



TOPIC: SAFE-TO-REPORT POLICY & ROLE OF OSTC

JULY 2024

Topics from Deputy Secretary of Defense Memo, "Updates to Department of Defense Policies to Enhance Support for Adult Sexual Assault Victims," signed May 2024. Available at www.sapr.mil/latest-policy-updates.

The Secretaries of the Military Departments are responsible for establishing Military Service-specific guidance that includes the policy in with DoDI 6495.02, vol. 1, to ensure the Safe-to-Report Policy in DoDI 6495.02, vol. 1, Enclosure 5 shall be used in cases that may involve a Service member victim's alleged collateral misconduct, in a manner that is consistent and appropriate to the circumstances, and at a time that encourages continued victim cooperation.

Enclosure 5, DoDI 6495.02, volume 1, as follows:

Mandates a Safe-To-Report policy and addresses the role of the Offices of Special Trial Counsel (OSTCs).

Alleged Collateral Misconduct in Sexual Assault Cases, Safe-to-Report Policy, and Role of the OSTC

a. Barrier to Reporting. Collateral misconduct (*See DoDI Glossary definition below*) by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders).

b. Safe-to-Report Policy. *The Secretaries of the Military Departments establish mandatory detailed processes and procedures for the identification and treatment of alleged "minor" and "non-minor" collateral misconduct by Service member victims of sexual assault. The Secretaries of the Military Departments and the Chief, NGB, shall ensure their respective mandatory Safe-to-Report Policies are implemented and executed properly in accordance with Section 539A of the William M. (Mac) Thornberry [National Defense Authorization Act for Fiscal Year 2021](#) and the standards in this volume.*

(1) *Each of the Military Services and NGB shall apply the Safe-to-Report policy in all instances of alleged collateral misconduct involving a Service member who is a sexual assault victim.*

(2) *Each of the Military Services and NGB shall track incidents of alleged collateral misconduct that are subject to their Safe-to-Report Policies.*

c. Applicability. *The Safe-to-Report Policy applies to all members of the armed forces including the Reserve Component of the Armed Forces and cadets and midshipmen at the Military Service Academies. This policy applies regardless of to whom the victim discloses the sexual assault, and regardless of whether the investigation and/or prosecution, if any, is handled by military or civilian authorities.*

d. Role of the Special Trial Counsel.

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(1) As set out by policy and law, special trial counsel have exclusive authority over “covered offenses” and may exercise authority over “related offenses,” including collateral misconduct allegedly committed by a Service member sexual assault victim.

(2) When special trial counsel exercise authority over a Service member victim’s alleged collateral misconduct, the special trial counsel must determine that such alleged collateral misconduct is “non-minor” before court-martial charges alleging collateral misconduct by a victim are preferred or referred.

(a) Special trial counsel will use the analytical framework, criteria, and standards established in this Safe-to-Report Policy.

(b) If the special trial counsel determines the alleged collateral misconduct to be non-minor, the special trial counsel shall provide information to the appropriate organization as required for data reporting requirements established in this policy.

(3) When special trial counsel do NOT exercise authority over the alleged collateral misconduct or when they defer, the commander will determine whether the Service member victim’s alleged collateral misconduct is “minor” or “non-minor” utilizing the analytical framework, criteria, and standards in the Safe-to-Report Policy established in DoDI 6495.02, vol. 1. Commanders shall consult with the serving Staff Judge Advocate Office when making these determinations.

e. Safe-to-Report Policy Assessment. The threshold issue for the applicability of the Safe-to-Report Policy is determining whether the alleged collateral misconduct in question is “minor” or “non-minor.” Commanders with disposition authority over the alleged collateral misconduct, including allegations deferred by a special trial counsel, are responsible for making the “minor” or “non-minor” determination. Commanders must assess the alleged collateral misconduct against aggravating and mitigating circumstances.

(1) If the alleged collateral misconduct is non-minor, then the Safe-to-Report Policy protections DO NOT apply and the victim may be subject to disciplinary action.

(2) If the alleged collateral misconduct is deemed minor, then the Safe-to-Report policy protections DO apply and the victim shall NOT be disciplined.

f. Aggravating Circumstances. The Safe-to-Report policies of the Military Departments and NGB will identify the “aggravating circumstances” that increase the gravity of alleged collateral misconduct or its impact on good order and discipline. The existence of aggravating circumstances does not automatically result in making the alleged collateral misconduct non-minor. Aggravating circumstances include, but are not limited to, whether the alleged misconduct intentionally or unintentionally:

(1) Resulted or imminently threatened to result in failure of a specified military mission or objective;

(2) Threatened the health and safety of any person. This does NOT include acts of the victim’s own self-harm or acts of self-defense against the suspect(s) of an assault; or

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(3) *Resulted in significant damage to government property or to the personal property of others, except when such damage was the collateral result of an assault or resulted from an act of self-defense.*

g. Mitigating Circumstances. *Safe-to-Report policies of the Military Departments and NGB will identify the “mitigating circumstances” that decrease the gravity of alleged collateral misconduct, its impact on good order and discipline, and concern that the collateral misconduct may be Service discrediting. Mitigating circumstances include, but are not limited to:*

(1) *The victim’s age and military experience level.*

(2) *Whether the suspect of the underlying sexual assault is in a position of authority over the victim or a higher grade than the victim.*

(3) *Whether the suspect of the underlying sexual assault engaged in actions to stalk, harass, haze, coerce, and/or otherwise influence the victim to engage in sexual behavior.*

(4) *Whether the alleged collateral misconduct was known to command before 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.*

(5) *Whether the victim engaged in misconduct AFTER the sexual assault that may be related to symptoms of exposure to trauma; e.g., the victim engaged in underage drinking as a coping mechanism to alleviate sexual assault trauma symptoms. (See Collateral Misconduct definition below)*

h. Special Trial Counsel’s Exercise of Authority. *If the special trial counsel exercises authority over a victim’s alleged collateral misconduct, the commander is precluded from taking disciplinary action against the victim for that misconduct unless the special trial counsel defers.*

i. Commander’s Authority. *When a special trial counsel does not exercise authority over the alleged collateral misconduct or when the special trial counsel defers, the commander will determine whether the Service member victim’s alleged collateral misconduct is minor or non-minor using the analytical framework, criteria, and standards established in this Safe-to-Report Policy. Commanders shall consult with their servicing SJA in reaching these determinations.*

j. Determination That the Alleged Collateral Misconduct Is Non-Minor.

(1) *Commanders in the grade of O-6 and above who possess special court-martial convening authority retain discretion on whether to discipline and when to discipline the victim. Commanders have discretion to withhold action, if any, on alleged non-minor collateral misconduct, until final disposition of the sexual assault case. Commanders shall not be penalized for such a deferral decision.*

(2) *Commanders may take into account the trauma to the victim and respond appropriately so as to encourage reporting of sexual assault and continued victim cooperation, while also bearing in mind any potential speedy trial and statute of limitations concerns.*

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(3) If a commander believes that it would be appropriate to document alleged non-minor collateral misconduct in the interest of rehabilitation, they should consider actions that minimize or eliminate impacts on the victim's career.

k. Determination That the Alleged Collateral Misconduct Is Minor – Triggering of Safe-to-Report Policy Protections.

(1) The following are examples of collateral misconduct that generally should be treated as minor for purposes of the Safe-to-Report policy:

(a) The victim was drinking underage at the time of the sexual assault.

(b) The victim was engaged in an unprofessional relationship with the accused at the time of the sexual assault. An "unprofessional relationship" is a relationship that violated law, regulation, or policy in place at the time of the sexual assault.

(c) The victim was in violation of lawful orders establishing curfews, off-limit locations, school standards, barracks/dormitory/berthing policies, or similar matters at the time of the alleged sexual assault.

(2) The Safe to Report policy does not preclude the commander from taking non-disciplinary administrative action such as referrals to substance abuse screening, or temporarily suspending access to critical positions such as positions in the personnel reliability program (PRP).

Updated Glossary definition of Collateral Misconduct from DoDI 6495.02, vol. 1:

"Collateral misconduct in this DoDI refers to the adult sexual assault victim's alleged misconduct that might be in time, place or circumstance associated with the victim's sexual assault incident. Some reported sexual assaults involve circumstances where the victim allegedly may have engaged in some form of misconduct "at or near the time" of the sexual assault or "at or near the time" the victim reports the sexual assault to authorities. Collateral misconduct will often be discovered as a direct result of the report of sexual assault or the ensuing investigation or prosecution of the sexual assault. "