



## Department of the Navy Safe-to-Report Policy and Reporting Requirement

In the Department of the Navy (DON) Safe-to-Report Policy of 29 June 2022, the Secretary of the Navy directed that no member of the DON may take adverse action against a Service Member who has made an unrestricted report of sexual assault, for minor misconduct collateral to the alleged assault. The purpose of this Safe-to-Report Policy is to remove a barrier to reporting by victims. Staff Judge Advocates (SJA) must both advise Commanding Officers (CO) regarding the application of the DON Safe-To-Report Policy and report information regarding victim collateral misconduct.

### ***Background***

Section 539A of the Fiscal Year 2021 National Defense Authorization Act directed the Secretary of Defense to establish a policy for addressing minor collateral misconduct by an alleged victim of sexual assault. Section 539A further mandated a process to track incidents of minor collateral misconduct involving an alleged victim of sexual assault. The Under Secretary of Defense for Personnel and Readiness (USD P&R) issued a memorandum on 25 October 2021 directing the Military Department Secretaries to issue a Safe-to-Report Policy and setting out standards that must be included. The Secretary of the Navy did so on 29 June 2022, immediately prohibiting disciplinary action against a victim of an alleged sexual assault for minor collateral misconduct and requiring the collection and reporting of information on all alleged collateral misconduct. This Practice Directive provides more specific requirements for implementation of the DON Safe-To-Report Policy and the associated data collection and reporting requirements.<sup>1</sup>

### ***Overview of the Safe-To-Report Policy***

The Safe-To-Report Policy applies to all Service Members who file an unrestricted report of sexual assault. The filing of the report of sexual assault alone classifies the Service Member as a victim for purposes of the Safe-To-Report Policy, regardless of to whom the report was made, any credibility assessment, findings of an investigation, or whether the investigation and prosecution is handled by military or civilian authorities. As used in the Safe-To-Report Policy, the term “sexual assault” refers to alleged violations of Article 120, alleged violations of Article 125 for forcible sodomy occurring before 1 January 2019, alleged attempts and conspiracies to commit the same, and any similar or comparable offense under federal, state, or local criminal law.

The Safe-To-Report Policy governs the actions of all members of the DON with respect to victims, though it centrally focuses on decisions to be made by COs—more specifically, Sexual Assault Initial Disposition Authorities (SA-IDA)—and restrictions upon their actions in certain situations. Initial disposition authority is withheld to the O-6 Special Court-Martial Convening Authority level for all alleged offenses arising from or relating to a reported sexual assault, including victim collateral misconduct.<sup>2</sup> Since only SA-IDAs may determine if victim misconduct is collateral to the report of sexual assault, *all* allegations of misconduct by a sexual assault victim must be forwarded to the first SA-IDA in the victim’s chain of command, referred to as the CO throughout the Safe-To-Report Policy and this Practice Directive.

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<sup>1</sup> The USD P&R memorandum, Data Call Spreadsheet, Data Call Instructions, and DON Safe-to-Report Policy are available under this Practice Directive at <https://www.hqmc.marines.mil/sja/44XX-Resources/Practice-Advisories-and-Directives>.

<sup>2</sup> Note, however, that the scope of offenses included within the term “sexual assault” as used in the Safe-to-Report Policy is narrower than the scope of “sex-related” offenses under the cognizance of SA-IDAs.

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The CO must first determine whether the alleged misconduct is collateral to the report of sexual assault. Collateral misconduct is victim misconduct that might be in time, place, or circumstance associated with the victim's alleged sexual assault incident. Collateral misconduct is most often discovered as a result of the sexual assault report or during the ensuing investigation or prosecution processes. The CO is required to consult with their servicing SJA when determining whether alleged victim misconduct is collateral misconduct. If the CO determines that the alleged victim misconduct *is not* collateral to the report of sexual assault, the Safe-To-Report Policy does not apply, and the CO may dispose of the alleged victim misconduct within his or her discretion, to include taking adverse administrative and disciplinary action. Pursuant to MCO 1752.5C, this disposition authority is non-delegable, and the CO may not forward the matter to a subordinate commander for disposition.

If the CO determines the alleged victim misconduct *is* collateral misconduct, the CO must then determine whether that alleged collateral misconduct is minor or non-minor. Again, the CO is required to consult with their servicing SJA when making this determination. Whether collateral misconduct is minor or non-minor depends on several factors, including the following:

- The nature of the alleged collateral misconduct and the circumstances surrounding its commission;
- The victim's age, rank, duty assignment, record, and experience; and
- The maximum sentence for the alleged collateral misconduct if tried by general court-martial.<sup>3</sup>

In addition to the above criteria, the CO must also consider the mitigating and aggravating circumstances of that alleged collateral misconduct when determining whether it is minor or non-minor. The Safe-To-Report Policy contains non-exhaustive lists of mitigating and aggravating circumstances that the CO should consider. It also provides examples of collateral misconduct that should generally be considered minor: underage drinking at or near the time of the sexual assault; an unprofessional relationship with the accused; and violations of certain orders or regulations.

If the CO determines that the alleged collateral misconduct is minor, the victim shall not be disciplined in any manner. The Safe-To-Report Policy identifies a non-exhaustive, yet broad array of prohibited command initiated actions against a victim for minor collateral misconduct, including letters of counseling, imposition of nonjudicial punishment, administrative separation, preferral of charges, and remarks in fitness reports or evaluations. Importantly, the Safe-To-Report Policy prohibits *any member of the DON* from taking disciplinary action against victims for minor collateral misconduct, not just SA-IDAs. Accordingly, commanders at all levels must set the conditions necessary for compliance.

Although no disciplinary action may be taken against a victim for minor collateral misconduct, the CO is authorized to take appropriate non-disciplinary administrative actions, such as referring the victim to substance abuse treatment, behavioral health, or medical providers, or temporary suspension of access to critical positions in the personnel reliability program until appropriate evaluations may be conducted.

If the CO determines that the victim's alleged collateral misconduct is non-minor, the CO may dispose of the allegation within his or her discretion. Pursuant to MCO 1752.5C, the CO is encouraged, but not required, to defer disciplinary action against the victim until the final disposition of the underlying sexual assault allegation is completed.

### ***Data Collection and Reporting Requirements***

A determination by a CO that victim misconduct is collateral misconduct triggers the data collection and reporting requirement of the Safe-to-Report Policy. The Data Call Spreadsheet promulgated by USD P&R through a memorandum dated 18 November 2021 will be utilized to execute the data collection and reporting requirement. The servicing SJA for the CO will document *all* victim collateral misconduct that occurs on and after 29 June 2022, regardless of whether the CO ultimately determines that the victim's alleged collateral misconduct is minor or non-

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<sup>3</sup> Ordinarily, minor collateral misconduct is an offense for which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial, though this is not determinative.

minor, and regardless of the CO's ultimate disposition of the victim's alleged non-minor collateral misconduct. SJAs will follow the Data Call Instructions from USD P&R, as elaborated upon and caveated below. If the CO determines that the alleged misconduct *is not* collateral misconduct, there is no requirement to document or report it in the Data Call Spreadsheet.

For the remainder of FY 2022, SJAs will input victim collateral misconduct information into the Data Call Spreadsheet and submit the completed spreadsheet by 1700 EST on 15 October 2022 via email to Judge Advocate Division (JMJD) at JAD\_safetoreport@usmc.mil. For future fiscal years, SJAs will submit the victim collateral misconduct Data Call Spreadsheet on a quarterly basis at the same time that the SJA submits the Quarterly Criminal Activity, Disciplinary Infractions, and Courts-Martial report. **Do not submit the Data Call spreadsheet directly to DON or DoD Sexual Assault Prevention and Response Offices.**

The following instructions apply to the Data Call Spreadsheet:

- Column A – DSAID Case Control Number: Enter the full DSAID number. This may be obtained from the cognizant Sexual Assault Response Coordinator.
- Column B – Service of the Victim: Select the Service affiliation of the victim.
- Column C – Pay Grade of the Victim: Select the pay grade of the victim at the time of the unrestricted sexual assault report (not the time of the alleged sexual assault);
- Column D – Gender of the Victim: Select the gender of the victim as reflected in the Marine Corps Total Force System or the Defense Enrollment Eligibility Reporting System.
- Column E – Date of SA Report: Enter the date of the unrestricted sexual assault report to the DoD as reflected in block 3B or 5B, as applicable, of DD Form 2910. Do not enter the date the alleged sexual assault occurred.
- Column F – Safe-To-Report Policy Used: Select “Yes” if the CO determines the collateral misconduct to be minor and is prohibited from disciplining the victim. Select “No” if the CO determines the collateral misconduct to be non-minor. The CO's assessment of the victim's alleged misconduct under the Safe-To-Report Policy is not itself an indication of whether the Safe-To-Report Policy was “used” in the sense of this Data Call. **For the purposes of this Data Call, the Safe-To-Report Policy is “used” only if the CO determines the collateral misconduct to be minor and is prohibited from disciplining the victim.**
- Column G – Reason Safe-To-Report Policy Not Used:
  - If the answer in Column F is “Yes,” select “Not applicable, Safe-To-Report Policy WAS used.” If the answer in Column F is “no,” there are only three possible reasons therefor:
    - (1) The allegation of collateral misconduct is not credible. In that situation, the CO is precluded from taking action not because of the Safe-to-Report Policy, but due to insufficient evidence.
    - (2) The alleged misconduct is not collateral to the report of sexual assault. In that situation, no data entry is required; only collateral misconduct must be documented.
    - (3) The alleged collateral misconduct is non-minor.
  - Though there are five options to select from in the dropdown menu, to ensure consistent application of the policy across the force, the Marine Corps will only use the following three options: (1) “Collateral misconduct was not minor;” (2) “Collateral misconduct accusation was not credible;” and (3) “Not applicable, Safe-to-Report Policy WAS used.”
  - The options, “Collateral misconduct was known BEFORE the sexual assault report” and “Collateral misconduct occurred AFTER the sexual assault report,” will not be used. These options reflect either: (1) the misconduct is not collateral (i.e., not associated in time, place, or circumstance) to the report of

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sexual assault, thus not triggering any data collection or reporting requirement under the Safe-to-Report Policy; or (2) the collateral misconduct is non-minor after consideration of the required criteria and any applicable aggravating and mitigating circumstances, and should be appropriately captured for data collection and reporting purposes as such by selecting “Collateral misconduct was not minor.”<sup>4</sup> If the timing of the collateral misconduct in relation to the sexual assault report or when the command became aware of the collateral misconduct in relation to the sexual assault report were considerations in determining whether the collateral misconduct was minor or non-minor, those considerations are to be documented in Column M.

- Column H – Timing of Action Taken for “Non-Minor” Collateral Misconduct: The purpose of this column is to record the timing of any disciplinary action against a victim for non-minor collateral misconduct in relation to the disposition of the underlying sexual assault allegation. As discussed above, COs are encouraged, but not required, to defer action against victims for collateral misconduct until disposition of the underlying sexual assault allegation. Select the appropriate option to reflect one of the following:
  - (1) The CO determined the collateral misconduct is *non-minor*, but decided to take no action;
  - (2) The CO determined the collateral misconduct is *non-minor*, and took action *before* the disposition of the sexual assault allegation;
  - (3) The CO determined the collateral misconduct is *non-minor*, and took action *after* the disposition of the sexual assault allegation; or
  - (4) The CO determined the collateral misconduct is *minor*, and disciplinary action is prohibited.
- Columns I – K – Adverse Action Taken: Select the type of adverse action taken against the victim for non-minor collateral misconduct, and elaborate as necessary in Column M. If more than one type of adverse action are taken, order them from most to least severe. Select “Action pending” only if the CO decided to take disciplinary action against the victim for non-minor collateral misconduct, and that disciplinary action is still pending by the suspense date for submission of the Data Call Spreadsheet. Otherwise, data should be entered only after a decision is made to take no action or upon completion of any adverse action.
- Column L – Date Action Taken: Enter the date one of following occurred, elaborating in Column M as necessary:
  - (1) The CO determined the collateral misconduct to be minor, thus prohibiting disciplinary action;
  - (2) The CO decided to take no disciplinary action against a victim for non-minor collateral misconduct;or
  - (3) Disciplinary action against a victim for non-minor collateral misconduct is completed.
- Column M – Short Narrative of the Safe-To-Report Incident: Enter a narrative that includes the following, without including any personally identifiable information:
  - (1) A description of the alleged collateral misconduct;
  - (2) Whether the collateral misconduct was determined to be minor or non-minor;
  - (3) The reason(s) why the collateral misconduct was deemed minor or non-minor;
  - (4) An explanation of any aggravating or mitigating circumstances considered by the CO in determining whether the victim’s conduct was deemed minor or non-minor. Include those aggravating or mitigating circumstances specifically listed in the Safe-to-Report Policy considered by the CO as well as any other aggravating or mitigating circumstance considered by the CO that are not specifically listed in the policy;

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<sup>4</sup> The timing of the alleged sexual assault, the unrestricted report, the alleged collateral misconduct, and the discovery by the command of the alleged collateral misconduct are relevant considerations when determining whether the alleged collateral misconduct is minor or non-minor, as reflected by the following mitigating circumstances listed in the Safe-to-Report Policy: “Whether the alleged collateral misconduct was known to command prior to the report of sexual assault, and if not known, the likelihood that the alleged collateral misconduct would have otherwise been discovered, but for the victim disclosing or reporting the sexual assault;” and “Whether the victim engaged in misconduct after the sexual assault, which may be related to symptoms of exposure to trauma....”

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- (5) A description of disciplinary action(s) taken for the collateral misconduct, if any;
  - (6) A listing of referrals to support services or removal from duty position, if any; and
  - (7) Any necessary elaboration upon the information entered in the other columns.

***Conclusion***

The Safe-To-Report Policy was issued to address the concern that a victim's fear of punishment for collateral misconduct poses a significant barrier to reporting allegations of sexual assault. Standardizing how SJAs advise and inform their COs on the Safe-To-Report Policy will ensure consistent and uniform victim protection and data collection. Please direct any questions about this Practice Directive to the JMJ Branch Head at (703) 693-9005.

## Safe-To-Report Policy Assessment Flow Chart

