

HOUSE BILL REPORT

HB 1564

As Amended by the Senate

Title: An act relating to prohibiting the sale of over-the-counter sexual assault kits.

Brief Description: Prohibiting the sale of over-the-counter sexual assault kits.

Sponsors: Representatives Mosbrucker, Orwall, Chambers, Graham, Rude and Rule.

Brief History:

Committee Activity:

Community Safety, Justice, & Reentry: 2/7/23, 2/16/23 [DP].

Floor Activity:

Passed House: 2/27/23, 96-0.

Senate Amended.

Passed Senate: 4/7/23, 42-7.

Brief Summary of Bill

- Prohibits the sale, offering for sale, or provision to individuals of "over-the-counter sexual assault kits."
- Allows for enforcement under the Consumer Protection Act.

HOUSE COMMITTEE ON COMMUNITY SAFETY, JUSTICE, & REENTRY

Majority Report: Do pass. Signed by 9 members: Representatives Goodman, Chair; Simmons, Vice Chair; Mosbrucker, Ranking Minority Member; Griffey, Assistant Ranking Minority Member; Davis, Farivar, Fosse, Graham and Ramos.

Staff: Michelle Rusk (786-7153).

Background:

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.

Sexual Assault Kits.

After a person has been the victim of a sexual assault, the person may undergo a forensic examination for the purpose of collecting evidence left behind during the assault. The doctor or nurse conducting the examination preserves the evidence using a sexual assault kit (SAK), also commonly referred to as a rape kit. After the examination, evidence from and custody of an SAK may be transferred to a law enforcement agency to be used during an investigation and subsequent criminal prosecution.

The state has established mandatory testing requirements for SAKs. A law enforcement agency is required to submit an SAK to the Washington State Patrol (WSP) Crime Laboratory for testing within 30 days of receipt, provided that the victim has consented to the testing. Consent is not a condition of submission if the SAK was collected from a non-emancipated minor. The WSP is also required to operate a statewide sexual assault kit tracking system, which must:

- track the location and status of SAKs from the point of collection and then throughout the criminal justice process;
- allow participants in the system to update and track the status and location of SAKs;
- allow victims of sexual assault to anonymously track or receive updates regarding the status of their SAKs; and
- use electronic technology or technologies that allow continuous access.

Payment for Sexual Assault Forensic Examinations.

State law prohibits hospitals and other emergency medical facilities from billing or charging a victim, directly or indirectly, for the costs of a sexual assault forensic examination. Hospitals and other emergency medical facilities may seek payment from the state through the Crime Victim Compensation Program.

Consumer Protection Act.

The Consumer Protection Act (CPA) prohibits unfair or deceptive acts or practices in trade or commerce; the formation of contracts, combinations, and conspiracies in restraint of trade or commerce; and monopolies. Persons injured by violations of the CPA may bring a civil action to enjoin further violations and recover actual damages, costs, and attorney's fees.

The Attorney General may bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to enjoin violations of the CPA and obtain restitution. The prevailing party may, in the discretion of the court, recover costs and attorney's fees. The Attorney General may also seek civil penalties up to the statutorily authorized maximums against any person who violates the CPA. Civil penalties are paid to the state.

Summary of Bill:

Prohibition.

A person may not sell, offer for sale, or provide to an individual an over-the-counter sexual assault kit. An over-the-counter sexual assault kit is a sexual assault kit or rape kit that:

- is marketed or presented as over-the-counter, at-home, or self-collected;
- is offered for sale or as a sample to members of the public; and
- purports to allow an individual to independently collect evidence of a sexual assault outside of a collecting facility.

An over-the-counter sexual assault kit does not include a sexual assault kit sold or provided to law enforcement or medical personnel or a collecting facility.

A violation of the prohibition on selling, offering for sale, or providing an individual an over-the-counter sexual assault kit is a *per se* violation of the Consumer Protection Act.

EFFECT OF SENATE AMENDMENT(S):

The Senate striking amendment:

- removes the definition for “over-the-counter sexual assault kit” and creates definitions for “health care facility,” “health care provider,” “person,” and “sexual assault kit”; and
- prohibits a person from selling, offering for sale, or otherwise making available a sexual assault kit:
 1. marketed or otherwise presented as over-the-counter, at-home, or self-collected, or in any manner that indicates the sexual assault kit may be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider; or
 2. if the person intends, knows, or reasonably should know that the sexual assault kit will be used for the collection of evidence of sexual assault other than by law enforcement or a health care provider.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) Opposition to this bill is misguided, because research shows that at-home sexual assault kits (at-home kit) are not a path to justice. Starting in 2014, we wanted to create a trauma-informed system that would support survivors in this state. Legislation has required sexual assault kits to be tested, and these at-home kits are moving in the wrong direction. This unproven product gives survivors false hope, and the state is trying to build trust back with survivors that there is a path to justice. The company has been in business

over five years and there is not one successful prosecution.

There are acceptable standards for evidence collection and handling. Chain of custody is very important. A sexual assault kit (SAK) is a very detailed kit with evidence stickers, a tracking system, and once it is used it is sealed and bar-coded so it not only gets a case to prosecution, but a survivor can track where the SAK is the entire time. At-home kits are ineligible for testing at Washington crime labs, and inadmissible due to spoliation and inability to cross-examine. At-home kits are do-it-yourself and do not have a medical assessment or exam included. Rape is violent, and there are usually physical injuries. A sexual assault nurse examiner (SANE) is trained to make sure forensic evidence is collected in a way that allows prosecution, provides you with legal support, and makes sure you are connected to a rape crisis counselor. Despite claims otherwise, at-home kits cannot substitute for crucial evidence from sexual assault exams.

There is no good reason to make a survivor of sexual assault pay to unknowingly prevent justice in their case. Washington does not charge people to be raped, and victims do not have to pay for an exam. Why would someone profit off of an at-home kit that doesn't get to prosecution?

The information collected by at-home kits cannot be uploaded into the national database used for matching DNA to suspects. How is DNA evidence from these at-home kits going to be used to get serial rapists off the street? Additionally, private companies do not have the same obligations to keep patient information confidential, the way the Health Insurance Portability and Accountability Act (HIPAA) requires.

Over 10 states have provided the company selling these at-home kits with some type of cease and desist letter or a warning to get the product out of their state. The problem these at-home kits are trying to solve is real. There is a need for more access to SANEs, including in Eastern Washington. Additionally, more funding is needed to ensure there is sufficient access to resources. But it was never a thought to reach out and bring in \$10 million in venture capital to sell a product that limits the options for survivors to pursue justice.

(Opposed) Leda Health (Leda) is for survivors by survivors, founded and staffed primarily by sexual assault survivors. It is a business-to-business and business-to-government operation that does not sell directly to consumers or victims. We present an additive option for systems to improve accessibility for survivors; as we know 70 percent of sexual assault survivors do not engage with the current options. We encourage survivors to seek comprehensive care at a hospital but we recognize it is not the reality or a reliable option for most survivors.

Leda offers a 24/7 virtual care team staffed by SANEs, emergency contraception, sexually transmitted infection testing, toxicology screening, and educational programming. Our at-home kits are designed to protect chain of custody, and create additional evidence to be

used at trial, and are HIPAA-compliant. As a venture-backed product, it can respond to feedback.

There is a massive misinformation situation around this bill. This is one of those legal concepts that is so simple it is easy to make it complicated. Survivors bring their own evidence to sexual assault prosecutions every day. What this comes down to is: Washington judges are required to presume evidence is admissible. Additionally, evidence from at-home kits are CODIS-eligible if the process is followed the way Leda outlines.

Persons Testifying: (In support) Representative Gina Mosbrucker, prime sponsor; Representative Tina Orwall; Quinn Dalan, Washington State Women's Commission; Mary Robnett, Pierce County Prosecutor; Leah Griffin, Sexual Assault Forensic Examination Working Group; James McMahan, Washington Association of Sheriffs and Police Chiefs; Annette Simpson, Harborview Abuse and Trauma Center; Heidi Anderson, Washington State Attorney General's Office; and Riddhi Mukhopadhyay, Sexual Violence Law Center.

(Opposed) Ilana Turko, Abby Clawson, Krystyn Tandy, Liesel Vaidya, and Madison Campbell, Leda Health.

Persons Signed In To Testify But Not Testifying: Alex Davidson, The Associated Students of the University of Washington; Maddie Menser, University of Washington Greeks Take Action; Reese Browsers; Shannon Bailie, University of Washington LiveWell; Katie Kolan, Washington State Hospital Association; Beth Sheeran; Melissa Johnson, Washington State Nurses Association; Debra Carlson; Kenzie Davis; Elsa Sjunneson; Andrea Cruz; Hannah Chamberlin and Paris Crawford, Leda Health; Hannah Chamberlin; Alexandra Asrow, Pritzker College of Medicine; Kaylee Powers; Sean Dugan; and Taytem Raynor, Reese Andrews, and Kristen Reijonen, University of Washington Kappa Delta.