



**SLDN**



# **FREEDOM TO SERVE**

**The Definitive Guide to LGBT Military Service**

***2011 Edition***

*Updated July 27, 2011*

**IMPORTANT:** This guide is effective upon repeal of “Don’t Ask, Don’t Tell” on Tuesday, September 20, 2011. Until then, service members are cautioned about coming out publicly. For more information on SLDN’s warning to service members, visit [www.sldn.org](http://www.sldn.org).



# SLDN

## THE VISION

Freedom to Serve

## THE WORK

Representing and defending LGBT service members through free and direct legal services  
Advocating for equality of benefits for legally married same-sex service members  
Assisting veterans to correct or upgrade their discharge paperwork  
Litigating in the courts, when necessary, to advance full LGBT equality in America’s military

## ACKNOWLEDGEMENTS

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# FREEDOM TO SERVE

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## I. About the SLDN Guide

This guide provides lesbian, gay, bisexual and transgender service members with a comprehensive overview of laws and policies that are relevant to their military service, as well as practical information for advocates and friends of gay and transgender service members. The Servicemembers Legal Defense Network (SLDN) is a legal aid and advocacy organization devoted to ensuring equality in military service for LGBT service members and to representing members of the military and their families against discriminatory policies and regulations. SLDN provides confidential legal assistance on any issue relating to their sexual orientation and military service, at no charge to LGBT service members, their families, partners or friends.

Information in this guide should help service members make informed decisions about how to lead their lives and how to serve successfully in an era of open service. It may also help service members understand how to protect themselves if need be, and how to respond if they are targeted in any way. **This guide does not, however, provide comprehensive counseling for service members, nor is it a substitute for seeking help from an SLDN attorney, a military attorney or a civilian attorney familiar with military law.** Each service member’s situation is different and must be evaluated and handled based on its own facts.

Every LGBT service member should know the information contained in this guide. Regulations of the individual services generally mirror the DoD directives with some minor differences. It is important to review the entire guide before studying the individual sections. This will provide an overview of the laws and policies, which is necessary to understand each of the sections and how they work together, on paper and in practice.

For free, confidential legal counseling, contact:

### Servicemembers Legal Defense Network (SLDN)

(202) 328-3244 (Phone)  
(800) 538-7418 (Toll Free)  
(202) 797-1635 (Fax)  
[legal@sldn.org](mailto:legal@sldn.org) (E-Mail)  
[www.sldn.org](http://www.sldn.org) (Web Site)

P.O. Box 65301  
Washington, D.C. 20035-5301

The military also offers free legal counseling. **If you choose to take advantage of this benefit, make sure that you clarify that the military attorney with whom you are consulting is a *defense* attorney and that your conversation is confidential.** The appropriate service offices are listed in the Additional Resources section of this guide.

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## II. What the Repeal of DADT Means

“Don’t Ask, Don’t Tell” (DADT) was the 1993 law that prevented LGB service members from serving openly.<sup>1</sup> The repeal of DADT is a major step forward for gay and lesbian service members, their families, the military, and the country as a whole. No longer will LGB people who volunteer to serve this country and defend our freedoms be denied that privilege because of who they are. Nor will they be forced to hide a part of themselves in order to continue their service.

But the repeal of DADT does not mean there is complete equality in our armed forces. There are other discriminatory laws and policies that will continue to prevent LGBT service members and their families from enjoying the same rights as their straight counterparts and their families. The following section lays out exactly what the repeal of DADT changes, and what it doesn’t.

### A. What Repeal Changes

With the repeal of DADT, service members will no longer be discharged solely on the basis of their sexual orientation. In practice, this means that service members who are complying with all sexual-orientation-neutral policies and regulations cannot be kicked out for engaging in the three types of so-called “homosexual conduct” that existed under DADT. Service members will no longer be forced out of the armed forces for:

- **Statements** — Statements are admissions of one’s sexual orientation, such as “I am gay.” Under DADT, a statement like this—or any other statement that would lead a “reasonable person” to conclude that a service member was gay—was considered homosexual conduct and was grounds for discharge.<sup>2</sup>

With the repeal of DADT, *statements about a service member’s sexual orientation are no longer grounds for discharge*, and service members are free to come out to whomever they would like, if they so choose.

- **Acts** — Under DADT, a homosexual act was any bodily contact, actively undertaken or passively permitted, between members of the same gender for the purpose of satisfying sexual desires, and any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in a homosexual act.<sup>3</sup>

With the repeal of DADT, *lawful acts with a person of the same sex are no longer grounds for discharge*. Service members are free to engage in intimate conduct with a person of the same sex to the extent permissible under sexual-orientation-neutral regulations. However, there are other provisions that limit or prohibit certain acts, and that can have serious penalties. For more information, please refer to the “Uniform Code of Military Justice” and “Military Policies” sections of this guide.

- **Marriage** — Same-sex marriage is currently available in several states and the District of Columbia. Other states have provisions for domestic partnerships or civil unions. Under DADT, any marriage or attempted marriage (which included civil unions, domestic partnerships or commitment ceremonies) was grounds for discharge.<sup>4</sup>

Today, *service members are free to marry, obtain a domestic partnership or civil union, or have a commitment ceremony with another person of the same sex without fear of separation*. Because of the Defense of Marriage Act (DOMA), a same-sex marriage will not be recognized as a valid marriage by the military and other parts of the federal government, even if it is validly performed in a state that allows same-sex marriage. Spouses of service members, therefore, will be limited in the benefits available to

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them (for more information, please see the “Families and Benefits” section of this guide). SLDN is working to change this inequity, but service members can rest assured that they will not be separated for committing to the person they love.

## B. What Repeal Does Not Change

By repealing DADT, the country and the military have taken a significant step towards equality for all who want to serve their country in uniform. But there are other discriminatory policies in the military that the repeal of DADT does not change. These include:

- **Transgender service** — “Don’t Ask, Don’t Tell” repeal does not change the medical regulatory ban in place for aspiring or current service members who identify as transgender. For detailed information about military policies regarding transgender service, please see the “Transgender Service” section of this Guide.
- **HIV regulations** — The repeal of “Don’t Ask, Don’t Tell” does not change the regulatory scheme in place for aspiring or current service members who are HIV-positive. For detailed information about the service policies regarding HIV, see the “HIV/AIDS Regulations” section of this Guide.
- The **Uniform Code of Military Justice** (UCMJ) is the criminal law of the US military. The repeal of DADT does not change any part of that law. All service members, regardless of sexual orientation, are responsible for understanding and complying with all provisions of the UCMJ. There is a risk, however, that those who wish to target gay and lesbian service members may make false allegations or misuse sections of the UCMJ to continue to discriminate against LGB service members. For more information about these rules, see “The UCMJ” section of this Guide.
- **VA Benefits** — The repeal of “Don’t Ask, Don’t Tell” does not change whether or not someone is eligible for VA benefits. The VA will continue to determine a service member’s eligibility for benefits based on factors such as time served, discharge characterization, and disability rating. For a more thorough discussion of Veterans’ Benefits and eligibility requirements, refer to the “Veterans’ Benefits” section of this Guide.

## III. Tips for Serving

With the repeal of “Don’t Ask, Don’t Tell,” gay and lesbian service members no longer have to hide their sexual orientation or risk losing their jobs. However, there are still a number of decisions that these service members must make and issues that they must face.

### A. No Requirement to Come Out or to Serve Openly

Service members are not required to declare their sexual orientation, and there will be no requirement to come out to anyone. With the repeal of DADT, gay and lesbian service members may choose whether they would like to come out, and to whom, and a service member will not be discharged simply for doing so. Service members may choose not to come out for a variety of personal reasons, including a fear of changed perceptions by coworkers, friends, and family, or a basic desire to keep their sexual orientation private. Other service members may feel that hiding their orientation creates more trouble, and they want to be open and honest about who they are. Gay and lesbian service members with partners or children might find that being open about their home life is necessary just to be able to carry on normal conversations (e.g., “Who takes care of your dog when you’re deployed?”).

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Furthermore, coming out may help to alleviate feelings of isolation and depression. And for some, being out is a matter of honor and integrity. What’s important is that service members now have a choice: they will not be discharged solely based on their sexual orientation, and the military will consider a service member’s sexual orientation as his or her personal and private matter.<sup>5</sup>

For service members who do not wish to declare their orientation, DoD policies have provided some protection to respect their wishes. Neither DoD nor any of the services will create a data category for sexual orientation,<sup>6</sup> and the services will not request, collect or maintain sexual orientation data as a matter of course, except where the information is essential to an investigation or other official action.<sup>7</sup> While new DoD policies state sexual orientation is no longer a basis for administrative discharge actions, sexual misconduct, regardless of orientation, remains a basis for criminal or non-judicial punishment. Investigators assigned to these cases might request service members to disclose their sexual orientation if it is essential to the investigation.<sup>8</sup> Service members may face false accusations of sexual misconduct from previous bad relationships, jealous love interests or others with a grudge against them. Service members accused of sexual misconduct should immediately seek assistance from a military defense attorney or an attorney at SLDN.

## **B. Being Publicly Out**

As a guiding principal, all service members should be allowed to serve in the same manner regardless of sexual orientation. Service members’ choices to come out and serve openly are not supposed to affect the quality of their service or their privileges. Instead, LGB service members will be regulated by the same high standards of conduct applied to all service members in their situation.<sup>9</sup>

Of course, choosing to come out is not always easy, even for civilians living in the most progressive environments. Some are concerned about how family and friends will react when they find out. Some fear rejection from their church. Some worry about harassment. Yet others are just figuring out their sexuality and aren’t ready to talk about it. It is a highly personal and sensitive choice, and service members should go at their own pace in deciding whether and when to come out, and who to tell.

### **1. Going to Gay-Oriented Events and Venues**

Participating in gay pride parades and going to gay bars—if done in compliance with uniform regulations—was not prohibited under DADT. But many LGB service members refrained from such activity out of concern that it might lead to suspicions about their sexual orientation that could ultimately lead to a discharge. With repeal of DADT, service members can be assured that the mere act of attending pride or going to a gay bar will not be grounds for separation.

**Pride Events:** The same regulations apply to attendance of gay-focused events, rallies, and pride parades as to all public events. For pride events of a social or cultural nature, service members may attend and participate fully in a manner consistent with off-duty conduct expectations. In addition, service members may attend political activities when not in uniform and voice their personal opinions on political candidates and issues, in a manner as not to appear as a representative of the Armed Forces.<sup>10</sup>

However, for events of a more political nature, service members must abide by their service regulations concerning participating in political activities, discussed below.

**Gay bars:** Service members may go to any bar they choose, including gay bars. The only caveat is that service members should check their command’s “off-limits establishments” designation list to ensure they

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do not violate any orders not to frequent a particular establishment. An establishment may be declared off-limits for a number of reasons, including known criminal activity, previous altercations involving service members, or other factors that affect good order and discipline.<sup>11</sup> However, it is not appropriate to declare a gay bar “off-limits” solely because it caters to gay clientele. “Off-limits” orders restricting service members from going to gay bars should be reported to SLDN, and SLDN can address the situation directly with the individual command or with the service branch.

While at a gay bar (or anyplace else) a service member’s conduct must conform to the rules. Activities that might be acceptable for a civilian might not be acceptable for a member of the United States armed forces. Both “indecent acts” and “indecent exposure” are prohibited by Article 120 of the UCMJ.

## ***2. Attending Military Sponsored Events***

Service balls, unit picnics and formal dinners are an important aspect of military life, promoting esprit de corps and celebrating joint or individual accomplishments. All service members should be able to participate fully in these military events without regard to their sexual orientation. If the event allows guests, then the service members should be free to invite their guest no matter their gender or sexual orientation. For example, if the Marine Corps Ball allows unit members to bring a date, then a gay service member should be allowed to bring someone of the same sex. Policies regarding public displays of affection and uniform requirements apply at military events. Additionally, service members will likely be responsible for the conduct of their guest, and their guest must conform to any rules the event imposes on all guests. SLDN can help address any issues regarding guest restrictions based on sexual orientation.

## ***3. Deploying or Moving Overseas***

Overseas assignments and deployments are not restricted based on a service member’s sexual orientation. However, some host-countries continue to have laws concerning homosexuality and homosexual conduct. Service members are supposed to be informed during deployment briefings and assignment notifications of the host-country laws and local military policies regarding homosexuality and homosexual conduct.<sup>12</sup> Command sponsorship and overseas moves with dependents are discussed below in Benefits and Family Programs.

## ***4. Finding Support Groups***

The military community has created many resources to help service members who need support for professional or personal matters. The base’s Morale, Welfare, and Recreation (MWR) Center may have information on community or on-base support, depending on what kind of support service members needs. Service members experiencing family, relationship or military life issues can contact Military OneSource, a free counseling service provided by the DoD.<sup>13</sup> Several LGBT organizations assist service members and may know of local support groups. A list of some organizations can be found in the resources section of this guide.

### **C. Standards of Conduct**

The armed forces have many rules, regulations, policies and standards of conduct. Service members are responsible for complying with them, and all should be applied without regard to sexual orientation.<sup>14</sup>

For LGB service members, understanding these regulations is particularly important. With the repeal of DADT, individuals who wish to target LGB service members may resort to misapplying sexual-orientation-neutral policies as a way of continuing to drum out LGB service members.

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## D. Addressing Harassment or Discrimination Based on Sexual Orientation

Service members perceived as gay may face harassment, threats and even violence. Service members who experience harassment based on their actual or perceived sexual orientation should contact an SLDN attorney immediately for assistance.

Harassment can take different forms, ranging from a hostile command climate filled with anti-gay jokes and comments to direct verbal and physical abuse to death threats. Military leaders have stated publicly that they do not tolerate harassment. In fact, the DADT Repeal Policy Guidance states “[h]arassment or abuse based on sexual orientation is unacceptable.”<sup>15</sup> Service members have the right to make complaints either through military channels or outside military channels about improper treatment or harassment.

Service members who are the target of harassment have some avenues within the military to try to stop the harassment, discussed below. Service members facing the threat of immediate physical harm may also report the threat directly to the military police. Although some chaplains have been outspoken in their opposition to gay military members as a matter of policy, if a military member’s physical safety is at risk, that is another matter. Chaplains can offer a safe space, especially on deployed ships, where there may be nowhere else to go. Some of the more common complaint procedures are:

**Command Complaint:** Generally speaking, service members should try to use their chain of command to address issues before attempting to make complaints through other channels. If a service member’s chain of command is part of the problem or condones the harassment, then the service member may need to use other methods to report the mistreatment.

**Equal Opportunity (EO) Complaint:** Each branch of the service has military equal opportunity (MEO) offices or officers to handle complaints of race- and gender-based discrimination and harassment. Any service member experiencing harassment or “sex stereotyping” can make a complaint to their MEO office. However, up to this point, sexual orientation discrimination is not considered a matter for MEO office.<sup>16</sup>

**Inspector General (IG) Complaint:** Service members may complain to the inspector general of their base, service, or the DoD about harassment or violations of regulations.<sup>17</sup> Once they are made, the handling of complaints is generally out of service members’ hands. The inspector general’s office does not itself have the power to correct problems, but its findings and recommendations may induce action by a command.

**“Writing Up”:** Service members can ask their commands to take disciplinary action against other members who violate the UCMJ or punitive regulations.<sup>18</sup> Requests are normally made in writing. Service members cannot demand that offenders be disciplined; it is up to the command to decide whether to take any action. Another practical reality is that a junior service member who attempts to place a senior service member “on report” may face retaliation by the senior member in ways that are hard to prove—*i.e.*, bad work assignments, weekend duty, assignments to work details etc.

**Article 138 Complaint:** Article 138 of the UCMJ permits service members to seek redress of a grievance against their commanding officer.<sup>19</sup> Service members may attempt to use this method to right any wrong they feel they have faced, whether or not a law or regulation has been violated. These complaints usually begin with a letter to the commander asking for specific redress (an apology, a training session about the military’s policies against harassment, a transfer to get away from harassment etc.). If the commander doesn’t grant the request in a reasonable time, a formal complaint may be made to any commissioned officer, superior to the commanding officer, who shall forward the complaint to the officer exercising general court-martial convening authority over the commander. That officer must act on the complaint and report the matter to the Secretary of the Service.<sup>20</sup>

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**Congressional Inquiry:** Members of the military have the right to communicate with their Members of Congress and to ask their help in resolving problems with the military.<sup>21</sup> They do not need command permission to do so, and need not notify their commands. In some cases, congressional inquiries are no more than an exchange of letters between a congressional aide and a liaison officer at the service’s headquarters. When presented with concrete evidence and asked for specific types of assistance, however, sympathetic Members of Congress can urge the services or local commands to take action about violations of antidiscrimination or other policies.

**Media/Press:** Complaining to the press, and using its ability to influence the military, should be done only with legal counsel and only as part of a well thought out strategy to redress a wrong. The decision to go to the media is not to be taken lightly and should generally be considered only after other avenues of redress have been tried. While the press can be influential, once the story is in the media, there is little the service member can do to control it. In addition, the service member may be ordered to not communicate with the press after the initial story runs. In these cases, a civilian attorney can represent the service member’s interests to the press to protect the service member from getting into trouble for disobeying an order.

If a service member is considering making a complaint, he or she should contact SLDN for assistance. An SLDN attorney can help decide the best way to route the complaint, encourage the command or the service to treat the complaint seriously and help protect against retaliation for making the complaint.

In general, it is helpful for service members to document harassment when it occurs. Service members should write down as clearly as possible the facts: what occurred, including the date, time and place of the incident, the name or description of each harasser and the names of any witnesses who observed the harassment. If service members receive a threatening note, they should handle it as little as possible and place it in a zip-lock bag or other container that will preserve it. Graffiti which may be easily erased, such as anti-gay epithets written on wipe boards or chalk boards, should be photographed and witnessed by a second person.

Service members should also, if possible, take photos of any destruction of property they experience or ask people who are trustworthy to look at the destruction so that there are witnesses to it. In addition, service members should make and keep copies of their documentation and any other information they receive.

Service members who report anti-gay harassment should consider asking their commands not to reveal the nature of the harassment to other service members. Revealing that a service member has been harassed because he or she is perceived as gay is likely to create and fuel rumors that might further jeopardize the service member’s

**Important information to include when reporting harassment:**

- Who harassed you?
- What was the harassment?
- When did it happen?
- Where did it happen?
- Who saw the incident?

**Physical Harassment and Property Damage Can Be a Reality**

After Private Mark Dennis was outed to his command by his online profile, he started to experience significant harassment from other soldiers. This included vandalism of his car resulting in significant damage, including slashing of the interior, defacing the car with anti-gay graffiti, barricading access to it, and contaminating the gas tank. SLDN assisted Private Dennis in reporting the incident to his command and filing a successful claim with the Army to recover his out-of-pocket expenses related to the repair of his car.

safety, even if the service member is not actually gay. In some cases, it might be valuable to reveal the nature of the harassment, as there is an Executive Order that permits prosecutors in crimes motivated by anti-gay animus to enhance the sentence for the underlying crime as a hate crime.<sup>22</sup>

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Normally, complaints cannot be used to stop discharge proceedings or disciplinary actions, though they can be useful in bringing the military’s attention to problems in those proceedings. Sometimes commands take a second look at discharge or disciplinary proceedings if they realize that the proceedings are tied to improper or illegal actions.

### E. Addressing Harassment or Discrimination Based on Gender

The previous section dealt with harassment and discrimination based on a service member’s sexual orientation — gay, lesbian, straight or bisexual. If you feel you are being harassed or discriminated against because of your gender — male or female — you should report it to the MEO office. Remember that you can be the victim of sex harassment or discrimination at the hands of a person who is the same gender as you.

### F. Whom You Can Talk to About Your Sexual Orientation

With the repeal of DADT, service members can talk about their sexual orientation with anyone they want without fear of losing their ability to serve. However, service members may wish to be out to only a few people or wish to have more control over how widespread knowledge of their sexual orientation becomes in their unit. Therefore, service members should be aware of the protections they have when speaking to others about their sexual orientation.

#### Protection Against Retaliation

Service members who face retaliation for making complaints often have protection under the Military Whistleblower Protection Act (10 U.S.C. § 1034 and DoDD 7050.6, *Military Whistleblower Protection* (2000)). Under the Act, service members who make certain types of complaints are entitled to prompt IG investigations of any adverse personnel action of threatened adverse personnel action taken to retaliate for their complaints. In addition, if the retaliation results in formal adverse action, service members are also entitled to expedited proceedings before the Board for Correction of Military Records (BCMR) or Board of Correction of Naval Records (BCNR), depending on the service.

#### Privilege v. Confidentiality

While often used interchangeably in practice and conversation, privilege and confidentiality are two different concepts concerning the protection of information from disclosure. Confidentiality refers to an affirmative duty of a party to not disclose information they have received. On the other hand, privilege refers to an exemption from a normal duty to disclose information. Generally, a person must not disclose confidential information and cannot be compelled to disclose confidential information.

### 1. Chaplains

Chaplains are an important resource for service members. While the DoD Directives concerning appointment of military chaplains do not explicitly address issues of confidentiality,<sup>23</sup> the regulations for the individual services may provide some protections. For example, the Army advises service members to speak with chaplains as a confidential resource,<sup>24</sup> and an Air Force regulation states that “[Chaplains] will not disclose confidential communications in private or in public.”<sup>25</sup> The chaplain’s denomination may impose additional obligations on the chaplain preventing disclosure of conversations.

The Military Rules of Evidence makes conversations with chaplains privileged when service members seek their spiritual guidance.<sup>26</sup> However, there is no privilege when service members speak to chaplains for reasons other than spiritual guidance. What constitutes spiritual guidance is not always clear. Conversations about a service member’s sexual orientation may not be considered spiritual guidance depending on the religious views of the chaplain’s denomination.

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Chaplains have a duty to care for all service members.<sup>27</sup> However, chaplains are not required to take actions inconsistent with their religious beliefs when conducting their religious ministry.<sup>28</sup>

If service members want to speak with military chaplains about issues surrounding sexual orientation, they should investigate what their chaplain’s religious denomination says about homosexuality, ask the chaplain if the conversation is confidential and then cast the conversation in a spiritual light. This can help ensure a higher chance that the conversation is confidential.

## ***2. Healthcare Providers (Doctors, Dentists, Nurses, Therapists etc.)***

Military health care providers are required to keep individually identifiable health information confidential except when the information is necessary for treatment, for judicial and administrative proceedings, or where disclosure is otherwise required by law.<sup>29</sup>

Anything service members reveal to military health professionals may be used by commands to investigate and/or discharge them. There is a very limited psychotherapist-patient privilege, added to the UCMJ in 1999, that may prevent disclosure of information during court-martial that a service member shares with a psychotherapist or an assistant.<sup>30</sup> However, this privilege applies only in the criminal context and not in the administrative separation process. There is no doctor-patient privilege in the military criminal justice system.

Military commanders may request access to the medical records of service members when necessary to assure fulfillment of military missions.<sup>31</sup> Military health information may be disclosed to commanders to determine the service member’s fitness for duty, compliance with standards and orders, or to carry out any other mission-necessary activity.<sup>32</sup> Commands are unable to request a service member’s medical records solely to find information on the member’s sexual orientation because policies forbid the use of sexual orientation as criteria in any mission, assignment or duty determinations.<sup>33</sup> However, because commands may still have access to such information when checking the service member’s records for other mission-related reasons, service members may wish to be careful of information provided to military health professionals if the member does not wish to be out to their command.

Due to the lack of full confidentiality with military health care providers, many service members seek medical and mental health treatment in the civilian community. Service members who choose to be treated by civilian practitioners should be aware that the services have regulations which require members to report that they have received medical or mental health treatment outside the military medical system.<sup>34</sup> Should the military learn of such treatment and the member has not reported it, the member may face UCMJ punishment for failure to obey an order or regulation.<sup>35</sup> If a service member lies about receiving treatment, he or she is at risk of violating the UCMJ by making a false statement.<sup>36</sup>

During security clearance investigations, service members are often asked to identify their civilian mental health providers and the reason for treatment on security clearance questionnaires. Investigators will sometimes press service members to sign an authorization form allowing them to question health care providers. Refusal to allow this access may result in the service member not receiving a security clearance. Investigators occasionally have questioned providers without first seeking service members’ authorization. Most civilian mental health professionals refuse to answer such questions, but service members should speak with their civilian providers before starting treatment to verify that their conversations are confidential and will not be revealed to security clearance investigators or to the military without their permission.

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### 3. *Lawyers*

Generally, information acquired by attorneys from their clients is confidential and protected by attorney-client privilege.<sup>37</sup> However, some limited circumstances may prevent a service member’s conversation with an attorney from being protected. For example, attorneys are not supposed to keep confidential any threats by their client to kill or maim another person. Under certain circumstances, the presence of a third person during a conversation may keep it from being confidential.

Defense attorneys have ethical obligations to be zealous advocates for their clients and will keep client information confidential, but not all military attorneys are defense attorneys. Command legal officers and prosecutors (also known as “trial counsel”), for example, have no obligation to keep conversations with service members confidential. Anything service members say to these officers can be used against them. Therefore, service members should never talk to any military attorney about their case without asking two key questions: “Are you a defense attorney?” and “Is our conversation confidential?” If the answer to both questions is “YES” then the service member knows the information they give the attorney will be kept confidential. If the answer to either question is “NO” then the service member should understand that there is no confidentiality protection and the conversation may be relayed to a third party.

Civilian attorneys also have a duty of confidentiality and must keep conversations with service member clients confidential, unless the service member gives them permission to do otherwise. If a service member is not sure whether they are a client, they should ask the attorney and make sure their conversation will be held in confidence.

### 4. *Spouses*

Private conversations between spouses are privileged except in a very limited number of situations. A spouse may choose to not testify about private marital conversations and can also prevent a spouse from testifying about those conversations.<sup>38</sup> While one spouse can prevent another from testifying about a private conversation, a spouse is free to reveal information about private conversations in any other situation, even to complete strangers. **Because of DOMA, this privilege does not apply to same-sex spouses.** However, the privilege does apply to previous and current opposite-sex marriage.

### 5. *Others Without Privilege or Confidentially Protection*

Service members will work and socialize with a variety of people during their military careers. A sense of camaraderie will often lead service members to share their personal and private matters with co-workers, supervisors and subordinates. This openness is often good for creating lasting relationships, but service members should be aware that there are no protections to prevent others from sharing this information other than a mutual respect for privacy. Service members who choose to disclose their sexual orientation to their Chain of Command, battle buddies, family or friends should understand that there is no privilege or confidentiality protection. However, misuse of this information could be a form of harassment or lead to discrimination, and service members experiencing issues with malicious disclosure of their private information should seek redress through the normal channels. See the previous sections on addressing harassment or discrimination.

## G. **Privacy and Cohabitation**

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Independent of DADT or its repeal, the DoD Unified Facilities Criteria is working towards securing better privacy by requiring new housing construction to afford service members a private bedroom and a bathroom shared by no more than one other service member.<sup>39</sup> While the military attempts to accommodate the privacy needs of service members, military life and necessity sometimes require living in environments with little to no privacy.<sup>40</sup> Units will assign living quarters based on the needs of the service, but will not ask for or use a service member’s sexual orientation in making any housing decisions.<sup>41</sup> Units will not segregate service members based on sexual orientation. Service members are expected to respect the privacy of fellow service members and to live in their assigned quarters.<sup>42</sup> Any problems with assigned roommates should be addressed through their command, but the command will not grant reassignments solely because of sexual orientation or personal views of sexual orientation.<sup>43</sup> If service members are experiencing housing difficulty based on their actual or perceived sexual orientation, they should contact SLDN immediately for assistance.

Service members may be eligible to live either in base family housing, if available, or off base depending on their number of dependants and rank and number of dependants. Those authorized to live in family housing because of legal dependants (children, opposite-sex spouse, parents) are normally not allowed to have non-family members live in the housing unit. Bases may have local policies that allow for child-care providers to live in base housing, and service members with same-sex spouses

#### **Wrongful Cohabitation**

Wrongful Cohabitation is an offense that falls under Article 134 of the Uniform Code of Military Justice (UCMJ). The Manual of Courts Martial defines Wrongful Cohabitation as two people openly and publicly living together as husband and wife and holding themselves out as husband and wife without actually being married. Because DOMA prevents the military from recognizing same-sex marriages as valid, service members are concerned they may come under this article. A necessary element of the charge is living together as “husband and wife,” which is not possible when dealing with same-sex partners. Because this necessary element is missing, SLDN does not believe that Wrongful Cohabitation in its current form applies to same-sex relationships. However, SLDN is watching for policy changes post-repeal that may alter what constitutes Wrongful Cohabitation. Service members concerned about this matter are encouraged to contact an SLDN attorney.

should contact their gaining unit for more information on these policies. If a service member is authorized to live off base, there is no restriction on the people with whom the member may share housing. For more information on military housing, please see the “Benefits and Family Programs” section of this Guide.

## **H. Political Activity**

Service members may attend political activities, vote and voice their personal opinions on political candidates and issues.<sup>44</sup> Service members may attend political fundraising activities, meetings, rallies, debates, conventions or activities as spectators when not in uniform and when no inference or appearance of official sponsorship, approval or endorsement can reasonably be drawn.<sup>45</sup> Service members may not participate as more than spectators in partisan political events; these events are those that advocate for a particular candidate, political party or a cause identified with a particular party. This restriction applies even if service members are in civilian clothes and there is no appearance of official endorsement.<sup>46</sup>

#### **A service member may:**

- Make monetary contributions to a political organization.
- Attend political meetings, rallies and conventions as a spectator when not in uniform.
- Lobby a Member of Congress on his or her own time and not in uniform.

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- Vote.
- Join a political organization and attend its meetings while not in uniform.
- Sign a petition for parity of military benefits for same-sex partners, as long as this action is done as a private citizen and not as a member of the armed forces.
- Write a letter to the editor of a newspaper expressing the service member’s personal views on public issues and political candidates.
- Display a bumper sticker on his or her private automobile hailing the repeal of “Don’t Ask, Don’t Tell.”

**A service member may not:**

- Participate in partisan political campaigns (partisan political activity includes advocating for a candidate associated with a political party).
- Use contemptuous words against military or elected officials.
- Display a large political sign, banner, or poster (as distinguished from a bumper sticker) on the top or side of a private vehicle.
- Sell tickets for, or otherwise actively promote, partisan political dinners and similar fundraising events.
- Attend political events as an official representative of the armed forces.
- Engage in any political activity while in uniform.
- Engage in any other activity that will be viewed as associating the Department of Defense or the Department of Homeland Security directly or indirectly with partisan political activity.

Service members who are uncertain whether a particular activity is covered by DoD policy should contact SLDN for help.

**I. Social Media and Public Profiles**

With the repeal of DADT, gay and lesbian service members are not barred from being out in public profiles on sites like Facebook. In the same way that others in the unit can use social media tools to connect, share photos and keep track of friends, LGB service members can do so without the constant threat that they will be discharged if their profile is discovered. The governing principle is that all sexual-orientation-neutral regulations that govern conduct exist for online behavior: if an act violates PDA rules, positing a picture of that act violates PDA rules as well; political activity online is limited in the same way.

Because of benefits to recruiting, morale and communications, service members may use government computers to access social media websites like Facebook or Twitter for both official purposes and limited personal use **when authorized by the work center.**<sup>47</sup> However, service members may not use government systems to visit sites that reflect poorly on the DoD.<sup>48</sup> For example, service members may not gamble or view pornography of any kind when using their work computer. Local command policies regarding acceptable personal use should be applied without regard to sexual orientation. If the command allows the use of social or dating websites, then there should be no

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restrictions on visiting gay social or dating websites. Before visiting sites for personal use, however, military members should research and understand their commands’ policies.

Sexual-orientation-neutral regulations applying to service members’ off-line conduct apply to their actions on-line. Just as a base or service can place certain items or places off-limits, they can also place certain internet sites off limits. Additional restrictions may apply if service members are using their own computers either during duty hours or connected to a government network. In these cases, service members should contact their supervisor or network administrator to see what restrictions are in place for personal computers.

Policies concerning the appropriate use of computers apply equally to phones. If a phone is internet-capable, such as an iPhone, Blackberry or Android device, service members should practice the same care they would with a computer when using the phone to access the internet.

When using any system owned by the government or connected to a government network, service members’ activities may be monitored.<sup>49</sup> Service members who wish to continue serving in the closet should be aware that others may be able to observe their online conduct when they are accessing a government network or system.

Service members must maintain operational security when using any information system or social network. Units should provide guidance on what information may or may not be shared publicly, but a good rule of thumb is to treat everything posted to a social network as public and not to disclose unit strength, mission or travel information. For example, a service member leaving for training should not post on Facebook that their unit is flying out tomorrow night at 2130.

## J. Pornography

In most cases, there is no issue with service members purchasing, possessing, or viewing legal pornography. However, the unique demands of the military do create limitations on a service member’s ability to have pornographic materials. Services may restrict members from possessing pornography while in training status. Pornography is forbidden on government computers or networks.<sup>50</sup> Military commissaries and exchanges may not sell or rent pornographic materials.<sup>51</sup> Members of the military may not appear in pornography.<sup>52</sup>

Members serving overseas or in deployed locations may be subject to additional area of responsibility orders restricting use of pornography. For example, General Order Number 1 of the U.S. Central Command forbids pornography in deployment locations under its control.<sup>53</sup> Host country laws may create additional restrictions on the types of pornographic materials permissible within a host country.

## K. Security Clearance Regulations

Throughout the era of DADT, many service members were caught between their desire to be completely honest during the security clearance process and their belief that DADT required them to keep parts of their lives a secret. With repeal, LGB service members will never again need to fear that their honesty during a clearance interview or application will endanger their career. The only rule of thumb service members need to remember during the security clearance process is: **DO NOT LIE.**

In fact, even under DADT, LGB service members could reveal their sexual orientation during a security clearance interview without the risk of losing their jobs. Under President Clinton’s May 1995 Executive Order<sup>54</sup> and resulting policy changes, questions about sexual orientation or same-sex sexual activities are improper and should not be asked unless they become relevant to resolve a legitimate national security concern. Legitimate security concerns

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include sexual conduct, whether heterosexual or homosexual, that “could make an individual susceptible to exploitation or coercion, or indicate a lack of trustworthiness, reliability, or good judgment that is required of anyone with access to classified information.”<sup>55</sup>

Some investigators, however, do ask questions concerning sexual orientation and same-sex relationships. The basic security clearance questionnaire asks whether or not you have a “cohabitant,” by which is meant a person with whom “you share bonds of affection, obligation, or other commitment, as opposed to...a roommate.”<sup>56</sup> Service members in relationships with foreign nationals are especially at risk because relationships with foreign nationals are seen as an independent risk to gaining or retaining a security clearance.<sup>57</sup>

Security clearance investigators should not reveal information about service members’ sexual orientation or activities obtained during security clearance interviews to the service members’ commanders. According to the regulations governing security clearance investigations, if the information is given to the commanders, those commanders are not supposed to use this information as a basis for adverse administrative action.<sup>58</sup>

## L. HIV/AIDS Regulations

As discussed above, the repeal of DADT does not change any of the regulations in place relating to HIV/AIDS or any other sexually transmitted disease. Members of the military who have tested positive for HIV or have been diagnosed with AIDS face different career outcomes depending on their service status. HIV+ persons are prohibited from enlisting in the armed forces.<sup>59</sup> Service members are periodically tested for HIV, and those who test HIV+ while on active duty are allowed to continue serving, so long as they remain healthy (*i.e.*, “medically fit for duty”). Reserve and National Guard members who test positive are usually administratively separated from the service. HIV+ members are given formal, written “safe sex” orders requiring them to disclose their HIV status to all persons prior to having sexual relations, as well as to always use condoms. Violation of this order may result in the service member’s criminal prosecution under Article 92 of the UCMJ.<sup>60</sup> Service members testing HIV+ should seek guidance from SLDN or an attorney experienced in military law.

Active duty service members who test HIV+ generally may remain in the military, but face restrictions on their duty assignments and must abide by certain orders and programs. HIV+ service members are provided medical treatment, and their health status is supposed to be, and usually is, treated confidentially. Active duty HIV+ members may face assignment limitations due to their status and are restricted to assignment within the continental United States and Hawaii, Alaska and Puerto Rico.<sup>61</sup> Additionally, service members are assigned to units not normally deployable, and the service member is not eligible for deployment orders.<sup>62</sup> HIV+ members are also given formal, written “safe sex” orders requiring them to disclose their HIV status to all persons prior to having sexual relations, as well as to always use condoms. Violation of this order may result in the service member’s criminal prosecution under Article 92 of the UCMJ (violation of an order or regulation) or Article 128 (assault with a means likely to inflict death or great bodily harm).

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Whether an active duty service member remains in the military after testing HIV+ is primarily dependent upon the service member’s health status. Active duty personnel who show symptoms of any HIV-related condition are evaluated for medical fitness and, if found unfit for duty, are medically separated from the service. Service members who are medically unfit with at least a 30% disability rating (using the Department of Veterans Affairs “Schedule for Rating Disabilities”<sup>63</sup>) will likely be medically retired (*i.e.*, retired from active duty with a pension along with access to military health care facilities).<sup>64</sup> Service members who are medically unfit with less than a 30% disability rating usually receive a one-time disability severance payment rather than disability retirement.<sup>65</sup> These members are then eligible for limited health care through VA medical facilities.<sup>66</sup> In addition, HIV+ active duty service members who are fit for duty may request an administrative separation from the service, but the services are not obligated to approve the request.<sup>67</sup>

#### Important Information for HIV+ Service Members

- HIV+ service members cannot be deployed overseas or receive overseas assignments.
- Most reserve and National Guard members testing HIV+ will be discharged due to their non-deployable status.
- Service members testing HIV+ while in the military will be medically evaluated and may be asked to name their past sexual partners.
- HIV+ service members are required to tell all future sexual partners of their HIV status and must use condoms during sexual acts or face potential criminal prosecution.

Reserve and National Guard service members who test HIV+ are treated differently than those service members testing HIV+ while on active duty. HIV+ Reserve and National Guard members are usually separated from the service, without opportunity to apply for disability retirement, unless they are eligible to transfer into an available “non-deployable” billet or they are granted a waiver.<sup>68</sup> There are relatively few “non-deployable” billets in the National Guard and Reserves, as most National Guard and Reserve billets are required to be available for overseas deployment when activated.

Service members who test HIV+ must go through a vigorous contact tracing process either conducted by military health care workers or by a civilian agency if a member tests positive through screening by a civilian agency. During the contact tracing process, health care workers ask HIV+ service members for names of sexual partners and others who may have been exposed to HIV by the positive service member. Even if a civilian agency performs the required contact tracing the military will sometimes perform their own contact tracing evaluation. The information provided by the HIV+ service member during this epidemiological assessment is not supposed to be used against that member in personnel or legal actions.<sup>69</sup> DoD has implemented a policy prohibiting “adverse personnel actions” against those testing HIV+ (including involuntary administrative discharge, court-martial, or unfavorable entries in personnel record) based solely on information obtained during contact tracing.

Service members testing HIV+ may also face harassment. Although military regulations require confidentiality of HIV test results, limiting knowledge of HIV+ status to those that need to know within the military, in reality, HIV+ test results often become widely known. Such medical privacy violations may cause embarrassment and even lead to harassment of HIV+ service members. If a service member’s health information becomes known and leads to harassment or discrimination, contact an SLDN attorney immediately for assistance.

## M. Seeking Medical Attention

All service members, regardless of sexual orientation, are eligible for treatment at a military Medical Treatment Facility (MTF). A service member’s sexual orientation or history of same-sex sexual conduct will not preclude the service member from medical treatment or preventative medicine programs. However, DoD has adopted FDA guidelines for blood and tissue donations. Under current FDA guidelines, a man who had sex with other men

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(MSM) is permanently disqualified from donating blood.<sup>70</sup> Women who had sexual contact with MSMs may not donate blood for a year after the contact. This policy only applies to the donation of blood, and not the receipt of blood. A MSM may receive blood when treated in a MTF, but they may not donate blood even to another MSM.

Military health care providers must protect individually identifiable health information from disclosure except when the information is necessary for treatment, for judicial and administrative proceedings, or where disclosure is otherwise allowed by law.<sup>71</sup> Military commanders may request access to the medical records of service members when necessary to assure fulfillment of military missions.<sup>72</sup> Military health information can be disclosed to commanders to determine the service member’s fitness for duty, compliance with standards and orders, or to carry out any other mission-necessary activity.<sup>73</sup> Commands are unable to request a service member’s medical records solely to find information on the member’s sexual orientation because policies forbid the use of sexual orientation as criteria in any mission, assignment, or duty determinations.<sup>74</sup> However, because commands may still have access to such information when checking the service member’s records for other mission-related reasons, service members may wish to be careful of information provided to military health professionals if the member does not wish to be out to their command. For more information on protections for medical information, see the Speaking with Healthcare Providers section of this Guide.

Many service members seek medical and mental health treatment in the civilian community. Service members who choose to be treated by civilian practitioners should be aware that the services have regulations which require members to report that they have received medical or mental health treatment outside the military medical system.<sup>75</sup> Should the military learn of such treatment and the member has not reported it, the member may face UCMJ punishment for failure to obey an order or regulation.<sup>76</sup> If a service member lies about receiving treatment, he or she is at risk of violating the UCMJ by making a false statement.<sup>77</sup>

## **N. Seeking Pastoral Care**

The U.S. military includes men and women of many religions, as well as non-believers. The military chaplaincy reflects this diversity, including chaplains who represent 130 different religious organizations in the Army alone.<sup>78</sup>

A chaplain, therefore, “[s]hall serve a religiously diverse population.”<sup>79</sup> For a person to be considered for appointment as a military chaplain, a religious organization must certify that he or she “is willing to function in a pluralistic environment, as defined in this Instruction, and is willing to support directly and indirectly the free exercise of religion by all members of the Military Services, their family members, and other persons authorized to be served by the military chaplaincies.”<sup>80</sup> Religious organizations that choose to participate in the Military Chaplaincies recognize that military commanders are required to provide comprehensive religious support to all authorized individuals within their areas of responsibility.<sup>81</sup> The Department of Defense has emphasized that, with the repeal of DADT, “the duty to care for all will not change.”<sup>82</sup>

Military chaplains, like other members of the armed services, may freely exercise their religious beliefs. Chaplains, in the context of their religious ministry, are not required to take actions inconsistent with their religious beliefs. Therefore, when a chaplain conducts a denominational service, the chaplain must to adhere to and preach fundamental teachings of the religion.

Service members often seek counseling or moral support from chaplains who are not of their own religion, simply because there is no other chaplain available. Military chaplains are required to provide such services to all service members. In this situation, a chaplain may not criticize the service member’s religion or denigrate the service member on the basis of gender, race, religion or sexual orientation even if that is part of the chaplain’s beliefs.

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At the same time, the chaplain’s obligation to his religion would preclude him from saying anything that appears to be supportive of service members whom his religion condemns. In fact, the chaplain’s endorsement should be withdrawn should the chaplain minister in a manner inconsistent with the tenets of his religion. If the chaplain cannot provide what the service members needs because of the chaplain’s own beliefs, then the chaplain’s obligation would be to help that service member find a religious resource, whether it is another chaplain or a lay-leader, who can provide that service member with the needed support.

## O. Veterans Administration Benefits

Eventually, service comes to an end and members begin the transition from military service to civilian life. Regardless of sexual orientation, service members leaving active duty service should be eligible for Transition Assistance Programs to help them prepare a resume, look for new careers or apply for more education. Service members may also be eligible for a host of additional benefits that they have earned through their service. For a listing of some of these benefits, please see the “Benefits and Family Programs” section of this guide. While current law restricts the eligibility of same-sex spouses for some benefits, veterans themselves should never be denied any benefit due solely to their sexual orientation. Veterans denied benefits based on sexual orientation should contact an SLDN attorney. While a veteran’s service may have ended, SLDN’s commitment to that veteran continues.

## IV. The Uniform Code of Military Justice (UCMJ)

The UCMJ criminalizes a variety of sexual activities. Like all military policies, the UCMJ should be applied without regard to sexual orientation. For LGB service members, understanding the rules is particularly important. With the repeal of DADT, commands who wish to target LGB service members may resort to misapplying sexual-orientation-neutral policies as a way of continuing to drum out LGB service members.

### A. Sodomy (UCMJ Article 125)

The Senate version of the FY 2012 National Defense Authorization Act includes a provision that would repeal Art. 125, which criminalizes sodomy. Consensual sodomy would no longer be criminal under the UCMJ, while non-consensual sodomy would be criminalized under a revised Art. 120, dealing with sexual assault. Until this provision becomes law and alters the UCMJ, the following information remains current.

The UCMJ prohibits all service members from engaging in sodomy as defined in Art. 125 (primarily oral and anal sex between members of the same or opposite sex). Service members found violating this article can be court-martialed and imprisoned if found guilty. Some confusion about the military’s prosecution of sodomy has arisen following the June 2003 United States Supreme Court decision in *Lawrence v. Texas*.<sup>83</sup> In that case, the Supreme Court ruled that a Texas sodomy statute prohibiting two persons of the same-sex from engaging in private consensual sexual conduct, and all similar state laws, are unconstitutional.

Following the decision in *Lawrence*, there were multiple appeals of consensual sodomy convictions in the military court system challenging the constitutionality of Art. 125. In August 2004, the military’s highest criminal court, the Court of Appeals for the Armed Forces (CAAF), ruled in *United States v. Marcum* that while the *Lawrence* decision does apply to the military, the military could still prosecute consensual sodomy if the conduct fell outside of protections provided under *Lawrence*, or if the conduct is prohibited because of additional factors solely relevant to the military context.<sup>84</sup> In other words, CAAF determined that the military could constitutionally continue to prosecute consensual sodomy under limited circumstances.<sup>85</sup> In *Marcum*, the court ruled that because the accused

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service member’s involvement was with a subordinate, his conduct was outside the constitutional protection defined by the Supreme Court and therefore his consensual sodomy conviction was correct. This ruling has resulted in confusion as to when consensual sodomy can be constitutionally punished in the military.

Non-consensual sodomy and sodomy with a minor remain fully prosecutable under Art. 125 and other UCMJ provisions.

Service members should operate under the assumption that they can be arrested and prosecuted if caught engaging in sexual activity falling within the definition of sodomy in Article 125 of the UCMJ. Convictions under Article 125 can result in up to five years in prison for each act, punitive discharge, reduction in pay and fines and forfeitures.<sup>86</sup> Service members have gone to prison for violating Article 125 of the UCMJ.

## **B. Sexual Misconduct (UCMJ Article 120)**

As noted in the section on Art. 125, the Senate version of the FY 2012 National Defense Authorization Act includes a substantial revision of Art. 120, which criminalizes sexual assault and lesser sexual crimes. Until this revision becomes law and alters the UCMJ, the following information remains current.

The UCMJ’s definition of sexual misconduct is broad, criminalizing many types of inappropriate physical contact. Like Art. 133 and Art. 134, however, some of the language in Art. 120 is broad and can subject a service member to improper prosecution for innocent or even accidental behavior.

Wrongful Sexual Contact: In order to be charged with “Wrongful Sexual Contact” a service member must engage in “sexual contact” without “legal justification or lawful authorization.” “Sexual contact” is defined as any “intentional touching” either directly or through clothes, of the “genitalia,” “breast,” “buttocks” or other personal areas. LGB service members need to beware that an accidental collision with another service member could be mistakenly perceived—or purposefully misrepresented—as intentional “sexual contact.”

Indecent Act: Service members can be charged with an “Indecent Act” if they engage in “indecent conduct,” which is in turn defined as “that form of immorality relating to sexual impurity that is grossly vulgar, obscene and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.” This includes “observing” another person without their consent and “contrary to that other person’s reasonable expectation of privacy” in their naked body or while engaged in a sexual act. LGB service members need to beware that an “indecent act” charge could result from someone making a false allegation about leering in the showers or watching a roommate change.

## **C. Conduct Unbecoming and General Article (UCMJ Articles 133 and 134)**

Service members may also be court-martialed for same-sex sexual conduct under Articles 133 and 134 of the UCMJ. Articles 133 and 134 are referred to as the general articles, and serve as a catch-all for conduct that the military wishes to make illegal but has not been specifically outlawed in any of the other articles.

Art. 133 outlaws “conduct unbecoming an officer and a gentleman.”<sup>87</sup> Art. 134 outlaws conduct that results in the “prejudice of good order and discipline in the armed forces” as well as conduct that “brings discredit upon the armed forces.”<sup>88</sup>

Conduct that has been considered a violation of Articles 133 and 134 includes: adultery, fraternization and soliciting another to commit an offense. For more information on each of these offenses, see the Military Policies section of this Guide.

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Under DADT, military authorities would not typically undertake criminal investigations and prosecutions under these articles, but would instead discharge an LGB service member for engaging in activities covered by these articles using DADT. With the repeal of DADT, such investigations and prosecutions should become more common, and service members should take the threat seriously. Not only sex acts, but virtually any physical act with another person can be criminally prosecuted if it can be shown that the act was committed for a sexual or romantic purpose. Convictions under Article 133 or 134 can, in some cases, result in up to five years of imprisonment for each act, a punitive discharge (Bad Conduct discharge or Dishonorable discharge), reduction in pay-grade and fines and forfeitures.<sup>89</sup> People have served time in military prison for engaging in homosexual conduct ruled to be in violation of Articles 133 and 134 of the UCMJ.

#### The Touch of a Hand – Leads to Prison Time

The risk of imprisonment for same-sex conduct seemed remote to Private James Reyes until he faced court-martial for what he thought was innocent romantic conduct. Private Reyes was sentenced to a year in prison by a military judge in Korea for touching another man’s hand during an off-duty conversation. Private Reyes’ alleged “victim” testified at court martial that the touch was merely the result of a misunderstanding and he did not feel as though he had been assaulted. Private Reyes spent more than a year in prison before SLDN attorneys successfully petitioned for his release through clemency.

### D. Fraternization

Fraternization is an Article 134 offense prohibiting commissioned and warrant officers from having unduly familiar relationships with enlisted members.<sup>90</sup> It can also result in Non-Judicial Punishment (NJP) disciplinary actions under Article 15. The implementing guidelines allow the branches to apply “frat” to enlisted members of different ranks and officers of different ranks, if the relationship is prejudicial to good order and discipline.<sup>91</sup> Fraternization includes both sexual/romantic and business relationships, and applies regardless of the gender of the members involved.<sup>92</sup> The offense is punishable under Article 92 (Failure to obey order or regulation) with maximum punishment of “[d]ismissal, forfeiture of all pay and allowances, and confinement for 2 years.”<sup>93</sup>

Not all contact or association between seniors and subordinates is fraternization; the key is “whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale.”<sup>94</sup> For example, “[d]ating, shared living accommodations, intimate or sexual relations, commercial solicitations, private business partnerships, gambling and borrowing money between officers and enlisted members, regardless of service, are unduly familiar and are prohibited.”<sup>95</sup>

Each branch has its own policies governing fraternization. In the Air Force<sup>96</sup> and Army<sup>97</sup> regulations, fraternization only applies to officer-enlisted relationships. In the Navy, Chief Petty Officers (E-7 through E-9) may be punished for having a personal relationship with E-1 through E-6 enlisted members in their chain of command.<sup>98</sup> Similarly, in the Marines, NCOs can be charged with fraternization for an improper relationship with a subordinate.<sup>99</sup>

Generally, marriage “cures” fraternization.<sup>100</sup> In other words, an officer who is legally married to an enlisted member cannot be charged with fraternization for conduct occurring *after* the marriage. For LBG service members, it is important to understand that a marriage to someone of the same sex will not “cure” the frat because DOMA prevents that marriage from being recognized as valid. Legally married dual-military gay couples will remain vulnerable to fraternization charges until DOMA is repealed or the Fraternization provisions are changed.

Two things should be kept in mind. First, fraternization does not require a sexual relationship. Second, the standard — “whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale” — is a subjective one. These two facts can make service members vulnerable to accusations of fraternization even where there was no improper

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conduct. They could also cause accusations against a service members mentoring person of a lesser rank. If an individual is out to get a service member because of his or her sexual orientation, an allegation of fraternization may be a relatively easy way to do it.

## **E. Adultery**

Adultery is punishable under Article 134, with a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.<sup>101</sup> Adultery is defined as wrongful sexual intercourse between a married person and someone who is not his or her spouse, when the conduct is prejudicial to good order and discipline or brings discredit to the armed forces.<sup>102</sup> Even private and discreet adultery can violate these standards, depending on the circumstances.<sup>103</sup>

Because same-sex marriages are not recognized under DOMA, a service member who is married to a same-sex partner would not be subject to adultery charges for having extramarital sex with another “unmarried” person. However, engaging in any type of penetrative sex with someone in a straight marriage may be considered Adultery. “Sexual intercourse” is not clearly defined in the Manual for Courts Martial for purposes of Adultery charges; it is defined broadly for other sections of the UCMJ to include oral and anal sex,<sup>104</sup> while it is distinguished from sodomy in other sections.<sup>105</sup>

## **V. Benefits and Family Programs**

### **A. LGB Military Families**

Under “Don’t Ask, Don’t Tell,” many gay and lesbian service members with families chose to keep their home life completely separate from work, and others faced investigation for actions such as listing a dependent child or partner on military paperwork. Marriage to someone of the same sex was grounds for discharge. With the repeal of DADT, gay service members may talk about their home life without losing their jobs and can engage without fear in many of the natural conversations that occur when working closely with others in a tightly knit unit.

But because of the Defense of Marriage Act (DOMA) and some military regulations, LGB families are not treated the same as the families of their straight counterparts.

#### **1. Marriage and Commitment**

After repeal of DADT, service members can get married to a same-sex partner without risking their employment. Several states and countries give legal recognition to same-sex couples. At the time of writing, six states (Massachusetts, Vermont, Connecticut, New Hampshire, Iowa, New York) and the District of Columbia grant marriage licenses to same-sex couples. California granted marriage licenses to same-sex couples for several months in 2008, and those marriages are still valid. Maryland recognizes (but does not perform) gay marriages. Several other states grant civil unions or domestic partnerships that attempt to approximate marriage.

While gay and lesbian service members have the option of getting married in a state that will legally recognize their union, DOMA prevents the Federal Government, and therefore the military, from doing so. This is because DOMA defines marriage for the Federal Government as a union between one man and one woman as husband and wife. From a practical standpoint, this means that many of the benefits that the military extends to “spouses” are not available to the same-sex spouses of service members.

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For service members who wish to remain closeted, they should be aware that records of marriage and commitment are publicly available records. The name (and gender) of their spouse could become known to anyone who bothers to look.

## **2. *Having Children and Adopting***

Dependent children of a gay service member are eligible for all of the same benefits as a child of any service member. This is the case for both biological and adopted children. When service members have a child, they *must* report this new dependent to the military in DEERS.<sup>106</sup> In order to enroll the child in TRICARE and other child benefits, the service member must present the child’s birth certificate and adoption papers, if applicable.<sup>107</sup> This applies to all legally adopted children and foster children.

In cases where an unmarried service member did not actually give birth to the child, proof of legal adoption should be sufficient to establish parentage for purposes of benefits eligibility. For example, if a service member and his same-sex partner jointly adopt a child, the policies should present no obstacle to recognition of the service member as a parent. If parentage is established through less-traditional means (*e.g.*, a second-parent adoption, presumed by virtue of a same-sex marriage, or through a parenting agreement) or if the service member does not appear on the birth certificate, the service member may encounter problems registering the child as a dependent. If this occurs, please contact SLDN for assistance.

Stepchildren and parents-in-law gained through same-sex marriages are excluded from benefits eligibility by DOMA. Typically, stepchildren are eligible for dependent benefits, and a stepchild must be registered in DEERS just like any other dependent child. However, to register a stepchild, a marriage certificate must be presented along with the child’s birth certificate. If a service member’s stepchild is from a same-sex marriage, the child will not be recognized as a dependent because of the way “marriage” is defined under the federal Defense of Marriage Act. The same goes for dependent parents-in-law.

## **3. *Family Care Plans***

Service members with children must create a Family Care Plan to delineate how their dependents will be cared for when the service member is deployed.<sup>108</sup> Any adult, including a same-sex partner, may be named as the caregiver on the Family Care Plan, giving the caregiver access to benefits such as counseling through Military OneSource and shopping and programs at military installations on behalf of the dependents.<sup>109</sup> See “Family Care Plans & Deployment Support” below for more information.

## **4. *Moving (PCS) and Housing***

When a married service member is assigned to a new duty station, he or she is usually eligible for increased funding to allow his spouse to accompany him.<sup>110</sup> However, DOMA prevents these benefits from being provided for a same-sex spouse. A legal child of a service member will be eligible for the dependent travel allowances to accompany the service member to the new station.

Of course, a same-sex partner could accompany the service member to a new station at his or her own expense, but if the assignment is overseas, the partner might “not be eligible for the special host-nation legal protections that a ‘command sponsored’ individual may receive.”<sup>111</sup> Moreover, the partner could not live in on-base housing (unless local policies allow non-dependents to live on base, such as childcare providers), nor would a partner make the service member eligible for BAH at the “with-dependent” rate.<sup>112</sup>

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## 5. *Marital Status and the UCMJ*

Marital status is relevant to several types of misconduct punishable under the UCMJ, such as adultery, spouse abuse and cohabitation. The conduct of service members who are married to a same-sex partner might, technically, not be covered within many of these provisions, but these service members are still expected to behave in accordance with good order and discipline.<sup>113</sup> On the other hand, a same-sex marriage does not “cure” fraternization for gay couples, and gay service members (particularly those engaging in fraternization) can be charged with consensual sodomy. Service members who get married to an opposite-sex partner to hide their sexual orientation can be charged with fraud if they are receiving benefits that they are not sharing with their spouse. For more information, see the UCMJ section of this Guide.

### B. **Benefits**

This section lays out what benefits are now available to LGB service members in light of DADT repeal and which benefits are not.

#### 1. *Benefits for Service Members*

In theory, there has never been a discrepancy between the benefits available to single gay service members and single straight service members; the same benefits have always been available to everyone who serves, regardless of sexual orientation. LGB service members, however, have often decided not to take advantage of all their benefits for fear that doing so would lead to a DADT discharge. With repeal, all service members should feel secure in accessing all their well-earned benefits.

#### 2. *Benefits for Same-sex Partners*

Service members have always been able to designate a person of their choice for certain benefits. Under DADT, service members lived with the reality that designating someone of the same sex might raise eyebrows and possibly lead to investigation. Now, service members should feel free to designate a same-sex partner for any of the following:

**Member-Designated Benefits:** Service members may freely designate any person, including a same-sex partner, for the following benefits:<sup>114</sup>

- Beneficiary of Servicemembers Group Life Insurance (SGLI) and Veterans’ Group Life Insurance (VGLI) payments
- Receipt of unused contributions from Post Vietnam-Era Veterans Assistance Program (VEAP) and the Montgomery G.I. Bill Death Benefit, as long as the person is also designated as an SGLI beneficiary
- Beneficiary of Thrift-Savings Plan (TSP)
- Retirement annuity under the Survivor Benefit Plan (SBP), as long as the service member is not in an opposite-sex marriage and does not have a dependent child
- Beneficiary for Death Gratuity and Beneficiary for Unpaid Pay/Allowances on DD Form 93
- Appointment as the Designated Caregiver of a wounded service member during recovery, under the Wounded Warrior Act
- Appointment as the caregiver of the service member’s children on a Family Care Plan if the service member is deployed. See below for more information

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**Emergency Notification:** Service members must keep DD Form 93 (Record of Emergency Data) updated so that family members may be notified if the service member is killed in action, wounded in action, missing in action or is taken as a prisoner of war. DOMA prevents a same-sex partner from being recognized as the primary next of kin (PNOK), which is determined by the family members listed on DD Form 93.<sup>115</sup> However, same-sex partners may be listed as “Designated Persons,” who are notified, though less quickly than the PNOK. Further, privacy regulations prevent “designated persons” from receiving all the details of the emergency. In the event that a service member is killed in action, any beneficiaries receiving survivor benefits or entitlements will be notified.<sup>116</sup>

A same-sex partner may be notified more quickly if the couple has children, because a child is the next-of-kin for a “single” service member. The child’s other parent or guardian would be notified on the child’s behalf.

The DD-93 also requires the identification of a Person Authorized to Direct Disposition (PADD) of remains.<sup>117</sup> This person must be a blood or adoptive relative, or a “spouse” recognized under DOMA.<sup>118</sup>

In case of emergencies back home (e.g., serious illness, death, and birth of a child or grandchild), the Red Cross provides notification to the service member, and if leave is requested, notification can be provided to his or her command as verification of the emergency.<sup>119</sup> If the service member’s presence is requested, he or she may ask for leave to return home and attend to the situation. Under DADT, the Red Cross handled notifications regarding a same-sex partner as if they were from family, but referred to the same-sex partner as a “close friend” to avoid scrutiny.<sup>120</sup> A service member is less likely to be granted leave to attend to a “close friend” than a recognized family member. Even if the Red Cross begins using the term “same-sex partner” or “same-sex spouse” in light of repeal, there is still no guidance for commanders on granting leave to service members in the event of injury or death of a same-sex partner.

#### In an Emergency

If the partner or family of a service member needs to contact the service member in an emergency, they should contact their local Red Cross for assistance. The Red Cross will need the following information about the service member:

- Full Name/Rank/Rating
- Branch of Service
- Social Security Number
- Military Address
- Information about the deployed unit and home base unit

**Hospital Visitation:** A patient may consent to receive anyone as a visitor. Federal health regulations stipulate that hospitals participating in Medicare (the vast majority of hospitals in the US) may not restrict or limit visitation privileges on the basis of sexual orientation, and that a patient has the right to allow visitation from any person, including a same-sex partner.<sup>121</sup> Military hospitals that do not accept Medicare are not obligated to follow these regulations, but they normally do.

As a spouse or partner, to protect yourself against discrimination if the patient is unable to give consent or if you are at a non-participating hospital, you may want to consult with a family law attorney to create a “hospital visitation authorization”<sup>122</sup> and if desired, medical powers of attorney giving each other the ability to make medical decisions on behalf of the other person.

### 3. *Benefits for Children and Same-sex Partners*

In general, dependent children of service members (including biological children, legally adopted children, foster children, and stepchildren) are entitled to a great number of benefits, including health care. Parents serving in the

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military may be eligible for certain additional benefits and allowances. This holds true for gay and lesbian service members with children. The only exception is stepchildren, because the government does not recognize a stepparent relationship created by a same-sex marriage.

Service members have a duty to report any legal dependents, including adopted children.<sup>123</sup> This applies to all active duty, reserve, National Guard, and personnel in the IRR. Same-sex spouses are not considered legal dependents, however, because of DOMA.

Please contact SLDN if you have questions about your family situation, especially if the service member is not the biological parent of the child.

**Medical & Dental Care for Children:** Children of gay service members are eligible for all of the same benefits as children of straight service members, including healthcare and insurance from TRICARE. Remember, service members *must* register their children in DEERS. If the child is adopted, the service member must present the birth certificate of the child as well as proof of adoption to show parentage.<sup>124</sup>

**Emergency Notification:** A service member’s child is considered the default next-of-kin of DD Form 93 for a “single” service member, and a parent or guardian of the child will be notified on behalf of the child in emergencies involving the service member. In other words, the same-sex partner of a service member, who is also the legal parent or guardian of the service member’s child, will likely receive notification more quickly than he or she would as a “designated person” without children.<sup>125</sup>

**Housing:** DOMA prevents the military from recognizing same-sex spouses as dependents of service members, so military family housing (MFH) and dependent-rate BAH is generally unavailable to same-sex couples unless they have children. If a service member has a dependent child, MFH and dependent-rate BAH is available.

Same-sex partners may qualify under local policies allowing certain non-dependents to live on base, such as child-care providers.<sup>126</sup> For example, the Army allows non-family members to live in military family housing (but not unaccompanied housing) with permission from the Housing Office.<sup>127</sup>

**Military ID Cards:** Children of service members are eligible for a military ID card after being designated by a service member as dependents in DEERS. Children living with someone other than the service member and all children over age 10 must have ID cards.<sup>128</sup> An ID card gives a child access to Morale, Welfare, and Recreation programming.

**Family Care Plans & Deployment Support:** When a service member is deployed, he or she must set up a Family Care Plan designating someone to care for his or her minor children and certain other dependents.<sup>129</sup> Same-sex partners may be named as the caregiver on the service member’s Family Care Plan, giving them access to benefits such as counseling through Military OneSource, shopping and programs at military installations on behalf of the dependents.

The caregiver does *not* receive a military ID card while the service member is deployed, but he or she may buy things for the dependents at a military Commissary and Exchange while the service member is deployed. In order to do this, the service member or caregiver must request a letter of authorization from the commanding officer of the installation with the commissary or exchange through the ID card office at that installation.<sup>130</sup>

In addition, the designated caregiver should be sure to have a comprehensive power of attorney written up as part of the Family Care Plan, so that he or she is able to accompany the dependent to military medical facilities and make decisions on his or her behalf.<sup>131</sup>

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#### 4. *Benefits Unavailable to Families of Gay or Lesbian Service Members*

##### a. **Benefits Unavailable Because of DOMA**

Most of the benefits available to veterans, service members and their families are granted directly by Congress.<sup>132</sup> Well over a hundred of these statutory benefits are contingent on marital status.<sup>133</sup> These benefits will remain unavailable to legally married same-sex couples unless the Defense of Marriage Act is repealed or declared unconstitutional by the Supreme Court, or individual statutes are modified by Congress.

**Basic Allowance for Housing at “with dependent rate”:** In order to receive the much-greater Basic Allowance for Housing at the “with dependent rate,” service members must have a qualifying dependent. The meaning of “dependent” for BAH (and many other benefits) is defined by Congress in Title 37 of the US Code, Section 401, to include a spouse, dependent parents and parents-in-law, biological and adopted children, and step-children. Same-sex spouses of service members are excluded from these benefits by the Defense of Marriage Act, as are parents-in-law and step-children from a same-sex marriage.

**Medical & Dental Insurance and TRICARE:** Statute also governs who can have access to military medical treatment facilities under TRICARE.<sup>134</sup> Those covered include service members and their dependents, including a spouse, dependent children and step-children, and dependent parents and parents-in-law. However, the Defense of Marriage Act prevents recognition of same-sex marriage, so a service member’s same-sex spouse, step-children and parents-in-law are currently ineligible for health benefits.

**Morale, Welfare, and Recreation Programs:** Generally, spouses of service members, along with dependent parents, parents-in-law, children and step-children, are authorized for unlimited use of all MWR programs because they are eligible for ID cards and registration in DEERS.<sup>135</sup> Eligible members are the same as those eligible for TRICARE benefits,<sup>136</sup> and therefore same-sex spouses (as well as parents-in-law and step-children) are excluded by virtue of DOMA.

However, regulations leave open to Installation Commanders the possibility of opening up limited access to certain MWR programs to guests and the general public.<sup>137</sup> These exceptions would be applied regardless of sexual orientation or individual situations; in other words, a same-sex spouse could not receive any more guest privileges than a girlfriend or boyfriend of a straight service member, and would likely be treated as any non-dependent member of the public.

**Relocation & Transportation:** If a service member with an opposite-sex spouse is assigned to a new base, he or she may be eligible for increased funding and support to allow the spouse to accompany him or her to the new assignment.<sup>138</sup> Similarly, an opposite-sex spouse can receive travel assistance to attend the burial ceremonies if the service member dies while on duty.<sup>139</sup> These statutory benefits are not available to legally married same-sex spouses, but children of gay or lesbian service members (not step-children) are entitled to these travel and transportation allowances.<sup>140</sup>

**Employment and Education for Spouses:** Opposite-sex spouses may be eligible for employment assistance during a permanent change of station, as well as education and training to help them find a “portable” career.<sup>141</sup> Again, DOMA restricts the application of these benefits to those married to a service member of the opposite sex.

**Family Separation Allowance:** A service member who is on duty or assigned to a new station and whose spouse and children are unable to accompany him is entitled to a monthly allowance.<sup>142</sup> If both spouses are

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### For New Recruits

You may be able to enter the military with a same-sex “friend” and guarantee that you will be together at least through basic training. The Navy and Air Force currently have limited “Buddy Programs” for new recruits who want to go to Basic Training together and eventually be stationed together. The Army has a “Buddy Program for chaplains. Ask a recruiter more about these programs.

service members and both are assigned to duty away from their (non-spouse) dependents, both are entitled to the allowance.<sup>143</sup> However, these benefits are limited by statute to those that are entitled to transportation allowances (see above),<sup>144</sup> thereby excluding same-sex spouses under DOMA.

**Surviving Spouse Benefits:** DOMA prevents the military from providing a number of benefits to same-sex spouses of deceased service members, including annuities based on retired or retainer pay.<sup>145</sup> If a gay or lesbian service member was previously married to an opposite-sex partner, these death benefits may go to that person instead.<sup>146</sup>

### Family Advocacy & Spouse Abuse

**Services:** Family Advocacy Services, including New Parent Support and assistance for abused or maltreated

spouses, are available only to those eligible for treatment in military medical facilities,<sup>147</sup> which does not include same-sex spouses. A legally married same-sex spouse of a service member can receive a basic assessment and safety plan from providers in the military facilities, but will receive care “out-side” the gate.<sup>148</sup> An abused same-sex spouse will not receive military-sponsored protection and emergency shelter<sup>149</sup> and is not afforded the ongoing financial support and benefits provided to opposite-sex spouses of service members discharged from the military for dependent abuse.<sup>150</sup>

SLDN does not provide general legal services, but if you are facing harassment of unequal treatment because of your perceived or actual sexual orientation, contact our legal team. We may be able to help.

## b. Benefits Unavailable Because of DoD Regulation

Certain family benefits granted by Department of Defense regulations remain unavailable to same-sex partners, even after repeal of DADT. This is because the regulations include the term “spouse” or “marriage” which must be interpreted to mean opposite-sex spouses because of DOMA. At this time, DoD has chosen not to create a new “qualifying relationship” status for same-sex couples.

If the Department of Defense exercises its authority to add new inclusive language for same-sex spouses or committed relationships or to remove reference to “marriage” or “spouse” in the regulations, these benefits may become available to same-sex partners of service members. There is no statutory reason to deny these rights to same-sex couples, and SLDN is advocating for immediate revisions so that families of gay and lesbian service members and veterans are treated equally with respect to these regulatory benefits.

**Joint Duty Assignments:** Under DoD regulations, dual-career military married couples are generally stationed to the same geographic area.<sup>151</sup> The language of the regulations makes married same-sex military couples ineligible for co-location consideration for duty assignments. Instead, they may make hardship-based requests for accommodation in assignments, like any single service member.<sup>152</sup> Similarly, same-sex military spouses are ineligible for exemption from serving in hostile-fire areas when their spouse is wounded or disabled by hostile fire.<sup>153</sup>

**Free Legal Services:** The Service secretaries have defined “dependent” in such a way that same-sex spouses are excluded from receiving free legal services from military legal assistance offices.<sup>154</sup> Same-sex partners will have to seek services from private attorneys.

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**Military Family Housing:** Under DoD regulations, Military Family Housing is available only to service members who qualify for housing at the “with-dependent” rate.<sup>155</sup> Gay and lesbian service members with children may qualify for MFH, but legally married same-sex couples without children are not eligible for these benefits.<sup>156</sup>

**Shopping at Commissaries, PX, BX & NEX:** Exchange and commissary access is restricted to “dependents” of service members. The statute itself does not define “dependent,”<sup>157</sup> but DoD Instructions on commissary management define “dependent” to include the service member’s spouse, dependent children and step-children, parents and parents-in-law, and former spouses that meet certain qualifications.<sup>158</sup> Same-sex spouses are excluded under this definition of “dependent” because of the Defense of Marriage Act, as are parents-in-law and step-children.

**Family Programs:** DoD uses a flexible definition of “family” for the purpose of implementing Family Centers and programming,<sup>159</sup> but leaves it up to the individual Service Secretaries to determine eligibility.<sup>160</sup> Thus, each branch of the service (and each installation commander) determines the extent to which same-sex spouses and partners have access to these programs, which include deployment support, marriage and family counseling, relocation assistance and financial management. You can ask your local Family Center or call SLDN for more information.

**Spousal Privilege in Courts Martial:** The Rules of Evidence in the Manual for Courts-Martial gives spouses the privilege to refuse to testify against their spouse in criminal cases (with a few exceptions).<sup>161</sup> Because same-sex marriage is not recognized under DOMA, same-sex spouses can be forced to testify against their loved ones and disclose confidential information shared during the marriage relationship. Please contact SLDN if you are facing criminal charges and your same-sex partner may have to testify against you.

#### Not an Honorable Discharge?

Some gay and lesbian service members were inappropriately denied “Honorable” discharges even when they deserved them based on their service record. If you think you were entitled to an honorable discharge characterization but it was denied under DADT or the prior ban, contact SLDN. We will discuss the process for changing your paperwork and prepare your application for an upgrade.

**Relocation & Overseas “Command-Sponsored” Status:** Relocation support and funding is not available to same-sex partners (see below). If a same-sex partner accompanies a service member overseas at his or her own expense, “in many instances the partner would not be eligible for the special host-nation legal protections that a ‘command sponsored’ individual may receive.”<sup>162</sup> A command-sponsored dependent<sup>163</sup> is also eligible for greater space-required and space-available travel privileges than non-command-sponsored individuals.<sup>164</sup> Notably, the Joint Federal Travel Regulations define “dependent” more broadly for civilian employees, to include domestic partners.<sup>165</sup>

### C. Veterans’ Benefits

Gay veterans can be open about their sexual orientation without risking loss of benefits or retirement pay. The section below contains information about select benefits of interest to LGBT veterans and their families. If you have questions about your eligibility for any veterans’ benefits, please contact SLDN for assistance.

Until the Defense of Marriage Act (DOMA) is repealed or declared unconstitutional by the Supreme Court, benefits based on marital status are unavailable to legally married gay veterans and their same-sex spouses.

**GI Bill:** Under the Montgomery GI Bill (Chapter 30), service members had to serve a minimum of two years active duty, receive an honorable discharge and contribute \$1200 toward the program to qualify for benefits. Veterans who were discharged under DADT might have been unable to meet these requirements.

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Under the new Post-9/11 GI Bill (Chapter 33), the qualifications were modified so that veterans who served at least 90 days active duty after September 10, 2001 and received an honorable discharge can recover a portion of the maximum benefit.<sup>166</sup> Veterans who paid into the Montgomery GI Bill may be able to transfer into the Post-9/11 GI Bill if they meet the new service requirements. Also, service members who have used all their Chapter 30 benefit and qualify for Chapter 33 can receive up to 12 months of Chapter 33.

In addition, the Post-9/11 GI Bill allows service members to transfer their GI Bill benefits to their spouse or children, if they take on additional service obligations.<sup>167</sup> However, a same-sex spouse would not be eligible for transfer because it is granted only to “spouses” as defined by DOMA.

**VA Caregiver Support:** Family members providing care for veterans injured in the line of duty post 9/11 may be eligible for federal assistance. The VA Caregiver Support program provides family caregivers with training, technical support, counseling and other benefits.<sup>168</sup> Additionally, if the family caregiver is the primary provider of care for the veteran, then that person may be eligible for additional benefits, such as a monthly stipend and care coverage for 30 days a year so that the family caregiver can take a break.<sup>169</sup> For this program, the family caregiver can be either a member of the veteran’s immediate or extended family, or anyone who lives with the veteran.<sup>170</sup> This means that domestic partners and same-sex spouses may be the family caregiver for a veteran.

**VA Guaranteed Home Loan Program:** Buying a home is a goal for many service members and veterans. Many have not had a chance to save up enough money to cover the down payment required by lenders to receive favorable financing. Under the Home Loan Program, service members and veterans may be able to obtain favorable financing on home mortgage loans without requiring a down payment.<sup>171</sup> Private lenders still finance the loan, but the federal government guarantees part of the loan to the lender, providing the security normally offered by a down payment.

SLDN has heard reports that some gay veterans have had trouble listing their same-sex partner on the deed or mortgage for their new home. If you are facing this situation, please contact SLDN for assistance.

Opposite-sex surviving spouses may also participate in the VA Home Loan Program in certain circumstances. The un-remarried surviving spouse of a veteran who died either on active duty or as the result of a service-connected disability may be eligible to take out loans under the Home Loan Program,<sup>172</sup> and the surviving spouse of any veteran who had a previous VA loan may refinance that loan through the program.<sup>173</sup> Because these surviving spouse benefits are determined by statute, same-sex marriages to a service member do not confer the benefit. At the same time, benefits based on a previous opposite-sex marriage to a service member are not terminated when the surviving spouse marries someone of the same sex, because the new marriage is not recognized.

**Disability Compensation:** Disabled veterans are entitled to various types of compensation for service-connected disability or death<sup>174</sup> and pensions for some non-service-connected disabilities.<sup>175</sup> Generally, veterans receive additional benefits if they are married or have dependent children,<sup>176</sup> but DOMA makes these increased payments unavailable to married same-sex spouses of disabled veterans.

**Surviving Spouse Compensation:** Generally, dependency and indemnity compensation is available to surviving spouses of veterans who die of a service-connected disability<sup>177</sup> or were receiving compensation for a service-connected disability.<sup>178</sup> However, these payments are not available to same-sex spouses, because of DOMA.

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## VI. Transgender Service

The term “transgender” is a broad umbrella under which several different groups of individuals may identify, including those seeking partial or full physical alteration of their birth sex. For the purposes of this guide, we will discuss these groups as they relate to military rules and regulations.

Issues for transgender individuals may come up at the time of enlistment, appointment or commissioning into the armed forces, or may arise for personnel already serving in the military. The military has a binary view of gender; therefore, the rules and regulations, including the language the military uses, reflect this view. Any transgender individual who has questions about military service, is being harassed, or is under investigation based on his or her gender identity or expression should contact SLDN for assistance.

### A. Enlistment / Appointment / Commissioning

To join the military, potential service members are required to undergo a physical examination as part of the induction process. During this examination, the military may disqualify a candidate if the potential service member has had any type of genital surgery. A history of genital surgery may result in a disqualification for “major abnormalities and defects of the genitalia.”<sup>179</sup>

Furthermore, even if the candidate has not had surgery but openly identifies as transgender, the military considers this to be a disqualifying psychiatric condition, labeling “transsexualism” and “transvestism” as “psychosexual conditions.”<sup>180</sup> An individual may request a medical waiver of any disqualifying condition from the Department of Defense.<sup>181</sup> The availability of medical waivers varies among the service branches. SLDN is not aware of a waiver ever being granted to a transgender service member.

### B. Currently Serving Members

Transgender service members who are thinking about becoming more public or who begin to transition while in the military should be aware of the difficulties in doing so. The military medical system does not recognize the World Professional Association for Transgender Health’s Standards of Care for Gender Identity Disorders<sup>182</sup> and will not provide transition-related medical care.<sup>183</sup> As stated above, being transgender is considered a medically disqualifying condition, and sex reassignment surgery and/or other medical procedures will become known by the military during the service member’s regularly scheduled physical exam. Because the military classifies sex reassignment surgery under “major abnormalities and defects of the genitalia,”<sup>184</sup> once this condition is known by the military, the service member will likely be discharged. Furthermore, even if the candidate has not had surgery but identifies as transgender, the military considers this to be a disqualifying psychiatric condition, labeling “transsexualism” and “transvestism” as “psychosexual conditions.”<sup>185</sup>

For those members who seek treatment from civilian providers, be aware that each service has regulations governing military members seeking outside health care which may include reporting requirements.<sup>186</sup> Failure to abide by these regulations could place a member at risk for criminal (UCMJ) action.

The military strictly regulates uniform and grooming standards by gender.<sup>187</sup> Wearing clothing the military does not consider gender-appropriate is considered “cross-dressing” by the military and is generally addressed in regulations governing conduct.<sup>188</sup> Each service has different regulations, and “cross-dressing” is handled differently depending on the circumstance, service component and the service member’s status as enlisted or officer, and active or reserve. As a practical matter, any “cross-dressing” or perceived “cross-dressing,” even in the context of

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following medical protocol in advance of full transition, will most likely be considered by the military to be a violation of regulations and result in discipline or criminal prosecution.<sup>189</sup>

Gender non-conforming service members are often perceived as being lesbian or gay by others in the military. These service members are often subjected to anti-gay harassment. In the event of such harassment, service members should contact SLDN for assistance.

### **C. Members of the Inactive Reserve Military (IRR)**

More and more inactive reserve military members are being recalled to active duty. Transgender persons in the inactive reserve who are in the process of transitioning may be confronted with the need to halt this process if they are recalled. Recall to active duty places them directly under the regulatory requirements discussed above. Therefore, these service members may need to consider ceasing or interrupting their transition while they complete their active service requirement. Alternatively, transitioning or post-transitioning reservists may be medically disqualified for continued service once they are called back to active duty and medically examined.

### **D. Tips for Serving in the Closet**

Despite the military’s rules that relate to service by transgender individuals, SLDN has heard of a number of cases of active-duty service members who identify as transgender. Though remaining in the closet is necessary for avoiding discharge, nothing stops a service member from self-identifying as transgender. Some transgender service members have sought counseling and even hormone therapy from civilian medical providers without reporting these developments to the military, though regulation strictly bans this practice.

Some transgender personnel have successfully come out to fellow service members. However, as under DADT even colleagues and friends that service members considered trustworthy have led — directly or indirectly — to their discharge.

SLDN recommends that transgender service members planning to out themselves to peers or to their command contact our legal hotline first to discuss legal options and the implications of doing so.

### **E. Discharges and Aftermath**

Discharges for “sexual gender and identity disorders” are classified as administrative rather than medical, despite the inclusion of this category under medical regulation. As a result, transgender service members may be faced with lack of access to VA health facilities. “Sexual gender and identity disorders” do not qualify for disability under DoD regulations.<sup>190</sup>

Transgender service members may be discharged for reasons other than simply being medically diagnosed as transgender. For example, some who may be disqualified for a medical issue unrelated to Gender Identity Disorder may undergo medical instead of administrative discharge. Additionally, discharges based on violations of conduct regulations (UCMJ infractions) may carry more punitive results.

Most of SLDN’s transgender clients have been discharged honorably, though other than honorable or dishonorable discharges may be possible depending on the case (*e.g.*, violations of conduct regulations). Discharged veterans seeking to upgrade their discharge characterization or to change their narrative reason for discharge may contact SLDN for assistance.

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## F. Transgender Veterans

The DD-214 form issued to each service member upon discharge carries no gender marker, though it does list legal name. Some transgender veterans have successfully amended this name listing with a DD-215 form, which lists changes to the DD-214.

By regulation, the VA is not permitted to perform or pay for sex reassignment surgery.<sup>191</sup> However, the Department of Veterans Affairs released a directive on 10 June 2011 articulating a policy of fair and equal treatment for transgender veterans. It also confirms coverage for medically necessary healthcare for transgender veterans, such as sex-specific care like mammograms and pap smears, and transition-related care like hormones and mental health services.<sup>192</sup>

## VII. Service Members Discharged Under DADT or Prior Policies

SLDN remains committed to providing quality legal services and assistance to LGB veterans affected by DADT or the prior policy.

### A. Changing DD-214s or Other Discharge Paperwork

Service members who were discharged because of DADT or the prior policies regarding gays and lesbians in the armed forces might want to have certain changes made in the discharge paperwork.

#### 1. *Upgrading Discharge Characterizations*

The discharge characterization for those discharged under DADT or the prior policy should accurately reflect the character of their service. This is not always the case.

Service members who were discharged under DADT generally received an Honorable or General Under Honorable Conditions discharge based on their service records. However, a service member discharged for a “Homosexual Act” that involved a so-called “aggravating factor” might have been given an Other Than Honorable (OTH) discharge characterization. Most of the factors on the list (such as acts involving minors, prostitutes or coercion) constituted unacceptable behavior and should have resulted in an OTH. But there were two “aggravating factors” that did not inherently constitute misconduct and that should not necessarily have resulted in OTH discharges. These were acts committed openly in public view (*e.g.*, holding hands at a restaurant) and acts committed on base or on post (*e.g.*, a quick hug while being dropped off).

In addition, the Navy and Marine Corps gave those discharged for “marriage” or “attempted marriage” an OTH, while in the Army and the Air Force, members discharged for same conduct received Honorable or General Under Honorable Conditions discharges, based on their service record.

Service members discharged under the pre-DADT policy were very likely to receive discharges that were less than Honorable.

Less than Honorable discharge characterizations can have lifelong consequences, such as limiting the veteran’s access to the GI Bill or Veterans Administration healthcare.

Former service members who received a less than Honorable discharge characterization that is not reflective of their service are eligible to apply to have that discharge upgraded to mirror their service. SLDN is preparing

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upgrade applications for these former service members, and we are committed to assisting every former service member who needs their discharge upgraded.

## 2. *Changing RE Codes and Narrative Reasons for Discharge*

Even if their discharges were Honorable, service members discharged under DADT or the prior policy have two notations on their discharge paperwork that they might find troubling.

- The negative reentry code (usually an RE-4 code) marks the veteran as someone who the military has made a judgment is not fit for military service. It is typically reserved for veterans whose discharge was related to misconduct, such as drug or alcohol abuse.
- The narrative reason for discharge summarizes the basis of a veteran’s separation from the military. In the case of a DADT discharge, the narrative reason is often “Homosexual Conduct,” “Homosexual Admission” or even just “Homosexual.”

Veterans often need to submit their discharge paperwork when applying for jobs in the civilian world. When the narrative reason for separation is “Homosexual” or a variation on that, the former service member is compelled to be immediately “out” to perspective employers and anyone else who sees the document. When there is a negative re-entry code, employers may conclude the former service member had engaged in misconduct while in the armed service.

The repeal of DADT and the adoption of a new regulatory framework allowing LGB service members to serve openly allows those discharged under DADT or the prior policy to apply to have their discharge paperwork changed. Discharge Review Boards (DRBs) can “change a discharge or dismissal, or issue a new discharge”<sup>193</sup> based on “propriety and equity.”<sup>194</sup> This includes taking into account current regulations and deeming a discharge inequitable if policies and procedures “under which the applicant was discharged differ in material respects from those currently applicable on a Service-wide basis” and if the “current policies or procedures represent a substantial enhancement of the rights afforded” to the applicant.<sup>195</sup> Boards of Correction for Military Records can likewise make corrections to any military record when it is necessary to “correct an error or remove an injustice.”<sup>196</sup>

It is unclear at this point what, if anything, will replace the narrative reason and re-entry code.

SLDN is committed to assisting those who would like to change their discharge paperwork. If you were affected by DADT or the prior policy and believe that your discharge paperwork could be changed, contact SLDN to speak with an attorney. We can prepare your application and ensure that you have the best chance at having you paperwork changed.

### **B. Re-accession and Re-instatement**

Many of those discharged under DADT want to rejoin the service now that DADT has been repealed. The Defense Department has made clear that service members discharged under DADT do not have a right to rejoin. Instead, those wishing to rejoin must apply through a recruiter. DoD has said that the negative re-entry codes will be waived, and that applicants with Honorable discharges will be assessed using the same criteria as other prior service applicants. They will be accepted or not based on the needs of the particular service. For prior service members, there are a variety of potential bars to re-entry, including age limits, fitness standards and cutoffs relating to time out of service. For many, this may mean that they do not meet the criteria for rejoining. SLDN will

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continue to advocate that the regulations for re-entry be as accommodating as possible to those discharged under DADT while still ensuring that the needs of the services are accounted for.

Others discharged under DADT want to return to their specific jobs in their former unit. In other words, they want to pick back up right where they left off when they were discharged. It is highly unlikely that rejoining service members will be reinstated exactly to their former position through the standard reentry process described above. For those rejoining members, a federal lawsuit may be the only way to get back to the exact place they were in before their DADT discharge. The primary limitation to filing a lawsuit is the six-year statute of limitations, which prevents anyone who was discharged more than six years ago from filing a lawsuit related to their discharge. In December 2010, SLDN and Morrison and Forrester filed *Almy et al v. United States Dep’t of Defense* on behalf of three former service members who are seeking reinstatement. The case is currently in active litigation.

### C. Back pay, Reparations, Lawsuits and Other Grievances

The Defense Department has said that there will be no reparations or other compensation for those who were discharged under DADT. This includes credit for the time former service members would have served or other monetary and non-monetary damages. Please contact SLDN for more information about your options.

## VIII. Additional Resources for Service Members

### A. Military Legal Resources

#### ARMY

Trial Defense Service (TDS)

[www.jagcnet.army.mil](http://www.jagcnet.army.mil)

#### AIR FORCE

Area Defense Counsel (ADC)

No Centralized Web Site

Air Force Legal Services Command is located at Bolling AFB, Washington DC.

(202) 767-4297

#### NAVY

Navy Legal Service Office (NLSO)

[www.jag.navy.mil/legal\\_services/nlso\\_map\\_global.htm](http://www.jag.navy.mil/legal_services/nlso_map_global.htm)

#### MARINE CORPS

Navy Legal Service Office (NLSO)

[www.jag.navy.mil/legal\\_services/nlso\\_map\\_global.htm](http://www.jag.navy.mil/legal_services/nlso_map_global.htm)

#### COAST GUARD

Navy Legal Service Office (NLSO)

[www.jag.navy.mil/legal\\_services/nlso\\_map\\_global.htm](http://www.jag.navy.mil/legal_services/nlso_map_global.htm)

Generally, Marines and Coast Guardsmen will need to seek representation through the closest NLSO office. There are fewer Marine and Coast Guard defense attorneys and they often work in a NLSO office.

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## **B. Service Related Resources**

### *1. Legal Services for Service Members & Veterans*

ABA Home Front

[www.americanbar.org/portals/public\\_resources/aba\\_home\\_front.html](http://www.americanbar.org/portals/public_resources/aba_home_front.html)

The American Bar Association’s Home Front connects service members with legal information, and has a comprehensive listing of state-by-state legal assistance programs for service members. For a direct referral, service members must go through their military legal services office to request a referral through the Military Pro Bono Center.

ABA Home Front: Military Pro Bono Center

[www.militaryprobono.org](http://www.militaryprobono.org)

The ABA Military Pro Bono Center sponsors ongoing projects to help active duty military personnel and military attorneys with free legal assistance. Through Operation Stand-By, military attorneys may seek attorney-to-attorney advice on state-specific legal information affecting their clients. The Project also accepts referrals from military legal services offices for pro bono civilian legal services for service members.

GI Rights Hotline

[girightshotline.org](http://girightshotline.org)

The GI Rights Hotline will connect service members with counselors (not always lawyers) who can provide up-to-date information about military law and policies. The calls are confidential, and the counselors can provide referrals for service members with additional needs.

Military Law Task Force

[www.nlgmltf.org](http://www.nlgmltf.org)

The National Lawyers Guild Military Law Task Force assists those working on military law issues as well as military law counselors working directly with GIs. It updates changes in military law and policy.

National Institute for Military Justice

[www.wcl.american.edu/nimj](http://www.wcl.american.edu/nimj)

The National Institute of Military Justice (NIMJ) is a District of Columbia non-profit corporation organized in 1991 to advance the fair administration of military justice and foster improved public understanding of the military justice system. NIMJ is not a government agency.

National Veterans Legal Service Program

[www.nvlsp.org](http://www.nvlsp.org)

NVLSP coordinates free legal services for veterans through the Veterans Consortium Pro Bono Program (at [www.vetsprobono.net](http://www.vetsprobono.net)), and for recent veterans through Lawyers Serving Warriors (at [www.lawyerservingwarriors.com](http://www.lawyerservingwarriors.com)).

### *2. LGBT Military Member Organizations*

The Blue Alliance

[blue-alliance.org](http://blue-alliance.org)

Blue Alliance is an organization of U. S. Air Force Academy alumni who are gay, lesbian, bisexual and transgender, along with supporters and friends. The organization is dedicated to reconnecting LGBT alumni to the Academy.

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Knights Out

[knightsout.org](http://knightsout.org)

Knights Out is an organization of West Point Alumni, Staff and Faculty who are united in supporting the rights of Lesbian, Gay, Bisexual and Transgender soldiers to openly serve their country. Knights Out is currently in the second phase of their mission: “to prepare West Point graduates and cadets to lead in a military where LGBT soldiers are allowed to serve openly.”

Military Partners & Families Coalition (MPFC)

[militarypartners.org](http://militarypartners.org)

MPFC connects civilian Military Partners to one another and performs advocacy and media education on the needs of LGBT military families.

OutServe

[outserv.org](http://outserv.org)

OutServe works to support a professional network of LGBT military personnel and create an environment of respect in the military with regard to sexual orientation and gender identity. OutServe has now connected over 3,300 LGBT servicemembers via hidden social media and has over 40 worldwide chapters including Afghanistan and Iraq.

Service Academy Gay & Lesbian Alumni NETWORK

[sagala.net](http://sagala.net)

Connects LGBT alumni of all the Service Academies to LGBT representatives from their school, including the Coast Guard Academy and Merchant Marine Academy.

Servicemembers United

[www.servicemembers.org](http://www.servicemembers.org)

Servicemembers United is a non-profit organization of LGBT troops and veterans and their families and allies. It engages in education and advocacy on behalf of LGBT troops and their families, and connects the LGBT military community.

USNA Out

[www.usnaout.org](http://www.usnaout.org)

USNA Out is an organization of more than 350 LGBT US Naval Academy alumni, their supporters and their friends. The organization strives to provide a path for “reconnection” to the many USNA alumni who have over time been disassociated from the Academy and the USNA Alumni Association because of their sexuality or gender identity. Membership is open to all alumni of USNA.

### **3. Research Organizations**

The Williams Institute

[www3.law.ucla.edu/williamsinstitute/home.html](http://www3.law.ucla.edu/williamsinstitute/home.html)

The Williams Institute advances sexual orientation law and public policy through rigorous independent research and scholarship, and disseminates it to judges, legislators, policymakers, media and the public. A national think tank at UCLA Law, the Williams Institute produces high quality research with real-world relevance.

The Michael Palm Center

[www.palmcenter.org](http://www.palmcenter.org)

The Center (previously Center for the Study of Sexual Minorities in the Military) promotes the interdisciplinary analysis of lesbian, gay, bisexual, transgendered and other marginalized sexual identities in the armed forces. It offers a large number of academic papers regarding LGBT issues in the military. The Palm Center is a part of the Williams Institute at the UCLA School of Law, but maintains independent leadership. Prior to becoming a part of the Williams Institute in 2011, the Palm Center was one of fourteen official research centers at The Institute for Social, Behavioral, and Economic Research (ISBER), University of California, Santa Barbara.

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Stanford University’s “Don’t Ask, Don’t Tell” Project  
[dont.stanford.edu](http://dont.stanford.edu)

The “Don’t Database” contains primary materials on the U.S. military’s policy on sexual orientation, from World War I to the present.

#### **4. Military News Sources**

Air Force Times  
[www.airforcetimes.com](http://www.airforcetimes.com)

Air Force Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

Army Times  
[www.armytimes.com](http://www.armytimes.com)

Army Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

DefenseLink (Department of Defense Homepage)  
[www.defenselink.mil](http://www.defenselink.mil)

The mission of DefenseLink is to support the overall mission of the Department of Defense by providing official, timely and accurate information about defense policies, organizations, functions and operations. Also, DefenseLink is the single, unified starting point for finding military information on-line.

Marine Corps Times  
[www.marinecorpstimes.com](http://www.marinecorpstimes.com)

Marine Corps Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

Navy Times  
[www.navytimes.com](http://www.navytimes.com)

Navy Times is part of the Military Times Media group, consisting of Army Times, Navy Times, Air Force Times and Marine Corps Times.

#### **5. Service Directives, Instructions, & Publications**

DoD Directives System – DoD Issuances  
[www.dtic.mil/whs/directives/index.html](http://www.dtic.mil/whs/directives/index.html)

The DoD Directives System was established to provide a single, uniform system of DoD issuances and directive-type memorandums used to convey DoD policies, responsibilities, and procedures. The DoD Directives System provides for the orderly processing, approval, publication, distribution, internal review, and records management of DoD Directives, DoD Instructions, and DoD Publications. There is a searchable database of current issuances.

Air Force Publications  
[www.e-publishing.af.mil](http://www.e-publishing.af.mil)

Army Publications  
[www.apd.army.mil](http://www.apd.army.mil)

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Coast Guard Publications  
[www.uscg.mil/directives/](http://www.uscg.mil/directives/)

Navy Publications  
[doni.daps.dla.mil](http://doni.daps.dla.mil)

Marine Corps Publications  
[www.marines.mil/news/publications](http://www.marines.mil/news/publications)

## C. LGBT Resources

### 1. Family Resources

Children of Lesbians & Gays Everywhere  
[www.colage.org](http://www.colage.org)

Established to engage, connect, and empower people to make the world a better place for children of lesbian, gay, bisexual, and/or transgender parents and families.

Military Partners & Families Coalition (MPFC)  
[militarypartners.org](http://militarypartners.org)

MPFC connects civilians Military Partners to one another and performs advocacy and media education on the needs of LGBT military families.

Parents, Families & Friends of Lesbians & Gays (PFLAG)  
[www.pflag.org](http://www.pflag.org)

PFLAG is a national non-profit organization with over 200,000 members and supporters and over 500 affiliates in the United States. This vast grassroots network is cultivated, resourced and serviced by the PFLAG national office, located in Washington, D.C., the national Board of Directors and 13 Regional Directors.

### 2. Legal and Policy Organizations

American Civil Liberties Union - Lesbian & Gay Rights Project  
[www.aclu.org/lgbt-rights](http://www.aclu.org/lgbt-rights)

The Lesbian & Gay Rights Project fights discrimination and moves public opinion on LGBT rights through the courts, legislatures and public education.

Family Equality Council  
[www.familyequality.org](http://www.familyequality.org)

The Family Equality Council works in both state and federal government to advance full social and legal equality on behalf of the approximately one million lesbian, gay, bisexual, and transgender families raising two million children. Parenting protections, adoption, repeal of DOMA, health insurance reform, immigration reform, safe schools, and workplace equality are many of the issues Family Equality Council is currently working on at the state and federal level.

Gay & Lesbian Advocates & Defenders (GLAD)  
[www.glad.org](http://www.glad.org)

GLAD is a New England-based organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD’s full-time legal staff and network of New England attorneys provide litigation, advocacy, and educational work in all areas of gay, lesbian, bisexual and transgender civil rights and the rights of people living with HIV.

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Gay, Lesbian & Straight Education Network

[www.glsen.org](http://www.glsen.org)

The Gay, Lesbian & Straight Education Network strives to assure that each member of every school community is valued and respected regardless of sexual orientation or gender identity/expression.

Human Rights Campaign (HRC)

[www.hrc.org](http://www.hrc.org)

The Human Rights Campaign is America’s largest civil rights organization working to achieve gay, lesbian, bisexual and transgender equality. HRC works to secure equal rights for LGBT individuals and families at the federal and state levels by lobbying elected officials, mobilizing grassroots supporters, educating Americans, investing strategically to elect fair-minded officials and partnering with other LGBT organizations.

Immigration Equality

[www.immigrationequality.org](http://www.immigrationequality.org)

Immigration Equality is a national grass roots organization that works to end discrimination in U.S. immigration law, to reduce the negative impact of that law on the lives of lesbian, gay, bisexual, transgender and HIV-positive people, and to help obtain asylum for those persecuted in their home country based on their sexual orientation, transgender identity or HIV-status.

International Gay & Lesbian Human Rights Commission (IGLHRC)

[www.iglhrc.org](http://www.iglhrc.org)

The mission of the International Gay and Lesbian Human Rights Commission (IGLHRC) is to secure the full enjoyment of the human rights of all people and communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status. A US-based non-profit, non-governmental organization (NGO), IGLHRC effects this mission through advocacy, documentation, coalition building, public education, and technical assistance.

Lambda Legal Defense and Education Fund

[www.lambdalegal.org](http://www.lambdalegal.org)

Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.

National Center for Lesbian Rights (NCLR)

[www.nclrights.org](http://www.nclrights.org)

NCLR is a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, and public education. In addition, NCLR provides representation and resources to gay men, and bisexual and transgender individuals on key issues that also significantly advance lesbian rights.

National Gay & Lesbian Task Force

[thetaskforce.org](http://thetaskforce.org)

The National Gay and Lesbian Task Force works to build the grassroots political strength of the LGBT community by training state and local activists and leaders, working to strengthen the infrastructure of state and local allies, and organizing broad-based campaigns to build public support for complete equality for LGBT people.

### **3. General LGBT Resources**

Family Diversity Projects

[www.lovemakesafamily.org](http://www.lovemakesafamily.org)

*Love Makes a Family* is a museum-quality traveling exhibit including photographs and interviews with families that have LGBT members. Through first-person accounts and positive images, this exhibit seeks to challenge and change damaging myths and stereotypes about LGBT people and their families.

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Gay & Lesbian Alliance Against Defamation

[www.glaad.org](http://www.glaad.org)

The Gay & Lesbian Alliance Against Defamation (GLAAD) is dedicated to promoting and ensuring fair, accurate and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation.

The Community of LGBT Centers

[www.lgbtcenters.org](http://www.lgbtcenters.org)

The Community of LGBT Centers exists to support and enhance LGBT community centers, which are engines of community organizing and liberation, and crucial to the health and strength of LGBT communities.

#### **4. Professional Associations**

Gay & Lesbian Medical Association

[www.glma.org](http://www.glma.org)

GLMA can help LGBT patients find a provider who is sensitive to their unique needs. GLMA professional association works to ensure equality in health care by using medical expertise in professional education, public policy work, patient education and referrals, and the promotion of research.

National Lesbian & Gay Journalists Association

[www.nlgja.org](http://www.nlgja.org)

NLGJA is an organization of journalists, media professionals, educators and students who work within the news industry to foster fair and accurate coverage of lesbian, gay, bisexual and transgender issues. NLGJA opposes all forms of workplace bias and provides professional development to its members.

National LGBT Bar Association

[www.lgbtbar.org](http://www.lgbtbar.org)

The LGBT Bar Association is a national association of lawyers, judges and other legal professionals, law students, activists, and affiliated lesbian, gay, bisexual, transgender legal organizations. The LGBT Bar Association promotes justice in and through the legal profession for the LGBT community in all its diversity.

Protect And Defend

[protectanddefend.org](http://protectanddefend.org)

Protect and Defend is a non-profit organization that serves the interests of gay and lesbian law enforcement, firefighters, military, and other public safety and justice system workers. It is primarily a social organization that organizes public and private events with an eye towards charitable fundraising for LGBT organizations.

#### **D. Women’s Resources**

National Organization for Women (NOW) - Lesbian Rights Homepage

[www.now.org/issues/lgbi](http://www.now.org/issues/lgbi)

NOW is committed to fighting discrimination based on sexual orientation or gender identity in all areas, including employment, housing, public accommodations, health services, child custody and military policies.

National Women’s Law Center

[www.nwlc.org](http://www.nwlc.org)

The Center has been at the forefront of landmark legal and public policy initiatives to improve the lives of women, girls and families since 1972. For example, the Center was instrumental in passing laws to prohibit pregnancy discrimination in employment and to provide compensation for victims of sexual harassment. In addition, NWLC is working to expand

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opportunities for female service members, to better prevent and detect sexual harassment and assault, and to eliminate all forms of sex discrimination in the military, including discrimination based on pregnancy and parental status.

Service Women’s Action Network (SWAN)

[servicewomen.org](http://servicewomen.org)

SWAN effects change for servicewomen and women veterans by engaging policy makers, the media, the public, military leadership and veterans providers on issues of concern to women. It provides community programs, personal support from fellow women veterans, and legal referrals from military law experts. Women veterans design, supervise and lead SWAN’s programs. SWAN runs a Peer Support hotline for women service members and veterans at 1-888-729-2089.

## E. Transgender Resources

FTM International

[www.ftmi.org](http://www.ftmi.org)

FTM International serves the Female-to-Male community by providing support meetings for FTMs and their families in cities around the world.

National Center for Transgender Equality

[transequality.org](http://transequality.org)

The National Center for Transgender Equality is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on national issues of importance to transgender people.

Transgendered American Veterans Association (TAVA)

[www.tavausa.org](http://www.tavausa.org)

TAVA was formed to address the growing concerns of fair and equal treatment of transgender veterans and active duty service members.

Transgender Law Center (TLC)

[transgenderlawcenter.org](http://transgenderlawcenter.org)

The Transgender Law Center is a California-based civil rights organization advocating for transgender communities. TLC utilizes direct legal services, public policy advocacy, and educational opportunities to advance the rights and safety of diverse transgender communities.

Transgender Law & Policy Institute (TLPI)

[www.transgenderlaw.org](http://www.transgenderlaw.org)

The TLPI brings experts and advocates together to work on law and policy initiatives designed to advance transgender equality.

## F. HIV/AIDS Resources

Department of Veterans Affairs – National HIV/AIDS Program

[www.hiv.va.gov](http://www.hiv.va.gov)

The VA’s goal is to provide excellence in patient care, veterans’ benefits and customer satisfaction. The mission of the Public Health Strategic Healthcare Group is to provide the highest quality, comprehensive care to veterans and to have that care recognized as the standard by which all health care in the United States is measured. This includes patient care activities, clinician and patient education, prevention activities, and research directed at continuous improvement of medical and preventive services and delivery of care to veterans.

GMHC

[www.gmhc.org](http://www.gmhc.org)

GMHC offers an array of services for the general public, including workshops, forums, the Hotline, and a treatment library. They offer further services for registered clients.

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The NAMES Project

[www.aidsquilt.org](http://www.aidsquilt.org)

The NAMES Project works to preserve, care for, and use the AIDS Memorial Quilt to foster healing, heighten awareness, and inspire action in the struggle against HIV and AIDS.

National Association of People with AIDS

[www.napwa.org](http://www.napwa.org)

The National Association of People with AIDS is a non-profit membership organization that advocates on behalf of all people living with HIV and AIDS in order to end the pandemic and the human suffering caused by HIV/AIDS. It also offers regional trainings and national conferences on the issue.

National Minority AIDS Council

[www.nmac.org](http://www.nmac.org)

Established in 1987, the National Minority AIDS Council (NMAC) is the premiere national organization dedicated to developing leadership within communities of color to address the challenges of HIV/AIDS.

## G. Veteran’s Resources

American Veterans for Equal Rights, Inc. (AVER)

[www.aver.us](http://www.aver.us)

AVER is a non-profit, chapter-based association of active, reserve and veteran LGBT service members dedicated to full and equal rights and equitable treatment for all present and former members of the U.S. Armed Forces. It offers opportunities to speak out and advocate for the end of “Don’t Ask, Don’t Tell.”

Department of Veterans Affairs (VA) – Veterans Benefits Administration

[www.vba.va.gov](http://www.vba.va.gov)

The mission of the Veterans Benefits Administration, in partnership with the Veterans Health Administration and the National Cemetery Administration, is to provide benefits and services to the veterans and their families in a responsive, timely and compassionate manner in recognition of their service to the Nation. Their webpage provides links to the most up-to-date resources for Veteran disability, education, and loan benefits.

National Organization of Veterans' Advocates, Inc. (NOVA)

[www.vetadvocates.com](http://www.vetadvocates.com)

NOVA was incorporated as a non-profit corporation to serve attorneys and non-attorney practitioners admitted to practice before the U.S. Court of Appeals for Veterans Claims (CAVC). NOVA recognizes the need to share information and analysis in order to provide successful advocacy for veterans. NOVA provides continuing legal education and support to individuals representing veterans.

National Veterans Legal Services Program (NVLSP)

[www.nvlsp.org](http://www.nvlsp.org)

NVLSP is an independent, nonprofit, veterans’ service organization dedicated to ensuring that the U.S. government honors its commitment to our veterans by providing them the federal benefits they have earned through their service to our country.

The Veterans Consortium Pro Bono Program

[www.vetsprobono.org](http://www.vetsprobono.org)

The Veterans Consortium Pro Bono Program (Program) was created in 1992, with a dual mission: to recruit and train attorneys in the fledgling field of veterans’ law; and to provide assistance to unrepresented appellants at the U.S. Court of Appeals for Veterans Claims.

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VoteVets.org

[votevets.org](http://votevets.org)

The mission of VoteVets.org is to use public issue campaigns and direct outreach to lawmakers to ensure that troops abroad have what they need to complete their missions, and receive the care they deserve when they get home. The group is the largest progressive organization of veterans in America.

## H. Spiritual Resources

Affirmation: Gay and Lesbian Mormons

[www.affirmation.org](http://www.affirmation.org)

Affirmation seeks to meet the needs of persons experiencing frustration or alienation from family, friends, and the Church because of their sexual orientation. In addition to offering assistance during life's occasional struggles, Affirmation provides a life-long opportunity for service, fun, friendship, personal enrichment, and spiritual growth.

DignityUSA (LGBT Catholics)

[www.dignityusa.org](http://www.dignityusa.org)

DignityUSA works for respect and justice for all gay, lesbian, bisexual, and transgender persons in the Catholic Church and the world through education, advocacy and support.

LGBT Humanist Council

[www.lgbthumanists.org](http://www.lgbthumanists.org)

A project of the American Humanist Association, The LGBT Humanist Council provides a place for LGBT Humanists to come together to discuss equality issues and methods to educate the greater community on LGBT and freethought concerns.

Lutherans Concerned / North America

[www.lcna.org](http://www.lcna.org)

The ministries of Lutherans Concerned / North America embody, inspire, and support the acceptance and full participation of people of all sexual orientations and gender identities, their families, friends and allies, within the Lutheran communion and its ecumenical and global partners.

Metropolitan Community Churches

[www.mccchurch.org](http://www.mccchurch.org)

As one of the world’s emerging churches, MCC is proclaiming a spirituality that is liberating and sufficiently profound to address the issues of our chaotic and complicated world.

Safra Project

[safraproject.org/co.htm](http://safraproject.org/co.htm)

Primarily a group dedicated to issues affecting LGBT Muslim women, the Safra Project provides many resources that to help LGBT Muslims of any gender. The Safra Project also provides resources on up-to-date research into gender and sexuality issues in Islam.

Soulforce

[www.soulforce.org](http://www.soulforce.org)

The purpose of Soulforce is freedom for lesbian, gay, bisexual, and transgender people from religious and political oppression through the practice of relentless nonviolent resistance.

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Unitarian Universalist Association

[www.uua.org](http://www.uua.org)

The Unitarian Universalist Association (UUA) represents the interests of more than one thousand Unitarian Universalist congregations on a continental scale. Unitarian Universalism has been on record as supporting the rights of bisexual, gay, and lesbian people since 1970.

United Methodist Reconciling Ministries

[www.rmnetwork.org](http://www.rmnetwork.org)

Reconciling Ministries Network is a national grassroots organization that exists to enable full participation of people of all sexual orientations and gender identities in the life of the United Methodist Church, both in policy and practice.

The World Congress of Gay, Lesbian, Bisexual and Transgender Jews

[www.glbtejews.org](http://www.glbtejews.org)

The World Congress of Gay, Lesbian, Bisexual, and Transgender Jews: Keshet Ga’avah consists of around 50 member organizations all over the world. The World Congress wishes: to be the worldwide voice of LGBT Jews; to support, inspire, and strengthen local groups; to foster a sense of community among diverse individuals and organizations; to achieve equality and security for LGBT Jews worldwide.

## I. Political Resources

Gay & Lesbian Victory Fund

[www.victoryfund.org](http://www.victoryfund.org)

The Gay & Lesbian Victory Fund provides strategic, technical and financial support to openly LGBT candidates and officials.

Log Cabin Republicans

[www.logcabin.org](http://www.logcabin.org)

Log Cabin Republicans is an organization for LGBT and allied people within the Republican Party. They work to make sure the GOP chooses fairness and freedom over intolerance and exclusion.

National Stonewall Democrats

[stonewalldemocrats.org](http://stonewalldemocrats.org)

The National Stonewall Democrats is a grassroots network connecting LGBT Democratic activists across the nation. With more than 90 chapters across the country, Stonewall is a grassroots force for social change within the LGBT movement and within the Democratic Party.

Outright Libertarians

[www.outrightusa.org](http://www.outrightusa.org)

Outright Libertarians is an LGBT association of Libertarian party activist and supporters, with basic beliefs in individual liberty and personal responsibility. They ensure the Libertarian party’s goals of equal rights for all includes LGBT people.

**See Servicemembers Legal Defense Network’s website for additional information about “Don’t Ask, Don’t Tell” and other related topics. [www.sldn.org](http://www.sldn.org)**

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<sup>1</sup> Officially titled “Policy concerning homosexuality in the armed forces” and codified at 10 U.S.C. § 654.

<sup>2</sup> 10 U.S.C. § 654 (b)(2).

<sup>3</sup> 10 U.S.C. § 654 (f)(3).

<sup>4</sup> 10 U.S.C. § 654 (b)(3).

<sup>5</sup> Memorandum from Under Secretary of Defense for Personnel and Readiness [hereinafter P&R] Clifford Stanley to the Secretaries of the Military Departments, *Repeal of Don’t Ask Don’t Tell and Future Impact on*

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Policy [hereinafter Stanley Policy Memorandum], attachment *DADT Repeal Policy Guidance* [hereinafter Policy Guidance], 1 (Jan. 28, 2011).

<sup>6</sup> Policy Guidance, *supra* note 5, at 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Policy Guidance, *supra* note 5, at 2.

<sup>10</sup> DoDD 1344.10, ¶ 4.1.1.

<sup>11</sup> 32 C.F.R. § 631.11.

<sup>12</sup> Policy Guidance, *supra* note 5, at 5.

<sup>13</sup> <http://www.militaryonesource.com>.

<sup>14</sup> Policy Guidance, *supra* note 5, at 2.

<sup>15</sup> Policy Guidance, *supra* note 5, at 3.

<sup>16</sup> Policy Guidance, *supra* note 5, at 4.

<sup>17</sup> 10 U.S.C. § 1034(c).

<sup>18</sup> Any person subject to the UCMJ may prefer charges against any other member subject to the Code. Manual for Courts-Martial United States, 2008 Edition (“MCM”), part II, ¶ 307(a). However, the common practice is only commanders, through the aid of command legal officers, prefer charges.

<sup>19</sup> “Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made.” 10 U.S.C. § 938.

<sup>20</sup> *See* MCM, part A2, § 938.

<sup>21</sup> *See* 10 U.S.C. § 1034.

<sup>22</sup> *Id.*

<sup>23</sup> DEP’T OF DEFENSE DIRECTIVE 1304.19, *Appointment of Chaplains for the Military Departments* (2007).

<sup>24</sup> “The privilege of confidential communication with a Chaplain is a right of every individual and an essential component of the Chaplains ministry.” AR 165-1, ¶ 16-2(a).

<sup>25</sup> *See, e.g.,* AIR FORCE MANUAL 52-103, *Chaplain Service Readiness Manual*, Attachment 10. The quoted language is part of the Covenant and Code of Ethics for Chaplains of the Armed Forces as prescribed by the National Conference on Ministry to the Armed Forces.

<sup>26</sup> MCM, MIL. R. EVID. 503.

<sup>27</sup> “The [chaplain] is willing to function in a pluralistic environment ... and is willing to support directly and indirectly the free exercise of religion by all members of the Military Services, their family members, and other persons authorized to be served by the military chaplaincies.” DoDI 1304.28, ¶ 6.1.2.

<sup>28</sup> Policy Guidance, *supra* note 5, at 3.

<sup>29</sup> DOD 6025.18-R, C1.2.

<sup>30</sup> MCM, part III, ¶ 513.

<sup>31</sup> DOD 6025.18-R, C7.11.1.1.

<sup>32</sup> DOD 6025.18-R, C7.11.1.3

<sup>33</sup> Policy Guidance, *supra* note 5, at 5.

<sup>34</sup> The Air Force requires that service members notify the servicing MTF within three days of seeking civilian medical care. *See* AFI 41-210, *Patient Administration Functions*, ¶ 3.9.1. Service members in the Army must obtain approval prior to seeking civilian medical care except in emergency situations. *See* AR 40-400, ¶ 10-6. Specific reporting requirements for the Navy and Marine Corps are unavailable online but are listed in NAVMED P-117.

<sup>35</sup> 10 U.S.C. § 892.

<sup>36</sup> 10 U.S.C. § 907.

<sup>37</sup> MCM ¶ 502.

<sup>38</sup> MCM ¶ 504.

<sup>39</sup> DEP’T OF DEFENSE REG. 4165.63-M, *DoD Housing Management* [hereinafter DoD 4165.63-M], Encl. 3, table 2 (2010).

<sup>40</sup> Policy Guidance, *supra* note 5, at 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> DEP’T OF DEFENSE DIRECTIVE 1344.10, *Political Activities by Members of the Armed Forces* [hereinafter DoDD 1344.10], ¶ 4.1.1 (2008).

<sup>45</sup> DoDD 1344.10, ¶ 4.1.1.

<sup>46</sup> DoDD 1344.10, ¶ 4.1.2.1.

<sup>47</sup> DEP’T OF DEFENSE DIRECTIVE-TYPE MEMORANDUM 09-026, *Responsible and Effective Use of Internet-based Capabilities* [hereinafter DTM 09-026], Attachment 2 (2011).

<sup>48</sup> DEP’T OF DEFENSE REG. 5500.7-R, *Joint Ethics* [hereinafter DoD 5500.7-R], ¶ 2-301(a)(2)(d) (2007).

<sup>49</sup> DoD 5500.7-R, ¶ 2-301(a)(3).

<sup>50</sup> DEP’T OF DEFENSE REG. 5500.7-R, *Joint Ethics* [hereinafter DoD 5500.7-R], ¶ 2-301(a)(2)(d) (2007).

<sup>51</sup> 10 U.S.C. § 2495b.

<sup>52</sup> 10 U.S.C. § 120(n) (making indecent exposure by service members a punishable offense).

<sup>53</sup> U.S. Central Command, *General Order Number 1B*, ¶ 2(e) (13 March 2006).

<sup>54</sup> Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995).

<sup>55</sup> Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Military Department, *Policy Guidelines on Homosexual Conduct in the Armed Forces*, July 19, 1993. See also, DoD 5200.2-R, *Personnel Security Program*, Appendix 8, “Sexual Behavior” (1987, incorporating changes through 1996).

<sup>56</sup> Standard Form 86, Questionnaire for National Security Positions, Question 17C, July 2008, available at [http://www.opm.gov/forms/pdf\\_fill/sf86.pdf](http://www.opm.gov/forms/pdf_fill/sf86.pdf).

<sup>57</sup> DoD 5200.2-R, *Personnel Security Program*, Appendix 8, “Foreign Influence” (1987, incorporating changes through 1996).

<sup>58</sup> “Information about an individual’s sexual orientation or statements by an individual that he or she is a homosexual or bisexual, or words to that effect, shall not be referred or reported to law enforcement agencies or to Military Departments (other than consolidated adjudication facilities) for any purpose. If investigative reports containing such information are referred to law enforcement agencies or Military Departments for other reasons, information subject to the limitations in this paragraph will be removed.” DoD 5200.2-R, *Personnel Security Program*, ¶ C2.4.3.4.3. (1987, incorporating changes through 1996).

<sup>59</sup> See DEP’T OF DEFENSE INSTRUCTION 6485.01, *Human Immunodeficiency Virus* [hereinafter DoDI 6485.01], ¶ 4.1 (2006). For specific service regulations, see generally, SECRETARY OF THE NAVY INSTRUCTION (SECNAVINST) 5300.30D, *Management of Human Immunodeficiency Virus-1 (HIV-1) Infection in the Navy and Marine Corps* (2006); AR 600-110, *Identification, Surveillance, and Administration of Personnel Infected With Human Immunodeficiency Virus* (2005); AFI 48-135, *Human Immunodeficiency Virus Program* (2004).

<sup>60</sup> Article 92 states that a service member will be punished at a court-martial if he or she violates a lawful order or regulation. 10 U.S.C. § 892.

<sup>61</sup> AFI 48-135, ¶ 3.8 (Air Force); AR 600-110, ¶ 4-2 (Army); SECNAVINST 5300.30D, ¶ 9 (Navy); NAVMC 2904, ¶ 2002(3) (Marine Corps); COMDTINST M6230.9, Chap. 3, Sec A (Coast Guard).

<sup>62</sup> AFI 48-135, ¶ 3.8 (Air Force); AR 600-110, ¶ 4-2 (Army); SECNAVINST 5300.30D, ¶ 9 (Navy); NAVMC 2904, ¶ 2002(3) (Marine Corps); COMDTINST M6230.9, Chap. 3, Sec A (Coast Guard).

<sup>63</sup> 38 C.F.R. § 4.88b, item 6351.

<sup>64</sup> 10 U.S.C. § 1201.

<sup>65</sup> 10 U.S.C. § 1212.

<sup>66</sup> 38 C.F.R. § 17.46.

<sup>67</sup> “Members with serologic evidence of HIV infection shall not be retired or separated solely on the basis of serologic evidence of HIV.” DoDI 6485.01, ¶ 6.2.2. But, it is the policy of DoD to retire or separate active duty or reserve component personnel infected with HIV “who are determined to be unfit for further duty.” DoDI 6485.01, ¶ 6.2.4.

<sup>68</sup> See, e.g., AR 600-110 ¶ 5-17.

<sup>69</sup> See DoDI 6485.01, ¶ 6.5.

<sup>70</sup> <http://www.fda.gov/biologicsbloodvaccines/bloodbloodproducts/questionsaboutblood/ucm108186.htm>.

<sup>71</sup> DoD 6025.18-R, C1.2.

<sup>72</sup> DoD 6025.18-R, C7.11.1.1.

<sup>73</sup> DoD 6025.18-R, C7.11.1.3.

<sup>74</sup> Policy Guidance, *supra* note 5, at 5.

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<sup>75</sup> The Air Force requires that service members notify the servicing MTF within three days of seeking civilian medical care. See AFI 41-210, *Patient Administration Functions*, ¶ 3.9.1. Service members in the Army must obtain approval prior to seeking civilian medical care except in emergency situations. See AR 40-400, ¶ 10-6. Specific reporting requirements for the Navy and Marine Corps are unavailable online but are listed in NAVMED P-117.

<sup>76</sup> 10 U.S.C. § 892.

<sup>77</sup> 10 U.S.C. § 907.

<sup>78</sup> See <http://www.army.mil/info/organization/chaplaincy/>.

<sup>79</sup> DEP’T OF DEFENSE DIRECTIVE 1304.19, *Appointment of Chaplains for the Military Departments*, § 4.2 (2007).

<sup>80</sup> DEP’T OF DEFENSE INSTRUCTION 1304.28, *Guidance for the Appointment of Chaplains for the Military Departments* § 6.1.2 (2007).

<sup>81</sup> *Id.*, Enclosure 3, § E3.1.1.

<sup>82</sup> Policy Guidance, *supra* note 5, at 3.

<sup>83</sup> 539 U.S. 558 (2003). In *Lawrence v. Texas*, the Supreme Court found that the U.S. Constitution protects the right of all individuals to engage in adult, consensual personal relationships. It overruled a previous decision by the Supreme Court, in *Bowers v. Hardwick*, which upheld state laws prohibiting private consensual sexual conduct among homosexuals and heterosexuals.

<sup>84</sup> 60 M.J. 198 (C.A.A.F. 2004).

<sup>85</sup> The *Marcum* Court set out three factors to be used in determining whether or not Article 125 is constitutional as-applied to a defendant’s conduct. These factors are: 1) Was the conduct that the accused was found guilty of committing of a nature to bring it within the liberty interest identified by the Supreme Court? 2) Did the conduct encompass any behavior or factors identified by the Supreme Court as outside the analysis in *Lawrence*? 3) Are there additional factors relevant solely in the military environment that affect the nature and reach of the *Lawrence* liberty interest? 60 M.J. 198 (C.A.A.F. 2004).

<sup>86</sup> MCM ¶ 51(e)(4).

<sup>87</sup> 10 U.S.C. § 933.

<sup>88</sup> 10 U.S.C. § 934.

<sup>89</sup> See MCM ¶¶ 59(e) and 90(e), respectively.

<sup>90</sup> MCM ¶¶ 59 and 83.

<sup>91</sup> MCM ¶ 83.c.2.

<sup>92</sup> *E.g.* AR 600–20, *Army Command Policy*, paragraph 4-14.a. (“This policy ... applies to different-gender relationships and same-gender relationships.”), available at [http://www.apd.army.mil/pdffiles/r600\\_20.pdf](http://www.apd.army.mil/pdffiles/r600_20.pdf); OPNAVINST 5370.2C, *Navy Fraternalization Policy*, paragraph 4.c. (“Historically, and as used in this instruction, fraternalization is a gender-neutral concept. Its focus is on the detriment to good order and discipline resulting from the erosion of respect for authority inherent in an unduly familiar senior-subordinate relationship, not the sex of the members involved.”) available at <http://doni.daps.dla.mil/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5370.2C.pdf>.

<sup>93</sup> MCM ¶ 83.e.

<sup>94</sup> MCM ¶ 83.c.1.

<sup>95</sup> OPNAVINST 5370.2C, ¶ 6.b.

<sup>96</sup> AFI 36-2909, *Professional and Unprofessional Relationships*, ¶ 2.2.1., available at <http://www.e-publishing.af.mil/shared/media/epubs/AFI36-2909.pdf>.

<sup>97</sup> AR 600–20, ¶ 4-14.a.

<sup>98</sup> OPNAVINST 5370.2C, ¶ 5.b.

<sup>99</sup> Marine Corps Manual 1100.4-5., available at

<http://www.marines.mil/news/publications/Documents/MARINE%20CORPS%20MANUAL%20W%20CH%201-3.pdf>

<sup>100</sup> *E.g.* AR 600–20, ¶ 4-14.c.2.a. (listing marriage as an exception to the rule against dating and shared living accommodations).

<sup>101</sup> MCM ¶ 62.

<sup>102</sup> MCM ¶ 62.b(3).

<sup>103</sup> MCM ¶ 62.c(2).

**IMPORTANT:** This guide is effective upon repeal of “Don’t Ask, Don’t Tell” on Tuesday, September 20, 2011. Until then, service members are cautioned about coming out publicly. For more information on SLDN’s warning to service members, visit [www.sldn.org](http://www.sldn.org).

- <sup>104</sup> MCM, Appendix 25, page 42. (defining “sexual intercourse” for the purposes of the rule on admissibility of evidence in child molestation cases as “genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex.”).
- <sup>105</sup> MCM ¶ 97.b(4) (describing pandering as including “arranging for, a certain person to engage in sexual intercourse or sodomy with another person”).
- <sup>106</sup> See DoDI 7730.19, ¶ 4; DoDI 1342.19, ¶ 4.7.
- <sup>107</sup> <http://tricare.mil/mybenefit/home/overview/Eligibility/DEERS/Children?>
- <sup>108</sup> See <http://www.militaryonesource.com/MOS/FindInformation/Category/Topic/Issue/Material.aspx?MaterialTypeID=9&MaterialID=16832> for more information on Family Care Plans.
- <sup>109</sup> *Id.* Military One Source on FCP.
- <sup>110</sup> See, e.g. 37 U.S.C. §§ 405a, 406, 407, 554.
- <sup>111</sup> See p147 [http://www.defense.gov/home/features/2010/0610\\_gatesdatd/DADTReport\\_FINAL\\_20101130%28secure-hires%29.pdf](http://www.defense.gov/home/features/2010/0610_gatesdatd/DADTReport_FINAL_20101130%28secure-hires%29.pdf).
- <sup>112</sup> 37 U.S.C. §401, 403; See Policy Guidance, *supra* note 5, at 4; Department of Defense, DoD Manual 4165.63-M, pages 49-50, *DoD Housing Management*, October 28, 2010 (defining “dependent,” “family,” “family member”), available at <http://www.dtic.mil/whs/directives/corres/pdf/416563m.pdf>.
- <sup>113</sup> 10 U.S.C. § 934.
- <sup>114</sup> See Policy Guidance, *supra* note 5, at 4-5.
- <sup>115</sup> DD Form 93, Instructions, Item 9a, 13a.
- <sup>116</sup> See DoDI 1300.18, § 6.1.3 <http://www.dtic.mil/whs/directives/corres/pdf/130018p.pdf>.
- <sup>117</sup> DoDI 1300.18, E2.42.
- <sup>118</sup> 10 U.S.C. 1482(c).
- <sup>119</sup> See the Red Cross Emergency Notification Service site for more information: <http://www.redcross.org/portal/site/en/menuitem.d8aaecf214c576bf971e4cfe43181aa0/?vgnextoid=7f26912c9973b110VgnVCM10000089f0870aRCRD&vgnextfmt=default>
- <sup>120</sup> Phone Interview with Beth at Red Cross General Counsel’s office, June 6, 2011.
- <sup>121</sup> 42 C.F.R. § 482.13.
- <sup>122</sup> E.g., [http://www.hrc.org/issues/marriage/domestic\\_partners/5433.htm](http://www.hrc.org/issues/marriage/domestic_partners/5433.htm).
- <sup>123</sup> See DoDI 7730.19, ¶ 4; DoDI 1342.19, ¶ 4.7.
- <sup>124</sup> See <http://tricare.mil/mybenefit/home/overview/Eligibility/DEERS/Children>.
- <sup>125</sup> See DoD Instruction 1300.18, ¶ 4.11 at <http://www.dtic.mil/whs/directives/corres/pdf/130018p.pdf>.
- <sup>126</sup> For example, the Air Force allows designated live-in childcare providers to live in on-base housing. AFI 32-6001, ¶ 2-12. Base policy would determine if the child’s legal parent can qualify as the live-in childcare provider.
- <sup>127</sup> AR 420-1, ¶ 3-15.a.
- <sup>128</sup> See <http://tricare.mil/mybenefit/home/overview/Eligibility/IDCards>.
- <sup>129</sup> See <http://www.militaryonesource.com/MOS/FindInformation/Category/Topic/Issue/Material.aspx?MaterialTypeID=9&MaterialID=16832> for more information on Family Care Plans.
- <sup>130</sup> *Id.*
- <sup>131</sup> *Id.*
- <sup>132</sup> GAO 1997 Study on DOMA’s effect: <http://www.gao.gov/products/OGC-97-16>  
Update to GAO Study, 2004: <http://www.gao.gov/products/GAO-04-353R>  
Another ~21 public laws since 2004 that apply to veterans or service members (searched on terms relevant to spouse, dependent, marriage, family).  
Allowances: [http://www.law.cornell.edu/uscode/html/uscode37/usc\\_sup\\_01\\_37\\_10\\_7.html](http://www.law.cornell.edu/uscode/html/uscode37/usc_sup_01_37_10_7.html)
- <sup>133</sup> See GAO Report on DOMA, Category 2 (Veterans’ Benefits) and Category 4 (Federal Civilian and Military Service Benefits) at <http://www.gao.gov/products/OGC-97-16>.
- <sup>134</sup> 10 U.S.C. §1072.
- <sup>135</sup> See Table 1, *DoDI 1015.10, July 6, 2009*. “Family members” is left vaguely defined (p.55) in the glossary as anyone who can get an ID card through DEERS.

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- <sup>136</sup> 10 U.S.C. § 1072 (explaining eligibility using the term “spouse”).
- <sup>137</sup> See Table 2, *DoDI 1015.10, July 6, 2009*.
- <sup>138</sup> See, e.g., 37 U.S.C. § 405a, § 406, § 407, § 554.
- <sup>139</sup> 37 U.S.C. § 411f (limiting the burial ceremony travel allowance to “eligible relatives,” including parents, spouse, children and stepchildren, siblings of the deceased service member, and the person designated to direct disposition of remains (“PADD”) on DD Form 93. Designation as the PADD is limited by 10 U.S.C. § 1482(c) to blood and adopted relatives, surviving spouse, or if none of those can be found, “a person standing in loco parentis to the decedent.”)
- <sup>140</sup> 37 U.S.C. § 401 (defining “dependents” as spouses, which is limited to opposite sex spouses under DOMA); Department of Defense, DoDI 1315.18, *Procedures for Military Personnel Assignments*, January 12, 2005, 44.
- <sup>141</sup> 10 U.S.C. § 1784, 1784(a).
- <sup>142</sup> 37 U.S.C. § 427.
- <sup>143</sup> *Id.*
- <sup>144</sup> 37 U.S.C. § 401 defines “dependent” for the purposes of 37 U.S.C. § 406, upon which Family Separation Allowance eligibility is based, according to 37 U.S.C. § 427.
- <sup>145</sup> 10 U.S.C. §§ 1431-55.
- <sup>146</sup> See, e.g. 10 U.S.C. § 1450.
- <sup>147</sup> See 10 U.S.C. §1072.
- <sup>148</sup> See Marine Level I DADT training, FAQ 20, p6. However, the definition of “domestic violence” in DODI 6400.06 will be updated to be more inclusive. See AD 2011.01, Attachment 2, paragraph 7 and 8, available at [http://www.apd.army.mil/pdffiles/ad2011\\_01.pdf](http://www.apd.army.mil/pdffiles/ad2011_01.pdf).
- <sup>149</sup> E.g., AR 608-18, The Army Family Advocacy Program, ¶ 3-27.c.; 3-22. Protective Custody.
- <sup>150</sup> Under 10 U.S.C. § 1059, spouses and former spouses of service members convicted of dependent abuse are afforded continuing commissary privileges and monthly pay, as long as they do not live with the abusive spouse. Note that this is a statutory provision, so inclusion of same-sex victims of dependent abuse is possibly only through modification of the law by an act of Congress, or by a declaration that the Defense of Marriage Act is unconstitutional.
- <sup>151</sup> See DoDI 1315.18 ¶¶ 6.2.3.2, E2.1.29.
- <sup>152</sup> See DEPARTMENT OF DEFENSE, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH THE REPEAL OF “DON’T ASK, DON’T TELL” (“Repeal Report”) 147-48, available at [http://www.defense.gov/home/features/2010/0610\\_gatesdadt/DADTReport\\_FINAL\\_20101130%28secure-hires%29.pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130%28secure-hires%29.pdf).
- <sup>153</sup> DoDI 1315.18, ¶ E3.11.1.1.
- <sup>154</sup> See 10 U.S.C. § 1044(e), leaving the determination of who is a “dependent” to the Service secretaries. Repeal Report 144.
- <sup>155</sup> 37 U.S.C. §401, 403. See also DoD Manual 4165.63-M, pages 49-50, *DoD Housing Management*, October 28, 2010 (defining “dependent,” “family,” “family member”), available at <http://www.dtic.mil/whs/directives/corres/pdf/416563m.pdf>.
- <sup>156</sup> *Id.*
- <sup>157</sup> 10 U.S.C. § 2481.
- <sup>158</sup> See Glossary, p 42, <http://www.dtic.mil/whs/directives/corres/pdf/133017p.pdf>.
- <sup>159</sup> DoDI 1342.22, ¶ E2.1.5. (“**Family Members.** Includes those individuals for whom the member provides medical, financial, and logistical (for example, housing, food, clothing) support. This includes, but is not limited to, the spouse, children under the age of 19, elderly adults, and persons with disabilities.”).
- <sup>160</sup> DoDI 1342.22, ¶ 5.3.2.
- <sup>161</sup> MCM, MIL. R. EVID. § 504 [http://www.uscg.mil/legal/mj/MJ\\_Doc/mcm2008.pdf](http://www.uscg.mil/legal/mj/MJ_Doc/mcm2008.pdf).
- <sup>162</sup> Repeal Report 147.
- <sup>163</sup> DoDD 4515.13-R uses the definition of “dependent” from JFTR Volume I, Appendix A1 (defining dependent of a uniformed services member as that in 37 U.S.C. § 401).
- <sup>164</sup> DoDD 4515.13-R, <http://www.dtic.mil/whs/directives/corres/pdf/451513r.pdf>. Non-command-sponsored dependents are eligible for space-required or space-available travel under limited circumstances. Non-dependents who are “close blood or affinitive relatives” of a military member who are “dependent on the

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sponsor for a home” (such as children over age 21, and perhaps a same-sex partner) are eligible for space-required travel in some emergency situations. *Id.* ¶ DL1.1.12.

<sup>165</sup> JFTR Volume I, Appendix A1, defining “dependent” for civilian employees.

<sup>166</sup> 38 U.S.C. § 3311.

<sup>167</sup> 38 U.S.C. § 3319.

<sup>168</sup> 38 U.S.C. § 1720G(a)(3)(A)(i).

<sup>169</sup> 38 U.S.C. § 1720G(a)(3)(A)(ii).

<sup>170</sup> 38 U.S.C. § 1720G(d)(3).

<sup>171</sup> 38 U.S.C. § 3710.

<sup>172</sup> 38 U.S.C. § 3701(b)(s).

<sup>173</sup> 38 U.S.C. § 3710(e)(3).

<sup>174</sup> See Title 38 of the US Code, Chapter 11.

<sup>175</sup> 38 U.S.C. § 1521.

<sup>176</sup> 38 U.S.C. §§ 1115, 1521(c), 1521 (d)(2).

<sup>177</sup> 38 U.S.C. § 1310.

<sup>178</sup> 38 U.S.C. § 1541.

<sup>179</sup> DEP’T OF DEFENSE INSTRUCTION 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, ¶¶ E4.14(e) and E4.15(l) (2010).

<sup>180</sup> *Id.* ¶ E4.28(r).

<sup>181</sup> E.g., USMEPCOM Regulation 40-1, *Medical Services; Medical Processing and Examinations*, ¶ 5-29 (2009).

<sup>182</sup> See [http://www.wpath.org/publications\\_standards.cfm](http://www.wpath.org/publications_standards.cfm) (2007).

<sup>183</sup> See 38 C.F.R. § 17.38.

<sup>184</sup> DEP’T OF DEFENSE INSTRUCTION 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, ¶¶ E4.14(e) and E4.15(l) (2010).

<sup>185</sup> *Id.* ¶ E4.28(r).

<sup>186</sup> The Air Force requires that service members notify the servicing MTF within three days of seeking civilian medical care. See AFI 41-210, *Patient Administration Functions*, ¶ 3.9.1. Service members in the Army must obtain approval prior to seeking civilian medical care except in emergency situations or when stationed abroad. See AR 40-400, *Patient Administration*, ¶ 10-6. Specific reporting requirements for the Navy and Marine Corps are listed in NAVMED P-117, *Manual of the Medical Department*.

<sup>187</sup> See generally AR 670-1, *Wear and Appearance of Army Uniforms and Insignia* (2005); MCO P1020.34G, *Marine Corps Uniform Regulations* (2003); Navy Uniform Regulations 2101.1; AFI 36-2903, *Dress and Personal Appearance of Air Force Personnel* (2007).

<sup>188</sup> While the UCMJ does not address the issue of “cross-dressing” explicitly, in *U.S. v. Davis*, the United States Court of Military Appeals held that cross-dressing may qualify “as a disorder or neglect to the prejudice of good order and discipline” or as being “of a nature to bring discredit upon the armed forces” in violation of UCMJ Art 134. *United States v. Davis*, 26 MJ 445 (CMA 1998).

<sup>189</sup> 10 U.S.C. § 892 (Failure to obey order or regulation); 10 U.S.C. § 933 (Conduct unbecoming an officer and a gentleman).

<sup>190</sup> DEP’T OF DEFENSE INSTRUCTION 1332.38, *Physical Disability Evaluation*, ¶ E5.1.3.9.6 (2006).

<sup>191</sup> See 38 C.F.R. 17.38.

<sup>192</sup> Department of Veterans Affairs, VHA Directive 2011-024, *Providing Health Care for Transgender and Intersex Veterans* (2011).

<sup>193</sup> 10 U.S.C. 1533(b).

<sup>194</sup> Department of Defense Instruction 1332.28 E4.1 (April 4, 2004).

<sup>195</sup> *Id.* at E4.3.1 – E4.3.1.1.

<sup>196</sup> 10 U.S.C. § 1552(a)(1).