

CRIME VICTIMS' RIGHTS-RELATED RECOMMENDATIONS FROM THE RESPONSE SYSTEMS PANEL

Report of the Response Systems to Adult Sexual Assault Crimes Panel, 134-137 (June 27, 2014)

- Victim's Right to Confer
DoD policy, the CVRA, and the newly enacted Article 6b provide a crime victim the right to confer with the attorney for the government in the case. In the military justice system, a victim may confer with trial counsel on matters such as whether to pursue court-martial, nonjudicial punishment or administrative action in the case. If the initial disposition authority decides to proceed with a court-martial, a victim may confer with the military prosecutor regarding what level of court-martial may be appropriate for the particular charges. However, the right to confer with the attorney for the government under the CVRA is not equivalent to the right to confer with trial counsel (military prosecutor) under the military justice system. Since the convening authority, not the prosecutor, makes decisions on how to dispose of cases under the UCMJ, a victim's right to confer with the trial counsel in the military justice system is not directly analogous to the CVRA right to confer with the prosecutor. In practice, the trial counsel typically relays the victim's concerns and preferences to the convening authority. However, *to protect each victim's rights, DoD must establish formal mechanisms to ensure the convening authority hears the victim's concerns prior to making a decision about case disposition. [RSP Recommendation 55]*
- Victim's Right to be Heard on the Plea
Article 6b grants the right to be reasonably heard at a public hearing regarding continuing confinement prior to the accused's trial, a sentencing hearing relating to the offense, and a public proceeding of the Service clemency and parole board relating to the offense, but is silent on the right to be heard on the plea. Neither Article 6b nor DoD policy include the victim's right to be reasonably heard on the plea before the accused and the convening authority come to an agreement. The military justice system handles pretrial agreements differently than the civilian system, so using the civilian process for a victim's right to be heard on the plea would not be analogous in the military. The analogous opportunity to be heard arises before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement submitted by an accused, and the right is to be heard by the convening authority. *Modifications should be made to the Manual for Courts-Martial and appropriate regulations to provide crime victims a right to be heard regarding a pretrial agreement. The modifications should provide victims the right to be heard by the convening authority regarding a plea, with appropriate consideration to account for military pretrial agreement practice. The recommended changes must ensure that the right to be heard occurs before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement offer submitted by an accused. The convening authority should retain discretion to determine the best means to comply with this right and consider the victim's opinion (e.g., submission in writing, in person). [RSP Recommendations 54-A through C]*
- Victim's Legal Standing to Enforce Rights
The FY14 NDAA neither addressed the victim's legal standing nor specified enforcement mechanisms for the rights set forth in Article 6b. Rather, the FY14 NDAA requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe appropriate regulations to implement mechanisms to ensure enforcement of such rights, including mechanisms for application of such rights and for consideration and disposition of applications

for such rights. The CVRA expressly provides legal standing for victims to assert their rights in the district court in which the alleged offender is being prosecuted and, if the offender has not yet been charged, the asserted claim should take place in the district where the crime occurred to seek enforcement of the rights listed in the CVRA. The district court will then immediately decide any motion asserting a victim's right. The CVRA also expressly provides for an expedited review of any trial court decision on a victim's right and allows a victim to petition the court of appeals for a writ of mandamus as well as appellate court review within seventy-two hours of the filing of the petition. Rights guaranteed by Article 6b of the UCMJ should be similarly enforceable. *The Secretary of Defense should clarify that victims have legal standing to enforce their rights listed in Article 6b of the UCMJ at any relevant time in the proceedings, including before, during and after trial. [RSP Recommendation 53]*

- Victim's Right to be Heard Through Counsel

The FY14 NDAA codified the right of a sexual assault victim to obtain legal services through a special victim counsel and defines the nature of the relationship between a special victim counsel and a victim as "an attorney and a client." The scope of representation permitted under the statute is expansive and includes legal consultation related to the military justice system and any military justice proceedings in which the victim may appear as either a victim or a witness. The Court of Appeals for the Armed Forces has addressed the issue of whether a victim has the right to be heard through counsel on certain issues. However, the scope of representation set forth by the FY14 NDAA is more expansive than the issues addressed by the Court of Appeals for the Armed Forces in case law. Litigation about a victim's right to be heard through counsel will likely continue unless DoD issues formal clarification. *Therefore, changes to the Manual for Courts-Martial and appropriate regulations should clarify that a victim's right to be heard includes the right to be heard on legal issues through counsel. [RSP Recommendation 46]*

- Victims' Access to Information

Providing information and records to a special victim counsel representing a victim requires further study. A special victim counsel's right to access records is no greater than his or her client's access rights. Currently, the government trial counsel may, but is not expressly required to, disclose information and records to the special victim counsel. Further, when disclosing information, the Freedom of Information Act and the Privacy Act limit the trial counsel. *The Judicial Proceedings Panel and the Joint Service Committee should review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right. [RSP Recommendation 45]*

- Victim Rights Notification and Enforcement

The CVRA requires prosecutors and investigators to use their "best efforts" to see that crime victims are notified of, and accorded, the rights under the CVRA. The court is responsible for ensuring that crime victims are afforded the rights guaranteed under the CVRA. The FY14 NDAA did not place a similar requirement on military investigators, prosecutors, or courts. Instead, the legislation requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe regulations to see that victims are notified of and accorded their rights. *The Secretary of Defense should prescribe appropriate regulations to ensure that military investigators, prosecutors and other DoD military and civilian employees engaged in the detection, investigation, or prosecution of crime are also required to use their best efforts to notify and accord victims the rights specified in Article 6b, UCMJ. [RSP Recommendation 58]*

- Preservation in Court Record of Trial Counsel Compliance with Victim Rights

In some civilian jurisdictions, the trial judge asks the prosecutor, on the record, if he or she has conferred with the victim and to present the victim's opinions to the court, even if the victim's opinions diverge from the government's position. *To ensure trial counsel have complied with their obligations to afford military crime victims the rights set forth in Article 6b of the UCMJ and DoD policy, the Service Secretaries should require military judges to inquire, on the record, whether trial counsel complied with statutory and policy requirements during courtmartial proceedings. [RSP Recommendation 57]*

- Investigating Violations or Failures to Accord Victim Rights

To promote compliance, the CVRA directed the U.S. Attorney General to establish regulations that designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of crime victims' rights. The Department of Justice established the Office of the Victims' Rights Ombudsman to receive and investigate complaints filed by crime victims against its employees. Similarly, the FY14 NDAA requires the military to designate an authority within each Service to receive and investigate complaints relating to the provision or violation of such rights. Designating a separate authority within each Service to receive and investigate complaints could result in disparate procedures, rules, and standards for making and investigating complaints relating to a failure to comply with crime victims' rights. Therefore, *the Panel recommends the Secretary of Defense assess the effectiveness of the processes to receive and investigate complaints relating to violations of or failures by military and civilian employees from all of the Services to provide the rights*