



**Maryland Sexual Assault Evidence Kit
Policy and Funding Committee**

**GUIDANCE TO LAW ENFORCEMENT AGENCIES ON DOCUMENTING A
VICTIM’S REQUEST TO SUSPEND OR LIMIT THE SCOPE
OF AN INVESTIGATION**

Effective October 1, 2020, [Senate Bill 807¹](#) will prohibit law enforcement agencies (“LEA”) from presenting sexual assault victims with a form purporting to:

- (1) Relieve the LEA of an obligation to the victim;
- (2) Preclude or define the scope of an investigation by the LEA into an act allegedly committed against the victim;
- (3) Prevent or limit a prosecution of an act allegedly committed against the victim; or
- (4) Limit private right of action of the victim pertaining to an act allegedly committed against the victim or the victim’s interaction with the LEA.

Further, Senate Bill 807 requires that if a victim requests that the scope of an investigation be limited or that an investigation be temporarily or permanently suspended, the LEA shall:

- (1) Thoroughly document the request; and
- (2) Follow up with the victim in accordance with practices recommended by the Maryland Police Training and Standards Commission (MPTSC).

Each law enforcement agency in the State must (1) adopt a policy to enforce the prohibition on seeking waivers from victims of sexually assaultive behavior, by January 1, 2021, and (2) provide a copy of the policy to the Maryland Sexual Assault Evidence Kit Policy and Funding Committee (the “Committee”) by January 15, 2021. The Committee developed the following guidance to assist LEAs in adopting policies and practices that thoroughly and accurately capture a victim’s decisions, consistent with State law and best practices.

BACKGROUND

It is not uncommon for sexual assault victims to express reluctance about participating in the investigation or prosecution of their alleged sexual assault. Over the years, some Maryland law enforcement agencies developed “waiver of rights forms” (or “waivers”) to document a victim’s decision to limit the scope of or suspend an investigation or prosecution.

However, the use of waivers has come under scrutiny for being coercive or potentially coercive. According to the International Association of Chiefs of Police (IACP), “Pressuring a reluctant witness to sign a form stating that they are not interested in prosecution and will not hold the agency accountable for stopping

¹ SB807, Ch. 584 (2020) will be codified under MD. CODE, Crim. Proc. § 11-929 (2020).

the investigation is poor practice and is potentially damaging to an agency.”² Reasons a victim may hesitate to move forward with an investigation vary widely and include, but are not limited to:

- Lack of trust, or a trusting rapport, with law enforcement or other members of the criminal justice system
- Fear of public embarrassment
- Fear of not being believed
- Reluctance to relive the trauma that they have already experienced
- Intimidation and fear of retaliation from the suspect

Victims should be empowered to make informed decisions about how their case is handled. This should be accomplished in a way that allays victims’ fears and instills confidence to maximize their engagement in the criminal justice process.

BEST PRACTICES

Generally, the Committee recommends that LEAs thoroughly document a victim’s wishes regarding how to proceed with an investigation or prosecution in the same manner that they document any other element of the case. Decisions around active participation are often difficult and may change repeatedly. Every effort should be made to understand the reasoning behind a victim’s decision as it may constitute evidence of the trauma. Understanding a victim’s reasoning may also provide insight into the steps LEAs can take to develop their relationship with and properly support the victim.

It is best practice to use audio and audio-video recordings to document victim interviews. According to the *National Sexual Assault Investigation and Prosecution Best Practices Guide* issued by the National District Attorney Association, Women Prosecutors Section: “Detectives should ensure that the interview with the victim is recorded, whenever possible, to ensure that the victim does not have to re-tell the events of an extremely traumatic occurrence. This recording can be as informal as an audio recording using a smartphone if other facilities are not available, are not feasible, or would be overly intimidating to the victim.”³

Additionally, LEAs should obtain the victim’s permission to audio or audio-video record. The Police Executive Research Forum’s Executive Guidebook entitled *Practical Approaches for Strengthening Law Enforcement’s Response to Sexual Assault* states:

“When possible, and in compliance with state law and agency policy, victim interviews should be audio-visually or audio recorded. A recorded victim interview is the best way to document what was stated by the victim and assists the investigator in accurately synopsising the victim’s statement in written reports. Recording victim statements also

² IACP: Sexual Assault Incident Reports, Investigative Strategies, August 8, 2018
<https://www.theiacp.org/sites/default/files/all/s/SexualAssaultGuidelines.pdf>

³ National District Attorneys Association Women Prosecutors Section, White Paper: National Sexual Assault Investigations and Prosecution Best Practices Guide, January 3, 2018
<https://www.ciclt.net/ul/ndaajustice/WhitepaperFinalDraft-SA.pdf>

conveys that their case is being taken seriously and being professionally investigated. Importantly, the interview should never be taped without the victim's permission."⁴

Any policy on the audio or audio-video recording of sexual assault victims should explicitly state that these recordings are not to be conducted surreptitiously and only with the consent of the victim. Care should be taken to ensure that a victim's consent is informed and voluntary. Victims should be informed of the purpose of the recording and who will have access to it. Victims should also be allowed the opportunity to consult with an advocate/attorney/support person prior to making this decision, if they request to do so. An advantage of this practice is that it ensures that the victim's wishes are thoroughly documented consistent with Senate Bill 807. Further, the nature of the conversation that led to any limitations of the scope of an investigation and/or prosecution would also be documented. This practice enhances the collection of intangible evidence such as a victim's body language or demeanor, prevents the repeated telling of a very traumatic story, allows for a trauma-informed/forensic interviewing format with less need for interruptions and note taking, protects the victim against real/perceived LEA misconduct, protects LEAs from real/perceived complaints of misconduct, and allows for LEA self-critique and observation to improve victim interview skills.

Each agency should also conduct follow-ups with victims in accordance with the practices recommended by MPTSC. (See Attachment 1) The IACP notes that "a victim's right to change their mind regarding moving forward with an investigation and prosecution should only be constrained by the statute of limitations." Further, they state that "victim follow-up builds trust with victims and sends a message to the community about the seriousness with which an agency handles sexual assault crimes."⁵

Although not explicitly stated, SB 807 also implies that an LEA should not initiate the conversation about limiting the scope of investigation or prosecution unless there is a specific and articulable investigative purpose for doing so. Thus, in most instances, a conversation of this nature should only occur when a victim expresses concern about or objects to moving forward with any aspect of the investigation. Similarly, an LEA should not discuss the difficulty of proving the facts alleged or share other discouraging opinions of the case with the victim. This is particularly true when interviewing victims from vulnerable populations, including homeless people, sex workers, people with behavioral health disabilities, and LGBTQ individuals.

KEY ELEMENTS OF A MODEL POLICY

- (1) Prohibit use of a form limiting the scope of an investigation and/or prosecution.
- (2) Prohibit the LEA from initiating conversations that seek to establish an agreement between the victim and the LEA that limits the scope of an investigation and/or prosecution.
- (3) Require thorough documentation of the victim's wishes, concerns, and cause of their concerns, if known.

⁴ Police Executive Research Forum: Executive Guidebook: Practical Approaches for Strengthening Law Enforcement's Response to Sexual Assault, May, 2018

<https://www.policeforum.org/assets/SexualAssaultResponseExecutiveGuidebook.pdf>

⁵ See FN 2 above.

- (4) Document steps taken to address any known concerns (contacted a victim advocate, introduced a different detective, accompanied victim for a protective order, etc.).
- (5) Prohibit the LEA from including any statements, or agreements, intended to limit the private right of action of the victim (i.e. no “hold-harmless” clauses).
- (6) Note that any decision made by the victim should not be considered permanent. These decisions should be allowed to change and should be incorporated into a strong victim follow-up protocol consistent with the practices identified by the MPTSC.
- (7) Note that limitations of the scope of the investigation or prosecution DO NOT change the testing requirements of a sexual assault evidence kit unless consent for analysis is knowingly, voluntarily and expressly withdrawn by the victim.

WITHDRAWAL OF CONSENT FOR KIT ANALYSIS

While SB 807 does not address the victim’s consent, or withdrawal thereof, for analysis of their sexual assault evidence kit, the Committee felt the issue should be incorporated into this guidance document. The issue of consent to have a sexual assault evidence kit tested is often addressed at the collection process as part of the provider’s informed consent document. Generally, consent for analysis is not provided unless, and until, a victim initiates a police report/investigation. The issue of continued consent versus withdrawal of consent for analysis is a distinctly different and separate decision from the decision to limit the scope of an investigation and/or prosecution.

VICTIM ADVOCATES

State law requires LEAs investigating sexual assault cases to make use of certified sexual assault crisis programs or other qualified community-based sexual assault victim service organizations that can provide services and support to survivors of sexual assault. Victim advocates are increasingly being utilized in every phase of sexual assault investigations. A community-based victim advocate can help navigate some of the tough situations that sexual assault victims experience while engaging with the criminal justice system. A victim advocate can be particularly helpful in understating and addressing victim concerns that may cause them to want to limit the scope of an investigation/prosecution. Further, a victim advocate can also help facilitate the necessary follow-ups with victims. Finally, community-based advocates are not subject to *Brady* requirements and often have greater understanding of options outside the criminal justice system.

ATTACHMENT 1
MPTSC APPROVED BEST PRACTICES

PTSC APPROVED PRACTICES -- (July 8, 2020)

Victims of Sexually Assaultive Behavior – Waivers of Rights – Prohibition

1. The officer/investigator should honor the confidentiality of the victim.
 - a. Officers/investigators should make efforts to provide a private and comfortable space for victims, especially when being asked to disclose details of their case.
 - b. Officers/investigators should make an effort to limit the number of disclosures that need to be made.
 - c. Officers/investigators should be aware, and advise victims if appropriate, that the details of their case can, and will, become a matter of public record and cannot be fully protected as confidential.
 - d. Victims should be advised that the services provided by certified sexual assault crisis programs are confidential.
 - e. The officer should not suggest a victim of sexually assaultive behavior sign a waiver of rights during the initial contact with the victim or during the continued investigation.

2. The officer/investigator should be aware of the potential to re-traumatize the victim when conducting follow-up contacts.

3. The officer/investigator should inform the victim that the officer, or an officer within the agency who investigates sexual assaults, will follow-up with the victim within 30 days of the initial contact to confirm the victim continues to request the suspension of the investigation and the officer/investigator will discuss how and when follow-up contact will be made.
 - a. Victims should be given the opportunity to indicate the preferred manner in which contact will be made via phone, e-mail, mail, or in-person.
 - b. If the victim would like to be contacted by phone, the officer/investigator should determine if a voicemail can be left and with what information.
 - c. The officer should document the victim's preference in the report.

4. The officer/investigator should provide the victim with the appropriate contact information for the law enforcement agency and/or assigned investigator.
 - a. Victims should be advised to contact the agency, or assigned investigator, at any time, with questions about their case; and/or
 - b. If they have decided to pursue a criminal investigation.

5. The officer/investigator should provide the victim with contact information for a certified sexual assault crisis program serving the jurisdiction at the time of the initial contact.

ATTACHMENT 1
MPTSC APPROVED BEST PRACTICES

- a. Officers/investigators should advise victims that discussions with an advocate from the certified sexual assault crisis program are confidential; and
 - b. Officers/investigators should advise victims that information discussed with the advocate will not be shared with the investigator without their express consent.
6. The officer/investigator should follow-up with the victim no later than 30 days following the initial contact. If the victim continues to request a suspension of the investigation:
- a. the officer/investigator should provide contact information for the appropriate individual or unit at the time of the follow-up;
 - b. the officer should request the victim advise the agency if a decision has been made to continue the investigation or to continue the decision to suspend the investigation.
7. The officer should advise the victim any decision to suspend an investigation will not be considered permanent and, should the victim choose to pursue a criminal investigation at a later date, the case may be re-opened for investigation.
- a. The officer/investigator should again provide contact information and should provide information for a certified sexual assault crisis program serving the jurisdiction.
 - b. The officer should notify the victim of any statute of limitations.
8. The officer should document this contact in the appropriate record.