

SENATE BILL REPORT

ESSB 5576

As Passed Senate, February 28, 2023

Title: An act relating to sexual assault procedures.

Brief Description: Concerning sexual assault procedures.

Sponsors: Senate Committee on Law & Justice (originally sponsored by Senators Dhingra, Kuderer, Lovelett, Nobles, Saldaña, Trudeau, Valdez and Wilson, C.).

Brief History:

Committee Activity: Law & Justice: 1/30/23, 2/02/23 [DPS].

Floor Activity: Passed Senate: 2/28/23, 47-0.

Brief Summary of Engrossed First Substitute Bill

- Requires jail and prison facilities to collect biological samples before a convicted person required to provide a sample is released from confinement, and establishes procedures to collect biological samples if such samples are not collected prior to a person's release from confinement.
- Requires persons required to provide a biological sample who will not be confined in a jail or prison facility, to be administratively booked at a city or county jail facility for the sole purpose of providing a biological sample.
- Requires sentencing courts to create and implement biological sample collection protocols, and to order biological samples at the time of sentencing.
- Limits the ability of a defendant accused of sex offenses to introduce evidence of a victim's past sexual behavior on a victim's social media account to attack the victim's credibility, or to prove the victim's consent.

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

SENATE COMMITTEE ON LAW & JUSTICE

Majority Report: That Substitute Senate Bill No. 5576 be substituted therefor, and the substitute bill do pass.

Signed by Senators Dhingra, Chair; Trudeau, Vice Chair; Padden, Ranking Member; Kuderer, McCune, Pedersen, Salomon, Torres, Valdez, Wagoner and Wilson, L..

Staff: Ryan Giannini (786-7285)

Background: Biological Samples. The Washington State Patrol (WSP) operates and maintains a deoxyribonucleic acid (DNA) identification system. The purpose of the system is to aid in criminal investigations, and to identify human remains or missing persons. The Forensic Laboratory Services Bureau of the WSP is responsible for testing biological samples for inclusion in the DNA database.

Biological samples must be collected from any person who has been convicted of a felony, any person who is required to register as a sex offender or kidnapping offender, or any person convicted of the following list of specified misdemeanors or gross misdemeanors:

- assault in the fourth degree where domestic violence was pleaded and proven;
- assault in the fourth degree with sexual motivation;
- communication with a minor for immoral purposes;
- custodial sexual misconduct in the second degree;
- failure to register as a sex or kidnapping person;
- harassment;
- patronizing a prostitute;
- sexual misconduct with a minor in the second degree;
- stalking;
- indecent exposure; and
- violation of a sexual assault protection order.

Collection of Biological Samples. County and city jails are responsible for collecting biological samples for DNA analysis from persons incarcerated in their facilities. The Department of Corrections (DOC) and the Department of Children, Youth, and Families (DCYF) are responsible for collecting biological samples for DNA analysis from persons incarcerated in a state facility. Local police departments and sheriff's offices are responsible for collecting biological samples for DNA analysis from registered sex offenders and kidnapping offenders and convicted persons who do not serve any term of confinement.

Refusal to Provide a Sample. A person who willfully refuses to comply with a legal request for a DNA sample is guilty of the crime of refusal to provide DNA. Refusal to provide DNA is a gross misdemeanor.

Evidence of Victim's Past Sexual History. In a prosecution for a sex offense, evidence of a victim's past sexual behavior is generally inadmissible to attack the credibility of the victim

and to prove the victim's consent. When the perpetrator and victim engaged in sexual intercourse with each other in the past, and when the behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense. In a prosecution for the crime of rape, trafficking, or an offense related to commercial sexual abuse of a minor, such evidence is admissible on the issue of consent if certain procedures are followed, except when prohibited in the underlying criminal offense.

Summary of Engrossed First Substitute Bill: Collection of Biological Samples. County and city jails, DOC, and DCYF are responsible for collecting biological samples for DNA analysis from persons required to provide a biological sample who are incarcerated in their facilities. If the biological sample is not collected prior to the person's release from confinement, the responsible city and county jail facility, DOC facility, or DCYF facility must notify the sentencing court within three business days of the person's release. The sentencing court must schedule a compliance hearing within ten days of receiving a notice that a person owing a biological sample was released from confinement. The local police department or sheriff's office must serve the person owing a biological sample with notice of the compliance hearing and to file proof of service with the sentencing court. A representative of the local police department or sheriff's office must attend the compliance hearing and obtain the person's biological sample. Attorneys' fees and court costs associated with scheduling and attending the compliance hearing must be paid for by the facility that failed to collect the person's biological sample at the time of the person's confinement.

A sentencing court is no longer required to order a convicted person required to provide a biological sample, who will not serve a term of confinement, to report to a local police department or sheriff's office to provide a biological sample. Instead, a sentencing court must order a convicted person to be administratively booked at a city or county jail for the sole purpose of providing a biological sample if the convicted person will not serve any term of confinement.

The sentencing court must create and implement a biological sample collection protocol. The sentencing court shall order the biological samples at the time of sentencing. If the biological sample is not collected at the time of sentencing, then the sample must be collected by county and city jails, DOC, DCYF, and local police departments and sheriff's offices. The sentencing court must schedule a compliance hearing within ten days of the sentence to ensure that the biological sample has been collected.

Evidence of a Victim's Past Sexual History. Inadmissible evidence of a victim's past sexual behavior includes a victim's social media account, including any text, image, video, or picture, which depict sexual content, history, activity, or communications.

Appropriation: None.

Fiscal Note: Available.

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

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony on Original Bill: *The committee recommended a different version of the bill than what was heard.* PRO: When courts order the collection of DNA from convicted persons required to provide DNA, there is no mechanism to ensure that collection has occurred. There is a lot of legally owed DNA that is not collected. The process in this bill tries to accommodate rural and urban areas. This bill sets up a system to have DNA collected from incarcerated people at the jail, and ensures that DNA is collected from people not confined in a jail. There will be compliance hearings to ensure the DNA is collected. For those not booked in jail, this ensures the court receives confirmation that the court order has been followed. In some courtrooms, law enforcement or someone else is available to collect lawfully owed DNA. This bill accommodates all courts, and ensures that all legally owed DNA is collected.

OTHER: Courts should have a protocol to ensure that lawfully owed DNA is collected. There are concerns as to who should collect the sample. Language in the bill directing court staff to obtain biological samples should be changed to say that court staff must order a biological sample be obtained. Court staff are not trained to take the sample of a person. The collection of lawfully owed DNA seem reasonable and required in this case. There are some concerns with data collection when it comes to privacy, but this issue may not come into play here.

Persons Testifying: PRO: Senator Manka Dhingra, Prime Sponsor.

OTHER: Eric Pratt, I, America; Melissa Johnson, District & Municipal Court Judges Association.

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