*proposed edit



Potential Recommendation #4

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



Potential Recommendation #5 and Alternate

Congress amend 10 U.S.C. § 1044e to expand SVC/VLC eligibility to ~~cover~~ any child victim of a sex-related offense committed by an individual subject to the UCMJ.

Alternate: The Judge Advocates General of the Military Services and SJA to the Commandant of the Marine Corps establish guidance and procedures to routinely grant SVC/VLC services **upon request** to non-eligible child victims of sex-related offenses by authorizing exceptions to policy.

* proposed edit



Potential Recommendation #6

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

* proposed edit



Potential Recommendation #7

The Secretary of Defense and the Secretaries of the Military Departments develop a Child Victim Advocate capability within each of the Services to support child victims of sexual offenses. ~~Align~~ **Embed** the Child Victim Advocate with**in** the SVC/VLC programs to ensure the child's legal interests are fully represented and protected.

*proposed edit



Potential Recommendation #8 and Alternate

Congress amend Article 6b, **UCMJ,*** to require that any representative who assumes the rights of the victim shall act to protect the victim's interests.

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

*proposed edit



Questions?

POTENTIAL FINDINGS AND RECOMMENDATIONS

Guardians ad litem (GAL) in the military justice system

DAC-IPAD Recommendation #1: “A military GAL program is unnecessary”: It is not advisable or necessary to establish a process in the military justice system under which a guardian ad litem may be appointed to represent the best interests of a child victim of an alleged sex-related offense in a court-martial.

- The Military Services currently utilize a multidisciplinary, victim-centric approach to respond to allegations of sex-related offenses committed against children by an individual subject to the Uniform Code of Military Justice (UCMJ) and to ensure the child victim’s legal, social, emotional, and physical needs are met.
- The Military Services’ response to a child’s allegations of sex-related offenses includes providing a Special Victims Counsel (SVC) (known as Victims Legal Counsel (VLC) in the Navy and Marine Corps) upon request to all eligible victims of sex-related offenses, including children.
- The national trend, reflected in the SVC/VLC program and the Rules of Professional Conduct, is for an attorney to represent the expressed interests of a child victim within the criminal justice system. Child victims’ rights experts believe that children as young as five or six are capable of expressing their wishes to an attorney on many issues relevant in a criminal trial and that a child’s considered, expressed interests *are* their best interests in most cases.
- The SVC/VLC enter into an attorney-client relationship with their child victim clients where the child has the capacity to do so, which is considered a best practice. Legal ethics standards recognize that young children are regarded as having opinions that are entitled to weight in legal proceedings, and that a child may be able to articulate a position with regard to their representation in some matters but not others.
- The Military Services report that, in the majority of child-victim cases, a child victim of a sex-related offense is either capable of expressing their wishes to an SVC/VLC or, if there is no SVC/VLC representing the child, to the trial counsel, or the child victim has a supportive, non-offending family member who can adequately advocate for their interests.
- Appointing the SVC/VLC as a GAL under limited circumstances is not considered a best practice. SVC/VLC are trained attorneys and are not experts in child development and behavior and have no experience or expertise as best interests advocate. Additionally, appointing the SVC/VLC as a hybrid counsel/GAL could result in conflicts of interest that would delay the criminal proceedings and result in confusion for the child victim.

- When a child victim lacks capacity to exercise their rights under Article 6b, UCMJ, the military judge is authorized to appoint a supportive adult to assume the rights of the victim. This Article 6b representative is typically a supportive parent or other family member, but can be another adult if necessary, as when there is no supportive, non-offending parent to assume those rights.
- In 2018 and 2019, military judges exercised their discretion to appoint an Article 6b representative to assume the rights of a child victim of a sex-related offense in 86 out of 1,348 cases. By Service, an Article 6b representative was appointed in 2% of cases in the Army; 9% in the Navy; 15% in the Marine Corps, 13% in the Air Force, and 0% in the Coast Guard involving a child victim of a sex-related offense.
- There currently is no statutory requirement that an Article 6b representative who assumes the rights of a child victim of a sex-related offense exercise those rights in the best interests of the child-victim, although the military judge has the authority to replace the representative for good cause.
- Rule 1.14 of Professional Conduct (Client with diminished capacity) for attorneys, as adopted by the Military Services, permits an attorney, in very limited circumstances, to take actions that are reasonably necessary to protect a client, including seeking the appointment of a guardian ad litem: when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical or other harm, and cannot adequately act in the client's own interest. "Reasonably necessary" protective action is generally the least restrictive action under the circumstances, and appointment of any guardian is considered a serious deprivation of the client's rights and ought not be undertaken if other, less drastic, solutions are available.
- In cases with an SVC/VLC and/or a supportive parent, regardless of whether the child victim has the capacity to direct their legal representation, appointment of an independent guardian ad litem or other best interest advocate is not only unnecessary, but could introduce new problems, particularly if they disagreed with the supportive parent on an issue.
- The Military Services currently have Memoranda of Understanding with local civilian services to coordinate obtaining guardian ad litem services for a child victim of a sex-related offense in those rare cases when necessary, but a GAL or other best interest advocate is unnecessary in the majority of cases.
- In the 1348 military cases involving child victims of an alleged sex-related offense reported in 2018 and 2019, the Military Services utilized a civilian guardian ad litem once in the Army, once in the Air Force, twice in the Marine Corps, and never in the Navy or Coast Guard.

- Military dependents who allege a sex-related offense while living overseas are typically returned to the states to access civilian social services in those cases where there is not a supportive family member.
- In the overwhelming majority of cases, the Military Services provide dependent child victims of sexual offenses the services they need, in conjunction with state child welfare agencies, sufficient to address their legal and social needs; however the DAC-IPAD makes the following additional recommendations to improve the delivery of these services and to address any gaps.

Addressing Potential Gaps in services provided to child victims of sex-related offenses

SVC/VLC Eligibility and Expertise in Representing Child Victims of Sex-related Offenses

DAC-IPAD Recommendation #2: “Provide additional expertise to ensure high quality SVC/VLC representation of child victims of sex-related offenses” Secretaries of the Military Departments enhance funding and training for SVCs/VLCs appointed to represent child victims, including authorization to hire civilian Highly Qualified Experts (HQE) with experience and expertise in representing child victims, including expertise in child development, within the SVC/VLC Programs.

- One or more Highly Qualified Experts (HQE) who are experienced specialists in child sexual abuse and representing and advocating on behalf of child crime victims could advise and train SVC/VLC and support SVC/VLC Program Managers. This proposal is similar to the support HQEs currently in the Military Services Trial Counsel Assistance Programs provide to the Special Victims Prosecutors who prosecute these cases, and the support the Defense Counsel Assistance Programs provide to defense counsel who defend those accused of sexual offenses and other criminal offenses.
- HQEs could also assist the assigned SVC/VLC to determine whether a child has capacity to direct their own representation.

DAC-IPAD Recommendation #3: In conjunction with Recommendation #2, The Judge Advocates General and SJA to the Commandant of the Marine Corps develop a cadre of identifiable SVC/VLC who have specialized training, experience, and expertise in representing child victims of sex offenses by utilizing military personnel mechanisms such as Additional Skill Identifiers.

- Specialized training and practice are critical for attorneys to effectively represent child victims. Experts recommend that a child victim’s attorney should be competent in understanding child and adolescent development, communication and confidentiality issues, and issues relating to the child-parent relationship.

DAC-IPAD Recommendation #4: “Improve notification of SVC/VLC eligibility” The Department of Defense Office of the Inspector General and the Secretaries of the Military Departments assess whether the Military Criminal Investigative Organizations (MCIO) and Family Advocacy Programs (FAP) currently are providing accurate and timely notification to child victims of their right to request SVC/VLC representation as soon as an allegation of a sexual offense is reported, and take necessary corrective action.

- MCIO and FAP personnel should inform child victims of sex-related offenses of the ability to request an SVC/VLC at the time the crime is reported.
- The notification should emphasize that the decision whether to request SVC/VLC assistance is the child’s decision, and that the SVC/VLC’s duty is to represent the child, not any parent or guardian.

DAC-IPAD Recommendation #5: “Expand SVC/VLC eligibility” Congress amend 10 U.S.C. § 1044 to expand SVC/VLC eligibility to ~~cover~~ any child victim of a sex-related offense committed by an individual subject to the UCMJ.

Alternative DAC-IPAD Recommendation #5: The Judge Advocates General of the Military Services and the Staff Judge Advocate to the Commandant of the Marine Corps establish guidance and procedures to routinely grant SVC/VLC services **upon request** to non-eligible children in cases involving child victims of sexual offenses by authorizing exceptions to policy.

- Every child victim of a sex-related offense in the military justice system should be eligible to receive the services of an independent, competent, and zealous attorney, with specialized training on sexual assault and child advocacy, with adequate time and resources to handle the case. Currently, SVC/VLC services for child victims of sex-related offenses are limited to military dependent children.
- The American Bar Association recognizes that only an attorney can ensure that a child victim’s rights are protected and that age-appropriate accommodations are made, and can petition the court for relief in cases where the court finds the child’s interests are not otherwise protected.
- Currently, the Military Services are authorized to grant exceptions to policy to appoint SVCs/VLCs **upon request** for child victims of sex-offenses who are not currently eligible. Each Military Service reports that such exceptions are routinely granted for child victims of sex-related offenses when requested.
- The Military Services’ statistics indicate that in 2018 and 2019, the majority of child victims of sex-related offenses were not represented by a SVC/VLC. For example, the Army, which has the greatest number of cases, reported that of 787 child victims of sex-related offenses in 2018 and 2019, 481 were military dependents eligible for SVC/VLC services. Of that number, 73 child victims were represented by an SVC/VLC, or approximately 15% of eligible victims and 9% of total victims.

- A statutory change to 10 U.S.C. § 1044 likely would require an accompanying increase in appropriations to fund the anticipated increase in case load for SVC/VLC programs.

DAC-IPAD Recommendation #6: “Authorize appointment of SVC/VLC in limited circumstances” Congress amend Article XX, UCMJ, to authorize the military judge to direct the appointment of a SVC/VLC **for a child victim of a sex-related offense** in the very limited circumstances where there is no supportive parent or guardian.

- The fact that only a fraction of child victims of sex-related offenses are represented by a SVC/VLC may indicate need for a new authority.
- There currently is no mechanism to assign an attorney to a child who has declined or failed to request SVC/VLC representation, in order to ascertain whether the child’s decision is voluntary. An attorney would first need to assess the child’s capacity to form an attorney-client relationship and, if so, to determine whether the child’s decision regarding representation is hindered by lack of a supportive parent or guardian.
- Under this proposal, the SVC/VLC could consult with the child who, if they possess the capacity to do so, could exercise a knowing and voluntary waiver of their right to legal representation.

Dedicated Victim Advocate for Child Victims of Sex-Related Offenses

DAC-IPAD Recommendation #7: “Create Child Victim Advocates” The Secretary of Defense and the Secretaries of the Military Departments develop a Child Victim Advocate capability within each of the Services to support child victims of sexual offenses. **Embed Align** the Child Victim Advocate with **in** the SVC/VLC programs to ensure the child’s legal interests are fully represented and protected.

- The military does not have a victim advocate program dedicated to support child victims of sex-offenses. Although FAP has Victim Advocates (VA) and Domestic Abuse Victim Advocates (DAVA) who support adults and non-offending parents in cases of domestic violence and child abuse and neglect, VA and DAVA are assigned to adults.
- Military child victims who are living OCONUS do not have access to civilian child protective services, child advocacy centers, or civilian advocates. Current practice is to return children in need of such services to the states for treatment and support.
- In order to enjoy privileged communications with child victims under Military Rule of Evidence 514, the Child Victim Advocate would reside within the SVC/VLC organizations and should not be aligned with FAP or the prosecution.
- The Child Victim Advocate would not serve as an independent “best interest” advocate charged with representing the best interests of the child. Instead, the child victim

advocate would work in conjunction with the SVC/VLC to enhance their representation of the child victim. The Child Victim Advocate, with training, expertise, experience in child development, and familiarity with the military justice system, could help support the legal interests of the child victim.

- Among other things, the Child Victim Advocate would collaborate with the attorney so both understand the child's developmental age and would assist the SVC/VLC in assessing the potential impact of legal proceedings and options on the child's mental and emotional state.
- While a Child Victim Advocate may not be necessary in every criminal case, this capability is most beneficial in cases when the child victim cannot express an interest and there is not a supportive parent to inform the SVC's representation of the child client. In these cases, the Child Victim Advocate would assist the SVC/VLC in gathering information from a wide range of sources on the child's history, family, community, and culture. This information would enable the SVC/VLC to make a substituted judgment determination.
- In cases without SVC/VLC representation, the Child Victim Advocate would be available to help the child navigate the criminal justice system.

Article 6b Representative's Responsibility to Act in Child Victim's Interest

DAC-IPAD Recommendation #8: "Clarify Article 6b representative's duties and responsibilities" Congress amend Article 6b, **UMCJ**, to require that any representative who assumes the rights of the victim shall act to protect the victim's interests.

- **In any case where a child victim has the capacity to direct their legal representation, or, if not represented, has the capacity to exercise their rights under Article 6b, designation of a representative to assume the right of the child is not necessary or desired.**
- In the majority of cases **in which the military judge exercises their discretion to designate an individual to assume the rights of the victim under the** Article 6b, **the** representative is the non-offending parent or another family member who supports the child victim of a sexual offense and acts in the child's interests when exercising the victim's rights guaranteed by Article 6b.
- The military judge currently has discretion to remove and replace for good cause an Article 6b representative.
- This amendment ensures that the Article 6b representative does not undermine the rights and privileges of the victim or exercise the child's legal rights in a manner which are objectively unreasonably and likely to cause harm.
- This proposal would require a statutory change to the language of Article 6b, UCMJ.

DAC-IPAD Alternative Recommendation #8: “Clarify Article 6b to require representative to act in best interest” As an alternative to Recommendation #8, Congress amend Article 6b, **UCMJ**, to require any representative who assumes the rights of the victim shall act in the victim’s “best interest.”

- In cases where the child victim is incapacitated or there is not a supportive family member, the Article 6b representative would be appointed to act in the child’s best interest.
- In many cases, a civilian GAL already may have been appointed to represent the child in the civil system—typically as part of a child abuse and neglect or custody proceeding. If a civilian GAL already is working with a child victim in the civil system, that same person could be appointed by the military judge as the Article 6b “best interest” representative.
- For children who are capable of directing their own representation or where there is a supportive parent, the presumption is that a “best interest” representative would not be necessary or helpful. Indeed, a “best interest” representative could undermine the attorney-client relationship and engender conflicts as well as additional litigation. In most cases, the SVC/VLC is fully trained to represent the child’s legal interests, and already works with FAP to coordinate social services to assist the child in coping with the impacts of the criminal proceedings. In most cases, the supporting parent also works to protect the child’s best interest.