

SENATE BILL REPORT

ESHB 2318

As Reported by Senate Committee On:
Law & Justice, February 27, 2020

Title: An act relating to advancing criminal investigatory practices.

Brief Description: Advancing criminal investigatory practices.

Sponsors: House Committee on Public Safety (originally sponsored by Representatives Orwall, Lovick, Slatter, Morgan, Wylie, Mosbrucker and Pollet).

Brief History: Passed House: 2/13/20, 92-4.

Committee Activity: Law & Justice: 2/20/20, 2/27/20 [DPA].

Brief Summary of Amended Bill

- Requires agencies to preserve crime investigation records related to deoxyribonucleic acid (DNA) work product.
- Defines sexual assault kit (SAK) to include all evidence collected during a sexual assault medical forensic examination.
- Establishes requirements for storing and preserving unreported SAKs.
- Revises required DNA sample collecting procedures for convicted offenders who are not immediately taken into custody.
- Requires the Criminal Justice Training Commission to collaborate with trauma-informed and victim-centered training experts and others to propose a case review program designed to improve outcomes in sexual assault investigations.

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: Do pass as amended.

Signed by Senators Pedersen, Chair; Dhingra, Vice Chair; Padden, Ranking Member; Holy, Kuderer, Salomon and Wilson, L..

Staff: Melissa Burke-Cain (786-7755)

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Background: DNA and other biological evidence may be collected from crime scenes, victims, and potential suspects during criminal investigations. DNA uses molecular genetic methods to enable individuals to be identified from biological fluids or samples because of unique patterns in an individual's DNA. DNA evidence may be used to identify suspects, reconstruct crimes, connect serial cases, and exonerate wrongfully accused or convicted persons.

The Washington State Patrol (WSP) Crime Laboratory analyzes forensic DNA from local law enforcement agencies, assists law enforcement and prosecutors to prepare and use DNA evidence in court, and provides expert court testimony on DNA evidence issues. WSP also maintains the state Combined DNA Index System (CODIS), which helps identify criminal suspects, human remains, and missing persons.

DNA Work Product. In a felony case, a sentencing court may order biological material or other evidence to be preserved. The court must specify which samples must be retained and for how long. In the absence of a court order, preservation practices vary across the state.

In 2015, the state set requirements for preserving DNA work product for certain types of criminal cases. DNA work product includes: product generated during scientific analysis of material, with some exceptions; and any material catalogued on a microscope slide, swab, in a sample tube, cutting, DNA extract, or other retention methods used to isolate potential biological evidence collected as part of a law enforcement investigation. If prepared for scientific analysis, it is DNA work product whether or not it is analyzed and derived from the contents of a SAK, blood, semen, hair, saliva, skin tissue, fingerprints, bones, teeth, or any other identifiable human biological material or physical evidence.

Agencies must preserve DNA work product collected in any felony case initially charged as a violent or sex offense. The mandated period for preservation depends upon whether a defendant has been identified, charged, and convicted, and it varies from the length of a sentence to 99 years.

Sexual Assault Kits. A sexual assault victim may undergo a forensic examination to collect evidence left behind during the assault. The doctor or nurse conducting the examination preserves the evidence using a SAK—also called a rape kit. Evidence from the SAK may be used during an investigation and subsequent criminal prosecution. Recently, the state established requirements for preserving, tracking, and testing SAKs. State law does not define the term SAK or specify what the SAK must include to meet current requirements.

A law enforcement agency must request testing of a SAK within 30 days of receiving it. The WSP Crime Laboratory tests the SAK. The victim must consent to testing unless the SAK was collected from an un-emancipated minor. Testing is mandatory for SAKs collected on or after July 24, 2015. Law enforcement agencies were required to request testing of previously unsubmitted SAKs collected before July 24, 2015, by October 1, 2019, and WSP must complete testing by December 1, 2021. Beginning May 1, 2022, WSP must complete testing of a SAK within 45 days of receiving the request.

Sexual Assault Kit Tracking and Unreported Sexual Assault Kits. WSP operates the statewide SAK tracking system to follow the location and status of all SAKs from the collection point and throughout the criminal justice process. Local law enforcement agencies, prosecutors, hospitals, and WSP must participate in the tracking system. Sexual assault survivors may track their SAKs anonymously. An "unreported SAK" means a SAK collected from an adult or emancipated minor victim who consents to the SAK's collection but who has not reported the alleged crime to law enforcement.

In 2019, the state established temporary storage and preservation requirements for unreported SAKs. Unreported SAKs collected prior to April 23, 2019, must be stored and preserved by the entity responsible for collecting the SAK. Unreported SAKs collected on or after April 23, 2019, must be stored and preserved by the WSP Crime Laboratory. These requirements expire June 30, 2020.

Offender DNA Combined DNA Index System Entry. CODIS stands for Combined DNA Index System enabling federal, state, and local forensic laboratories to exchange and compare DNA profiles electronically. CODIS links serial violent crimes to each other and to known offenders. State law requires certain convicted offenders to provide a biological sample for entry of their DNA profile into the CODIS offender index. The DNA profile is searched against other indexes and may result in investigative leads when a DNA profile matches another profile in the index, including profiles generated from crime scene evidence. If an offender is sentenced to confinement in a state or local corrections or rehabilitative facility, the facility collects the sample. If the offender will not serve any term of confinement, the court must order the person to provide a sample at the local police or sheriff's office by a specific date. A person who willfully refuses to provide a DNA sample commits a gross misdemeanor.

Summary of Amended Bill: DNA work product includes the materials collected by a forensic nurse. Law enforcement agencies must preserve criminal investigation records related to DNA work product. Screening byproducts are exempt from requirements to preserve DNA work product. A screening byproduct is a product or waste generated during examination of DNA evidence, or the screening process of DNA evidence, that is not intended for long-term storage. A "sexual assault kit" for the purposes of DNA work product and preserving, testing, and tracking SAKs, includes all evidence collected during a sexual assault medical forensic examination.

The statewide SAK tracking system must include information as to whether a particular SAK contains materials collected for forensic toxicological analysis. The requirements for mandatory testing of SAKs does not include toxicological analysis. Law enforcement agencies retain discretion to determine whether to request toxicological analysis.

Beginning on June 30, 2020, the local law enforcement agency must transport unreported SAKs from the the collecting entity to the agency. The local law enforcement agency must store and preserve the unreported SAKs for 20 years from its collection date. Law enforcement agencies may arrange for storage and preservation of found property with another government department on its behalf, except for specified items. Alternate storage for found property must meet the same storage and retention requirements as those that law enforcement agency would have to meet. The collecting entity and law enforcement

agencies must consult to determine which agency would have jurisdiction to investigate related criminal allegations if they were reported, and therefore would be responsible for transporting and storing the unreported SAK. By January 1, 2021, unreported SAKs currently stored by WSP must be transported to the applicable local law enforcement agency.

A convicted offender who will not be taken into custody immediately and must provide a biological sample for CODIS, must provide the sample before leaving the court's presence if the local police or sheriff's department has a protocol for courtroom sample collection. Otherwise, the court must order the person to report to the local police or sheriff's office to provide the sample.

Subject to a specific appropriation, the Criminal Justice Training Commission (CJTC) must develop a proposal for a case review program designed to improve outcomes in sexual assault investigations by improving training and investigation practices. The CJTC must consult with specified entities and must submit a report with its proposal to the Governor and Legislature by December 1, 2020.

EFFECT OF LAW & JUSTICE COMMITTEE AMENDMENT(S):

- Changes requirements for storage of found property to allow law enforcement agencies to arrange storage of found property with another government department, except for specified items that must be stored by law enforcement such as cash, credit cards, legal documents, firearms, and evidence in an on-going investigation or case.
- Requires alternate storage for found property to meet the same requirements that law enforcement would have to meet for storage and retention.
- Adds review of a random pull of cases for the CJTC case review program.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: The bill contains several effective dates. Please refer to the bill.

Staff Summary of Public Testimony on Engrossed Substitute House Bill: *The committee recommended a different version of the bill than what was heard.* PRO: Out of 1180 DNA samples analyzed, 420 matched to a sample already in the CODIS index. This bill is a pathway to justice for sexual assault survivors. We have instituted a moratorium on destroying unreported SAK kits. Unreported kits are not always held in a way that preserves chain of custody. Under the bill, law enforcement agencies hold the unreported kits preserving the chain of custody. There are storage issues; there is some grant funding available for small law enforcement jurisdictions to help provide refrigerated units. The best situation is keeping all the physical evidence in one location by identifying it in the WSP's system. We have heard heartbreaking testimony over many years telling us that Washington State could be doing a better job for these survivors of sexual assault. The multisystem approach to case review in this proposal is a positive step. There are many, many persons who have been ordered by the courts to provide a DNA sample because of the crimes they

have committed. They are ordered to go to the police department or sheriff's office to provide the sample, but they just walk away. The provision for in-court samples helps close that gap. Cold case review is very important and a database that has all of the samples the law requires is much more robust and gives a much better chance of a CODIS hit. Hopefully someday we will be the state that has a zero backlog of SAK kits. State policy helps show the survivors that the state is listening to their concerns and believing them. This bill extends the good work from the past. There are many reasons why a survivor would have their kit prepared but not make a criminal complaint—fear of reprisal, the need to finish school before taking on the task of going through the justice system process, among many other reasons. Even if they do not report the crime right away, their evidence will be preserved. Law enforcement agencies routinely store lost property, for example, bicycles. Bicycles should not be prioritized over rape kits. It is important for survivors to know that the evidence in the SAK kit is being properly preserved in a way that it would stand up in court. Clothing and blood samples are not currently identified as part of the SAK kit, but this bill clarifies what a SAK kit must include. Right now, evidence from the same case may be stored in multiple locations. Hospitals are running out of storage space for the unreported kits. We support storing the evidence in local law enforcement agencies because they know how to maintain chain of custody. In the future we may consider storing at local agencies during active investigations, but having a centralized storage facility for longer-term storage. The case review program at the CJTC will build on the training already conducted. Victim engagement is vital to a successful investigation and prosecution where the perpetrators will be held accountable. It is very important to preserve the investigation reports preserved for the same length of time as the SAK results, especially for cold cases. Right now the reports are not required to be preserved under the law enforcement agency's retention schedule. So that future investigators know who was questioned, the circumstances, and it is a natural expectation to keep them together. After the forensic examination, which takes hours, the survivor just wants to go home, get a shower, and process what has happened to them. They may not have the ability to talk to the police for days or even months after the assault. It gives the survivor security to know their evidence is safeguarded and could be available in the future. Only a portion of the SAK kit needs to be stored under refrigeration—urine and blood samples.

CON: We support the services and additional support for survivors; our issue is the storage of unreported kits. We oppose local law enforcement having to store them for logistics reasons and philosophical reasons. Many small law enforcement agencies have a limited storage capacity, especially limited refrigerated storage. In addition, we oppose law enforcement holding evidence that is not associated with a criminal investigation.

Persons Testifying: PRO: Representative Tina Orwall, Prime Sponsor; Andrea Piper-Wentland, King County Sexual Assault Resource Center; Leah Griffin, Sexual Assault Forensic Examination Working Group; Lauren McDonald, WSHA; Jennifer Wallace, Criminal Justice Training Commission; Kate Hemann, Attorney General's Office.

CON: James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: No one.