

HOUSE BILL REPORT

ESHB 2318

As Passed House:
February 13, 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:

Committee Activity:

Public Safety: 1/14/20, 1/23/20 [DPS];
Appropriations: 2/5/20, 2/8/20 [DPS(PS)].

Floor Activity:

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

Brief Summary of Engrossed Substitute Bill

- Requires agencies to preserve criminal investigatory records related to deoxyribonucleic acid (DNA) work product.
- Defines "sexual assault kit" (SAK) as it relates to state law on DNA work product preservation and SAK preservation, testing, and tracking as including all evidence collected during a sexual assault medical forensic examination.
- Establishes storage and preservation requirements for unreported SAKs.
- Modifies procedures for collecting required DNA samples from convicted offenders who will not immediately be taken into custody.
- Requires the Criminal Justice Training Commission to develop a proposal for a case review program.

HOUSE COMMITTEE ON PUBLIC SAFETY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives Goodman, Chair; Davis, Vice Chair; Appleton, 2nd Vice Chair; Lovick, Orwall, Pellicciotti and Pettigrew.

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.

Minority Report: Without recommendation. Signed by 2 members: Representatives Sutherland, Assistant Ranking Minority Member; Graham.

Minority Report: Do not pass. Signed by 1 member: Representative Klippert, Ranking Minority Member.

Staff: Kelly Leonard (786-7147).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The substitute bill by Committee on Public Safety be substituted therefor and the substitute bill do pass. Signed by 31 members: Representatives Ormsby, Chair; Robinson, 1st Vice Chair; Bergquist, 2nd Vice Chair; Stokesbary, Ranking Minority Member; MacEwen, Assistant Ranking Minority Member; Rude, Assistant Ranking Minority Member; Caldier, Chandler, Chopp, Cody, Dolan, Dye, Fitzgibbon, Hansen, Hoff, Hudgins, Kilduff, Kraft, Macri, Mosbrucker, Pettigrew, Pollet, Ryu, Schmick, Senn, Steele, Sullivan, Sutherland, Tarleton, Tharinger and Ybarra.

Staff: Yvonne Walker (786-7841).

Background:

Deoxyribonucleic acid (DNA) and other biological evidence is collected from crime scenes, victims, and potential suspects for the purpose of supporting criminal investigations. This includes, for example, identifying suspects, reconstructing crimes, connecting serial cases, and exonerating wrongfully accused or convicted persons.

The Washington State Patrol (WSP) Crime Laboratory provides forensic DNA analysis services to local law enforcement agencies, assistance to law enforcement officials and prosecutors in the preparation and utilization of DNA evidence for presentation in court, and expert testimony in court on DNA evidentiary issues. The WSP also maintains the state Combined DNA Index System (CODIS), which assists with identifying suspects in criminal investigations as well as identifying human remains and missing persons.

DNA Work Product.

In any felony case, a sentencing court may order the preservation of biological material or other evidence. The court must specify the samples to be maintained and the length of time the samples must be preserved. In the absence of a court order, preservation practices generally vary across the state. However, in 2015 the state established certain preservation requirements for DNA work product secured in connection with certain types of criminal cases.

DNA work product includes: product generated during the process of scientific analysis of material, with some exceptions; and any material catalogued on a microscope slide, swab, in a sample tube, cutting, DNA extract, or some other similar retention method used to isolate potential biological evidence collected by law enforcement as part of its investigation and prepared for scientific analysis, whether or not it is submitted for analysis and derived from

the contents of a sexual assault kit (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.

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 SAK, also commonly referred to as a rape kit. Evidence from the SAK may be used during an investigation and subsequent criminal prosecution. In recent years, the state has established several requirements pertaining to the preservation, tracking, and testing of SAKs. However, state law does not define the term SAK nor does it specify what is or is not included in the SAK for the purposes of current requirements.

Mandatory Testing. A law enforcement agency is required to submit a request for testing to the WSP Crime Laboratory within 30 days of receiving a SAK, 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 mandatory testing requirement was prospective as of July 24, 2015, meaning it does not apply to previously unsubmitted SAKs. Beginning May 1, 2022, the WSP must complete testing of a SAK within 45 days of receiving the request.

For previously unsubmitted SAKs collected before July 24, 2015, law enforcement agencies must have submitted requests for testing by October 1, 2019, and the WSP must complete testing by December 1, 2021.

Tracking. The WSP operates the Statewide SAK Tracking System for the purpose of tracking the location and status of all SAKs from the point of collection and then throughout the criminal justice process. Local law enforcement agencies, prosecutors, hospitals, and the WSP are required to participate in the system. The system also allows sexual assault survivors to anonymously track their SAKs.

Unreported SAKs. An "unreported SAK" refers to a SAK collected from an adult or emancipated minor victim who has consented to the collection of the SAK 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 the collection, while those collected on or after that date must be stored and preserved by the WSP Crime Laboratory. These requirements expire June 30, 2020.

Offender DNA for Entry into CODIS.

State law requires the collection of biological samples from certain convicted offenders for the purposing of entering a DNA profile into the CODIS Offender Index. The profile is

searched against other indexes and may result in investigative leads. Investigative leads may be due to a DNA profile matching another profile in the Forensic Index, including profiles generated from crime scene evidence.

Various entities are responsible for collecting the samples. For a person who is sentenced to a term of confinement at a state or local correctional or rehabilitative facility, the facility collects the sample. For a person who will not serve any term of confinement, the court must order the person to report to the local police department or sheriff's office and provide a sample by a deadline established by the court.

A person who willfully refuses to comply with a legal request for a DNA sample is guilty of a gross misdemeanor.

Summary of Engrossed Substitute Bill:

DNA Work Product.

The requirements for preserving DNA work product in forensic cases are modified. DNA work product also includes the same materials collected by forensic nurses. Law enforcement agencies must also preserve criminal investigatory records related to DNA work product.

Screening byproducts are exempt from DNA work product preservation requirements. A screening byproduct is a product or waste generated during examination of DNA evidence, or the screening process of such evidence, that is not intended for long-term storage.

Sexual Assault Kits.

"Sexual assault kit," as it relates to state law on DNA work product and SAK preservation, testing, and tracking, is defined as including all evidence collected during a sexual assault medical forensic examination.

Tracking and Testing. 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.

Unreported SAKs. Beginning June 30, 2020, any unreported SAK must be transported from the collecting entity to the applicable local law enforcement agency. By January 1, 2021, unreported SAKs currently being stored by the WSP must also be transported to the applicable local law enforcement agency.

The local law enforcement agency is responsible for conducting the transport of the unreported SAK from the collecting entity to the agency, and it must store and preserve the unreported SAK for 20 years from the date of collection.

The collecting entity and law enforcement agencies must consult with one another to determine which agency would have jurisdiction to investigate any related criminal allegations if they were to be reported to law enforcement and is, therefore, responsible for transporting and storing the unreported SAK.

Offender DNA for Entry into CODIS.

Certain requirements are modified with respect to convicted offenders who will not immediately be taken into custody and who are required to provide a biological sample. If the local police department or sheriff's office has a protocol for collecting the sample in the courtroom, the court must order the person to immediately provide the sample before leaving the presence of the court. Otherwise, the court must order the person to report to the local police department or sheriff's office.

Case Reviews.

Subject to a specific appropriation, the Criminal Justice Training Commission (CJTC) must develop a proposal for a case review program. The CJTC is required to research, design, and develop case review strategies designed to optimize outcomes in sexual assault investigations through improved training and investigatory practices. The CJTC must consult with specified entities and may form a multidisciplinary work group. The CJTC must submit a report with its proposal to the Governor and Legislature by December 1, 2020.

Appropriation: None.

Fiscal Note: Available.

Effective Date: This bill takes effect 90 days after adjournment of the session in which the bill is passed, except for section 3, relating to the storage of unreported sexual assault kits, which takes effect June 30, 2020.

Staff Summary of Public Testimony (Public Safety):

(In support) Washington has made significant progress towards comprehensive SAK reform. As a result of previous legislation, the WSP is establishing a high-throughput laboratory and is almost finished testing the backlog, and the CJTC has established advanced victim-centered, trauma-informed training for sexual assault investigators. This bill is a natural extension of the work that has already been done, and it represents a critical next step in the reform process.

First, this bill aims to address the longstanding issue of where and how long to store unreported SAKs. The Sexual Assault Forensic Examination (SAFE) Best Practices Advisory Group was nearly unanimous in recommending that unreported SAKs should be transported to local law enforcement agencies and stored for 20 years.

Survivors expect that unreported SAKs will be preserved, and doing so is important to reduce system attrition. Survivors need to have confidence and trust in the system. No one goes to the hospital and has a sexual assault forensic examination for fun—to the contrary, it is an

extremely difficult and invasive process. Some survivors need time before reporting the crime. Regardless of whether a report is filed, all SAKs are evidence. Local law enforcement agencies are, therefore, the most appropriate entity to store unreported SAKs. Law enforcement agencies store lost bicycles. They can also store unreported SAKs. Law enforcement agencies are experts in forensic evidence and can ensure chain of custody. The 20-year storage requirement creates certainty and consistency across the state. This is the right thing to do.

The bill should be amended to clarify that law enforcement agencies are responsible for transporting unreported SAKs.

Second, the bill clarifies definitions in order to ensure that the entire contents of each SAK are tracked, stored, and preserved. The state has an obligation to preserve all evidence, including toxicological evidence. Currently, SAKs are being separated from toxicological evidence, and it is unclear if that evidence is being stored properly.

Third, the bill tries to improve compliance with DNA collection laws and support the Offender Index in CODIS. The state has tested thousands of SAKs in recent years, adding more profiles to the Forensic Index. But, in order to improve the chances of actually solving these cases, the state needs to improve practices for collecting offender DNA and increasing the profiles in the Offender Index. The state currently relies on out-of-custody offenders to voluntarily report to law enforcement to provide their samples. They often leave court and never report to law enforcement. This bill would require those samples to be collected immediately.

This bill takes a step towards establishing a case review program through the CJTC. The CJTC has trained over 200 officers in victim-centered, trauma-informed investigation practices, and it is receiving lots of positive feedback. However, the CJTC wants to develop a program where it visits departments and reviews actual cases to assess if the training is working.

(Opposed) There has been great work on SAKs in recent years. Some of the remaining issues are the most difficult to tackle. If it were easy, it would have already been done. On the issue of unreported SAKs, the SAFE Best Practice Advisory Group did not reach consensus on its recommendations due to the concerns of law enforcement. From the perspective of law enforcement, unreported SAKs are not evidence yet. If a crime has not been reported, then it is not appropriate for an agency to take custody of the SAK. Further, there are significant logistical and expensive issues related to long-term storage.

The bill should be amended to clarify the definition of "unreported SAK." The bill states that an unreported SAK is a SAK without a report or without consent for testing. This is confusing.

The state is investing a lot of resources in examining the system, but law enforcement agencies are hurting for resources to investigate the cases associated with the backlog. It does not make sense to continue to do ancillary projects when law enforcement has been asking for resources year after year to accomplish the core mission of SAK reform. If all

SAKs are being tested, then law enforcement needs the resources to investigate every single case.

Staff Summary of Public Testimony (Appropriations):

(In support) This bill is a result from input provided by the Safe Advisory Group and will help move Washington forward as a leader in addressing sexual assault kits. When survivors have a rape kit done it is assumed that all the evidence is stored; however, it has been found that only the DNA is stored. In addition, the state needs better protocols for collecting DNA from offenders that do not go to prison. The changes included in this bill are the right things to do to support sexual assault survivors. This matter should be a law enforcement priority and the Legislature should provide ample funds to ensure that all rape kits are tested.

The case reviews required in the bill are a way to determine which of those departments have successful reviews. This study will also help to research case reviews in other states and possibly incorporate some of those successes in Washington.

(Opposed) The Washington Association of Sheriffs and Police Chiefs was originally opposed to this bill but now that an amendment has been included, they are now in support.

Persons Testifying (Public Safety): (In support) Representative Orwall, prime sponsor; Andrea Piper-Wentland, King County Sexual Assault Resource Center; Leah Griffin, Sexual Assault Forensic Examination Best Practices Working Group; Heidi Fehr; Kate Hemann, Office of the Attorney General; Jennifer Wallace, Criminal Justice Training Commission; Lauren McDonald, Washington State Hospital Association; and Lisa Wahl.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Testifying (Appropriations): (In support) Andrea Piper-Wentland, King County Sexual Assault Resource Center; Leah Griffin, Survivor Taskforce; Jen Wallace, Criminal Justice Training Center; Katharine Hemann, Office of the Attorney General; and Arthur West.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying (Public Safety): None.

Persons Signed In To Testify But Not Testifying (Appropriations): None.