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Ms. Martha S. Bashford, Chair, DAC-IPAD
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Dear Martha,

We met in 2012 when I was investigating police response to sexual assault in the District of Columbia. You and Melissa Mourges were kind enough to share best practices from your experience in Manhattan. I am delighted to cross paths again in this new context and thought I would inform you about areas of concern Human Rights Watch found in our research on military sexual assault for the panel's consideration.

From 2013 to 2016, Human Rights Watch researched retaliation against those who report sexual assault in the military. We conducted more than 270 interviews, over 160 of which were with survivors of military sexual assault. We issued two reports on the subject, *Embattled: Retaliation against Sexual Assault Survivors in the US Military* and *Booted: Lack of Recourse for Wrongfully Discharged Rape Survivors*. We found that after reporting a sexual assault, survivors experienced professional and/or personal retaliation that was often quite severe. For many their career was effectively over as a result of reporting. The steep price paid by those who reported an assault is observed by other servicemembers: according to the Department of Defense Personnel Survey, 43 percent of victims who chose not to report their assaults did not do so in part because they saw what happened to those who had reported.¹ Nearly half of those who did not report their assaults (47 percent) indicated that they did not do so because they feared retaliation from the perpetrator or his supporters or feared they would be labeled a "troublemaker." Thus, addressing retaliation and other negative consequences that stem from reporting an assault will be essential in tackling the overall problem of sexual assault

¹ Defense Manpower Center, "2012 Workplace and Gender Relations Survey of Active Duty Members," March 15, 2013, pp. 1060197.

in the military. Unless survivors feel safe reporting their assaults, perpetrators will remain at large.

Since our report was published, the Department of Defense and Congress have taken a number of welcome measures to address the problem of retaliation. However, the following important issues remain unaddressed:

- 1) The sole legal protection military survivors have against professional retaliation is the Military Whistleblower Protection Act. Although the Department of Defense Workplace Survey found 30 to 40 percent of survivors indicate they have experienced professional retaliation, whistleblower protection has provided virtually no recourse for survivors who have been demoted, received poor work assignments, or were given bad reviews or reprimands after reporting.² The Department of Defense substantiated its first reprisal case involving sexual assault in 2016.³ Over the previous 10 years, it had only fully investigated five of 38 complaints because survivors could not meet the threshold burden of proof required to trigger a full investigation. The existing burden of proof for military personnel is significantly higher for service members than it is for civilians, rendering military whistleblower protection virtually meaningless. While some aspects of the act have improved since our report, so long as the burden of proof remains on the complainant to show that the reprisal would not have occurred but for their reporting a sexual assault, the protection against reprisals will be insufficient.⁴
- 2) Survivors of sexual assault are still subject to potentially wrongful non-disability mental health discharges that may deprive them of much-needed benefits and health care. Several years ago, the media exposed the widespread practice of discharging combat veterans who suffered from Post-Traumatic Stress Disorder (PTSD) for having a “Personality Disorder” (which was for many years a fast way to remove a troublemaker from service). Personality Disorder discharges are considered a non-disability mental health condition. Administrative discharges on these grounds often deny the combat veterans necessary health care and are

² RAND, “Sexual Assault and Sexual Harassment in the Military: Top-line Estimates for Active-Duty Service Members from the 2014 RAND Military Workplace Study,” 2014, http://www.sapr.mil/public/docs/reports/FY14_POTUS_Annex_1_RAND.pdf.

³ Dianna Cahn, “First Time: IG Confirms Retaliation against Rape Whistleblower,” *Stars and Stripes*, May 23, 2016, <https://www.stripes.com/news/us/first-time-ig-confirms-retaliation-against-rape-whistleblower-1.411108>.

⁴ The standard burden of proof for civilians in the US (and the emerging international standard) requires the complainant only to show the protected conduct (here, the reporting of a sexual assault) was a contributing factor in the challenged discrimination. The burden then shifts to the organization which must demonstrate by clear and convincing evidence that it would have taken the same action for independent legitimate reasons in the absence of the protected activity.

deeply stigmatizing. After congressional hearings, additional protections were put in place to ensure those who had served in combat and may have had PTSD were not wrongfully discharged. Now prior to issuing a non-disability mental health discharge for these service members, the diagnosis must be reviewed by a peer or higher level professional, the service member must be checked for PTSD, and the Surgeon General must sign off on the decision. Although rape victims have an even higher prevalence rate of PTSD than combat veterans (according to studies up to 50 percent, compared to 10-18 percent for veterans of Operation Iraqi Freedom and Operation Enduring Freedom),⁵ no such protections exist against wrongful non-disability mental health discharges. Between January 2009 and June 2015, 498 service members who reported a sexual assault were given a non-disability mental health discharge, which in turn may deprive them of much-needed benefits and health care.⁶

- 3) A very significant obstacle to reporting sexual assault remains the victim's fear of punishment for prohibited conduct that the victim engaged in around the time of the sexual assault. Currently, there is no immunity for collateral offenses that are commonly associated with sexual assaults such as underage drinking, fraternization, or adultery. While commanders may defer punishment, there is no promise of immunity that would reassure survivors that they will not themselves be disciplined for reporting an assault. Though the military says victims are not often punished, we interviewed several survivors who were in fact disciplined or even court-martialed for alleged prohibited misconduct that was only revealed as a result of reporting an assault, effectively ending their career. As with retaliation generally, when others hear about even one victim being punished for behavior that came to light because he or she reported, they will be less likely to report themselves. Some Special Victims Counsel have told us that they counsel survivors not to report when they fear that it will result in punishment for the victim. Until this issue is resolved, it will be difficult to fully address sexual assault in the military.

⁵ Studies have found that 10-18 percent of combat troops serving in Operation Enduring Freedom (Afghanistan; OEF) or Operation Iraqi Freedom (Iraq; OIF) have probable PTSD following deployment. Terry L. Schell and Grant N. Marshall, "Survey of individuals previously deployed for OEF/OIF," in *Invisible Wounds of War: Psychological and Cognitive Injuries, Their Consequences, and Services to Assist Recovery*, ed. Terri Tanielian and Lisa H. Jaycox (Santa Monica, CA: RAND Corporation, 2008), pp. 87-115. Some estimate the rate of sexual assault survivors who experience PTSD to be as high as 50 percent. Kaitlin A. Chivers-Wilson, "Sexual assault and posttraumatic stress disorder: A review of the biological, psychological and sociological factors and treatments," *McGill Journal of Medicine* 9 (2006): 111-118.

⁶ Inspector General, US Department of Defense, "Evaluation of the Separation of Service Members who Made a Report of Sexual Assault," May 9, 2016, Appendix C

Apart from these outstanding issues for those who are currently in service, we hope you will consider making recommendations to ameliorate the ongoing hardships of those whose careers ended prematurely after reporting an assault and were unable to benefit from reforms and protections that have been implemented in recent years.

As mentioned above, many rape victims were wrongly discharged for personality disorder. Veterans with “personality disorder” discharges told us of the extreme stigma they face when presenting their discharge papers and how it has prevented them from getting medical care, jobs, education, and even custody of their children. Despite the Government Accountability Office’s conclusion that proper procedures for personality disorder discharges were often not followed and that many of these discharges are erroneous, nothing has been done to fix the records of those saddled with these flawed discharges. We believe the Secretary of Defense should instruct the military review boards to change the narrative reason for discharge from “Personality Disorder” to “Secretarial Authority” for those who do not in fact have personality disorder, something that their current medical practitioners can readily determine since it is a lifelong condition.

More broadly, for all victims who believe they have been wrongfully discharged, we have concerns that they will not have a meaningful opportunity to have their records reviewed and changed. The mechanisms for changing their records, the military administrative review boards, are overworked and understaffed and may not have the ability to adequately consider the complex cases before them. Survivors do not generally have assistance with the applications and, due to trauma, may have great difficulty with the process. Cases that have been decided are not indexed making it impossible for veterans and their lawyers to find similar cases that have been previously decided. Moreover, many due process protections are lacking. There is no right to a hearing for older cases or cases in which a disability is claimed; access to hearings before the Discharge Review Boards is extremely limited making them inaccessible to those most in need. Yet a personal appearance may make a significant difference in the chances of success for survivors. In short, while recent instructions from the Secretary of Defense’s office have been helpful in providing guidelines to the boards on how to handle upgrading misconduct cases for victims who may have had PTSD at the time of their discharge, we believe the entire review process is in need of closer inspection, with input from Veterans’ Service Organizations, to ensure due process requirements are met and that the boards are consistently using best practices.

I would be happy to provide more information about our research or recommendations if it would be helpful.

Sincerely yours,

Sara Darehshori