

MAINE STATE LEGISLATURE

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RESOLVE Chapter 66, LD 1504, 126th Maine State Legislature, Resolve, Directing the Adjutant General of the State To Ensure the Maine Code of Military Justice Addresses Sexual Trauma in the Military

As requested in Legislative Document 1504, The Adjutant General's Office conducted an assessment of the Maine Code of Military Justice (MCMJ) and the provisions of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 in order to determine if there are gaps in adequate prosecution and proper treatment of sexual assault victims.

As a point of clarity, neither the Adjutant General nor the Maine National Guard (MENG) have authority over, or access to the data of active duty service members, or any reserve units in the State of Maine, such as Army Reserve, Naval Reserve, Marine Reserve or Coast Guard Reserve. These entities fall under Title 10 USC and the United States Uniform Code of Military Justice (UCMJ). The Maine National Guard has legal authority over Army and Air National Guard Soldiers and Airmen in Title 32 status or state active duty. When our National Guard units are activated for a deployment under Title 10 USC, the MENG maintains some administrative oversight but does not have legal authority or command and control over them. Throughout the document replace active duty with Maine National Guard service members and delete the term "air reserve technicians".

In 2012, the Maine National Guard identified the need for sexual assault offenses to be specifically included in Title 37-B Chapter 5, the Maine Code of Military Justice. Language similar to Articles 120, 125 and 134 of the UCMJ were drafted for submission and enacted by the legislature in 2013. Unrestricted Reports of sexual assault are referred to the civil authorities for investigation and adjudication, however, the MENG maintains capabilities in addition to or in lieu of a District Attorney's actions.

The MENG is currently complying with many of the 14 discussion points below as outlined in the NDAA 2013 and subsequent policies or regulations at the national level. Additionally, key program elements are detailed in the TAG Policy 13-12, Maine National Guard Sexual Assault Program Policy. While the topics below are extremely valuable to discuss and document, language for the Maine Code of Military Justice should be reserved for definitions of the offenses and prescribed punishments. In some instances, the National Guard is not able to fully comply with the proposals below due to programs and policies outside of our control.

Itemized assessment of discussion points:

1. Mandatory administrative separation or dismissal of any member of the Maine National Guard convicted of any sexual offense; PAGE 1, Lines 12-13.

The MENG fully supports this initiative and currently applies associated regulatory guidance when possible. This provision could be expanded further to include punitive discharge and bar to reenlistment.

One challenge is that the MENG is not automatically notified when its service members are convicted of a crime. Per HRH policy Memo #11-056, Self Reporting by Officers and Senior Enlisted Members of Criminal Convictions, commissioned officers, warrant officers and enlisted members above the grade E-6 are instructed to report any conviction of any criminal laws of the United States. However, this is done on the honor system and lower enlisted members are not required to self-report under that policy.

2. Retention of restricted report documentation for 50 years, if so desired by the victim, including information regarding a victim's consent regarding use of report records; PAGE 1, Lines 14-16.

We currently follow the Army, Air Force and National Guard Bureau (NGB) policies directing record retention for 50 years for unrestricted reports and 5 years for restricted reports. This is accomplished by utilizing a secure national database. DD Forms 2910 will be uploaded and maintained for 50 years in Unrestricted Reports and retained in hard copy for 5 years for Restricted Reports. This facilitates victim access to documents needed to make VA claims for care and benefits.

However, we must honor the regulatory requirement that the DD Form 2910 filed in connection with a Restricted Report shall be retained for 50 years at the request of victim.

3. Allowing victims to return to active duty after separation to help prosecute sex offenders; PAGE 1, Line 17.

This could be a valuable and important capability; however, the MENG has no authority to return victims to active duty after separation. It may be possible to allow them back into the MENG on a case-by-case basis. This could be beneficial in order to compensate victims for time spent participating in interviews with the National Guard Bureau Office of Complex Investigations or prosecution by civil authorities. Each victim's wishes should be considered since returning to service after separation could be a triggering event.

4. The creation of an independent review panel to examine the way sexual assaults are investigated, prosecuted and adjudicated under the Maine Code of Military Justice;

In all unrestricted reports of sexual assault, civilian law enforcement and the appropriate Military Criminal Investigative Organization (MCIO) will be notified to initiate an investigation. If these organizations choose not to investigate, the National Guard now has an independent and impartial process to fill the gap. In the summer of 2012, the National Guard Bureau created the Office of Complex Investigations to assist state Adjutants General in investigating sexual assaults that occur in T-32 status or have a National Guard nexus.

The specially identified, screened, and trained investigators serve as centrally managed cadre that can be dispatched to a state. An investigator's findings are reviewed by the NGB-JA office for sufficiency and the findings are turned over to the Adjutant General for action. The objectives of this program are: to provide a uniform, systematic and structured approach to the proper investigation of unrestricted sexual assault cases, to reduce trauma involved in these cases by ensuring professional, responsive and responsible treatment of victims by NG entities, and to prevent future sexual assaults by identifying predatory behaviors and providing information to eliminate sexual predators within the National Guard.

The investigator will use Forensic Experiential Trauma Interview techniques and keep an electronic file of videotaped interviews and summations, as well as hard-copy summations. They are authorized to wear civilian clothes to conduct their duties and are trained to ensure fairness and impartiality throughout the investigation. While these investigators are not considered criminal investigators or law enforcement personnel they conduct interviews, analyze facts, determine whether or not reports are substantiated, and present findings to The Adjutant General. The standard of proof is the "preponderance of evidence". The investigator typically should spend seven days at the site of the investigation and 14 days at his or her home station to complete the report. It should be filed with the requesting state within three weeks.

The Maine National Guard is firmly committed to properly and transparently adjudicating substantiated unrestricted reports of sexual assault. If a further independent panel is legally created to review these cases, we will readily abide by that process as well.

5. Annual command climate assessment surveys to track individual attitudes toward sexual assault and sexual harassment; PAGE 1, Lines 21-22.

Annual command climate assessments through the Defense Equal Opportunity Management Institute are already required by regulation. The last command climate survey was completed on 15 March 2013. All Maine Army National Guard Soldiers had the opportunity and were directed to complete the on-line survey. Follow-up sensing sessions with randomly selected unit members from randomly selected units were completed on 9 May 2013.

The overall rate of Soldiers who experienced sexual harassment is 7.6%. Females are almost twice as likely to experience sexual harassment, however, in terms of raw numbers, four times as many male service members were victims of sexual harassment - 23 females, and 92 males. The Maine Army National Guard has rates comparable to NGB as a whole, but this number should be zero. Soldiers did report perceiving that senior leadership supports a healthy equal opportunity climate and that there is change toward upholding and enforcing the standards across the board. Professional behavior is expected and training will be further tailored to focus on intervening early to stop sexual harassment.

The Maine Air National Guard also completed the Air Force Equal Opportunity Climate Assessment in May 2013. Additionally, anonymous Unit Risk Inventory Surveys were conducted in the fall of 2012, which contained questions about sexual harassment and assault.

6. Mandatory insurance coverage for mental and physical health issues, including abortions in cases of rape or incest for service women and military family members; PAGE 1, Line 23.

If a Maine National Guard member is sexually assaulted while they are in a duty status, a Line of Duty (LOD) determination can be processed. An approved LOD will trigger payment for physical and mental health care related to the assault. With recent changes in NDAA 2013, federal funds can be used to perform an abortion in cases where the pregnancy is the result of rape or incest. All pre-authorizations for medical care will be processed through the TRICARE Military Medical Support Office.

Maine National Guard family members are not eligible to make a military report of sexual assault or receive medical benefits. A SARC or victim advocate can connect the family member to civilian services and provide information as needed.

MENG service members do not have mandatory insurance coverage or benefits when they are not in a duty status; however, service members can choose to purchase TRICARE Reserve Select. The State of Maine provides free and confidential sexual assault forensic exams to victims, which can include prophylaxis for sexually transmitted infections and emergency contraceptive to prevent pregnancy.

7. Required sexual assault prevention and intervention in precommand and command courses for officers and relevant personnel; PAGE 1, Line 25-26.

The Maine Army National Guard began conducting an in-state pre-command course in 2011 where students receive a block of instruction on the sexual assault program. Most other developmental courses are conducted out of state but are required to meet the detailed sexual assault training requirements outlined in Department of Defense Instruction 6495.02, SAPR Program Procedures. All Maine National Guard Soldiers and Airman receive annual training on sexual assault prevention and intervention. This year the service members received an additional briefing called Leader Engagement as part of the Sexual Assault Stand-Down. SAPR training is also currently included in specialized MENG courses like 68W Health Care Specialist re-certification and the Mobilization Officers Course. Additionally, leaders are invited to attend semi-annual refresher training for Victim Advocates and special events for Sexual Assault Awareness Month in order to learn more about the program, the problem and the solutions. The program plans to formalize a SAPR in-brief for all incoming commanders and first sergeants in order to best prepare them to respond to cases of sexual assault, harassment and precursors.

8. Notification to Maine National Guard personnel of the options available for the correction of military records that reflect any retaliatory personnel action consequent to a report of sexual assault or sexual harassment; PAGE 1, lines 27-29.

Soldiers and Airmen who make a formal complaint of sexual harassment on National Guard Bureau (NGB) Form 333 are counseled regarding their right to make a good faith complaint and not be subject to any form of retaliation or reprisal. All persons involved in the filing, including the complainant, witnesses providing testimony, or those named as a principle agency witness of an Equal Opportunity complaint are afforded protection against reprisal. The commander will discuss reprisal prevention with all concerned, and provide the reprisal prevention plan to the inquiry/investigating officer for inclusion in the official case file. As part of every discharge packet, the Soldier signs a memorandum asking: "Did you file an unrestricted report of a sexual assault in which you were a victim within the past 24 months?" and "If the answer is yes, do you believe that this separation action is a direct or indirect result of your sexual assault, or of filing the unrestricted report?" A Victim Advocate or SARC can assist the victim with the processes countering reprisal or requesting a record correction.

9. Prohibition against the use of a moral waiver for recruitment of anyone convicted of a sexual offense; PAGE 1, Lines 30-31.

NGB policy addresses waivers for sexual offenses and the provision, as written, removes any room for command discretion. Current regulations specifically preclude appointment (non-waiverable) of a convicted/registered sex offender – for enlistments, commissions, warrants and promotions.

10. Active duty retention of survivors until the completion of a line of duty determination to ensure completion of an official investigation and adjudication of the sexual offense case; PAGE 1 Lines 32-34.

The MENG may be able to retain survivors while the investigations are ongoing however, Line of Duty determinations for medical benefits can be completed without the member saying in active duty status. These service members may also be entitled to services under the Wounded Warrior Program.

11. Development of a policy for and documented annual review of required initial and annual sexual assault prevention training for all new enlistees and members of the Maine National Guard, respectively; PAGE 1 Lines 35-37.

Training is currently documented using 2 databases (DTMS & ADLS). The SARC reviews the data at least quarterly, reports are sent to NGB and briefed at staff call periodically. The Chief of the National Guard Bureau also sends training status slides to the Adjutants General quarterly.

Sexual Assault Prevention training occurs annually and is mandatory for all service members regardless of rank, occupation or specialty. The training provides scenario-based, real-life situations to demonstrate the entire cycle of prevention, reporting, response and accountability procedures. Training explains the difference between sexual harassment and sexual assault and that both are unacceptable forms of behavior. Training emphasizes the distinction between civil and criminal actions.

New National Guard recruits begin with one weekend a month in the Recruit Sustainment Program where they receive a mandatory block of instruction on SAPR to clarify the nature of sexual assault in the military environment, encourage bystander intervention and educate Soldiers about the consequences of sexual assault. The recruits also receive additional briefings at Basic Combat Training.

12. Development of a policy addressing data collection and retention requirements to track reports of sexual harassment, sexual assault and rape from the date of an incident report to case closure; PAGE 2, Lines 1-3.

MENG follows the NGB policy. All formal and informal reports of EO violations, including sexual harassment are reported to NGB on a statistical report. Sexual assaults are tracked on national database.

13. Annual briefing by the Adjutant General to the Governor and the joint standing committee of the Legislature having jurisdiction over veterans and legal affairs, including a summary of all sexual assault and rape incidents, their status and the outcomes, including the duty status of adjudicated and administratively dismissed military offenders and military victims; PAGE 2, Lines 4-8.

The Adjutant General could provide such information upon request as part of the annual report under 37-B MRSA § 10. However, the information would be limited to non-identify information that does not jeopardize ongoing investigations or the privacy rights of victims, witnesses and alleged perpetrators.

14. Development of a policy to ensure convicted felons who meet national sex offender registry requirements are placed on that registry; PAGE 2, Lines 9-10.

The MENG has no authority to ensure convicted felons register with the national sex offender registry.