

Topics from Deputy Secretary of Defense Memo, "Updates to Department of Defense Policy and Procedures for the Sexual Assault Prevention and Response Program and Adult Sexual Assault Investigations," signed November 10, 2021. Available at [www.sapr.mil/policy](http://www.sapr.mil/policy).

## **TOPIC: Expanded Eligibility to File Restricted Reports and Process for Victims to Decline to Participate in Investigations**

### **Enclosure 4 of DoDI 6495.02, volume 1, paragraph 1 REPORTING OPTIONS, as follows:**

Corresponding changes below from (b)-(f) are approved for DoDI 5505.18, Section 3, Procedures.

A Sample Section 540K Declination Letter is available [here](#).

### **Expanded Eligibility to File Restricted Reports**

(b)

(6) Victims are eligible to file a Restricted Report, providing they did not personally report the sexual assault incident to law enforcement, to include MCIOs, and they did not previously elect to make an Unrestricted Report by signing a DD Form 2910, with a SARC or SAPR VA on the same sexual assault incident. Victims covered by DoDI 6495.02, volume 1 are eligible to file Restricted Reports **even if**:

- (a) they disclosed the sexual assault incident to their commander or to personnel in the chain of command, or
- (b) there is an ongoing MCIO investigation into the sexual assault incident initiated by a third party and not due to the victim's disclosure to law enforcement, or
- (c) the MCIO investigation into the sexual assault incident has been closed.

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### **Clarification: What does "personally report the sexual assault incident to law-enforcement" mean?**

#### **Scenarios.**

1. *Victim approaches law-enforcement and tells them they want to report a sexual assault.*
  - a. *Victim is NO LONGER ELIGIBLE to file a Restricted Report, even if the victim doesn't follow through and actually sign a statement for law-enforcement.*
2. *Victim tells a friend she or he was thinking of going to law-enforcement to report her or his sexual assault. Friend of the sexual assault victim approaches law-enforcement and tells law-enforcement her or his friend wants to report.*
  - a. *Victim IS STILL ELIGIBLE to file a Restricted Report, because the victim did not personally report.*
3. *Victim previously filed a Restricted Report and is subsequently approached BY law enforcement about an open investigation. The investigation was initiated on a third-party report.*
  - a. *Victim RETAINS the Restricted Report.*
  - b. *If the victim underwent a forensic examination, that SAFE Kit is protected as part of the Restricted Report, and the MCIOs cannot seize it as evidence.*
  - c. *MCIOs need to ask whether the victim wants to participate in the investigation, and if the victim does not, then the MCIOs will offer her or him a "Section 540K Declination to Participate in the Investigation Letter" to formally document the declination.*

4. *Victim previously filed a Restricted Report and is subsequently approached BY law enforcement about an open investigation. Victim decides to participate in the investigation and gives a formal statement to the MCIO.*
  - a. *Victim RETAINS the Restricted Report. There is NEVER an “automatic unrestricting” of a Restricted Reporting that was previously filed on a DD Form 2910. The SARC may ask the victim IF he or she wants to convert, but if the victim doesn’t want to re-sign the 2910, the Restricted Report stays in place.*
  - b. *This will appear in DSAID as an “open with limited” and a Restricted Report.*

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However, in these situations, victims sometime feel that they are required to provide a statement because law enforcement approached them. It is important to note that Section 534 of NDAA for FY2016 requires notification of availability of an SVC/VLC to Service members/adult dependents before MCIOs or trial counsel interviews –or- requests any statement from an individual regarding a sex-related offense.

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5. *The victim has not filed a (Restricted or Unrestricted) report with a SARC yet and is approached by law-enforcement about an investigation. The investigation was initiated in a third-party report.*
  - a. *Victim IS STILL ELIGIBLE to file a Restricted Report, as long as the victim doesn’t give a formal statement to the MCIOs.*
  - b. *MCIOs need to ask whether the victim wants to participate in the investigation. If the victim does not, then the MCIOs will offer the victim a “Section 540K Declination to Participate in the Investigation Letter” to formally document the declination.*

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**Clarification: Since the commander now knows the name of the victim and the victim is still eligible to file a Restricted Report – Can a victim who files a Restricted Report now request and Expedited Transfer or a Military Protective Order?**

1. No, the victim has to convert to Unrestricted to request an Expedited Transfer or a Military Protective Order. However, if there are safety concerns, the SARCs MUST conduct a new safety assessment and take any appropriate measures (to include discussing with the SJA whether the situation meets the “Safety Exception” for Restricted Reporting.)
2. Caveat: This does not prevent the commander on their own accord (without a request from a victim) from deciding to issue a Military Protective Order. It only prevents the victim from requesting one without converting.

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(7) In accordance with the NDAA FY 2014, Section 1742, a commander who receives a report of a sex-related offense involving a member of the armed forces within his or her chain of command shall immediately refer the report to the MCIO of the military department concerned with responsibility for investigating that offense. A commander retains his/her duty, in accordance with this instruction, DoDI 5505.18, DoDI 5505.19, and section 1742 of the NDAA FY 2014, to immediately contact the MCIO upon being notified of a sexual assault, whether the sexual assault is in his or her own chain of command or another. Military law enforcement and MCIOs retain their duty to initiate a criminal investigation in response to allegations of adult sexual assault, in accordance with DoDI 5505.03 and DoDI 5505.18.

- (a) Commanders and personnel in the chain of command shall encourage individuals covered by this instruction who report experiencing a sexual assault to meet with a SARC or SAPR VA.
- (b) The commander and other appropriate personnel in the chain of command shall inform the individual disclosing the sexual assault of their respective reporting requirements, including notifying the SARC, but also inform the victim that this has no impact on the victim choosing to file a Restricted or Unrestricted report.

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**Clarification: Service regulations dictate who are the “appropriate personnel in the chain of command” that are mandatory reporters to the commander.**

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**Clarification: With expanded eligibility to file Restricted Reports, there will be more Restricted Reports that correspond to open or closed investigations. Will there be an attempt to link Restricted Reports to investigations?**

There will be no attempt to link Restricted Reports to investigations, as this would necessitate that the SARC conducts an "investigative interview" with the victim and asks the victim the facts of the case. The goal of the SAPR Program has always been to encourage reporting and to protect victim privacy, where possible. In addition, privileged communications with SARCs and victim advocates must be protected so they can invoke MRE 514, if needed.

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#### **Process for Victims to Decline to Participate in Investigations**

##### **(d) Non-Participating Victim “Section 540K Declination Letter” for MCIO Investigations.**

- (1) In MCIO investigations that are initiated upon third-party reports or by command (if a Service member reports a sex-related offense to a supervisor in the chain of command), an individual identified as a victim may submit a “Section 540K Declination to Participate in the MCIO Investigation” letter (“Section 540K Declination Letter”) to document his or her decision not to participate in the investigation, and the reason for declining, should they so desire.
- (2) The number of “Section 540K Declination Letter” and reasons for declining participation in the investigation, if known, shall be reported in DSAID and may be used to comply with congressional reporting requirements or other requests for information, as appropriate.
- (3) Victims may decline to participate in a sexual assault investigation. The victim's declination to participate has no compulsory effect on the investigative or military justice process; the investigation or military justice process may proceed as appropriate, and can continue without the victim's participation. However, in situations where victim's statement is required to identify the suspect and/or essential to the furtherance of the case, the victim's declination to participate may result in the investigation being terminated. By contrast, in cases where a suspect has been identified, military law and policy requires the investigation to continue, despite the victim's wishes. The latter reflects the overarching need in the military not only to promote public safety, but also to ensure good order and discipline within the Force. *In addition, cases involving a suspect in a "position of authority" will be fully investigated in all circumstances, despite a victim filing a “Section 540K Declination Letter”.*
- (4) Assessing a victim's intended level of participation at the outset of an investigation may allow criminal investigators to determine if conditions permit them to respect the victim's documented desire for privacy. If conditions allow an investigation to be terminated based on a victim's declination to participate, then the Department should accede to the victim's desires, whenever

practicable. Moreover, a victim's declination to participate in an investigation will be fully acknowledged by criminal investigators; i.e., the MCIO will tell the victim that the MCIO understands the victim's concerns. The MCIO acknowledgment will also make it clear to the victim that the victim's decision was considered, explain whether the victim's decision will drive closure of the case, **and**, in cases where investigation must proceed in spite of the victim's wishes, explain why the case was not closed.

- (5) Current policy allows eligible victims to consult with an SVC/VLC or retain private counsel, at their own expense, on a wide variety of military justice process matters, including a desire not to participate in the investigation.
- (6) Victims have the right to be heard, and to have their decision not to participate in an investigation formally documented. A victim is authorized to use the "Section 540K Declination Letter" when the appropriate MCIO has initiated an investigation, as required by DoDI 5505.03 and DoDI 5505.18. The following procedures will be followed:
  - (a) In MCIO investigations that are initiated upon third-party reports, by command (when a victim disclosed her/his sexual assault to a supervisor in the chain of command, not realizing the supervisor would contact criminal investigators), or pursuant to an exception to Restricted Reporting, the MCIO concerned will contact the individual alleged to have been victimized as soon as possible after receipt of the allegation and, to the extent practicable, before contacting any other potential witnesses, to determine the victim's desired level of participation and to protect victim privacy. MCIOs are required to provide the victim the opportunity to speak to an SVC/VLC BEFORE conducting the interview with the victim, in accordance with 10 USC 1044e and DODI 5505.18. In situations wherein the victim intends to decline to participate in the investigation, the victim will then be encouraged to consult with an SVC/VLC and to provide the MCIO concerned with written notice of his or her decision as soon as possible. The MCIO will immediately contact the SARC and also encourage the victim to speak with the SARC to review reporting options and receive information about victims' rights and services.
  - (b) To protect the loss of critical evidence and to protect the privacy of the victim, the MCIOs should, whenever practicable, prioritize other investigative activity associated with the allegation and proceed with investigating the offense consistent with this instruction, without the involvement of the victim who reported, until they have spoken to the victim about his/her intended level of participation or until the MCIOs have received the victim's declination letter. In addition, whenever practicable, the MCIO concerned will formulate an investigative protocol that aims to protect the victim's privacy until the MCIO has spoken with the victim. In situations wherein the victim intends to decline to participate in the investigation, the "Section 540K Declination Letter" will be the official means by which a victim will document his/her decision not to participate in an investigation and, if desired, the rationale for the decision, and the victim will then be encouraged to consult with an SVC/VLC and provide the MCIOs with written notice of his or her decision as soon as possible.
  - (c) In situations where the victim has met with a SARC or SAPR VA, if the victim opts to file an official report through a DD Form 2910, the SARC or SAPR VA must facilitate a Safety Assessment in accordance with DoDI 6495.02, volume 1 and notify the victim of the option to have a SAFE. The SARC or SAPR VA will inform the victim of the opportunity to submit the suspect's information in the CATCH Program.
  - (d) Regardless of whether the victim filed a DD Form 2910, the SARC/SAPR VA will offer the victim a referral to an SVC/VLC, if eligible, and recommend that the victim meets with an SVC/VLC or consults with retained private counsel to fill out the "Section 540K Declination Letter", as desired.

- (e) **If the victim meets with his/her assigned SVC/VLC**, in the course of providing legal advice and representation to the victim and in accordance with Service-specific policies, the following topics should be addressed:
- (1) Potential implications of requesting that the investigation be terminated, including loss of evidence and investigative leads.
  - (2) The option of requesting to reopen the investigation. However, the victim should also be notified that the passage of time may result in the loss of evidence and the ability to conduct a thorough investigation, limiting the investigator's ability to successfully resume the investigative process.
  - (3) The victim's decision must be freely made, and not subject to external influences, such as retaliation, ostracism, coercion, or fear of reprisal.
  - (4) Assisting the victim with the "Section 540K Declination Letter" and facilitating submitting the letter to the appropriate MCIO.
- (f) **If the victim does not or declines to consult with an SVC/VLC or private counsel** and informs the assigned MCIO investigator that s/he does not want to participate in the investigation, the MCIO investigator will give the victim a "Section 540K Declination Letter" form and repeat the recommendation that the victim meet with an SVC/VLC for assistance with filling out the letter, and the implications associated with doing so. The MCIO investigator will also ask the victim if:
- (1) Anyone is influencing or coercing the victim to decline to participate in the investigation.
  - (2) Anyone is threatening or retaliating against the victim because of the open sexual assault investigation.
  - (3) He or she has any safety concerns related to the investigation of the sexual assault incident.
- (g) If the victim submits a "Section 540K Declination Letter," the MCIO investigator will notify his or her installation-level field supervisor for a decision on whether the investigation should be closed. Such decisions will follow established policy and involve legal coordination, as appropriate.
- (1) The investigation will be paused pending approval by the MCIO Installation-level field supervisor. The victim's "Section 540K Declination Letter" and the approval/disapproval to close the case will be documented in the case file with the date and the name of the supervisor.
  - (2) **If the MCIO installation-level field supervisor approves closing the investigation**, the MCIO will notify the victim or the victim's legal representative that the investigation is closed but can be reopened at any time if the victim changes his/her mind. The MCIO shall document in the case file that the notification was made to the victim (or his or her designated SVC/VLC/private counsel) with the date, time, and method of notification.
  - (3) **If circumstances do not allow for the termination of the investigation**, such as when the identity of the suspect is known or investigators have viable leads to discover it, the installation-level field supervisor will disapprove closing the investigation and require investigators to notify the victim of that decision to continue the investigation and the reasons for doing so.

(4) In all circumstances, the victim's "Section 540K Declination Letter" will be retained by the appropriate MCIO, as this reflects an investigatory process and not a SAPR advocacy function.

(h) If the victim retains an SVC/VLC/private counsel, the MCIO shall follow similar procedures as described above, but instead direct all communication to victim's counsel, as appropriate.

(7) Third-party reporters of sexual assault will not be notified of the MCIO's decision to honor the victim's request not to participate in the investigation. Third-party reports often reflect an individual's concern for the safety of the reported victim, the mission, and for society. However, it is not the Department's policy to inform a third-party reporter of the status of a criminal investigation when the third-party is not the victim. Consequently, MCIOs will inform third-party reporters upon receipt of an allegation that a status or eventual outcome of an investigation will not be shared with the reporter.

(8) Criminal investigations will proceed according to established policy and procedure when victims do not submit the "Section 540K Declination Letter". A delay in submission of the letter may jeopardize the MCIO's ability to close the investigation.

#### **Expanded Eligibility for Restricted Reporting When Victims Disclose Their Sexual Assault to Another Person**

*f.*

(1) A victim's communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting.

(a) However, if the person to whom the victim confided the information (e.g., roommate, friend, family member) is law enforcement or an MCIO (other than those involved in the CATCH Program), there can be no Restricted Report. All victim disclosures made directly to law enforcement, to include MCIOs investigators, carry no expectation of confidentiality and are not eligible for a Restricted Report.

(b) A victim may disclose a sexual assault incident to someone in her or his chain of command without realizing that, as a result of doing so, personnel in the chain of command are still required to immediately notify the commander and the MCIO. However, in this circumstance, while a victim may still elect to file a Restricted Report, such an election does not preclude the initiation of an investigation into the allegations.

#### **Expanded Eligibility for Restricted Reporting When There is an Independent Investigation or an Investigation Triggered by a Third-Party Report**

*g.*

(1) A concurrent independent sexual assault investigation by an MCIO will not preclude the individual identified as a victim in the matter from being eligible to file a Restricted Report. For example, if there is an ongoing investigation of the victim's sexual assault and the MCIO notifies the SARC of the investigation before the victim makes a Restricted Report, this has no impact, and the victim is still eligible to file a Restricted Report.

(2) Even though the Restricted Report does not directly impact the status of the ongoing investigation, the Restricted Report does provide the victim a level of privacy. As a result of the filing of the Restricted Report, the victim's commander, once he or she knows of the Restricted Report status of the victim, will not ask the SARC/SAPR VA any details about the Restricted Report, nor will the commander seek to speak to the victim about the reported

sexual assault incident, unless an exception to Restricted Reporting applies in accordance with Enclosure 4 of this instruction.

- (3) WHY DO VICTIMS RETAIN ELIGIBILITY FOR A RESTRICTED REPORT AFTER THE INVESTIGATION HAS CLOSED? To receive SAPR advocacy services that facilitate access to medical and mental health care, SVC/VLC, and a safety assessment. In addition, after filing the Restricted Report, victims receive a copy of the completed DD Form 2910, which they can use with the Department of Veterans Affairs as documentation of their sexual assault report, such as when seeking healthcare services or filing a disability claim.