
Wisconsin Legislative Council
COMMITTEE RECOMMENDATIONS



STUDY COMMITTEE ON
WISCONSIN NATIONAL GUARD SEXUAL
MISCONDUCT PROCEDURES

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The Wisconsin Legislative Council is a nonpartisan legislative service agency. Among other services provided to the Wisconsin Legislature, staff of the Wisconsin Legislative Council conduct study committees under the direction of the Joint Legislative Council.

Established in 1947, the Joint Legislative Council directs study committees to study and recommend legislation regarding major policy questions facing the state. Study committee members are selected by the Joint Legislative Council and include both legislators and citizen members who are knowledgeable about a study committee's topic.

This document summarizes committee activity and presents study committee recommendations to the Joint Legislative Council.

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PART I | EXECUTIVE SUMMARY

The Wisconsin National Guard serves as both the state's organized militia and an armed military force that is organized under federal law. It is organized, trained, equipped, and available for deployment under official orders in both state and national emergencies. The Guard has dual state and federal missions; its federal mission is to provide trained units to the U.S. Army and Air Force in time of war or national emergency, while its state mission is to help civil authorities protect life and property and preserve peace, order, and public safety in times of natural or human-caused emergencies.

To serve these state and federal missions, Wisconsin National Guard members may be in either "federal status" under Title 10 of the U.S. Code or "state status" under state law or when ordered to duty under Title 32 of the U.S. Code. Under the Guard's structure as a hybrid state and federal organization that serves as both Wisconsin's militia and as part of the U.S. Air and Army National Guard, the Governor and the Governor's appointed Adjutant General command the Guard, while the federal Defense Department, the Secretaries of the Army and Air Force, and the National Guard Bureau prescribe regulations and issue orders to organize, discipline, and govern the Guard.

In recent years, various news organizations reported concerns that the Wisconsin National Guard failed to properly handle or respond to allegations of sexual assault and sexual harassment within the Guard. In March 2019, in response to these reports and similar concerns raised to various federal and state officials, Governor Tony Evers and U.S. Senator Tammy Baldwin requested that the federal National Guard Bureau's Office of Complex Investigations (OCI) conduct an assessment of the Wisconsin National Guard's sexual assault and harassment reporting procedures, investigation protocols, and accountability measures.

The OCI assessment, completed in November 2019, reported that the investigatory team "found that the Wisconsin National Guard's programs and systems for handling allegations of sexual assault, sexual harassment, and other workplace or service-related misconduct were non-compliant with federal law and regulation, and in various respects, deficient or failing." Shortly after the assessment was released, then-Adjutant General Major General Donald Dunbar resigned at the request of Governor Evers. Governor Evers then ordered the Wisconsin National Guard to submit a corrective action plan.

In response to legislative interest in ensuring that state law provides adequate mechanisms for addressing sexual misconduct within the Wisconsin National Guard, the Joint Legislative Council (JLC) created the Study Committee on Wisconsin National Guard Sexual Misconduct Procedures and directed it to study the Wisconsin National Guard's procedures for investigating and addressing sexual misconduct.

PART II | COMMITTEE ACTIVITY

The JLC established the Study Committee on Wisconsin National Guard Sexual Misconduct Procedures and appointed the chairperson by a mail ballot dated April 8, 2022. The study committee was directed to study the Wisconsin National Guard's procedures for investigating and addressing sexual misconduct. The committee was also directed to review the findings and recommendations contained in previously completed investigations into the Wisconsin National Guard's procedures, with a particular focus on the National Guard Bureau OCI's assessment of the Wisconsin National Guard's sexual assault and harassment reporting procedures, investigation protocols, and accountability measures. The committee was further directed to recommend legislation that enhances oversight of the Wisconsin National Guard as it relates to sexual misconduct, ensures state law complies with relevant federal requirements, and amends the Wisconsin Code of Military Justice (WCMJ) where necessary.

The JLC appointed the study committee's membership by mail ballot dated May 31, 2022. The final committee membership consisted of two senators, two representatives, and seven public members. **Appendix 1** lists the committee members.

SUMMARY OF MEETINGS

The study committee held five meetings on the following dates at the State Capitol in Madison:

- August 9, 2022.
- September 14, 2022.
- October 13, 2022.
- November 17, 2022.
- December 12, 2022.

August 9, 2022

At the study committee's meeting on August 9, 2022, Legislative Council staff summarized the material in Staff Brief 2022-05, *Study Committee on Wisconsin National Guard Sexual Misconduct Procedures*. The summary highlighted: the organization and hybrid nature of the National Guard; federal regulations regarding sexual assault prevention and response and equal opportunity; the sources of applicable rules of conduct and how those rules are enforced; OCI's investigation of the Wisconsin National Guard; and the Guard's actions to implement OCI's recommendations. They also explained that members of the Wisconsin National Guard are subject to the WCMJ, which codifies offenses that may be punished under the code and establishes procedures for enforcing the code. If on federal Title 10 status, members are subject instead to the federal Uniform Code of Military Justice (UCMJ).

Major General Charles Walker, Director, OCI, National Guard Bureau (NGB), then provided an overview of the OCI and of best practices that states have used for addressing sexual assault in the National Guard. He explained that OCI investigates allegations of sexual assault in an administrative capacity at the request of state adjutants general. If OCI substantiates an allegation of sexual assault, the state National Guard must take action against the perpetrator. General Walker also described best practices that states have taken for addressing sexual assault in the National Guard, including: (1) utilizing a single, centralized agency to conduct criminal investigations of sexual assault; (2) utilizing the Office of Provost Marshal; and (3) exercising oversight of the state militia.

Colonel Douglas H. Moore, Staff Judge Advocate, Captain Leigh M. Neville-Neil, Deputy Brigade Staff Judge Advocate, Wisconsin Army National Guard, and Meg Vergeront, General Counsel, Wisconsin Department of Military Affairs (DMA), described changes the Wisconsin National Guard has made to its policies following the OCI assessment. In particular, Colonel Moore discussed how the Guard has improved tracking and transparency of complaints of sexual assault and disciplinary matters; updated sexual assault policies to comply with federal law and policies; and improved staffing levels, resources, training, and communication. He also described the resources available for victims of sexual assault, the procedural differences in handling restricted and unrestricted reports of sexual assault, and the National Guard's relationship with local law enforcement officials through the provost marshal.

Following the presentations from invited speakers, the study committee discussed, among other topics, issues related to accountability, identifying barriers to reporting, ensuring adequate victim supports, and the importance of tracking allegations of sexual misconduct. Committee members also discussed the use of, and potential update to, the WCMJ, efforts to prevent sexual misconduct, and efforts to encourage reporting of sexual misconduct. One committee member also discussed the opportunity to learn about what other states have been doing to address sexual misconduct in the National Guard.

September 14, 2022

The study committee's meeting on September 14, 2022, began with a brief summary by Legislative Council staff of Memo No. 1 (September 7, 2022). Legislative Council staff explained that the memo provides background information on two topics the study committee discussed at its August 9, meeting: the recent codification of sexual harassment in the UCMJ and legislation other states have enacted to address sexual misconduct in their national guards.

Major General Paul E. Knapp, Adjutant General, Wisconsin National Guard; CPT Leigh M. Neville-Neil, Deputy Brigade Staff Judge Advocate, Wisconsin National Guard; and Penny Gietzen, Sexual Assault Response Coordinator, Wisconsin National Guard, then discussed the Wisconsin National Guard's response to reports of sexual assault and sexual harassment.

General Knapp explained that the Wisconsin National Guard has worked diligently to address and implement each of the recommendations in OCI's assessment, and become a leader in preventing and responding to sexual assault and sexual harassment. He also discussed efforts to make Wisconsin's Sexual Assault Prevention and Response (SAPR) program consistent, fair, and reasonably swift, with a focus on the victim and the victim's care.

Ms. Gietzen explained specific aspects of the SAPR program that she oversees, including training, advocacy services, and case management. She described the training that Sexual Assault Response Coordinators (SARCs) and victim advocates receive and current challenges to bringing new individuals to those roles, such as the extensive vetting process and limited number of seats available for positions in training programs. She also discussed attempts to remove barriers to reporting cases of sexual assault and sexual harassment, such as through educating commanders about the SAPR program. She said that she meets monthly with a group that includes Guard leadership and various health and behavioral health service representatives to discuss cases and care for victims.

Following these presentations, committee members discussed the benefits of updating the WCMJ, ways to ensure that victims receive proper support and services, and the Wisconsin National Guard's status of discipline briefings. Committee members agreed that they would like more information regarding what type of information regarding reports of, and disciplines related to, sexual assault and sexual harassment could be made publicly available.

October 13, 2022

At the study committee's meeting on October 13, 2022, Legislative Council staff summarized Memo No. 2 (October 6, 2022). Legislative Council staff explained that the memo provides information on: requirements that other states' National Guards submit a report to the Legislature regarding reports of sexual assault and sexual harassment; the applicability of Wisconsin's constitutional and statutory provisions regarding victims' rights to proceedings brought under the WCMJ; the rules of evidence for a court-martial under the WCMJ; the treatment of nonconsensual sexual contact or a nonconsensual sexual act under the WCMJ and UCMJ; and three punitive articles that have recently been adopted under the UCMJ, but are not replicated in the WCMJ.

Chair Kurtz then invited Col. Moore and Cpt. Neville-Neil to answer questions from committee members. In response to committee questions, they told the committee that the Wisconsin National Guard currently uses an Excel spreadsheet to track misconduct by Guard members, which is compiled by paralegals and commanders and used as the basis for status of discipline briefings, but could benefit from a more comprehensive case management and tracking system. They also told the committee they agree the WCMJ should be updated to reflect certain recent amendments to the UCMJ, but that any changes should first be carefully considered.

Following the question and answer period with Col. Moore and Cpt. Neville-Neil, committee members discussed issues the committee could address with legislation. Among other issues, members expressed concern over certain differences between the UCMJ and WCMJ. There was consensus among committee members that the WCMJ should be updated to more closely reflect the UCMJ for the following offenses: abusive sexual contact, sexual assault, sexual harassment, retaliation, and prohibited activities with a recruit or trainee.

Committee members also discussed creating a process for the Legislature to regularly review substantive updates to the UCMJ to determine whether the WCMJ should be similarly updated. They also agreed it would be beneficial for DMA to submit an annual report to the Legislature regarding reports of sexual assault and sexual harassment within the National Guard. There was consensus among committee members that the bill draft's reporting requirements should be based on the summary of what other states generally require, as described in Memo No. 2. A committee member also requested that the report include information on the rank of the members involved.

Committee members expressed interest in exploring options for developing a case management and tracking system for instances of misconduct within the National Guard, but requested additional information regarding the Guard's needs and the logistics of creating such a system.

Committee members also expressed interest in specifying that victims' rights provided under Wisconsin law apply to victims of crimes under the WCMJ and discussed issues related to who may be considered a victim for the purposes of [ch. 322](#), Stats., and how current victims' rights provisions apply to victims within the context of a military justice proceeding. Specifically, committee members noted that while not specifically codified under the WCMJ, NGB and Department of Defense (DOD) directives protect certain rights of victims of sexual assault and sexual harassment, and that it is difficult to directly apply victims' rights to the WCMJ because of procedural and substantive differences between the military justice system and the civilian criminal justice system. Chair Kurtz asked Mr. Gerol and Legislative Council staff to explore possible changes to the WCMJ that the committee could consider.

Finally, committee members expressed interest in clarifying a provision of the WCMJ that authorizes the Governor to prescribe pretrial, trial, and post-trial procedures for courts-martial that arise under the WCMJ. Chair Kurtz directed Legislative Council staff to prepare a bill draft

that modifies this provision to more directly specify that the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces apply to courts-martial under the WCMJ.

November 17, 2022

At the study committee's meeting on November 17, 2022, members discussed 10 bill drafts that were presented to the committee by Legislative Council staff. Legislative Council staff explained that they consulted with DMA staff while preparing the bill drafts and incorporated refinements based on DMA's technical expertise. They then explained following bill drafts:

LRB-6547/P4 creates a punitive article in the WCMJ that prohibits certain members of the National Guard in a position of special trust from engaging in sexual activity with a specially protected junior member of the armed forces. Staff explained that this bill draft creates an article that is identical to an article added to the UCMJ by the National Defense Authorization Act (NDAA) of 2016, with one minor revision to omit language not relevant to the Wisconsin National Guard. The committee did not request any modifications to the bill draft.

LRB-6548/P4 creates a punitive article under the WCMJ that prohibits wrongfully taking or threatening to take an adverse personnel action against a person or withholding or threatening to withhold a favorable personnel action against a person, if done with the intent to: (1) retaliate against any person for reporting or planning to report a criminal or military offense; (2) retaliate against any person for making or planning to make a protected communication; or (3) discourage a person from reporting a criminal offense or making a protected communication. Staff explained that this bill draft creates an article that is similar to one added to the UCMJ, but with modifications made to reference state officials and agencies. The committee requested that the bill draft be updated to protect communications made to state legislative service agencies.

LRB-6549/P4 creates a punitive article under the WCMJ that prohibits sexual harassment and is identical to a punitive article recently added to the UCMJ. Staff informed the committee that DMA advised that placing this article near Article 134, General Section, would be beneficial to parallel the placement of the article under the UCMJ. The committee did not request any modifications to the bill draft.

LRB-6551/P3 partially aligns Article 120 of the WCMJ with Article 120 of the UCMJ by providing that a person is guilty of sexual assault if he or she commits a sexual act upon another person without the other person's consent and that a person is guilty of abusive sexual contact if he or she commits sexual contact against another person without the other person's consent. Committee members agreed that this modification should be made to the WCMJ. After discussing additional differences between the WCMJ, UCMJ, and state civilian criminal law, committee members expressed a desire to replicate the UCMJ provision while ensuring that engaging in a sexual act and causing nonconsensual bodily harm remains punishable under the WCMJ.

LRB-6552/P3 requires the Adjutant General to submit an annual report on several topics related to sexual assault and sexual harassment to the Governor and the appropriate standing committees of the Legislature and to publish the report on DMA's website.

Among other requirements, the bill draft would require that the report include data regarding all reported incidents of sexual assault and sexual harassment made in the prior federal fiscal year, including the following information for unrestricted reports of sexual assault and reports of sexual harassment: (1) the duty status of the members involved at the time of the incident; (2) information on the status of the report, including whether the case was referred for additional discipline; and (3) a summary of any resolution or discipline taken, including whether criminal

charges were referred or filed. Legislative Council staff informed the committee that DMA did not believe the report could include a summary of the incident without revealing the parties' identities. The committee requested that the bill draft be modified to require that the report indicate more specifically the type of conduct reported.

LRB-6553/P3 modifies Article 36 of the WCMJ. That article provides that the Governor may prescribe the pretrial, trial, and post-trial procedures that apply to courts-martial cases under the WCMJ, which shall apply the principles of law and rules of evidence generally recognized in military criminal cases in the courts of the armed forces, so long as they are not inconsistent with the WCMJ. Legislative Council staff explained that the bill draft would instead require the Adjutant General to prescribe pretrial, trial, and post-trial procedures, not otherwise specified in the code, in writing and to make those procedures publicly available on DMA's website. Staff further explained that the bill draft incorporates suggestions from DMA and allows the Guard to establish courts-martial procedures that draw from both state criminal procedure and military law. The committee did not request any modifications to the bill draft.

LRB-6554/P2 requires DMA to submit a report annually to the appropriate standing committees of the Legislature that summarizes any substantive changes to the UCMJ's punitive articles in the prior federal fiscal year and compares those changes to the WCMJ. The committee requested two modifications: (1) that the bill draft define "substantive change" as "any change to the UCMJ that modifies the elements of a punitive article, creates a punitive article, or repeals a punitive article"; and (2) that the bill draft require the report to include DMA's recommendations regarding whether the substantive changes to the UCMJ should be incorporated into the WCMJ.

LRB-6556/P2 requires DMA to establish and maintain a case management system that allows the National Guard to manage and track case-related information for cases of misconduct within the Guard. In response to questions from committee members, Legislative Council staff confirmed that DMA would have discretion with respect to the type of case management system it used to satisfy the bill draft's requirements. The committee did not request any modifications to the bill draft.

LRB-6557/P4 provides the victim of an offense under the WCMJ with the rights that are provided to crime victims under [Article 1, Section 9m \(2\)](#) of the Wisconsin Constitution, which provides crime victims with a number of rights, such as the right to be treated with dignity, respect, courtesy, sensitivity, and fairness; the right to privacy; and the right to timely disposition of the case.

Committee members discussed potential practical implications of applying these rights to the WCMJ and whether rights that were drafted within the context of the criminal justice system could be implemented within the military justice system. Committee members also noted that the National Guard currently provides a variety of services to victims, and that the Guard's current practices could inform what requirements the committee might consider recommending. Committee members requested that Legislative Council staff consult with DMA to ascertain which rights provided by the bill draft could be harmonized with the military justice system.

LRB-6559/P3 makes three changes to the WCMJ. The bill draft: (1) clarifies that civilian criminal courts have primary jurisdiction over certain offenses under the WCMJ that have analogues within the state criminal code by modifying the definition of "military offense" and repealing the definition of "nonmilitary offenses"; (2) provides that the limits of punishment under the WCMJ are those under the UCMJ, unless otherwise prescribed by the Governor; and (3) modifies the punitive article titled "Conduct Unbecoming an Officer and a Gentleman" to

remove gender-specific language and align the article with Article 133 of the UCMJ. The committee did not request any modifications to the bill draft.

December 12, 2022

At the study committee's meeting on December 12, 2022, the study committee voted on updated bill drafts. Those votes are described in Part IV.

Legislative Council staff began the committee's discussion by explaining the bill drafts and providing an overview of changes from the November 17 meeting. They explained that the bill drafts were updated, combined, and renumbered into drafts for the 2023-24 legislative session as follows:

- **LRB-0831/P1** requires DMA to establish and maintain a case management tracking system for cases of misconduct within the National Guard is identical to LRB-6556/P2, except that it was renumbered for the 2023-24 session.
- **LRB-0833/P2** generally combines LRB-6552/P3, which requires the Adjutant General to annual report certain information regarding sexual assault and sexual harassment, and LRB-6554/P2, which requires DMA to annually report to the relevant standing committees of the Legislature any substantive changes that were made to the UCMJ in the prior federal fiscal year. LRB-0833/P2 additionally modifies certain aspects of the prior drafts to include initial applicability provisions and provide a definition of "substantive change."
- **LRB-0834/P2** generally incorporates LRB-6547/P4, LRB-6548/P4, LRB-6549/P4, LRB-6551/P3, LRB-6553/P3, LRB-6557/P4, LRB-6559/P3, all of which relate to various articles of the WCMJ. The bill draft also includes revisions the committee requested to these drafts and incorporates DMA's technical recommendations. Additionally, LRB-0834/P2 replaces the provisions in LRB-6557/P4 related to victims' rights under the WCMJ with a directive to the Adjutant General to instead prescribe in writing, publish on the DMA's website, and implement a policy that ensures that any victim of an offense under the WCMJ is treated with dignity, respect, courtesy, sensitivity, and fairness.

The committee voted to recommend introduction of all three bill drafts by the JLC, as is explained in Parts III and IV.

PART III | RECOMMENDATIONS

This Part of the report provides background information on, and a description of, the bill drafts as recommended by the Study Committee on Wisconsin National Guard Sexual Misconduct Procedures.

LRB-0831/1, RELATING TO A CASE MANAGEMENT SYSTEM FOR TRACKING MISCONDUCT WITHIN THE WISCONSIN NATIONAL GUARD

LRB-0831/1 requires DMA to establish and maintain a case management system that allows the National Guard to manage and track all case-related information for cases of misconduct within the National Guard.

LRB-0833/1, RELATING TO ANNUAL REPORTING TO THE LEGISLATURE OF SEXUAL HARASSMENT AND ASSAULT THAT OCCURS IN THE WISCONSIN NATIONAL GUARD AND CHANGES TO THE UNIFORM CODE OF MILITARY JUSTICE

Report Regarding Sexual Assault and Sexual Harassment

LRB-0833/1 requires the Adjutant General to submit a report to the Governor and appropriate standing committees of the Legislature annually on several topics related to sexual assault and sexual harassment reported by members of the Wisconsin National Guard. The report must also be made publicly available on DMA's website, and must contain certain information.

First, the report must include data regarding all reported incidents of sexual assault and sexual harassment made by members of the Wisconsin National Guard during the prior federal fiscal year, including the numbers of restricted and unrestricted reports of sexual assault and reports of sexual harassment and historical trends relating to that data for the five previous federal fiscal years. For unrestricted reports of sexual assault and for reports of sexual harassment, the report must include:

- The type of conduct that was reported to have occurred.
- The duty status of the members involved at the time of the incident.
- Information on the status of the report, including whether the case was referred for additional discipline.
- A summary of any resolution or discipline taken, including whether criminal charges were referred or filed. The report must protect the privacy of victims of sexual assault and sexual harassment and may not provide any personal identifying information that would allow a victim to be identified.

Second, the report must include a summary of any training provided to members of the Wisconsin National Guard in the preceding year related to preventing and responding to incidents of sexual assault and sexual harassment.

Third, the report must include a summary of any current NGB policies related to preventing and responding to incidents of sexual assault and sexual harassment during the previous federal fiscal year, and a description of how those policies are being implemented in the Wisconsin National Guard.

Fourth, the report must include a summary of the current policies and procedures related to preventing and responding to incidents of sexual assault and sexual harassment in the Wisconsin National Guard and any changes made since the prior report.

The report is due by February 1 of each year, beginning with reported incidents of sexual assault and sexual harassment made on or after October 1, 2023. The report must be published on DMA's website and the subject of a public hearing, at least annually, by the appropriate standing committees of the Legislature.

Report Regarding Substantive Changes to UCMJ

Background

When members of the Wisconsin National Guard are on state status, they are subject to the WCMJ. The WCMJ is modeled on the UCMJ, but includes state-specific procedures and provisions. The UCMJ is regularly modified by Congress, but these changes do not affect the WCMJ unless subsequently adopted by the Wisconsin Legislature.

Description

The bill draft requires DMA to submit a report to the appropriate standing committees of the Legislature annually that summarizes any substantive changes that have been made to the UCMJ during the prior fiscal year, compares the changes to the WCMJ's punitive articles, and makes recommendations regarding whether those substantive changes should be incorporated into the WCMJ. A substantive change is any change that modifies the elements of, creates, or repeals a punitive article of the UCMJ.

The report is due by July 1 of each year, beginning with substantive changes made on or after October 1, 2023. The bill draft further requires that the appropriate standing committees of the Legislature hold a public hearing on the report at least annually.

LRB-0834/1, RELATING TO PUNITIVE ARTICLES IN THE WCMJ PROHIBITING CERTAIN ACTIVITIES; PROCEDURES APPLICABLE TO COURTS-MARTIAL CASES UNDER THE WCMJ; TREATMENT OF VICTIMS OF AN OFFENSE UNDER THE WCMJ; DEFINING MILITARY OFFENSES UNDER THE WCMJ; PUNISHMENTS FOR VIOLATIONS OF THE WCMJ; AND THE REMOVAL OF GENDER-SPECIFIC LANGUAGE FROM THE WCMJ

LRB-0834/1 makes a number of changes to the WCMJ. As is explained in more detail below, the bill draft: clarifies the jurisdiction of military and civilian courts over offenses under the WCMJ; specifies the limits of punishment for violating the WCMJ's punitive articles; and directs the Adjutant General to prescribe rules of procedure that apply to proceedings under the WCMJ and a policy regarding the treatment of victims of offenses under the WCMJ. The bill draft also modifies and creates various punitive articles in the WCMJ to more closely align the WCMJ with the UCMJ.

Jurisdiction of Courts-Martial

Background

Under the WCMJ, courts-martial have primary jurisdiction of military offenses, while civilian criminal courts have primary jurisdiction of nonmilitary offenses when an act or omission violates both the WCMJ and civilian criminal law. When a civilian court has primary jurisdiction over an offense, the National Guard may initiate a court-martial proceeding only after the civilian authority has declined to prosecute or dismissed the charge, provided that jeopardy has not attached.¹

The WCMJ defines “military offense” by enumerating offenses under the WCMJ and defines “nonmilitary offenses” as offenses that are in the state’s civilian penal statute and are not offenses under the WCMJ. Under current law, the definition of “military offense” includes several offenses that are offenses under both the WCMJ and civilian criminal law, which appears to give courts-martial, rather than civilian criminal courts, primary jurisdiction over those offenses.

Description

The bill draft clarifies that civilian authorities have primary jurisdiction over the offenses of rape and sexual assault; stalking; rape and sexual assault of a child; sexual misconduct; larceny and wrongful appropriation; robbery; forgery; maiming; arson; extortion; assault; burglary; housebreaking; and perjury. Accordingly, the bill draft removes those offenses from the definition of “military offense” and repeals the definition of “nonmilitary offenses.”

Limits of Punishment

Background

Under current law, the limits of punishment for violating an offense under the WCMJ shall be prescribed by the Governor, but may not exceed 10 years of confinement or constitute cruel or unusual punishment.

Description

The bill draft adopts the limits of punishment under the UCMJ by incorporation, unless the Governor prescribes other limits. These limits still may not exceed 10 years of confinement or constitute cruel or unusual punishment.

Rules of Procedure for Courts-Martial

Background

Under current law, the Governor may prescribe pretrial, trial, and post-trial procedures, including modes of proof, for courts-martial cases arising under the WCMJ. These procedures shall apply the principles of law and the rules of evidence generally recognized in military criminal cases in the courts of the armed forces but which may not be contrary to or inconsistent with the WCMJ.

¹ The National Guard may take administrative disciplinary actions against a person for violating an offense over which a civilian court has primary jurisdiction regardless of whether the civilian authority prosecutes the offense.

Description

The bill draft modifies this provision to require the Adjutant General to prescribe in writing pretrial, trial, and post-trial procedures for courts-martial cases arising under the WCMJ and to make these procedures publicly available on DMA's website.

Policy on Treatment of Victims

Background

The Wisconsin Constitution and Wisconsin Statutes grant crime victims a variety of rights, including the right to be treated with dignity, respect, courtesy, sensitivity, and fairness. For these purposes, "crime victim" is defined, generally, as a person against whom a crime has been committed. A victim of an offense under the WCMJ may satisfy this definition of crime victim under some, but not all, circumstances.

Description

The bill draft requires the Adjutant General to prescribe in writing, publish on the DMA's website, and implement a policy that ensures that any victim of an offense under the WCMJ is treated with dignity, respect, courtesy, sensitivity, and fairness.

Punitive Articles Created or Modified

Background

As noted above, Congress amends the UCMJ on a regular basis, but these changes do not affect the WCMJ unless subsequently adopted by the Wisconsin Legislature. Currently, the UCMJ includes various punitive articles relevant to sexual assault and sexual harassment that either are not yet reflected in the WCMJ or contain elements that differ than those expressed in the WCMJ.

Description

Prohibited Activities With a Military Recruit or Trainee by a Person in a Position of Trust

The bill draft creates a punitive article that prohibits an officer, noncommissioned officer, or petty officer who is in a training leadership position from engaging in a prohibited sexual activity with a specially protected junior member of the armed forces. It also prohibits a military recruiter from engaging in prohibited sexual activity with an applicant for military service or a specially protected junior member of the state military forces who is enlisted under a delayed entry program. This article parallels Article 93a of the UCMJ, which was adopted in the NDAA for fiscal year 2016.

Under the bill draft, prohibited sexual activity means any sexual act or sexual contact or any attempt or solicitation to commit a sexual act or sexual contact. A specially protected junior member of the armed forces is a member of the state military forces who is one of the following: (1) assigned to or awaiting assignment to basic training or other initial active duty for training; (2) a cadet, midshipman, an officer candidate, or student in any other officer qualification program; or (3) in any program that, by regulation of the Secretary of the Army or Air Force, is identified as a training program for initial career qualification. Consent is not a defense for any conduct at issue.

Retaliation

The bill draft creates a punitive article that prohibits wrongfully taking or threatening to take an adverse personnel action against any person or wrongfully withholding or threatening to withhold a favorable personnel action with respect to any person, if done with intent to do any of the following: (1) retaliate against any person for reporting or planning to report a criminal or military offense; (2) retaliate against any person for making or planning to make a protected communication; or (3) discourage any person from reporting a criminal or military offense or making a protected communication.

Under the bill draft, a communication qualifies as a protected communication under two circumstances. The first is if it is a lawful communication to a member of Congress, member of the Wisconsin Legislature, the Governor, or an inspector general. The second is if it satisfies both of the following conditions: (1) the communication is to a member of the U.S. DOD, a member of the NGB, a law enforcement officer, a state agency, a legislative service agency, a person in the chain of command, or a court-martial proceeding; and (2) in the communication a member of the state military forces complains of, or discloses evidence that, the person reasonably believes constitutes evidence of a violation of a law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

This provision is modeled on Article 132 of the UCMJ, which was adopted in the fiscal year 2016 NDAA.

Sexual Assault and Abusive Sexual Contact

The bill draft aligns the elements of sexual assault and abusive sexual contact under the WCMJ with the elements of these offenses under the UCMJ. Although the WCMJ's provisions addressing sexual assault and abusive sexual contact are modeled on those in the UCMJ, the WCMJ does not reflect the elements of these offenses as currently expressed in the UCMJ. Among other differences, under the UCMJ, a person is guilty of sexual assault or abusive sexual contact if he or she commits a sexual act or sexual contact upon another person without the consent of the other person. This provision is not currently reflected in the WCMJ. The bill draft modifies the WCMJ to also specify that, as under the UCMJ, a person who commits a sexual act or sexual contact upon another person without that person's consent is guilty of sexual assault or abusive sexual contact, respectively.

Additionally, under both the UCMJ and WCMJ, there are a variety of different types of conduct that constitute the offense of sexual assault. Under the UCMJ, one of the ways the elements of sexual assault are satisfied is if a person commits a sexual act upon another person by doing certain enumerated acts. These acts are: (1) threatening or placing that other person in fear; (2) making a fraudulent representation that the sexual act serves a professional purpose; or (3) inducing a belief by any artifice, pretense, or concealment that the person is another person. The corresponding provision in the WCMJ differs in two respects from the UCMJ. First, under the WCMJ, the victim's lack of consent to the sexual act or sexual contact is an element of the offense, but under the UCMJ consent is not an issue. Second, the WCMJ includes in the list of acts above, "causing bodily harm to that other person." The bill draft removes the issue of consent from the offense under the WCMJ and removes from the list of other actions "causing bodily harm to that other person," consistent with the UCMJ.

Sexual Harassment

The bill draft creates a punitive article in the WCMJ that prohibits sexual harassment and parallels an amendment made to Article 134 of the UCMJ in the fiscal year 2022 NDAA.

Specifically, any person who either knowingly makes an unwelcome sexual advance, demand, or request for a sexual favor or knowingly engages in other unwelcome conduct of a sexual nature is guilty of sexual harassment, if the conduct meets two conditions.

First, the sexual advance, demand, request, or conduct of a sexual nature must do either of the following:

- Under the circumstances, cause a reasonable person to believe, and actually cause at least one person to believe, that submission to or rejection would be made, either explicitly or implicitly, a term or condition of that person's job, pay, career, benefits, or entitlements or would be used as a basis for decisions affecting that person's job, pay, career, benefits, or entitlements.
- Be so severe, repetitive, or pervasive that a reasonable person would perceive, and at least one person actually perceived, an intimidating, hostile, or offensive working environment.

Second, the sexual advance, demand, request, or conduct of a sexual nature must be to the prejudice of good order and discipline in the state military forces or of a nature to bring discredit upon the state military forces, or both.

Conduct Unbecoming an Officer

Article 133 of the WCMJ prohibits any commissioned officer, cadet, candidate, or midshipman from engaging in conduct unbecoming of an officer and a gentleman. The bill draft removes the language referring to "and a gentleman" to eliminate gender-specific language and parallel a similar modification to the UCMJ.

PART IV | STUDY COMMITTEE VOTES

At the December 12, 2022 meeting, the Study Committee on Wisconsin National Guard Sexual Misconduct Procedures voted unanimously to recommend the following bill drafts for introduction by the JLC in the 2023-24 legislative session:

- LRB-0831/P1, relating to a case management system for tracking misconduct within the Wisconsin National Guard, passed on a vote of Ayes, 8 (Reps. Kurtz and Riemer; Sens. Wimberger and Agard; and Public Members Curtis, Gerol, Guzman, and Inlow); Noes, 0; and Absent, 3 (Public Members Arenz, Carroll, and La Sage).
- LRB-0833/P2, relating to annual reporting to the legislature of sexual harassment and assault that occurs in the Wisconsin National Guard and of changes to the Uniform Code of Military Justice, passed on a vote of Ayes, 8 (Reps. Kurtz and Riemer; Sens. Wimberger and Agard; and Public Members Curtis, Gerol, Guzman, and Inlow); Noes, 0; and Absent, 3 (Public Members Arenz, Carroll, and La Sage).
- LRB-0834/P2,² relating to punitive articles in the Wisconsin Code of Military Justice prohibiting certain activities with a military recruit or trainee by a person in a position of special trust, prohibiting certain retaliatory activities, prohibiting sexual harassment, and prohibiting sexual assault; pretrial, trial, and post-trial procedures applicable to courts-martial cases under the Wisconsin Code of Military Justice; treatment of victims of an offense under the Wisconsin Military Code of Justice; defining military offenses under the Wisconsin Code of Military Justice; punishments for violations of the Wisconsin Code of Military Justice; and the removal of gender-specific language from the Wisconsin Code of Military Justice, passed on a vote of Ayes, 8 (Reps. Kurtz and Riemer; Sens. Wimberger and Agard; and Public Members Curtis, Gerol, Guzman, and Inlow); Noes, 0; and Absent, 3 (Public Members Arenz, Carroll, and La Sage).

² Subsequent to the committee's vote, the Legislative Reference Bureau condensed the relating clause to LRB-0834/1 to the following: "relating to: punitive articles in the Wisconsin Code of Military Justice prohibiting certain activities; procedures applicable to courts-martial cases under the Wisconsin Code of Military Justice; treatment of victims of an offense under the Wisconsin Code of Military Justice; defining military offenses under the Wisconsin Code of Military Justice; punishments for violations of the Wisconsin Code of Military Justice; and the removal of gender-specific language from the Wisconsin Code of Military Justice."

APPENDIX 1 | LIST OF COMMITTEE MEMBERS

Study Committee on Wisconsin National Guard Sexual Misconduct Procedures

Chair Tony Kurtz, Representative
Wonewoc, WI 53968

Melissa Agard, Senator
Madison, WI 53704

Autumn Carroll, Army Veteran
Milwaukee, WI 53207

Adam Gerol, District Attorney
Ozaukee County Justice Center
Port Washington, WI 53074

Melissa Inlow, District Attorney
Clark County
Neillsville, WI 54456

Daniel Riemer, Representative
Milwaukee, WI 53215

Vice Chair Eric Wimberger, Senator
Green Bay, WI 54301

Amy Arenz, Founder/CEO
Concero
Madison, WI 53703

Jacob Curtis, Assistant Staff Judge Advocate
115th FW
Grafton, WI 53024

Gabriela Guzman
OSJA/WI National Guard
De Pere, WI 54115

Jade La Sage, Veteran
US Marine Corp
Johnson Creek, WI 53028

STUDY ASSIGNMENT: The study committee is directed to study the Wisconsin National Guard's procedures for investigating and addressing sexual misconduct. The committee shall review the findings and recommendations contained in previously completed investigations into the Wisconsin National Guard's procedures, with a particular focus on the National Guard Bureau Office of Complex Investigation's assessment of the Wisconsin National Guard's sexual assault and harassment reporting procedures, investigation protocols, and accountability measures. The committee is directed to recommend legislation that enhances oversight of the Wisconsin National Guard as it relates to sexual misconduct, ensures state law complies with relevant federal requirements, and amends the Wisconsin Code of Military Justice where necessary.

11 MEMBERS: 2 Representatives; 2 Senators; and 7 Public Members.

LEGISLATIVE COUNCIL STAFF: David Moore, Senior Staff Attorney, Tom Koss, Staff Attorney, Alex Witz, Legal Intern, and Kelly Mautz, Administrative Staff.

APPENDIX 2 | LIST OF COMMITTEE MATERIALS

August 9, 2022

- Staff Brief 2022-05, Study Committee on Wisconsin National Guard Sexual Misconduct Procedures (July 29, 2022).
- Report, National Guard Bureau Office of Complex Investigations Report of Assessment of the Wisconsin National Guard (December 19, 2019).
- Minutes of the August 9, 2022, meeting.

September 14, 2022

- Memo No. 1, Information in Response to Committee Discussion at August 9, 2022 Meeting (September 7, 2022).
- Minutes of the September 14, 2022, meeting.

October 13, 2022

- Memo No. 2, Information in Response to Committee Discussion at September 14, 2022, Meeting.
- Presentation, Joint Legislative Council Study Committee on Wisconsin National Guard Sexual Misconduct Procedures, by David Moore, Senior Staff Attorney, and Tom Koss, Staff Attorney, Legislative Council (October 13, 2022).
- Report, Vermont National Guard Legislative Report, Fiscal Year 2021, Sexual Assault and Sexual Harassment; Report.
- Minutes of the October 13, 2022, meeting.

November 17, 2022

- LRB-6547/P4, relating to creating a punitive article in the Wisconsin Code of Military Justice prohibiting certain activities with a military recruit or trainee by a person in a position of special trust.
- LRB-6548/P4, relating to creating a punitive article in the Wisconsin Code of Military Justice prohibiting certain retaliatory activities.
- LRB-6549/P4, relating to a punitive article in the Wisconsin Code of Military Justice regarding sexual harassment.
- LRB-6551/P3, relating to a punitive article under the Wisconsin Code of Military Justice relating to sexual assault.
- LRB-6552/P3, relating to reporting of sexual harassment and assault that occurs in the Wisconsin National Guard.
- LRB-6553/P3, relating to pretrial, trial, and post-trial procedures applicable to courts-martial cases under the Wisconsin Code of Military Justice.
- LRB-6554/P2, relating to requiring the Department of Military Affairs to annually report to the legislature any changes to the Uniform Code of Military Justice.
- LRB6556/P2, relating to a case management system for tracking misconduct within the Wisconsin national guard.

- LRB-6557/P4, relating to the rights of victims of an offense under the Wisconsin Code of Military Justice.
- LRB-6559/P3, relating to military offenses under the Wisconsin Code of Military Justice, punishments for violations of the Wisconsin Code of Military Justice, and the removal of gender-specific language from the Wisconsin Code of Military Justice.
- Minutes of the November 17, 2022, meeting.

December 12, 2022

- LRB-0831/P1, relating to a case management system for tracking misconduct within the Wisconsin national guard.
- LRB-0833/P2, relating to annual reporting to the legislature of sexual harassment and assault that occurs in the Wisconsin National Guard and of changes to the Uniform Code of Military Justice.
- LRB-0834/P2, relating to punitive articles in the Wisconsin Code of Military Justice prohibiting certain activities with a military recruit or trainee by a person in a position of special trust, prohibiting certain retaliatory activities, prohibiting sexual harassment, and prohibiting sexual assault; pretrial, trial, and post-trial procedures applicable to courts-martial cases under the Wisconsin Code of Military Justice; treatment of victims of an offense under the Wisconsin Code of Military Justice; defining military offenses under the Wisconsin Code of Military Justice; punishments for violations of the Wisconsin Code of Military Justice; and the removal of gender-specific language from the Wisconsin Code of Military Justice.
- Minutes of the December 12, 2022, meeting.

[Copies of documents are available at www.legis.wisconsin.gov/lc.]