MCASA
Maryland Coalition Against Sexual Assault

Working to end sexual violence in Maryland

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Testimony Supporting Senate Bill 949 with Sponsor Amendments
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The Maryland Coalition Against Sexual Assault (MCASA) is a non-profit membership organization that includes the State's seventeen rape crisis centers, law enforcement, mental health and health care providers, attorneys, educators, survivors of sexual violence and other concerned individuals. MCASA includes the Sexual Assault Legal Institute (SALI), a statewide legal services provider for survivors of sexual assault. MCASA represents the unified voice and combined energy of all of its members working to eliminate sexual violence. We urge the Judicial Proceedings Committee to report favorably on Senate Bill 949 with Sponsor Amendments.

Senate Bill 949 - Protecting Survivors of Sexual Assault from Commercial Exploitation - Commercial Purveyors of Self Administered Sexual Assault Evidence Collection Kits
Senate Bill 949 would prohibit a person from selling, offering for sale, or distributing a self-administered sexual assault evidence kit. The consumer protection division of the Attorney General's Office would be charged with enforcing these provisions and any civil penalties recovered would be used for Forensic Nurse Examiner Training. If a self-administered kit is used by a survivor, SB949 makes it clear that information about this prohibition may not be presented in a criminal or civil proceeding.

Amendments supported by the Sponsor and offered by Chair Luke Clippinger would provide additional protection for survivors and help ensure their access to justice. MCASA strongly supports these amendments.

Difficulty accessing Sexual Asssault Forensic Exams (SAFEs) is a significant problem in Maryland, but "do it yourself" rape kits are not the solution.
Sexual assault forensic exams are available to survivors at designated hospitals in Maryland. These exams are performed by expert, trained forensic nurse examiners. The exam and following care are FREE and include:

- A forensic interview, including gathering information about the assault and observations about the survivors' demeanor (including information important to hearsay exceptions and evidentiary rules);
- A head-to-toe examination with evidentiary samples based on the forensic interview. This may include photographs, including photos taken with specialized equipment known as alternate light source (ALS) to document injuries and bruises not visible to the naked eye, samples from under

fingernails and from the survivor's body to collect potential DNA left by the assailant, samples to determine if semen is present, and the use of specialized equipment to document the existence of microscopic tears in vaginal and anal areas;
- Emergency hospital treatment and follow-up medical testing performed up to 90 days after the initial physical examination;
- Treatment for injuries;
- nPEP to prevent the survivor from contracting HIV and associated labs to monitor potential contraction;
- Providing medication to prevent other sexually transmitted infections;
- Pregnancy prevention medication and counseling;
- Mental health crisis support and referrals;
- Assessing whether the patient-survivor was strangled and, if strangulation occurred, treating the patient, assessing additional risks related to strangulation, and documenting physical injuries caused by strangulation;
- Connecting survivors with local rape crisis centers to provide additional follow-up and information regarding criminal and civil justice options;
- Proper storage and preservation of evidence and compliance with chain of custody protocols;
- Expert testimony at trial if the survivor chooses to pursue criminal charges;
- Survivor centered care, focused on empowering victim/survivors and respecting their decisions.

Sexual Assault Forensic Examinations are part of a specialized and regulated medical field. The International Association of Forensic Nurse Examiners provides resources, clinical skills training, information regarding certification, assessment of educational opportunities, a Journal of Forensic Nursing, and advocacy for forensic examiners and the victims of trauma they respond to. The U.S. Department of Justice, Office of Violence Against Women, has a National Protocol for Sexual Assault Forensic Examinations (2013, currently being updated), a 144 page document detailing expert standards for conducting SAFEs. Maryland has regulations regarding both SAFEs, https://www.mcasa.org/assets/files/Maryland-Forensic-Exam-Regs-effective-12-29-08.pdf , and the qualifications of those conducting SAFEs, http://mdrules.elaws.us/comar/10.27.21

There is a crisis in access to sexual assault forensic exams in Maryland. This is a long-standing issue and has been resistant to efforts to address the problem. Structurally, the system is not as survivor-friendly as it could or should be. Survivors are required to go to specific hospitals and, if they present at the "wrong" hospital, must go elsewhere. The statewide nursing shortage exacerbates this issue and sometime survivors are sent to other hospitals even when they present at a hospital with a SAFE program because there is no forensic nurse available. This is not only unacceptable, it is now creating an opportunity for exploitation by companies seeking to profit off of sexual assault survivors.

Maryland and other states have been subject to aggressive and misleading marketing by a commercial purveyor of a product labeled as an "early evidence kit" or referred to as "do-it-yourself" rape kits. Initial outreach included misrepresentations that the for-profit enterprise was a "nonprofit organization" and incorrect statements about Maryland law and whether self-administered kits were authorized. While the language of survivor-empowerment is used, the advertised products have not been introduced in court, and it appears they have rarely even been

produced. There are, however, significant indications that financial profit is the underlying motive. This includes reports that venture capitalists have been recruited with statements that "Sexual assault" was a "multibillion-dollar industry", https://www.thecut.com/article/inside-diy-rape-kit-startup-leda-health.html , and significant information on-line seeking private equity, see, e.g., https://pitchbook.com/profiles/company/277813-45, https://www.crunchbase.com/organization/leda-health-company/company_financials.

This financial profit would come at the expense of sexual assault survivors. As reported by the Maryland Attorney General's Sexual Assault Forensic Evidence Kit Policy and Funding Committee, the self-administered kits raise significant concerns regarding the admissibility in court, the privacy of both victim/survivors and alleged perpetrators, and the ability of survivors to access all the advocacy and medical care, including follow-up care, needed after an incident of sexual assault. https://www.marylandattorneygeneral.gov/Pages/Groups/Supp_Report_HB758_SB789.pdf. See also, https://www.marylandattorneygeneral.gov/Pages/Groups/HB758_SB789_Report_2023.pdf

Senate Bill 949 is carefully balanced to ensure the actions of survivors are not restricted by prohibitions on self-administered kits. In MCASA's view, some of the most important provisions of SB949 are found on page 5, lines 6-20. These provisions ensure that if a sexual assault survivor does use a self-administered kit – perhaps after being misled by unscrupulous enterprises – the factfinder (judge or jury) may not be informed that the kit is, in essence, illegal and falls under the prohibitions found in §14-4602 of the Commercial Law Article. In other words, if a survivor uses a kit, it will be treated the same way as a blue dress with semen, bed sheets, underwear, or any other object related to the sexual assault. This is critical to ensure that survivors are not unintentionally harmed by the consumer protection provisions.

Amendments respond to efforts to prevent commercial purveyors from being held accountable by the justice system. "Terms and Conditions" of use by at least one purveyor would waive important legal rights of survivors and prevent lawsuits against the company.

These "terms and conditions" include:

> **Binding Arbitration.** In the event that a dispute arises between you and Leda Health, you agree to first contact us to seek a resolution. If we are not able to resolve the issue, then except for disputes relating to the infringement or other misuse of intellectual property rights, such dispute will be resolved through binding arbitration rather than in court. Such arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the rules of the AAA, and any arbitration hearing will be held in New York, New York. You and Leda Health agree that each may bring claims against the other only in your or its individual capacities, and not as a plaintiff or class member in any purported class, consolidated or representative proceeding. YOU UNDERSTAND THAT YOU ARE WAIVING YOUR RIGHT TO HAVE YOUR CLAIMS HEARD IN COURT BY A JUDGE OR JURY. AN ARBITRATION AWARD IS ENFORCEABLE AS A COURT ORDER AND IS SUBJECT TO ONLY LIMITED REVIEW BY A JUDGE. YOU ALSO UNDERSTAND AND AGREE THAT THIS ARBITRATION PROVISION PREVENTS YOU FROM PARTICIPATING AS A PLAINTIFF OR AS A CLASS MEMBER IN ANY PURPORTED CLASS ACTION OR REPRESENTATIVE PROCEEDING.
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> **Indemnification.** We are not responsible or liable for any actions taken by you as a result of your use of our Services. You hereby agree to defend, indemnify and hold Leda Health, its officers, directors, employees, owners, successors, and assigns harmless against all losses, damages, or expenses of whatever form or nature, including actual attorneys' fees and other costs of legal defense, whether direct

or indirect, which they, or any of them, may sustain or incur as a result of your act or omission including, but not limited to: (i) your breach of any of the provisions of this Agreement, (ii) your negligence or other tortious conduct; or (iii) your use of the Services.

Limitation of Liability. To the maximum extent permitted by law, in no event will Leda Health, its affiliates, officers, employees, agents, suppliers, contractors, or licensors be liable for any direct, indirect, incidental, special, consequential, or punitive damages, including without limitation: loss of profits, data, use, goodwill, or other intangible losses, resulting from: (i) your access to or use of or inability to access or use the Services; (ii) any conduct or content of any third party on the Services, including without limitation, any defamatory, offensive, or illegal conduct of other users or third parties; (iii) any content obtained from the Services; (iv) unauthorized access, use or alteration of your transmissions or content; or (v) any damage to equipment caused by the Services and any cost of recovering lost data or of reprogramming, whether based on warranty, contract, tort (including negligence), product liability, personal injury, or any other legal theory, whether or not Leda Health has been informed of the possibility of such loss or damage, and even if a remedy set forth herein is found to have failed of its essential purpose. The provisions of this section apply to you to the maximum extent permitted by applicable law.

Limitation of Liability regarding Third Party Actions. To provide you with the Services, we may in some instances utilize the services of third parties, such as third-party providers of services for STI testing, Plan B contraceptives, delivery services, and laboratory testing. You acknowledge that in these circumstances, Leda cannot control the actions of the third party service providers and shall not be responsible or liable for any actions, liabilities, or damages that may arise from the actions or omissions of third party service providers. In the event that you are involved in a dispute with a third party service provider arising from actions of that third party, you agree that Leda shall not be a party to the action and shall not be responsible for damages incurred as a result of the third-party service provider's actions or omissions.

These provisions would, for example, prevent the survivor from suing if her or his privacy was violated because the kit purveyor used a third party company to conduct analysis and information was posted on the internet. They would prevent the kit purveyor from being sued in court for misleading statement. They would protect scammers from being held accountable.

Proposed amendments would make it 100% clear that Maryland's public policy does not permit enforcement of the provisions to prevent survivors' access to court. The amendment language is based on similar provisions in the code regarding enforcement of non-disclosure agreements. These are needed to prevent companies from being able to get away with exploiting survivors who have just suffered the trauma of rape.

"Early Evidence" kits are an attempt to exploit the gap in access to SAFEs for financial profit and at the expense of sexual assault survivors. Commercial "do-it-yourself" rape kits mislead sexual assault survivors at an enormously vulnerable time. They have not been used in court, do not provide the full range of medical services and supports needed by survivors, and create a false sense of hope saving swabs will somehow provide an option to seek justice in the future.

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