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

February 21, 2020

TO:           The Honorable Luke Clippinger  
                  Chair, House Judiciary Committee

FROM:        The Maryland Sexual Assault Evidence Kit Policy and Funding Committee

RE:           House Bill 1248: Sexual Assault Evidence Kits - Voluntary Payment for Testing  
                  (LETTER OF CONCERN)

The Sexual Assault Evidence Kit Policy and Funding Committee (“SAEK Committee”) submits this letter of concern regarding House Bill 1248, which allows a victim to pay for the testing of a sexual assault evidence kit that has not been tested within 6 months of being transferred to a forensic laboratory or because it falls within one of the exemptions to the testing mandated by the law. As more fully explained below, the SAEK Committee has two major concerns with this policy: (1) it creates a system of disparate access to justice for sexual assault victims who cannot personally afford (or do not have health insurance companies willing to cover) the costs associated with testing a sexual assault evidence kit; and (2) it expends resources on testing sexual assault evidence kits that would not qualify for submission into the FBI’s Combined DNA Index System (CODIS) and thus could not be used to identify perpetrators and solve crimes of sexual assault.<sup>1</sup>

The SAEK Committee, created by statute in 2017, is chaired by the Office of the Attorney General and consists of a broad cross-section of stakeholders including law enforcement, medical professionals, crime victim rights attorneys, victim advocates, prosecutors, agency officials and legislators. The Committee was established to create effective statewide policies regarding the collection, testing, and retention of medical forensic evidence in sexual assault cases and to

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<sup>1</sup> The SAEK Committee also notes that similar concerns were raised by The Joyful Heart Foundation, a national rape kit testing advocacy organization, when similar legislation was filed in 2018. *See* March 14, 2018 letter from Ilse Knecht, Director of Policy and Advocacy, Joyful Heart Foundation to Delegate Frank M. Conaway, opposing HB1121.

increase access to justice for sexual assault victims.<sup>2</sup> Also relevant to HB 1248, the Committee is specifically mandated to develop recommendations concerning “payment for sexual assault evidence collection kits.”<sup>3</sup>

Information collected by the SAEK Committee indicates that it can cost between \$1000 to \$4000 to test a sexual assault evidence kit depending on the amount of evidence tested and whether testing is performed in-house by an agency forensic laboratory or outsourced to a private facility. The SAEK Committee believes that it is the government’s responsibility to cover the costs of testing sexual assault evidence kits and that State oversight of testing is critical to ensuring that justice is equally accessible to all victims. For these reasons and at the direction of the legislature, the Committee successfully secured \$2.6 million in federal funding to test sexual assault evidence kits and developed a testing protocol requiring that kits be tested based on the date of the offense, starting with the most recent cases.<sup>4</sup> Last year, the General Assembly passed legislation creating a state Sexual Assault Kit Testing Grant Program. In January, the Governor’s Office of Crime Prevention, Youth, and Victim Services awarded \$1.8 million in grants under the fund to the Maryland State Police and Baltimore, Montgomery and Prince George’s Counties.<sup>5</sup> As a result of these grants, millions of additional dollars are now being directed to test sexual assault evidence kits throughout Maryland, consistent with the new criteria recommended by the SAEK Committee and enacted by the legislature just last year.

When the legislature last considered allowing victims to pay for the testing of their sexual assault evidence kits in 2018, there was no state law mandating broad and consistent testing of kits in a timely manner. That has since changed. Last year, the General Assembly passed House Bill 1096/Senate Bill 767, effective January 1, 2020, which requires that all sexual assault evidence kits be tested with the following limited exceptions:

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<sup>2</sup> MD. CODE ANN., Crim. Pro. § 11-927(c).

<sup>3</sup> Crim. Pro. § 11-927(e)(1)(iii).

<sup>4</sup> Approximately \$900,000 of this grant is estimated to be used for kit testing. The remainder will be used to perform a statewide inventory of untested kits, to develop and implement a statewide kit tracking system, and to provide victim services. In developing the testing protocol, the SAEK Committee sought to use objective criteria that could be fairly applied and would not disproportionately impact socially and economically disadvantaged victims. For an update on the status of the federal grant, *see* the SAEK Committee’s 2020 Annual Report, available online at: [http://www.marylandattorneygeneral.gov/Pages/Groups/123019\\_SAEK\\_Committee\\_2020\\_Report.pdf](http://www.marylandattorneygeneral.gov/Pages/Groups/123019_SAEK_Committee_2020_Report.pdf).

<sup>5</sup> *See* <http://goccp.maryland.gov/governors-office-of-crime-prevention-youth-and-victim-services-announces-awards-for-sexual-assault-kit-testing-grant-program/>.

1. Cases where there is clear evidence disproving the allegations of sexual assault;
2. The facts alleged could not be interpreted to violate the crimes of (1) assault, reckless endangerment, or related crimes; (2) sexual crimes; (3) abuse and other offensive conduct; or (4) prostitution or related crimes;
3. The victim declines to give consent for analysis; and
4. The suspect's profile was previously uploaded into CODIS as a convicted offender for a qualifying offense [and] the suspect has pled guilty in the current sexual assault case.<sup>6</sup>

These exceptions serve two purposes: they reflect the requirements for entering evidence into CODIS—a national database populated by DNA samples submitted by forensic laboratories from around the country—to identify serial predators of sexual assault; and they direct limited resources to those cases for which law enforcement might obtain new evidence to identify offenders and/or prosecute crimes. Specifically, exceptions (1) and (2) relate to cases that meet the definition of “unfounded” under the Federal Bureau of Investigation’s (FBI) Uniform Crime Reporting standards. Exception (3) refers to “Jane Doe” or anonymous kits. Finally, exception (4) acknowledges the limited resources of laboratories by excluding specific circumstances where law enforcement is confident that a suspect’s DNA has already been entered into CODIS for comparison against other samples. Kits that are deemed “unfounded” or are not associated with a crime are not eligible for submission into CODIS for comparison against other DNA samples, and thus cannot help to identify offenders or prosecute crimes.<sup>7</sup>

HB1248 would allow victims (or their insurance carriers) to pay to have a forensic kit tested that meets one of the testing exceptions in Crim. Pro. § 11-926(e). Again, the SAEK Committee is concerned about this proposal for two reasons. First, it creates a disparate system where victims with resources have their kits tested while victims who cannot afford to pay for

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<sup>6</sup> Crim. Pro. § 11-926(e)(1)-(4). By definition, evidence associated with unfounded cases are not eligible to be entered into CODIS.

<sup>7</sup> We understand that some law enforcement agencies have broadly and inappropriately applied the unfounded exemptions. Thus, HB 1096/SB 767 also directed the SAEK Committee to develop an independent review process for examining law enforcement decisions not to test a kit. That process, which would subject such decisions to two tiers of review—first by a local Sexual Assault Response Team and then by the SAEK Committee—is set forth in the SAEK Committee’s 2020 Annual Report. Regulations enacting this process will be published in the February 28 issue of the Maryland Register. *See* SAEK Committee’s 2020 Annual Report, Appendix C and D.

testing do not. The SAEK Committee believes that all kits that qualify for testing should be tested in a timely manner, without regard to a victim's ability to pay.<sup>8</sup>

Second, HB1248 would allow for the testing of kits that cannot be uploaded into CODIS and will not be useful in a prosecution of the alleged perpetrator. If clear evidence exists to disprove the allegation of sexual assault, or the facts alleged do not constitute a crime, the State cannot prosecute the alleged offender regardless of forensic testing results.<sup>9</sup> The Committee is concerned that should HB1248 become law, some people may be misled into believing that if they pay for forensic testing, the results can be used to persuade the State to proceed with criminal charges.

We hope the information set forth above assists the Committee in its consideration of House Bill 1248. For more information regarding the SAEK Committee's activities, please contact Zenita Wickham Hurley, Committee Chair, at [zhurley@oag.state.md.us](mailto:zhurley@oag.state.md.us) or 410-576-7939.

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<sup>8</sup> Consistent with HB1096/SB 767, the newly proposed regulations will also require forensic laboratories to report annually to the Office of the Attorney General beginning September 2021 regarding the time required to complete testing for each kit received. Once agencies have an opportunity to implement the new federal and state grant funding and local laboratories begin reporting testing timeframes, the SAEK Committee will be able to better assess whether additional funding sources for kit testing are necessary. See SAEK Committee's 2020 Annual Report, Appendix D.

<sup>9</sup> Again, as mentioned above in footnote 7, a two-tiered appeal process exists for cases determined to be "unfounded." If a victim disagrees with law enforcements conclusion that the case is unfounded, he or she can appeal that decision. If the appeal is successful, the State will pay to test the kit.