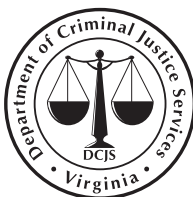



Blueprints for Change: Criminal Justice Policy Issues in Virginia



Virginia Department of Criminal Justice Services
www.dcjs.virginia.gov

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The Department of Criminal Justice Services (DCJS) is the state criminal justice planning agency in Virginia and is responsible for administering state and federal funds dedicated to improving state and local criminal justice practices, preventing crime and delinquency, and ensuring services to crime victims.

In its role as a planning agency, the Department convened six policy sessions over a two day period in May, 2007. The facilitated sessions explored six different leading edge criminal justice issues, chosen by the Department. Each three-hour session brought together a multidisciplinary group of executive-level participants who were selected because of their knowledge of the issue and their ability to advance the discussion of public policy related to the issue.

The discussions in these sessions, and the recommendations that emerged, are recorded in these policy papers.

In publishing these papers, DCJS hopes that they will stimulate further discussions by state and local decision makers and will provide useful guidance for making substantive statutory change where necessary, as well as for decisions on funding, and policy and program development.

The 2007 Blueprints for Change: Criminal Justice Policy Issues in Virginia documents are:

Canine Training and Law Enforcement

Data Mining and Regional Networks as an Investigative Tool: Administrative and Policy Considerations

Evidence-Based Practices in Community Corrections

Sexual Assault Policies in Virginia Law Enforcement Agencies

Using Technology to Guard Against Bias in Policing

Virginia's Response to the JJDP Act's Sight & Sound Separation Requirement

**For additional information on these documents, please visit the
Department of Criminal Justice Services website at: www.dcjs.virginia.gov**

Sexual Assault Policies in Virginia Law Enforcement Agencies



Sexual violence continues to be a prevalent crime in our society. Unfortunately many victims choose not to report these crimes because of embarrassment, fear, and trauma. Many victims lack faith in the systems with which they must come into contact, such as law enforcement, prosecution, and the media. According to the Federal Bureau of Investigations, only 16% of sexual violence victims report the crime to law enforcement authorities.¹ In a National Crime Victimization Survey compiled by the Bureau of Justice Statistics, the U.S. Department of Justice reported that only 39% of sexual violence victims report the crime to law enforcement authorities in 2003.² The survey indicated an average annual number of 179,170 sexual assaults against women and 19,670 against men for the year. Offenders known to the victim accounted for more than two-thirds (72%) of sexual assaults.

Virginia crime statistics also indicate that sexual violence is an underreported crime. There were 5,475 forcible rapes and 255 non-forcible rapes reported in 2006 to the Department of State Police by law enforcement agencies.³ During July 1, 2005 to June 30, 2006 (Fiscal Year 2006), Virginia sexual assault crisis centers, funded by DCJS, provided services to 10,331 new victims of sexual assault.⁴

In an attempt to address some of the issues contributing to underreporting, Congress passed the federal Violence Against Women Act (VAWA) of 2005. As a condition of receiving federal grant funds available through VAWA, the states are required to certify that their laws, policies and practices do not require sexual assault victims to participate in the criminal justice system or cooperate with law enforcement authorities in order to be provided with a forensic medical exam or reimbursement for charges incurred on account of such an exam. This requirement becomes effective on January 5, 2009. Thus, any required statutory changes must be enacted during the 2008 Session of the General Assembly.

Currently, the *Code of Virginia* does not explicitly require that victims cooperate with law enforcement authorities, or that they participate in the criminal justice process, in order to have a forensic medical exam or Physical Evidence Recovery Kit (PERK) conducted. However, unless the Commonwealth's attorney has previously designated a physician or facility to conduct forensic medical exams, § 19.2-165.1 requires prosecutors to review and authorize payment of medical expenses incurred in order to collect evidence establishing that a crime has occurred. The linkage of exam cost payment and prosecutor authorization implies some level of participation in the criminal justice process and cooperation with law enforcement authorities. Additionally, it appears that law enforcement and hospital practices may also convey the message that cooperation and/or participation are required. DCJS conducted a "Survey of Sexual Assault Policies in Virginia Law Enforcement Agencies" in 2004, which yielded a response rate of 47%. Almost 18% (21) of survey respondents indicated that a victim must express a willingness to press charges in order for a Physical Evidence Recovery Kit (PERK) to be authorized in their locality. Nearly one-third (31%; 35) of respondents indicated that their Commonwealth's attorneys do not authorize payment for processing by the Supreme Court, if the victim chooses not to press charges. An additional 46% were unsure if the Commonwealth's Attorneys in their jurisdictions authorized payment under such circumstances. These findings may reflect a conclusion by some local

¹ In J. Timberlake, "Profile, Congresswomen, and the New Bills," *Women's Self-Defense*, May 1994, 48.

² U.S. DOJ, Bureau of Justice Statistics, "National Crime Victimization Survey," 2004

³ Department of State Police, Virginia Uniform Crime Reporting Program, "Crime in Virginia," January-December 2006.

⁴ Virginia Department of Criminal Justice Services, 2004

officials that the current language of 19.2-165.1 of the *Code of Virginia* requires that payment of expenses not be authorized, unless it is established that a crime was committed and that victims' unwillingness to cooperate with law enforcement authorities and/or participate in the criminal justice process make it impossible to draw this conclusion. For others, a credible allegation of assault is sufficient to authorize payment, even if the victim is uncooperative or subsequent investigation indicates that no charges will be filed.

Given current practice and policy in Virginia, the VAWA requirement prompted the Department of Criminal Justice Services, which administers a portion of Virginia's VAWA funds, to examine this issue as part of its Blueprints meeting in May 2007. The meeting included 28 individuals representing federal, state, and local agencies with a stake in the issues. Included were individuals representing victim advocates, law enforcement agencies, prosecutors, forensic nurses, the Virginia Chiefs of Police Association, the Supreme Court, the Department of Forensic Science (DFS), the Criminal Injuries Compensation Fund, the federal Office on Violence Against Women, the National Center for Victims of Crime, college campuses, civilians, and the U.S. Military. The group discussed successes and challenges regarding current policy and practices related to sexual violence and forensic medical examinations as they relate to federal and state laws.



POLICY/RESEARCH QUESTIONS

After a discussion about the successes and challenges faced by local, state, and federal representatives at the meetings, the following questions were posed to the participants.

1. What is working well in localities with regards to authorizing, conducting, and certifying payment for Physical Evidence Recovery Kit exams? What are the characteristics of a smooth process currently?
2. What are the current obstacles to authorizing, conducting, and certifying payments for PERK exams?
3. What needs to change in order to implement the VAWA requirement? (For example, statutory changes, training needs, policy and procedural changes, and associated resource needs, etc.)
4. What would an ideal PERK process be, if resources (money, time, etc.) were not an issue?



DISCUSSION

Differences in Federal and State Policy

The 2005 federal Violence Against Women Act (Title I, Section 101), amends Section 2010 of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3796gg-4) to now state that "nothing in this section shall be construed to permit a State... to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such an exam, or both." The Department of Justice Office on Violence Against Women (OVW) interprets this statutory mandate to mean that states must certify that: "The State... does not require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such an exam, or both." This requirement becomes effective on January 5, 2009.

The *Code of Virginia* (§19.2-165.1) states that "all medical fees involved in the gathering of evidence for all criminal cases where medical evidence is necessary to establish a crime has occurred shall be paid by the Commonwealth out of the appropriation for criminal charges." The Supreme Court of Virginia is responsible for processing the payment of PERK examinations. The Commonwealth's Attorney, in the city or county having jurisdiction over the case, or the attorney's designee, has the authority to authorize payment of a PERK examination by the Supreme Court of Virginia. Although there is no specific assignment of responsibility in

the *Code of Virginia*, law enforcement officers in the city or county having jurisdiction over a case usually are responsible for authorizing the performance of a PERK examination by a forensic nurse examiner (FNE), sexual assault nurse examiner (SANE), physician or facility. This practice is common in part because law enforcement agencies are equipped to store the evidence gathered and to maintain chain of custody.

Additionally, some hospitals do not maintain supplies of the kits. In those cases, law enforcement officers provide the kit when called by the hospital. Some hospitals cannot or do not store the collected evidence.

In practice, it appears that, given these links between the criminal justice system and the forensic medical exam, some sexual assault victims may be denied PERK examinations and/or payment for those exams unless they decide immediately to report the crimes to law enforcement authorities and express willingness to “press charges.” As the chances of finding physical evidence decreases in direct proportion to the elapsed time between the assault and the examination, a PERK exam must be completed within 72 hours of the assault. When victims are asked to determine whether or not they will participate in the criminal justice system within 72 hours of having been sexually assaulted, many victims feel unable to make this decision at such a traumatic time and consequently forgo the examination. Sometimes victims will later feel ready to make a commitment to participate in the criminal justice system, however, the physical evidence has been lost and chances for a successful prosecution have therefore diminished.

One mechanism that can be used in cases such as this is using an anonymous reporting system, such as blind reporting. Blind reporting is a system that allows victims of sexual assault to report the crimes to law enforcement authorities, without having to commit immediately to an investigation. It is a practice that evolved from the third party reporting system in which another party, such as a sexual violence crisis center advocate, shares information with a law enforcement agency about the occurrence of a sexual assault without disclosing the identity of the victim. Blind reporting is now considered to be the more recommended practice. Blind reporting allows investigators to gain information about crimes of sexual violence that might otherwise have been unreported. It also allows victims to gather legal information from law enforcement agencies, without making an immediate decision on reporting or not.

The concept of blind reporting has raised questions and concerns. These include:

1. How will the identity of the victim be kept confidential?
2. Who will maintain and store the evidence until a determination is made by a victim to actually report?
3. How long will the evidence be stored until it can safely be destroyed?
4. Who will pay for the collection of evidence that may never be used for evidence in an investigation?
5. What types of additional resources may be required by implementing such a system?

Some localities in Virginia and the U.S. Military have successfully responded to these questions. Not all localities in Virginia require victim participation in the criminal justice system in order to conduct a PERK examination. For example, in South Hampton Roads, a third party reporting process has been established. The area law enforcement agencies keep the evidence for 90 days to allow victims that time to decide whether or not they wish to participate in the criminal justice system.

The City of Alexandria has instituted a “police information report” process, in which the Police Department is able to accept information about sexual assault crimes, without initiating an investigation. These reports are kept separate from case files which are being investigated, unless and until such a time as the victim decides to go forward with the criminal justice process. This allows police to gather information regarding crimes in their community that would otherwise go unreported.

In June 2006, the military adopted a “restricted reporting” policy, whereby victims of sexual assault who are undecided concerning reporting the crime are provided a forensic medical exam and given up to one year to make a decision to report. The PERK, identified only by a number, is submitted to law enforcement authorities, who store the evidence for up to one year. The hospital and the Sexual Assault Prevention Office have access to the name which corresponds to that number. A military representative with the Sexual Assault Prevention Office stated that within one year of implementation approximately one in four restricted reports were later transferred to unrestricted reports, that is, 25% of victims later decided to report the crime to law enforcement.

The federal requirement regarding access to forensic medical exams is intended to allow victims time to make informed decisions regarding cooperation with law enforcement officials and criminal justice system involvement, while allowing crucial, time-sensitive evidence to be gathered. OVW is hopeful that these changes will result in an increase in the number of reports to law enforcement agencies and an increase the likelihood of successful prosecutions. OVW is currently developing a model policy on blind reporting to provide states an exemplary practice for compliance.

Implementation of the VAWA Requirement in Virginia

To comply with the VAWA requirement, a consensus was reached by the participants to recommend amendments to §19.2-165.1 to assure that all PERKs conducted would be paid, without specific individual authorizations by the local Commonwealth’s attorney.

Since sexual assault is a public health as well as a criminal justice issue, specially trained healthcare providers should be responsible for deciding when to conduct forensic medical exams. Commonwealth’s Attorneys should continue to designate specific facilities to conduct the examinations, but the individual authorization of payment of expenses incurred should be eliminated.

The group agreed to convene another meeting to discuss specific recommendations to implement procedures relating to developing a model blind reporting policy, including maintaining victim confidentiality, appropriate authorization and payment procedures, and procedures for storing and maintaining evidence collected in these cases. Other groups, including the Hospital and Healthcare Association, will also be consulted. In addition, procedures and a possible alternate funding source for payment of evidence collection in cases of blind reporting will also be examined.

The Code change proposed by the group entailed adding a subsection B to §19.2-165.1, which would state the following:

Notwithstanding any requirement in subsection A related to authorization for payment of evidence collection expenses, all medical fees incurred in the gathering of evidence in cases of alleged sexual assault or sexual abuse shall be paid.

An attorney advisor with OVW confirmed that by adding the above language to §19.2-165.1, Virginia would be in compliance with the VAWA requirement.

A recommendation was made to examine the feasibility of establishing two funds for PERK payments. One would be designated for payment of PERKs conducted in cases where victims report the crime to law enforcement and participate in the criminal justice system. The second would be a separate fund designated for PERKs conducted in cases where victims are undecided. A process was suggested whereby hospitals would bill the Criminal Injuries Compensation Fund (CICF), which would then either pay the bill or direct the bill to the Supreme Court of Virginia for payment, based respectively on whether the victim wishes to report the crime or is undecided. To implement this practice, changes to the *Code of Virginia* and administrative practices at CICF and the Supreme Court would be needed. The process for separating these funds

should be further discussed and should be undertaken in consultation with the Supreme Court of Virginia, and the CICF.

Model PERK Practice in Virginia

The group discussed at length what model PERK practice should be developed to guide localities' procedures. The following is a summary of issues discussed.

By removing the link between PERK examinations and the criminal justice system, the following questions must be considered in developing a model PERK policy:

1. What is the best model policy: Blind reporting or evidence-based prosecution?

To implement a blind reporting practice in Virginia, policies would need to be enacted to address issues such as evidence storage procedures, liability of the criminal justice system, and privileged information. For example, a specific legislative "privilege" would be required in the *Code of Virginia* if blind reporting were implemented. Otherwise Commonwealth's attorneys could subpoena individuals and evidence in order to identify victims.

Many states have adopted blind reporting policies to address the issue of underreporting in sexual assault cases. However, participants had concerns regarding implementing a blind reporting model policy in Virginia. Some participants believed that adopting such a practice would promote the illusion that the victim has control over a criminal case. Sometimes the criminal justice process moves forward whether or not victims wish it to do so. This type of approach is often promoted in domestic violence cases. Various methods are used to promote "no-drop" policies and "evidence based," or "victimless" prosecutions.

Evidence-based prosecution can compromise victim safety as well as damage a victim's trust in the criminal justice system. Without a strong coordinated community response, victim safety may be at risk. A strong coordinated community response often eliminates the need for evidence-based prosecutions; the number of victims who decide not to report drops and the number of convictions increases. However, if the criminal justice system chooses to proceed based on the evidence obtained, regardless of the victim's choice, victims may be less likely to participate in the criminal justice system. Ultimately, evidence-based prosecutions could result in more victims choosing not to report sexual assaults.

Some participants were concerned that creating the confidentiality implied by a blind reporting process may have unintended negative consequences. Are local officials bound to protect the public or to protect the victim's anonymity? Who is responsible if there is a second victim following a blind report? How should local officials answer questions about why certain rapes apparently were not aggressively investigated, etc? Concerns expressed about blind reporting related to the fact that law enforcement would be viewed as relinquishing control over the case, giving victims the right to determine whether or not they would press charges and whether or not law enforcement would proceed with an investigation. Common practice currently entails law enforcement officers asking victims if they are willing to press charges. If they are not, a PERK is not authorized, and an investigation is not conducted beyond that point. Some localities have reported, however, that their current practice is to encourage victims to participate in a PERK examination, even if they think they may not cooperate with the criminal justice system. These cases are authorized for payments.

2. What should be done with the evidence?

A crucial issue that must be considered is storage of evidence. Chain of custody must be maintained, but who should store the evidence and for how long? By and large Virginia hospitals are not currently equipped to store evidence for prolonged periods of time. If the evidence continues to be submitted to

law enforcement agencies, what is the law enforcement agency's obligation to the victim and to the public? Unless specific policies are in place prohibiting further action by law enforcement without victim authorization, officers may decide to initiate an investigation based on the evidence and may, in fact, have a duty to do so. Such a policy should address and alleviate concerns about liability issues.

Another consideration is whether or not PERKs should be processed or merely preserved in cases where a victim has not yet reported to law enforcement. If kits are processed by the Department of Forensic Science, that may help promote a better criminal justice response to sexual assault and may improve public safety. It may also encourage a victim to report the crime if processing the PERK results in a "hit" in the DNA database. However, if the kit yields information (e.g., a "hit") but the victim chooses not to report and policy precludes law enforcement officers from fully investigating a case without victim authorization, this inaction may be criticized as undermining public safety.

The alternative practice of preserving evidence for those cases where a victim has not reported to law enforcement should also be considered, as preservation is a much less demanding task than processing evidence. This practice entails law enforcement officers submitting PERKs to the Department of Forensic Science for preservation purposes and then returning the kits to law enforcement agencies for storage. Law enforcement could then store the evidence for as long as needed without danger of the evidence deteriorating. If the victim decides to report the crime, the law enforcement agency can then submit the kit to DFS for processing.

Other Issues

Other issues that warrant consideration are the costs associated with implementation of the VAWA requirement and the additional collaboration, training and resources, which will be needed. Virginia should expect an increase in the number of PERKs being conducted when law enforcement authorization is no longer required; however, it is difficult to estimate the magnitude of the increase. Part of the reason the *Code of Virginia* stipulated that authorization was required was to contain costs. Reimbursement costs will increase with higher number of PERKs being performed. In addition, DFS costs will increase; the extent of this increase will depend upon whether the evidence is initially processed or only preserved. More PERKs and reported cases may put a strain on hospitals and local sexual assault crisis centers. Additional staffing may be needed. It may also be necessary to increase the number of Forensic Nurse Examiner/Sexual Assault Nurse Examiner (FNE/SANE) programs. These programs should be available to all Virginians, no matter where victims are physically located, rather than being an exceptional service found only in a few progressive hospitals. Currently, there are only 21 FNE/SANE active teams in Virginia. More than half of the state does not have access to professional forensic medical examinations conducted by FNE/SANEs. Law enforcement agencies or hospitals may also need larger storage facilities.

If implementation of the VAWA requirement does lead to an increased number of victims reporting to law enforcement authorities, law enforcement and prosecution case loads will increase. Adequate and continuing training for healthcare professionals, law enforcement officers, victim advocates, and prosecutors is essential. These professionals, their agencies and their professional organizations should work collaboratively to implement a model PERK process, which they can support.



CONCLUSIONS AND RECOMMENDATIONS

Much can be done in Virginia to promote an effective response to sexual assault cases which enhances victim safety and offender accountability. Some strategies require a limited amount of effort by one or two agencies. Some require a long-term strategy to effect a change in public policy at the state level. The following list of recommendations is not an exhaustive list of what could be done. In addition to any action taken at the state level, local agencies are likely to create other procedures that may have a positive impact on this issue at the community level.

1. Legislation should be proposed which amends the *Code of Virginia* §19.2-165.1, adding a subsection B to §19.2-165.1, which would direct hospitals to conduct PERK examinations and have no provision for authorization of payment out of the appropriation for criminal charges.
2. The Supreme Court of Virginia and Criminal Injuries Compensation Fund should determine the feasibility of establishing two funds for PERK reimbursements, one designated for payment of PERKs conducted in cases where victims wish to report the crime to law enforcement and participate in the criminal justice system and a separate fund designated for PERKs conducted in cases where victims are undecided.
3. DCJS should reconvene the group to develop a model PERK process for Virginia. Data from other states should be collected regarding such issues as blind reporting.
4. Training should be developed and provided to law enforcement officers, health care professionals, prosecutors, and victims services professionals on sexual assault response, the implementation of the VAWA requirement, and the model PERK process.
5. Collaboration should be encouraged between law enforcement officers, health care professionals, prosecutors, and victims services professionals to implement the VAWA requirement, develop a model PERK process, and adapt such a model at the local level as needed.
6. Support should be sought for increasing the number of FNE/SANE programs in Virginia.
7. Support should be sought for additional staffing for law enforcement officers, health care professionals, prosecutors, and victims services professionals.



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