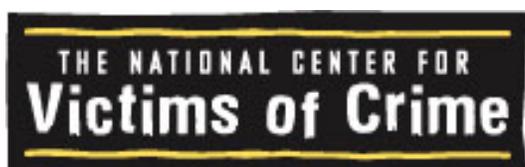


Sexual Assault Survivors DNA Justice Act

Section-by-Section Analysis



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Sexual Assault Survivors DNA Justice Act

Section-by-Section Analysis

§ 101. Short title.

This chapter shall be called the “Sexual Assault Survivors DNA Justice Act.”

§ 102. Purpose.

A. Forensic DNA and DNA databases have become powerful tools for the criminal justice system response to sexual assault cases, making it possible to identify unknown offenders and link crimes to each other, thereby discovering serial criminals. Timely testing of DNA evidence is key to securing justice for survivors, accountability for offenders, and safety for communities.

B. Victims of these crimes have a strong interest in the progress of their case. Victims also have a strong interest in privacy, in being treated with dignity and respect, and in being kept informed from the time they make a report of sexual assault until the conclusion of all related justice proceedings.

C. Law enforcement has an obligation to victims of sexual assaults in the proper handling, retention, and timely DNA testing of sexual assault forensic evidence or other crime scene evidence and to be responsive to victims concerning the developments of forensic testing and the investigation of their cases.

Based in part on California law. Cal. Penal Code § 680(b)(3) (West 2014).

§ 103. Definitions.

As used in this chapter:

A. “Cold case” means a felony crime reported to law enforcement that has remained unsolved for over one year after the crime was initially reported to law enforcement and for which the applicable statute of limitations has not expired.

B. “Sexual assault” shall include offenses defined in §§ _____, _____, _____, _____.

C. “Victim” shall mean a person against whom the sexual assault has been committed. For purposes of the victim’s rights to notification, the term includes the parent or guardian of a minor victim, or if the person is killed or incapacitated, the person’s spouse, parent, child, grandparent, sibling, any other person related to the person by consanguinity or affinity to the second degree, or any other lawful representative of the person, unless the person’s parent, guardian, spouse, child, grandparent, sibling, other person related to the person by consanguinity or affinity to the second degree, or other lawful representative is the accused.

D. “Victim advocate” means a person who is employed or authorized by a public or private entity to provide counseling, treatment, or other supportive assistance to crime victims.

The definition of “cold case” is taken from Colorado law. Colo. Rev. Stat. § 24-4.1-302(1.2) (2013).

The definition of “sexual assault” should mirror definitions already used in state law.

The definition of “victim” is based on Arizona law. Ariz. Rev. Stat. Ann. § 13-4401 (2013).

The definition of “victim advocate” is taken from Alabama and Arizona law. Ala. Code § 15-23-60 (2013); Ariz. Rev. Stat. Ann. § 13-4401 (2013).

§ 201. Rights related to sexual assault forensic exam.

A. Victims of sexual assault have a right to receive a forensic sexual assault exam provided at state expense if timely sought.

Derived from Colorado and Iowa law. Colo. Rev. Stat. § 24-33.5-113(1)(b)(I) (2013); Iowa Code § 709.22(c)(8) (2013). It is important to affirmatively state this principal in law, leaving no room for misunderstanding that only victims of certain sexual assaults are entitled to a forensic exam. No firm time limit is attached to this right, because continuing advances in DNA technology are expanding the window of time during which evidence may be collected. The National Protocol for Sexual Assault Medical Forensic Examinations stresses that while evidence should be gathered as soon as possible, decisions of timeliness should be made on a case-by-case basis. Office on Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents* (Washington, DC: U.S. Department of Justice, April 2013), 73, <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

B. Law enforcement officers with reason to believe a sexual assault has occurred shall assist the victim in obtaining medical treatment necessitated by the sexual assault, including providing assistance to the victim in obtaining transportation to a facility offering comprehensive post-sexual assault medical care and forensic exams.

Derived from Iowa law, (Iowa Code § 709.22(1)(b) (2013)), although that law specifies transportation to the nearest emergency room. Some jurisdictions are establishing separate centers to provide the medical response to victims, thus the language was adapted to increase flexibility. This provision is included to promote a prompt health care response to victims and also allow for the timely offer of a forensic sexual assault exam.

C. Victims have the right to be accompanied by a victim advocate at any proceeding related to an assault, including a sexual assault medical forensic examination.

Derived from Iowa law. Iowa Code § 709.22(c)(9) (2013). This provision is important, ensuring that victims have the option to have a further supportive presence during the forensic exam.

D. Standards for consent for the collection, testing, and release of test results of the forensic medical evidence shall be developed by the (insert agency with primary responsibility), in consultation with the state sexual assault coalition and (insert entity representing sexual assault nurse examiners). Standards shall include:

- 1. Consent forms that notify persons of the potential effects of each step of the process, including the collection and testing of forensic medical evidence and release of test results, and require acknowledgement of consent for each step of the process;*
- 2. Who may give consent and when it is required;*
- 3. Who may withdraw consent and when it may be withdrawn; and*
- 4. When, how, to whom, and for what purposes the results of tests may be released.*

Derived from Colorado and Texas law. Colo. Rev. Stat. § 24-33.5-113 (2013); Tex. Gov't Code Ann. § 420.0735 (West 2013).

Informed consent is a primary principle of health care. It has specifically been recognized as an important element in the medical response to sexual assault. See Office on Violence Against Women, *A National Protocol for Sexual Assault Medical Forensic Examinations Adults/Adolescents* (Washington, DC: U.S. Department of Justice, April 2013), 43-45, <https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf>.

This provision will ensure that policies are set in place regarding the examination and testing of minors, unconscious persons, and persons with cognitive disabilities. Having a multidisciplinary body develop such consent forms will reinforce the principals of victim choice and autonomy. It will also provide an opportunity to address potentially divisive issues such as ability to test kits from unreported cases (anonymous kits).

E. Law enforcement and medical personnel shall not, for any reason, discourage a victim of sexual assault from receiving a forensic medical examination.

Based on Colorado law. Colo. Rev. Stat. § 24-33.5-113 (2013). This language should not preclude a thoughtful discussion with the victim regarding the forensic medical examination.

§ 301. Victims' right to notice regarding the investigation and forensic evidence.

A. At the time of the initial contact between a victim and a law enforcement agency, the agency shall provide the victim notice of his or her rights under section 201.

B. After the initial contact between a victim and a law enforcement agency, the agency shall provide the victim written notice of his or her rights under this section.

Subsections (A) and (B) are based on a longstanding principal that due process requires that victims be informed of their legal rights. As a practical matter, victims must receive immediate notification of their rights regarding access to a forensic medical exam, as provided in section 201, in order to obtain that examination in a timely manner. Victims require reasonably prompt, but not immediate, information regarding their rights to information about the status of the case and the processing of the evidence.

C. The victim, guardian of a victim, or surviving family member of a deceased victim has the following rights upon request:

It is important to limit notifications below to notification upon request, both to reduce the burden on law enforcement and also to give the victim choice in the amount of involvement and future notifications she or he wishes.

(1) the right to receive a free copy of the initial incident report.

Based on Colorado law. Colo. Rev. Stat. § 24-4.1-303 (2013).

(2) the right to be informed regarding the status of any analysis being performed on any evidence that was collected during the investigation of the offense, including:

(a) at the time a request is submitted to a crime laboratory to process and analyze any evidence that was collected during the investigation of the offense;

(b) whether a DNA profile of the assailant was obtained from that analysis;

(c) at the time of the submission of a request to compare any biological evidence collected during the investigation of the offense with DNA profiles maintained in a state or federal DNA database; and

(d) of the results of the comparison described by paragraph (c), unless disclosing the results would unduly interfere with the investigation of the offense, in which event the victim, guardian, or relative shall be informed of the estimated date on which that information is expected to be disclosed.

Derived from California, Texas, and Utah law. Cal. Penal Code § 680 (West 2013); Tex. Code Crim. Proc. Ann. art. 56.021 (West 2013); Utah Code Ann. § 77-37-3(j) (LexisNexis 2013) (as amended by H.B. 157, 2014 Leg., Gen. Sess.). The provisions are an extension of the commonly recognized right of victims to be informed of the status of the case, with specific points of notice regarding the processing of evidence taken with the cooperation of the victim. As examples of the right to be informed of the status of the investigation, see 42 U.S.C. § 10607 (2014); D.C. Code § 23-1902 (2014); 725 Ill. Comp. Stat. 120/4.5 (2014); Mo. Rev. Stat. § 595.209 (2014); Neb. Rev. Stat. § 81-1846 (2013); N.J. Stat. Ann. § 52:4B-36 (West 2013). Rhode Island requires a victim be updated regarding the case status every three months until the offender is apprehended or the investigation is closed. R.I. Gen. Laws § 12-28-3 (2013).

(3) the right to be informed by law enforcement if:

(a) the agency elects not to analyze DNA evidence within time limits established by law; or

(b) the sexual assault forensic evidence kit or other crime scene evidence from an unsolved sexual assault case will be destroyed or disposed of. Notice under this subsection shall be provided 60

days prior to such destruction or disposal and shall include information about how to appeal the decision.

Based on California and Utah law, (Cal. Penal Code § 680 (West 2013); Utah Code Ann. § 77-37-3(3) (LexisNexis 2013) (as amended by H.B. 157, 2014 Leg., Gen. Sess.)), with certain adaptations: those states limit the application of subsection (a) to cases involving an unknown perpetrator. That provision is broadened here because, as our understanding and use of DNA forensic evidence advances, we are learning that evidence can be useful even in cases where the perpetrator's identity is known. It may, for example, corroborate a victim's version of events rather than a defendant's, or it may link a known defendant to other similar complaints, lending credence to a victim's complaint.

§ 302. Victims' right to notice in cold cases.

The law enforcement agency responsible for investigating a crime shall provide the victim in a cold case with information concerning any change in the status of the case, including the re-opening of the case to resume investigation, unless such disclosure would unreasonably interfere with the investigation. In addition, upon the written request of the victim, the law enforcement agency shall provide an update at least annually to the victim concerning the status of a cold case.

This provision is based on Colorado and Illinois law. Colo. Rev. Stat. § 24-4.1-303 (2013); 725 Ill. Comp. Stat. 120/4.5 (2014). The section addresses the victim's right to be kept informed in the context of a cold case. Routine updates upon request can be important, continuing expressions of recognition of the victim's interest, and can promote cooperation if a cold case is reopened.

§ 303. Victims' right to be notified of a final decision not to charge.

If a sexual assault victim has requested notice, the investigating law enforcement agency shall provide timely notice to a victim of any final decision not to file criminal charges against a person accused of committing a sexual assault against the victim.

Based on Colorado law, (Colo. Rev. Stat. § 24-4.1-303(10)(b)(V), (11) (2013)), which requires notice to the victim of a violent crime in which no charges of at least a misdemeanor are filed. The Colorado law is structured to generally place responsibility for such notification in misdemeanor cases on law enforcement and, in felony cases for which law enforcement has requested the filing of charges, on the prosecutor. This version assigns responsibility to law enforcement as the agency most likely to have any prior contact with the victim.

In addition to Colorado, some states require the prosecutor to confer with the victim prior to certain decisions, including the decision not to proceed with prosecution. Ariz. Rev. Stat. Ann. § 13-4419 (2013); Tenn. Code Ann. § 40-38-114 (2013).

The term "timely notice" is used to protect the interest of a victim in receiving notification prior to the expiration of the statute of limitations, so that the victim has a meaningful window of time in which to consult with the prosecutor.

§ 304. Victim request for information.

A. A victim who requests to be notified under sections 301, 302, or 303, must provide a current address, telephone phone number, and email address, if an email address is available, to the attorney representing the state and the law enforcement agency that is investigating the offense. The victim must inform the attorney representing the state and the law enforcement agency of any change in the address or phone number.

B. A victim may designate a person, including an entity that provides services to victims of sexual assault or the victim's attorney, to receive any notice requested under sections 301, 302, or 303. The designation must include a current address, telephone number, and email address, if an email address is available, for that designee.

Derived from California, Texas, and Utah law. Cal. Penal Code § 680(g), (h) (West 2013); Tex. Code Crim. Proc. Ann. art. 56.021(b), (c) (West 2013); Utah Code Ann. § 77-37-3(4) (LexisNexis).

§ 401. Right to victim compensation.

Section _____ of the Crime Victim Compensation Law shall be amended to provide:

A. Notwithstanding the provisions of this chapter that limit the time period for which expenses may be submitted or a claim for compensation may be filed, where further investigation into a previously reported crime is initiated by a law enforcement agency, any victim of such crime committed may apply for reimbursement as set forth in paragraph (B) of this section.

B. A victim may apply for reimbursement under the circumstances set forth in paragraph (A) of this section for the following:

1. The cost of mental health counseling services;
2. Reasonable expenses incurred due to attendance at court proceedings and other justice-related proceedings;
3. Expenses for essential personal safety property, not to exceed _____;
4. Reasonable medical expenses;
5. Reasonable attorney's fees not to exceed \$_____, at an hourly rate set by the compensation program, for the provision of legal assistance to the victim in any legal matter arising from or relating to the victimization.

When cold cases are reopened, a victim may suffer new emotional trauma requiring counseling; may sustain medical costs; may incur expenses in meeting with investigators or the prosecutor or in participating in court proceedings; may have security concerns; or may incur attorney's fees related to the victimization. However, such a victim may never have applied for compensation at the time of the crime—perhaps he or she was unaware of the compensation program, did not seek counseling, or did not have any other related expenses. Alternatively, the victim may have initially sought victim compensation, but after the passage of time, that claim has been closed. Compensation programs should allow for new and revived claims to assist victims with crime-related expenses in reopened cases.

Largely derived from Delaware law. (Del. Code Ann. tit. 11, § 9009 (2014)). The Delaware law limits counseling to 50 sessions, and sets a time limit on the submission of claims. Those restrictions are eliminated here. It also limits reimbursement to attendance to criminal proceedings; that language has been expanded to encompass juvenile proceedings and other justice proceedings, such as habeas corpus or parole proceedings. Subsections (4) and (5) have been added. Subsection (5) is based on New Jersey law. N.J. Stat. Ann. § 52:4B-8 (b) (West 2013).

The Delaware provision also allows an extension to the time to claim compensation where similar expenses are incurred when:

1. An offender appears in any judicial or administrative proceeding regarding a criminal charge, conviction, or sentence, including but not limited to a trial, appeal, postconviction relief, mediation, penalty, parole, or pardon hearing;
2. The offender is released from incarceration; or
3. The death penalty is imposed.

§ 501. Defendant or convicted person without standing to object; Lack of compliance with chapter not grounds to set aside conviction or sentence.

A defendant or person accused or convicted of a crime against the victim shall have no standing to object to any failure to comply with this section. The failure to provide a right or notice to a sexual assault

victim under this section may not be used by a defendant to seek to have the conviction or sentence set aside.

Based on California law. Cal. Penal Code § 608(j) (West 2013).