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Fairness for all victims: Addressing the gap in the rights of victims of crime within the Canadian military justice system

Submission to the Court Martial Comprehensive Review

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The Office of the Federal Ombudsman for Victims of Crime

The Office of the Federal Ombudsman for Victims of Crime (OFOVC) is an independent resource for victims in Canada. It was created in 2007 to ensure that the federal government meets its responsibilities to victims of crime.

Our mandate relates exclusively to matters of federal jurisdiction and enables us to:

- promote access by victims to existing federal programs and services for victims;
- address complaints of victims about compliance with the provisions of the *Corrections and Conditional Release Act* that apply to victims of crimes committed by offenders under federal jurisdiction;
- promote awareness of the needs and concerns of victims and the applicable laws that benefit victims of crime, including to promote the principles set out in the *Canadian Statement of Basic Principles of Justice for Victims of Crime* with respect to matters of federal jurisdiction, among criminal justice personnel and policy makers;
- identify and review emerging and systemic issues, including those issues related to programs and services provided or administered by the Department of Justice Canada or the Department of Public Safety and Emergency Preparedness Canada, that impact negatively on victims of crime; and
- facilitate access by victims to existing federal programs and services by providing them with information and referrals.

We are also involved in ongoing discussions with the Government about our mandate in relation to the *Canadian Victims Bill of Rights* (CVBR). The CVBR, which came into effect on July 23, 2015¹, gives registered victims of crime a more effective voice in the criminal justice system, and provides statutory rights for victims to information, protection, participation, and to seek restitution. As well, victims who

¹ The *Victims Bill of Rights: An Act to Enact the Canadian Victims Bill of Rights and to Amend Certain Acts* created the legislative recognition of victims' rights and made amendments to the *Criminal Code*, *Corrections and Conditional Release Act*, *Canada Evidence Act*, and *Employment Insurance Act*. While almost all technical amendments came into force on July 23, 2015, some amendments to the *Corrections and Conditional Release Act* came into force on June 1, 2016. http://www.parl.gc.ca/content/hoc/Bills/412/Government/C-32/C-32_4/C-32_4.PDF

believe that any of their rights under the CVBR have been infringed or denied by a federal entity have the right to file a complaint with its complaint mechanism.

An important part of the OFOVC's work is to ensure that victims of crime in Canada are informed, considered, protected, and supported. This includes ensuring that victims have a voice when the Government is developing or updating federal programs and services, legislation, and regulations.

Introduction

The Judge Advocate General has launched a comprehensive review of the Canadian Armed Forces' court martial system. The Court Martial Comprehensive Review Team is engaging with Canadians on several key areas including, for example, the special needs of specific groups, such as victims of crime, within the military justice system.

The OFOVC welcomes the opportunity to provide input into the review with the aim to ensure that the victims within the military justice system have access to the same rights and entitlements that are in place for all other victims of crime in Canada.

Context

The Canadian Victims Bill of Rights (CVBR)

The CVBR is applicable to offences investigated and prosecuted in the Canadian criminal justice system. It defines a victim as a person who has suffered physical, emotional, property, or financial loss. However, a general provision of the CVBR² excludes its application in service offences, and therefore excludes its application in the military justice system.

The CVBR provides victims of crime in Canada with the following statutory rights:

- **Right to Information** – Victims have a right to request general information about the criminal justice system (CJS) and available victim services and programs, including the right to be informed about restorative justice programs. They also have the right to request specific information relating to the investigation, prosecution, sentencing, and conditional release of the person(s) who harmed them.
- **Right to Protection** – Victims have a right to have their security and privacy considered at all stages of the CJS, and for reasonable and necessary measures to be taken to protect them from intimidation and retaliation. As well, they have the right to request that their identity be protected from public disclosure, and to request to use testimonial aids when appearing as a witness.
- **Right to Participation** – Victims have a right to convey their views about decisions to be made that affect their rights under the CVBR, and to have their rights considered at various stages of the criminal justice process. Victims also have a right to present a victim impact statement, and to have it considered.

² Section 18(3) of former Bill C-32 (the *Victims Bill of Rights Act*) states: “This Act does not apply in respect of offences that are service offences, as defined in subsection 2(1) of the *National Defence Act* that are investigated or proceeded with under that Act.”

- **Right to seek Restitution** – Victims have a right to have the court consider making a restitution order against the offender. As well, every victim with a restitution order has the right, if they are not paid, to have the order entered as a civil court judgment that is enforceable against the offender.

Any victim who is of the opinion that any of their rights under the CVBR have been infringed or denied by a federal department/agency also has the **right to file a complaint** in accordance with the federal entity’s complaints mechanism. Further, any victim who has exhausted his or her recourse under the complaints mechanism, and who is dissatisfied with the outcome, may file a complaint with any authority that has jurisdiction to review complaints in relation to that federal entity, such as the OFOVC.

Former Bill C-71, Victims Rights in the Military Justice System

On June 15, 2015, former Minister of National Defence, Jason Kenney, introduced Bill C-71, *An Act to amend the National Defence Act and the Criminal Code (Victims Rights in the Military Justice System Act)*, in the House of Commons and it was given first reading. The bill proposed amendments to provisions of the *National Defence Act* governing the military justice system. The amendments sought to add a new Division entitled “Declaration of Victims Rights” to the Code of Service Discipline, specifying that victims of service offences have rights to information, protection, participation, and restitution. Specifically, the legislation would have amended Part III of the *National Defence Act* to provide victims against whom a service offence has been committed, or is alleged to have been committed, the right, among other things, to³:

- be provided with information, on request, about: the military justice system and the role of victims in it, the services and programs available to victims, the status and outcome of the investigation and proceedings, hearings (e.g., for the purpose of making dispositions, as well as those held by a Review Board), and the release of the offender from a service prison or detention

³ Bill C-71, *An Act to amend the National Defence Act and the Criminal Code (Victims Rights in the Military Justice System Act)*. Accessed on October 31, 2016 from: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8047662&File=45#7>

barrack;

- have their security and privacy considered by the appropriate authorities in the military justice system and to have reasonable and necessary measures taken to protect them from intimidation and retaliation;
- request testimonial aids when appearing as a witness;
- present a victim impact statement to the appropriate authorities in the military justice system and to have it considered;
- have the court martial consider making a restitution order against the offender which, if not paid, could be entered as a civil court judgment that would be enforceable against the offender; and
- file a complaint for any infringement or denial of any of rights under the Declaration of Victims Rights by an authority within the military justice system.

The OFOVC wrote a letter on June 4, 2015 to the former Minister of Defence in support of the legislation, which would have granted victims of service offences rights consistent with those afforded to all victims of criminal offences under the CVBR.

Similarly, in its second progress report on efforts to address inappropriate sexual behaviours⁴, the Canadian Armed Forces (CAF) also indicated its support for the development of a new bill, similar to Bill C-71.

Unfortunately, the bill died on the order paper in June 2015. Since that time, the OFOVC has continued to advocate for similar legislation to be tabled. On December 3, 2015, the OFOVC wrote to the Honourable Harjit Singh Sajjan, Minister of National Defence, concerning this issue. The Ombudsman received a response from Minister Sajjan on March 22, 2016, acknowledging the disparity between the rights afforded to victims of crime in the civilian criminal justice system and the military justice

⁴ *Progress Report Addressing Inappropriate Sexual Behaviour*. Canadian Armed Forces. August, 30 2016.

system. In his response, Minister Sajjan noted that this statutory gap would be a priority in the coming months. A September 23, 2016 Canadian Press article similarly quotes a National Defence spokesperson as stating that “*ensuring victims’ rights in the military justice system is a priority for the government and that officials are looking at the issue*” but without providing a timeline.⁵

⁵ Lee Berthiaume, The Globe and Mail, September 23, 2016, “Military police, prosecutors call for more rights for victims of crime.” Accessed on October 31, 2016: <http://www.theglobeandmail.com/news/national/military-police-prosecutors-call-for-more-rights-for-victims-of-crime/article32023647/>

Position

Access to rights for all Canadian victims

Currently, victims' entitlements provided for in the CVBR do not apply to offences investigated or proceeded with under the *National Defence Act* and therefore do not apply to victims of crime in the Canadian military justice system. This has created a deep imbalance between the rights and entitlements afforded to victims of crime within the civilian system and those afforded to victims within Canada's military justice system. Practically speaking, this means, for example, that victims of offences such as sexual assault that are tried in military court have fewer rights, and continue to be treated differently than sexual assault victims in the civilian system.

It is the OFOVC's position that this imbalance needs to be remedied. A victim of crime is a victim, no matter who their employer. The OFOVC firmly believes that *all* victims of crime should have access to legislated rights that address their needs for information, participation, protection and restitution throughout the investigation and prosecution of an offence and beyond.

Taking a victim-centred approach

In addition to enhancing victims' rights to create a level playing field, equally important is ensuring that overall, the military justice system is addressing the needs and concerns of victims through policy, culture and practice.

This can be done by taking a victims-centred approach both in reviewing existing laws, services, policies and practices and in developing new ones. A victim-centred approach includes:

- Treating all victims of crime with the compassion, dignity and respect they deserve.
- Creating supportive environments where victims feel comfortable to seek the help they need.
- Ensuring that victims have information about their options, needs and rights.
- Prioritizing victims' safety, protection, well-being, privacy, empowerment and rehabilitation.

- Taking a sensitive, non-judgmental and coordinated approach to delivery of services.
- Ensuring that victims are heard and have an opportunity to participate in the military justice system.
- Taking into consider each victim's unique circumstances and needs.

This type of approach offers significant benefits for victims and their loved ones. It allows them to feel heard, to participate in a meaningful way and promotes healing and resilience. It also reduces the potential for further harm, re-victimization and post-traumatic stress. Overall, victims feel safer and more secure and are more likely to be satisfied with the process.

Recommendations

Recommendation 1: Bring victims' rights under the *National Defence Act* in line with those under the *Canadian Victims Bill of Rights*.

Since 2014, when the CVBR was in development, the OFOVC has been actively recommending that the federal government introduce legislation that would ensure that the rights provided to victims under the CVBR are mirrored in the military justice system. Most recently, we reiterated this recommendation in our submission to Status of Women Canada in the context of developing a federal strategy to prevent and address gender-based violence.

Since 2000, military police have received between 134 and 201 complaints of sexual assault per year, and it is likely that hundreds of other cases have gone unreported.⁶ Given its prevalence, the example of gender-based violence helps to underscore the importance of ensuring that victims in the military justice system are afforded the same rights as all other crime victims. These victims deserve to have the same rights to information, protection, participation and restitution irrespective of the system with which they are interacting.

The OFOVC is encouraged by recent initiatives undertaken by the CAF to acknowledge and address the pervasive problem of inappropriate sexual behaviour, as documented in two progress reports so far, one covering the period from June to December 2015, and the other from January to June 2016. These steps include, for example: implementation of Operation HONOUR to eliminate harmful and inappropriate sexual behaviour within the CAF; establishment of the Sexual Misconduct Response Centre to provide support to CAF members who have experienced or witnessed inappropriate sexual behaviour; and implementation of a voluntary survey on sexual misconduct conducted by Statistics Canada to help the CAF better understand the scope of inappropriate sexual behavior and the impact it is having on members.

⁶ *Our military's disgrace*. Maclean's Magazine. May 16, 2014.

While progress is being made, the OFOVC remains concerned about the imbalance of victims' rights provided for in the *National Defence Act* versus the CVBR as it relates to victims of sexual offences and all other types of crime. For this reason, the OFOVC strongly encourages the Court Martial Comprehensive Review Team and the federal government to prioritize the introduction of legislation to amend the *National Defence Act* to mirror the CVBR. Doing so would be a critical step forward to help ensure that victims in the military justice system have rights and entitlements consistent with all other victims of crime in Canada.

Recommendation 2: That the Canadian Armed Forces ensure its internal policies, procedures and practices as they relate, or could relate, to victims of crime address victims' needs and concerns.

In addition to the benefits to individual victims, providing a more equal and supportive environment for victims of crime in the military would help to enhance confidence and potentially participation in the Canadian military justice system. This is important not only for the treatment of victims, but also for the effectiveness of the overall system. Members of the CAF who have been victimized, or who see others who have been victimized, may look to past experiences as a deciding factor in whether or not to report crime. If victims' experiences in the military justice system are such that victims feel marginalized or less protected than even the average Canadian, they may be more reluctant to come forward. This reluctance may contribute to a culture of unreported crime and ongoing victimization. Providing a system that is fair and respectful of victims' needs and concerns can help to encourage reporting and, therefore, assist the CAF in becoming aware of – and having the opportunity to address – acts of violence and crime within its organization. Without knowledge of these crimes, or the impacts these crimes have on its members, the military may miss important opportunities for change in its work to ensure a safe and healthy environment for all staff.

“Victims who feel that they have been treated fairly are more satisfied with the criminal justice authorities and institutions than victims who feel that they have not been treated fairly.”

Wemmers, van der Leeden, and Steensma
(1995)

Conclusion

The OFOVC works diligently to bring awareness to the needs and concerns of victims of crime and makes subsequent recommendations to the federal Government to strengthen policies, programs, and legislation to better meet these needs.

All victims of crime deserve equal access to rights and entitlements. We strongly believe that addressing the current imbalance of victims' rights in the military justice system through enactment of legislation should be a key consideration as the Court Martial Comprehensive Review proceeds. The OFOVC also encourages the use of a victim-centred approach in relation to military justice proceedings, in order to both promote resiliency and reduce re-victimization and trauma to members, as well to enhance confidence in the military justice system overall. Confidence in the CAF court martial system is key to its overall effectiveness.

The OFOVC would welcome any further opportunity to discuss ways to better support victims in the military justice system as part of the Court Martial Comprehensive Review.

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