

STATE OF WISCONSIN
Department of Justice

STATEMENT OF SCOPE OF PROPOSED RULES

Rule No.: Wis. Admin. Code JUS 21 (Tracking of sexual assault kits in sexual assault cases)
Relating to: Tracking of sexual assault kits in sexual assault cases.

1. Description of the objectives of the rules:

Consistent with Wis. Stat. § 165.776(4), as created by 2021 Wis. Act. 117, the State of Wisconsin Department of Justice (“DOJ”) proposes to promulgate rules to conform to statutory requirements in Wis. Stat. § 165.776(3)(a) and (b). These provisions relate to the entry of information associated with sexual assault kits from victims by law enforcement agencies, health care professionals, and crime laboratories into the Wisconsin Sexual Assault Kit Tracking System.

2. Description of existing policies relevant to the rules and of new policies proposed to be included in the rules and an analysis of policy alternatives; the history, background, and justification for the rules:

In spring 2016, as part of the Wisconsin Sexual Assault Kit Initiative (SAKI), DOJ initiated a process to inventory all previously unsubmitted sexual assault kits. Through a cooperative effort with Wisconsin law enforcement agencies and health care professionals, thousands of sexual assault kits were inventoried, culminating in almost 4,500 untested sexual assault kits being submitted by law enforcement agencies across the state to the Wisconsin State Crime Laboratories for processing.

As part of the SAKI project and associated multidisciplinary discussions, DOJ developed “best practice” guidance for its criminal justice partners involved in the receipt, investigative handling, and processing of sexual assault kit evidence from victims in Wisconsin. Continued kit inventory project efforts (termed a “kit census”) have maintained a method to catalogue and account for sexual assault kits in the state.

Reporting options for victims who provided evidence through a sexual assault kit were additionally created as a “best practice” guideline, allowing victims the choice of reporting the sexual assault crime to law enforcement with consent for analysis, or conversely, not reporting the crime to law enforcement when no consent is provided for the analysis of their kit. The sexual assault kits for which the victim chose the “non-reporting” option would be transferred by the collecting health care facility directly to the Wisconsin State Crime Laboratories for storage. DOJ determined these kits would be stored at the Wisconsin State Crime Laboratories for ten years, coinciding with the statute of limitations for second- and third-degree sexual assault offenses. If the non-reporting victim did not choose to report the crime after ten years from the date of the offense, the Wisconsin State Crime Laboratories would then dispose of the kit. If the non-reporting victim chose later to file a report of the sexual assault to law enforcement, this would cause the sexual assault kit to be removed from storage and processed by the Wisconsin State Crime Laboratories.

As part of DOJ’s “best practice” efforts described above, to improve the process of tracking sexual assault kits for victims and impacted criminal justice partners, DOJ purchased an electronic databasing system, InVita Healthcare Technologies’ STACS Track-Kit. The Track-Kit system is a cloud-based web application

that is used to track sexual assault kits and is used in several other states. DOJ has implemented a project team that has performed testing of the Track-Kit application's features, as well as the security of the system. In December 2021, selected law enforcement agencies, health care facilities, and crime laboratories started to use the Track-Kit system as part of the Wisconsin Sexual Assault Kit Tracking project in a pilot phase.

In 2021 Wis. Act 117, Wisconsin established statutes governing the tracking of sexual assault kits, which contain evidence collected as part of sexual assault forensic examinations of victims. The law describes an electronic database, which shall be known as the Wisconsin Sexual Assault Kit Tracking System, to allow victims of sexual assault the ability to anonymously access information about the location and status of any sexual assault kit the victim has provided, notwithstanding other limitations on accessing the information in Wis. Stat. § 165.79(1). The law further defines that the Wisconsin Sexual Assault Kit Tracking System shall allow continuous and ongoing access by criminal justice partners and DOJ to update and track the location and status of sexual assault kits, including the initial collection of evidence, receipt and storage at law enforcement agencies, receipt and analysis at forensic laboratories, and destruction.

2021 Wis. Act 117 impacts the following DOJ criminal justice partners, specified in Wis. Stat. § 165.776, as follows:

A. Wisconsin Law Enforcement Agencies and Health Care Professionals

Under Wis. Stat. § 165.776(3)(a), whenever Wisconsin law enforcement agencies or health care professionals collect a sexual assault kit from a victim, they shall enter the information required into the Wisconsin Sexual Assault Kit Tracking System. The statute does not, however, define procedures for these practices. The proposed rules would develop a required practice and define processes for those criminal justice partners impacted by Wis. Stat. § 165.776(3)(a), namely, law enforcement agencies and health care professionals.

B. Wisconsin State Crime Laboratories

Under Wis. Stat. § 165.776(3)(b), the Wisconsin State Crime Laboratories shall enter the information required into the Wisconsin Sexual Assault Kit Tracking System. The statute does not, however, define procedures for these practices. The proposed rules would develop a required practice and define processes for those criminal justice partners impacted by Wis. Stat. § 165.776(3)(b), namely, crime laboratories.

Accordingly, DOJ proposes to promulgate rules to administer 2021 Wis. Act 117 and Wis. Stat. § 165.776(3)(a) and (b), as required by law.

3. Statutory authority for the rules (including the statutory citation and language):

The proposed promulgation of these rules is supported by Wis. Stat. §§ 227.11(2)(a) and 165.776(4). Section 165.776(4) was created by 2021 Wis. Act. 117 and requires DOJ to promulgate rules to administer section 165.776. *See* 2021 Wis. Act. 117, § 1.

Wisconsin Stat. § 227.11(2)(a) provides:

(2) Rule-making authority is expressly conferred as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate

the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation. All of the following apply to the promulgation of a rule interpreting the provisions of a statute enforced or administered by an agency:

1. A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

2. A statutory provision describing the agency's general powers or duties does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.

Wisconsin Stat. § 165.776(4), as created by 2021 Wis. Act. 117, provides that “[t]he department shall promulgate rules to administer this section.”

2021 Wis. Act. 117, § 1 provides, in pertinent part: “(4) The department shall promulgate rules to administer this section.”

These statutes and 2021 Wis. Act 117 expressly confer on DOJ the power to promulgate rules interpreting the provisions in Wis. Stat. § 165.776 that are to be enforced or administered by DOJ to effectuate the purpose of those statutory provisions and the act, as long as the rules do not exceed the bounds of correct interpretation of the governing statutes.

DOJ finds that the promulgation of the proposed rules is appropriate to comply with the Legislature’s direction that DOJ promulgate rules, as described above. DOJ further finds that the rules here proposed:

- do not exceed the bounds of correct interpretation of Wis. Stat. § 165.776;
- are authorized by the statutes and act described above and are not based on authority derived from any other statutory or nonstatutory statements or declarations of legislative intent, purpose, findings, or policy;
- are authorized as necessary interpretations of the specific requirements of Wis. Stat. § 165.776 and 2021 Wis. Act. 117 and are not based on authority derived from any other general powers or duties of DOJ; and
- do not impose any standards or requirements that are more restrictive than the standards and requirements contained in Wis. Stat. § 165.776.

For these reasons, the proposed rules are authorized by Wis. Stat. §§ 227.11(2)(a) and 165.776(4).

4. Estimate of the amount of time that state employees will spend to develop the rules and of other resources necessary to develop the rules:

It is estimated that state employees will spend approximately 60 hours on the rulemaking process for the rules proposed here, primarily for compliance with required rulemaking procedures.

5. Description of all entities that may be impacted by the rules:

Several entities may be impacted by the proposed rules. First, DOJ may be impacted, as it is the state agency primarily tasked with administering the changes to the law enacted in 2021 Wis. Act 117. Second, law enforcement agencies and district attorneys and their staffs may be impacted. Third, health care professionals, including those who work for hospitals and clinics, may be impacted. Fourth, the Wisconsin State Crime Laboratories may be impacted.

The nature of these potential impacts of the proposed rules are described in more detail in section 2 of this scope statement.

6. Summary and preliminary comparison of any existing or proposed federal regulation that is intended to address the activities to be regulated by the rules:

Congress enacted the Survivors' Bill of Rights Act of 2016, which was signed into law on October 7, 2016. *See* 18 U.S.C. § 3772. This law gives sexual assault survivors several rights, including: (1) the right not to be prevented from, or charged for, receiving a medical forensic examination; (2) the right to have a sexual-assault evidence collection kit or its probative contents preserved, without charge, for the duration of the maximum applicable statute of limitations or 20 years, whichever is shorter; (3) the right to be informed of any result of a sexual assault evidence collection kit, including a DNA profile match, toxicology report, or other information collected as part of a medical forensic examination, if such disclosure would not impede or compromise an ongoing investigation; (4) the right to be informed in writing of policies governing the collection and preservation of a sexual assault evidence collection kit; (5) the right to, upon written request, receive written notification from the appropriate official with custody not later than 60 days before the date of the intended destruction or disposal of the sexual assault evidence collection kit; and (6) the right to, upon written request, be granted further preservation of the kit or its probative contents. 18 U.S.C. §§ 3772(a)(1)–(3)(B).

18 U.S.C. § 3772 generally addresses the same activities that the proposed rules will address, namely, the tracking of sexual assault kits and related evidence. However, the federal law is about providing specific rights to crime victims; whereas the proposed rules will be about establishing how DOJ will administer and execute the statutes governing tracking sexual assault kits, namely Wis. Stat. § 165.776.

In 2021, a bill was proposed in Congress to enact the Survivors' Bill of Rights in the States Act of 2021. *See* Survivors' Bill of Rights in the States Act of 2021, H.R. 4978, 117th Cong. § 1 (2021). The bill was introduced in the U.S. House of Representatives on August 6, 2021. It would create an incentive for states to put in place laws that provide to sexual assault survivors the rights, at a minimum, under 18 U.S.C. § 3772. It would enable the U.S. Attorney General to make grants to those states equal to 10 percent of the average of the amount of funding of the three most recent awards that a state received under part T of title I of the Omnibus Crime Control and Safe Streets Act of 1968, 34 U.S.C. § 10441 et seq., commonly referred to as the STOP Violence Against Women Formula Grant Program.

This proposed legislation involves grant funding, and the proposed rules do not address grants or funding sources for sexual-assault kit analysis.

Lastly, 32 C.F.R. § 114, addressing "Victim and Witness Assistance" in cases involving offenses by military personnel, establishes certain rights for sexual assault victims. These include the rights to: (1) have a "sexual assault evidence collection kit or its probative contents preserved, without charge"; (2) be

informed of the result of such kits; (3) be informed in writing of policies governing the collection and preservation of such kits; (4) upon written request, receive written notification from the appropriate official with custody not less than 60 days before the intended destruction or disposal of the kit; and (5) upon written request, be granted further preservation of such kits or their probative contents. 32 C.F.R. § 114.6(b)(1)(xi), (xii), (xiii), (xiv), (xv).

These federal regulations generally address the same activities that the proposed rules will address, namely, the tracking of sexual assault kits and related evidence. However, the federal regulations are about providing specific rights to victims of particular crimes by military personnel; whereas the proposed rules will be about establishing how DOJ will administer and execute the statutes governing the tracking of sexual assault kits, namely Wis. Stat. § 165.776.

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