

## **Zero Tolerance to Unacceptable Sexual Behaviour: A Victim/Survivor Focused Approach**

Note: This Policy should be read in conjunction with 2022DIN01-035 'Zero Tolerance to Sexual Offences and Sexual Relationships Between Instructors and Trainees'.

### **References:**

- A. [JDP 763](#), The MOD Behaviours and Informal Complaints Resolution Policy.
- B. MOD's 'Sexual Harassment: What You Need to Know' (Sexual Harassment Booklet), dated August 2020.

### **Introduction**

1. Unacceptable sexual behaviour<sup>1</sup> seriously harms victims/survivors ('victims'), adversely impacts unit cohesion and operational effectiveness, and undermines public confidence in the Armed Forces. There is no place in the UK Armed Forces for people who display unacceptable sexual behaviour, which includes those who commit sexual offences.<sup>2</sup> Unacceptable sexual behaviour is any sexual conduct that is unlawful (i.e., a sexual offence) and/or that is inconsistent with core behaviours.<sup>34</sup> Any sexual behaviour which fails the Service Test<sup>5</sup> is unacceptable.

2. There is a presumption that anyone in the Armed Forces who is found<sup>6</sup> to have behaved in an unacceptable way that is sexual in nature, will be discharged. This policy is effective from 19 November 2022 (see paragraph 23)

### **Purpose**

3. Supporting people who are victims of unacceptable sexual behaviour must be our priority.<sup>7</sup> Defence wants to ensure that victims of unacceptable sexual behaviour trust that they can report such behaviour, that their report will be listened to, and that they will be supported throughout any investigation. Commanding Officers (COs) are to take this responsibility to victims extremely seriously and any indications that a sexual offence has taken place must be referred to the Service Police. Defence must ensure that victims have the confidence that their complaint will be investigated in an appropriate and sensitive way (see paragraph 10 below), and that appropriate action will be taken against any person displaying unacceptable behaviour.

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<sup>1</sup> Note, unacceptable sexual behaviour is referred to as 'sexual harassment' in many policies and publications. The two terms describe the same behaviour and may be used inter-changeably across policies, however, this DIN will use the term 'unacceptable sexual behaviour' as it forms part of a range of policies addressing different unacceptable behaviours.

<sup>2</sup> See 2022DIN 01-035, 'Zero Tolerance to Sexual Offences and Sexual Relationships Between Instructors and Trainees.'

<sup>3</sup> The MOD's Policy on Unacceptable Behaviours is set out in JSP 763 Part 1. Unacceptable behaviour is defined as 'any conduct that is unlawful or that is inconsistent with core behaviours'. See JSP 763, Part 1, paragraph 1.3 and 2.1.

<sup>4</sup> Core behaviours are discussed at JSP 763, Part 1, paragraph 1.3. A non-exhaustive list of examples of breaches of core behaviours are provided in JSP 763 paragraph 2.22.

<sup>5</sup> 'Have the actions or behaviour of an individual adversely impacted or are they likely to impact on the efficiency or operational effectiveness of the Service?' See JSP 763, Part 1, paragraph 2.44 – 2.45.

<sup>6</sup> The standard of proof that such a relationship took place is to the civil standard, i.e. on the balance of probabilities.

<sup>7</sup> JSP 839, 2020DIN01-065 and 2014DIN01-209.

4. Armed Forces personnel must be clear what acceptable behaviour looks like, how they are expected to behave and the standards of behaviour they can expect from people that they work with.

### **Intent – Zero Tolerance**

5. Zero tolerance means that every allegation of unacceptable sexual behaviour will be acted upon through prompt, thorough, independent and efficient investigation<sup>8</sup>. There is a presumption<sup>9</sup> that anyone in the Armed Forces who is found<sup>10</sup> to have behaved in a sexually unacceptable way, will be discharged.

### **Unacceptable Sexual Behaviour**

6. Unacceptable sexual behaviour encapsulates a wide range of behaviours; it is challenging to define, but we should all be able to recognise it, or seek advice to help us recognise it, when we come across it. The behaviours set out below are some examples of unacceptable sexual behaviour:

- Lewd or suggestive comments and/or gestures of a sexual nature (in person or electronically, including on social media). These comments or gestures can be directed to another person or be about another person.
- Spreading rumours of a sexual nature about someone.
- Asking unwanted questions of a sexual nature.
- Touching someone in a way that makes them feel uncomfortable.<sup>11</sup>
- Displaying or watching pornographic imagery where other people may see and be offended, upset or made to feel uncomfortable by it (in person or electronically, including social media).
- Sexually explicit conversation or ‘jokes’ where people may hear and be offended, upset or made to feel uncomfortable by it (in person or electronically, including social media).
- Unwanted sexual advances (including repeated and unwanted requests for dates or sexual favours). This can include inappropriate or unwanted gifts.
- Using unwanted terms of endearment (i.e. ‘babe’ or ‘stud’).
- Wolf-whistling or ‘Cat Calling’.
- Non-verbal behaviours such as intrusive staring of a sexual nature, winking, licking lips suggestively or leering.
- Comments and jokes of a personal or sexual nature (in person or electronically, including social media).
- Graffiti of lewd/unacceptable sexual comments.

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<sup>8</sup> If the behaviour is not criminal the investigation will not be by Service or Civilian Police. See paragraph 10 below re. types of investigation.

<sup>9</sup> See presumption of discharge considerations from paragraph 13 below.

<sup>10</sup> The standard of proof that such a relationship took place is to the civil standard, i.e., on the balance of probabilities. See paragraph 13 below re. evidence.

<sup>11</sup> Unwelcome touching may be a criminal offence such as sexual assault, common assault or battery. Potential criminal offences should be reported to the police.

- Inappropriate nudity (circumstance dependant), i.e. naked bar/naked bus. Includes the removal of clothing in a social/mess setting.
- Sharing sexual/sexualised images via social media/messaging service/airdrop.
- Rating/grading/commenting on people based on their appearance in a sexual way.
- Displaying evidence of 'sexual conquests' in communal areas.
- Unit 'bucket lists' requiring individuals to complete sexualised/ sexually inappropriate challenges.
- Sexual relationships that fail the 'Service Test' (see paragraphs 9-11 below).

7. This list is not exhaustive, and it is for those dealing with the behaviour to determine whether it was sexual and unacceptable. Legal advice must be sought to determine whether an offence may have been committed, but the following considerations may help to decide whether the behaviour reported was 'sexual and unacceptable':

- How did the victim perceive the behaviour? Was it unwanted?
- Would a reasonable person consider that the behaviour was sexual and unacceptable?
- Was the sexual behaviour inconsistent with core values?
- Did the sexual behaviour fail the Service Test?
- Did the behaviour have the purpose or effect of violating the victim's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment?
- What were the circumstances of the behaviour?
- Was the victim treated less favourably for rejecting or submitting to the unwanted sexual behaviour?
- Were the language or gestures used sexual?
- Were sexual body parts, or gestures mimicking sexual body parts, involved in the behaviour?
- Was there a repetition of the behaviour? It is not necessary for behaviour to be repeated to be captured by this policy, but it makes it less likely that the person displaying the behaviour did not understand or intend for it to be interpreted as sexual.
- Where pornographic images were viewed, was it reasonable to expect that others might see those images?
- Was there an attempt on the part of the person displaying the behaviour to intimidate, bully, embarrass or cajole the victim?
- Is any alternative interpretation of, or explanation about, the behaviour credible?

## **Consent**

8. Many examples of unacceptable sexual behaviour are unacceptable because the person affected by that behaviour does not consent. Consent means that a person has given their permission for or agreed to that behaviour and has the freedom and capacity to make that choice. When a person does not consent or is unable to consent, then it is likely that the behaviour is unacceptable. The fact a person does not object does not necessarily mean they

consent, as they may be embarrassed, intimidated or feel under pressure not to say anything. If consent is given it must be genuine, which means they should not be under undue pressure or be coerced into giving consent. The context is also important as factors such as differences in rank or relative power, age or experience and peer pressure will be relevant as to whether consent has been given and is genuine. It should be remembered that if a person does not consent a criminal offence may also have been committed, however some types of behaviour, such as sexual activity with a child (i.e., someone under 16), will always be an offence because a child is unable to give consent, regardless of the circumstances.

### **Consensual Sexual Relationships that Fail the Service Test**

9. Consensual sexual relationships that would fail the Service Test (other than Instructor/Trainee sexual relationships) are not captured by this policy as the Services already have policies to address them, enabling appropriate levels of administrative action to be taken depending on the seriousness of the case and the adverse impact on efficiency or operational effectiveness. Sexual relationships between instructors and trainees will result in mandatory discharge of the instructor and are addressed in 2022DIN01-0135. A new Service offence is being developed which will reinforce this policy.

### **Investigating Unacceptable Sexual Behaviour**

10. Complaints about unacceptable sexual behaviour can be submitted as a formal Service Complaint<sup>12</sup> or through new single Service arrangements which are currently being developed so that reports of unacceptable sexual behaviour can be investigated and handled independently.<sup>13</sup> If the complaint is submitted as a Service Complaint, changes to the way in which sexual Service Complaints are handled means that the investigation will be independent of the chain of command.<sup>14</sup> If the victim raises an issue but chooses not to make a formal 'Service Complaint', the matter will be investigated in line with single Service arrangements currently being developed. In both instances, where it is found that unacceptable sexual behaviour took place (see paragraph 13 below), this policy will apply and there will be a presumption of discharge.

### **Evidence of Unacceptable Sexual Behaviour**

11. The standard of proof that must be met to determine if unacceptable sexual behaviour took place is on the balance of probabilities, which is the administrative standard and is lower than the criminal standard which is beyond reasonable doubt. For that reason, the following situations may provide sufficient evidence of unacceptable sexual behaviour to engage this policy:

- Potential sexual offences initially reported to the police which are discontinued during investigation, or which having been considered by the Service Prosecuting Authority (SPA) / Crown Prosecution Service (CPS) (and

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<sup>12</sup> See JSP 831 re. matters can be complained about and the time limit for submitting a Service Complaint.

<sup>13</sup> To be in place in November 2022.

<sup>14</sup> This is subject to ongoing work and JSP 831 will be updated shortly to reflect the change.

Scotland/N. Ireland equivalents) are not prosecuted as there is not considered to be a Realistic Prospect of Conviction of a criminal offence.

- Potential sexual offences prosecuted at Court Martial or in the civilian criminal justice system, for which the Defendant is found not guilty (beyond reasonable doubt) of a criminal offence.<sup>15</sup>

12. In these situations, regardless of the lack of prosecution or finding of not guilty, there may still be evidence of unacceptable sexual behaviour (including a subsequent civil conviction), and this policy must be applied to consider whether the presumption of discharge is triggered.

#### Scenario

An officer has been charged with sexual assault following behaviour which included touching a number of people sexually, without their permission, whilst on a night out. Some of the people touched in this way are work colleagues who have complained to their Chain of Command, and CCTV has been provided to the Service Police which clearly shows the behaviour complained of.

Whilst the investigation and prosecution are ongoing, it is considered that the evidence against the officer is so overwhelming that it passes the evidential threshold (i.e. balance of probabilities) for administrative discharge to be sought. Legal advice has been sought to ensure that this is the case.

### Presumption of Discharge – Considerations

13. When proven (see paragraph 11 above), unacceptable sexual behaviour will trigger a presumption of discharge, however, the individual circumstances of every case must be considered before a decision to discharge is confirmed. There may be mitigating features in a certain case meaning that the presumption should not apply. Conversely, the behaviour may be so serious that the mitigating features are irrelevant or there may be aggravating features which indicate that discharge is the correct action to take. The following, non-exhaustive, list of mitigating and aggravating features should be considered when deciding whether the presumption of discharge applies:

#### Mitigating Features

- Low level of harm to victim
- Low level of culpability
- Youth or inexperience of the perpetrator. For example, a person under 18 who is still in Phase 1 training.
- Positive engagement of the perpetrator in the investigation process.
- Perpetrator clearly understands the seriousness of their behaviour, indicates genuine remorse and is capable of changing their behaviour.

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<sup>15</sup> Noting anecdotal accounts of criminal matters in which a Defendant is found not guilty, yet the behaviour evidenced at trial would have failed the Service Test.

- Perpetrator's willingness to engage with training in order to learn about appropriate behaviours.

#### Aggravating Features

- Greater harm to victim
- Higher culpability
- Age or seniority of the perpetrator.
- Impact on unit cohesion. Retaining a person convicted of a sexual offence or known to have behaved in an unacceptable (sexual) manner can have a detrimental impact on teamwork, working relationships and morale.
- Operational effectiveness is undermined
- Perpetrator's lack of appreciation of seriousness of behaviour, lack of remorse and an unwillingness to change behaviour.
- Perpetrator's unwillingness to engage in training to learn about appropriate behaviours.
- Behaviour was of a kind that was problematic within a unit and specific action had already been taken to address it, including warnings to personnel, yet the perpetrator continued to behave in that way.

14. There is a presumption that anyone in the Armed Forces who is found to have behaved in an unacceptable way that is sexual in nature, will be discharged. If, exceptionally, someone is retained but they go on to behave in a sexually unacceptable way a second time, their discharge is mandatory.

#### Scenario

A Junior Rating/NCO who has recently joined their first unit is discussing sexual relationships in the workplace. This is making colleagues feel uncomfortable and one raises it with their line manager. On talking to the Junior Rating/NCO it is clear that they thought this kind of behaviour was acceptable in the workplace. They are shocked and embarrassed to discover that it is not and that colleagues felt uncomfortable.

This is an example of where the threshold for a presumption of discharge may not have been met. The individual's age and seniority are relevant here.

Training and MAA such as warnings is likely to have a positive reformatory effect on behaviour.

#### **Application**

15. This policy applies to UK Armed Forces personnel, whether Regular or Reservist, no matter who the victim or affected person(s) are. See paragraph 26 for relevant MOD Civilian Employee policy.

16. This policy draws together aspects of the single Services (sS) policy and sets out what Service personnel can expect to happen if they behave in a sexually unacceptable way.

Therefore, whilst this policy is not to be applied retrospectively<sup>16</sup>, there is nothing to prevent the Services considering discharge of Service personnel who displayed unacceptable sexual behaviour prior to the publication of this policy, if the action taken is in line with pre-existing sS policy.

## Process

17. Whenever sexually unacceptable behaviour is found to have taken place (following investigation, as set out in paragraph 10 above), the CO must apply this policy to the situation to determine whether the presumption of discharge is met. The CO must then seek 2\* approval for the sanction to be awarded, whether that is discharge or whether it is considered that mitigating features apply to the case so that a lesser sanction is appropriate.

18. Discharge of any individual is a Full Command issue and should be conducted in accordance with sS administrative procedures.

19. Discharge statistics for unacceptable sexual behaviour must be submitted to Ministers on a 6-monthly basis. In support of the submission, each Service will provide an overview of the themes and lessons learned from the cases, along with details of any specific action being taken to address those themes and lessons. This will enable monitoring to ensure consistent application of this policy across Defence, allow analysis of the data and enable holding to account.<sup>17</sup>

## Addressing Unacceptable Sexual Behaviour

‘We all have a role to play in preventing unacceptable behaviour. We must intervene when we see behaviours falling short of our high standards and values. Everyone in Defence needs to be confident that we will respond if they have cause to raise a complaint.’

JSP 763, Foreword

20. Unacceptable sexual behaviour of any kind should be challenged and reported; Reference B, the MOD’s ‘Sexual Harassment: What You Need to Know’ (Sexual Harassment Booklet) provides a number of sources of support including (but not limited to) the following:

- Speak to your line manager or Chain of Command
- Speak to your local D&I Adviser or Practitioner, details available locally
- Call the anonymous whole force Bullying, Harassment, and Discrimination Helpline on 0800 783 0334
- Confide in a colleague or staff network
- Speak to a medical professional if your health is affected. You may also wish to consult with a local Sexual Assault Referral Centre.

<sup>16</sup> i.e., The behaviour took place before the implementation date on 19 November 2022.

<sup>17</sup> MOD reporting process to be published separately. Retention of data must be in line with appropriate data retention/ protection laws and policies, and the Rehabilitation of Offenders Act 1974 (see paragraph 15).

21. The guidance at Reference B should also be considered by anyone who has unacceptable sexual behaviour reported to them. COs must remember their obligation to report potential sexual offences to the Service Police.<sup>18</sup>

### **Implications of Discharge**

22. Personnel discharged in accordance with this policy are unlikely to be considered suitable to re-join the Armed Forces. Eligibility to re-join will depend on the sS Discharge category deemed appropriate by that Service.

### **Implementation of the Policy**

23. Following the introduction of this policy on 19 July 2022, a 4-month period of training will commence to ensure that all Armed Forces personnel are made aware of and understand the policy. New sS arrangements will also be developed for a process to manage administrative action investigations for unacceptable sexual behaviour. The policy will then come into force on 19 November 2022.

24. This policy overlaps with pre-existing policy in JSP 763 which addresses sexual harassment. JSP 763 remains extant but is built upon by this Zero Tolerance policy to give direction about the action to be taken to address unacceptable sexual behaviour. The intent is that JSP 763 will be updated to incorporate the Zero Tolerance policies.

### **Application to MOD Civilian Employees**

25. This policy does not specifically apply to MOD Civilian Employees because of differences in administrative and disciplinary procedures. Nevertheless, the Civil Service has zero tolerance for sexual misconduct.<sup>19</sup>

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<sup>18</sup> Victims retain the right to report offences with a Service connection to the Service or Civilian Police.

<sup>19</sup> For MOD Main Civilian Employees see [Misconduct and Discipline Procedure](#). For DE&S Civilian Employees see the HR portal. For RFA Personnel see [Misconduct - Royal Fleet Auxiliary](#).