



VAWA 2005 and the Implications for Community Response to Sexual Assault

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Note: Our summary of VAWA 2005 provisions was reviewed by Marnie Shiels, Esq., Attorney Advisor for the Office on Violence Against Women (OVW), U.S. Department of Justice, Office of Justice Programs.

In 2005, Congress reauthorized the Violence Against Women Act of 1994 in legislation commonly referred to as VAWA 2005. The purpose of this article is to describe some of the provisions that will have an impact on how communities respond to sexual assault. In particular, we will focus on the following provisions:

- (1) States must pay for forensic exams for victims of sexual assault, in order to remain eligible for STOP Violence Against Women Formula Grants (commonly referred to as STOP Grant funds).
- (2) States have discretion regarding whether or not to cover the costs for medical testing and treatment conducted as part of a forensic exam.
- (3) States may now use federal STOP Grant funds to pay for forensic exams as long as they are performed by trained examiners and the costs are not billed to victims or their private insurance.
- (4) To remain eligible for STOP Grant funds, victims cannot be required to participate in the criminal justice system in order to obtain a forensic exam.

We will describe these provisions in more detail, and then explore their implications. Unfortunately, the issues involved are rather complicated, because they are intertwined with the questions of whether forensic exams are authorized by law enforcement and whether medical professionals are mandated by law to report sexual assault.

(1) States Will Pay for Forensic Exams of Sexual Assault Victims

Under VAWA 2005, grantees of the STOP Violence Against Women Formula Grant Program must meet certain requirements concerning payment for the forensic medical exam in order to receive funds. Specifically, the State, Territory, or the District of Columbia must certify that it or another governmental entity "incurs the full out-of-pocket cost of forensic medical exams" for victims of sexual assault. If one part of a State or Territory, such as a county or city, is forcing victims to incur these costs, then the State or Territory will not be able to certify and will be ineligible for the grant funds.

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For the purposes of VAWA 2005, a sexual assault forensic examination is defined as including, at a minimum:

- examination of physical trauma
- determination of penetration or force
- patient interview; and
- collection and evaluation of evidence [28 C.F.R. § 90.2(b) (1)]

(2) States Have Discretion Regarding Payment for Medical Testing and Treatment

Yet VAWA 2005 also states that “the inclusion of additional procedures (e.g., testing for sexually transmitted diseases) to obtain evidence may be determined by the state ... in accordance with its current laws, policies, and practices” [§90.2(b)(2)]. In other words, although VAWA 2005 requires states to pay for the forensic aspects of the exam (as defined above), they are given discretion regarding whether to pay for medical aspects of the exam. The practice therefore varies both as a result of state laws and specific practices within the community. As a result, victims of sexual assault may find that all, none, or some of the costs for medical testing and treatment procedures are covered.

However, even for those states that do use state funds to pay for medical services provided as part of a forensic examination, these expenses will often be paid through the existing Crime Victims Compensation fund. Victims may therefore be required to pay for the costs of medical testing and treatment upfront, and then submit an application to be reimbursed through the Crime Victims Compensation Fund.

Unfortunately, the eligibility criteria for most state Crime Victims Compensation funds require victims to report the sexual assault in a timely manner (often 72 hours to 5 days) and cooperate with the criminal justice system. As we all know, victims of sexual assault typically report to law enforcement after a delay of days or weeks (if they report at all), and many decide that they are unable to actively participate in the investigation and prosecution of their sexual assault. Therefore, even if medical services are reimbursed using state funds, the eligibility criteria for the Crime Victims Compensation funds will often limit the availability of these funds for many victims of sexual assault.

(3) The Cost of Forensic Exams Cannot be Billed to Victims or Their Insurance

Another provision of VAWA 2005 is closely related to this issue of payment. Specifically, states may now use federal STOP Grant funds to pay for forensic examinations of sexual assault victims as long as they are performed by trained examiners and victims are not required to seek reimbursement from their own private insurance for the cost of the exam. Therefore, although the current protocol in some states and communities is to bill victims or their private insurance for the cost of a

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sexual assault forensic examination first, this practice may disappear as alternative legislation and protocols are developed.

(4) Victims Cannot be Required to Participate in the Criminal Justice System

A fourth important provision of VAWA 2005 specifies that any state receiving STOP Grant funds cannot “require a sexual assault victim to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical examination, reimbursement for charges incurred on account of such an examination, or both.” States violating this provision will not be eligible to receive continued STOP Grant funding. At this time, however, it is not entirely clear how this issue will be reconciled in those states where the law requires that forensic examinations be authorized by law enforcement. This is where the issues get particularly complicated, so we’re going to unpack them separately.

Therefore, we will now turn toward an explanation of how these VAWA 2005 provisions are intertwined with the questions of (1) whether medical professionals are mandated by state law to notify law enforcement of sexual assaults that are committed against their patients; (2) whether a forensic examination must be authorized by law enforcement before it can be conducted, and; (3) who pays for forensic examinations.

Mandated Reporting by Medical Professionals

In some states, medical professionals are mandated by state law to notify law enforcement of any sexual assault that is committed or suspected against one of their patients. These laws vary dramatically in terms of what triggers the mandated reporting requirement, what information must be reported, who must be notified of the report, and what specific procedures must be followed to comply with this mandated reporting requirement. In order to clarify these complex issues, the American Prosecutors Research Institute (APRI), through their National Center for the Prosecution of Violence Against Women, released a report in 2005 entitled: *“Rape and Sexual Assault Reporting Requirements for Competent Adult Victims.”*

To find out whether or not your state has a **law mandating medical professionals to report suspected cases of sexual assault to law enforcement**, see the interactive map created by the American Prosecutors Research Institute through the National Center for the Prosecution of Violence Against Women at http://www.ndaa.org/apri/programs/vawa/state_rape_reportings_requirements.html.

Summary of State Laws Regarding Mandated Reporting

As summarized in the APRI (2005) report, **some states have laws explicitly requiring medical professionals to notify law enforcement officials of a suspected sexual**

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assault against a competent adult victim. In these states, the victim does not decide whether or not the sexual assault will be reported to law enforcement.

Most state laws also require medical professionals to report a sexual assault committed against any victim who is a minor, or vulnerable based on their advanced age, severe disability, or other factors. Most state laws also require mandated reporting of any sexual assault committed by a caretaker or other authority figure, although the exact provisions of these reporting requirements vary by state.

Some state laws require medical professionals to report any non-accidental or intentional injury against competent adult victims, including those caused by violent crime. However, it remains unclear whether some of these state laws require medical professionals to report a sexual assault against a competent adult victim that did not result in any physical injury other than the sexual assault itself.

Other states have laws requiring medical professionals only to report certain types of injuries against competent adult victims, such as “injuries caused by firearms, stab wounds, or non-accidental wounds caused by a knife or sharp pointed instrument, injuries caused with a deadly weapon and burns, among others” (APRI, 2005, p. 9). Therefore, medical professionals would only be required to notify law enforcement of a sexual assault if it involved this type of specific injury; otherwise reporting would remain the victim’s decision.

For those states with no mandated reporting requirement regarding the sexual assault of a competent adult victim, it typically remains the victim’s decision regarding whether or not the crime will be reported to law enforcement officials. However, some hospitals or other forensic exam facilities may have a policy of reporting sexual assaults, even when they are not mandated to do so by state law.

Not the time to ask victims about prosecution or even reporting

It is important to note, however, that regardless of the law in your state, mandated reporting requirements for medical professionals never require a victim to actually talk with law enforcement professionals or to participate in an investigation or prosecution. The reporting requirement simply mandates that the health care provider provide information about the sexual assault to law enforcement authorities (the information that is provided and the procedure for doing so also varies by states).

Therefore, regardless of whether or not a mandated report is made by medical professionals, they should never ask sexual assault victims whether or not they want to report the crime to law enforcement or “press charges.” Rather, **best practice is for health care providers (including forensic examiners) to simply ask sexual assault victims whether they are willing to talk with a law enforcement officer about what an investigation might look like and what criminal justice outcomes might realistically be expected.**

Are Victims Identified in a Mandated Report?

In states with mandated reporting requirements for competent adult victims of sexual assault, victims are not the ones to decide whether or not the sexual assault will be reported to law enforcement. Medical professionals in these states are mandated to report the sexual assault to law enforcement, irrespective of the victim's wishes. Yet some of these mandated reporting laws do not require that any identifying information be provided. In this case, the mandated reporter may file only a blind (anonymous) report with law enforcement officials.

In other states, the law requires medical professionals to provide the victim's identity to law enforcement, along with other basic information about the sexual assault. Again, these laws still leave it up to the victim to decide whether or not to talk with law enforcement professionals or participate in an investigation and prosecution.

The Need for Community-Wide Protocols and Outreach Efforts

In summary, state laws differ with respect to whether or not they require medical professionals to report a sexual assault that has been committed or suspected against one of their patients. However, the details of these mandated reporting requirements vary dramatically. Professionals from within law enforcement and health care must therefore work together to clarify their own understanding of state laws regarding mandated reporting and develop a community-wide protocol for complying with the requirement. Then the community will need to engage in outreach efforts to inform mandated reporters of their responsibilities and create procedures for filing mandated reports. This may include the following (these are quoted directly from the *National Protocol for Sexual Assault Medical Forensic Examinations* published in 2004 by the Office on Violence Against Women):

“Develop **public information initiatives** on mandatory reporting – mandatory reporters need to know applicable statutes regarding reporting sexual assault cases that involve older vulnerable adults, persons with severe disabilities, and minors.”

“A **toll-free hotline number** exclusively dedicated to abuse reports may also help simplify reporting and ensure a written report of each case and referrals to appropriate agencies. Such a hotline could be operated at a State, tribal, regional, or local level.”ⁱ

“In **institutional settings** such as prisons, jails, immigrant detention centers, nursing homes and assisted living programs, inpatient treatment centers, and group homes, ensure that victims can report assaults to outside agencies and are offered protection from retaliation for reporting.”

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“In each case strive to create an environment in which **victims are encouraged to report and are supported** – throughout the criminal justice process and beyond.”

“Even in those cases that do not develop beyond an initial report to the police, **victims should feel that they are respected**” (National Protocol, 2004, p. 48).

Whatever the specific reporting requirements, they must be clearly explained to mandated reporters, so they know how to comply, and to victims, so they know what to expect from the process. Victims must also be notified of what triggers a mandatory report and what information would be provided. However, they must also be informed that even a mandatory report does not obligate them to talk with law enforcement professionals or participate in the investigation or criminal prosecution.

Law Enforcement Authorization of Forensic Exams

Another important element that complicates the implementation of the new VAWA provisions is the fact that state laws vary in whether or not they require forensic exams to be authorized by law enforcement personnel before they can be conducted.

To find out whether your state has laws governing **law enforcement authorization** of forensic examinations, please see the interactive map created by the American Prosecutors Research Institute at:
http://www.ndaa.org/apri/programs/vawa/state_rape_reportings_requirements.html.

Summary of State Laws Regarding Law Enforcement Authorization

In some states, the law requires law enforcement authorization of any forensic examination, so victims of sexual assault must report the crime to law enforcement in order to obtain a forensic examination. The rationale for this type of requirement is that part of the role of law enforcement is to determine whether the elements of a crime have been met, and whether a forensic examination of the victim would constitute an appropriate step in the ongoing investigation. This determination will be based on law enforcement expertise in the various penal code definitions and elements of criminal sex offenses, as well as an understanding of forensic evidence and the likelihood of recovering probative evidence and information in a forensic examination given the specific circumstances of any particular case.

In most cases, this does not mean that the victim has to participate in the resulting investigation or prosecution, but simply that the crime must be reported to law enforcement personnel so they can authorize the forensic examination so it may be conducted by medical professionals. This is typically the case when local law enforcement agencies or other government entities have the responsibility for paying for the costs of the forensic examination.

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In other communities, however, victims can obtain a forensic examination without authorization by law enforcement.

Forensic Examinations without Law Enforcement Involvement

In communities where victims can obtain a forensic examination without authorization by law enforcement, the specific policies and practices vary dramatically. For example, victims in some communities may be able to obtain a forensic examination simply by presenting to their hospital emergency room or to a specialized medical facility located in a rape crisis center, local YWCA, or other community organization. This typically occurs when forensic examinations are paid for by the hospital, rape crisis center, or other community organization conducting the examinations, rather than by law enforcement or another government entity.

- Of course, keep in mind that the medical professional conducting the forensic examination may be required by state law to report any suspected case of sexual assault to law enforcement – even if the forensic examination does not need to be authorized by law enforcement.
- This would be dictated by state laws governing mandated reporting by medical professionals, and is unrelated to the question of whether or not state laws require forensic examinations be authorized (and/or paid for) by law enforcement.

As with law enforcement agencies, these forensic examination facilities may have specific guidelines regarding timelines for how long after the sexual assault a forensic examination will be conducted. When this kind of facility conducts forensic examinations without law enforcement's involvement, however, they will need to develop detailed policies regarding:

- How long evidence will be stored at the facility before it is destroyed
- What measures will be taken to protect the integrity of evidence and chain of custody
- Whether and how victims will be contacted for follow-up
- Whether and how any DNA evidence from the suspect will be submitted to the national DNA databank (the FBI Laboratory's Combined DNA Index System known as CODIS)
- What provisions will be included in the consent form to be signed by victims

Who Pays for the Forensic Examination

Related to the issue of whether or not law enforcement must authorize a sexual assault medical forensic examination is the question of who pays for it.

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- For example, in many communities, the cost of a forensic examination comes out of the budget of the local law enforcement agency or prosecutor's office. This is often the case when the need for a forensic examination must be evaluated and authorized by law enforcement before it can be conducted.
- In other communities, the cost is covered by: the hospital or other medical facility conducting the forensic examination; city, county, or state government; state crime victims compensation program; the victim's private insurance; or the victim him- or herself. (Recall that the new provision of VAWA 2005 will likely put an end to the practice of billing victims or their private insurance for the costs of a forensic exam.)
- Yet in some of these communities, costs are only covered for the forensic components of the examination, and not medical evaluation and treatment. This is likely to be in communities where the costs are covered by a governmental entity such as the local law enforcement agency, prosecutor's office, or the city, county, or state government, or the state crime victims compensation program. This issue was discussed already.

Some State Laws Specify Who Pays for Forensic Exams

Again turning to the summary by the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute (APRI, 2005), a number of states have laws pertaining to the payment for forensic examinations. However, the exact provisions of these laws vary dramatically. Other states do not have any laws outlining who will pay for sexual assault medical forensic examinations.

In most of the states with laws explicitly addressing this question, the statute specifies that forensic examinations will be paid for by the **local law enforcement agency** or **crime victims compensation fund**. Yet some of the state laws indicating that the crime victims compensation fund will pay for forensic examinations have severe limitations. For example, some of these state laws indicate that sexual assault medical forensic examinations will only be paid for if:

- the victim reports to law enforcement
- the report is made within a specified time period (ranging from 72 hours to 5 days)
- the forensic examination is authorized by law enforcement and/or
- the forensic examination is approved by the local prosecutor

It is currently unclear how these requirements will be reconciled with the new provisions of VAWA 2005, but it appears that states will need to revise these requirements in order to comply with the new federal legislation and remain eligible for STOP Grant funding.

Some State Laws Specify Only who Will Not Pay for Forensic Exams

Other state laws simply indicate that forensic examinations will **not be billed to victims or their private insurance**, without specifying exactly which entity will cover the costs. This type of legislation clearly complies with the new provision of VAWA 2005 by specifying that victims cannot be required to pay for their forensic examination or seek reimbursement from their own private insurance. This means that victims cannot be charged for any of the costs associated with a forensic examination conducted for the purpose of gathering evidence of a sexual assault.

However, the fact that these state laws do not specify who will pay the costs is a source of considerable concern. It is therefore up to communities, regions, and states to develop appropriate protocols for designating the source of payment for medical forensic examinations. This is clearly a task that must be undertaken with collaboration between all of the various disciplines involved in responding to sexual assault victims, such as law enforcement, prosecution, health care, and victim advocacy. In fact, these disciplines might need to work collaboratively to develop model language for a new or revised state statute regarding the payment for forensic examinations.

To find out whether your state law specifies who pays for forensic exams, please see the interactive map developed by the American Prosecutors Research Institute at http://www.ndaa.org/apri/programs/vawa/state_rape_reportings_requirements.html.

How the Question of Payment Affects Other Issues

Of course the question of who pays for the forensic examination will also affect a number of other issues, such as whether or not law enforcement is notified and whether or not the victim can retain confidentiality. For example, if the forensic examination is paid for by a law enforcement agency or prosecutor's office, their protocols will typically require that they be notified of the incident in order to authorize payment in advance. The forensic examination will then not typically be confidential, unless the community has a protocol in place for authorizing and conducting forensic examinations using a pseudonym (e.g., "Jane Doe") or blind identification number.

- In other words, the fact that the forensic examination is paid for by law enforcement or prosecution typically means that it will result in a formal report with the victim's name and other identifying information. There may be certain protections of the victim's privacy based on state law, agency policy, or local protocol. However, the report will not usually be anonymous, unless it is received by the law enforcement or prosecution agency as a "blind report" (e.g., using a pseudonym such as "Jane Doe" or an identification number).
- On the other hand, forensic examinations that are conducted and paid for by a community-based organization such as a rape crisis center or YWCA might take place without notifying law enforcement and regardless of whether the

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victim chooses to make a report. This would depend on whether state laws require mandated reporting to law enforcement and/or whether community protocols specify a procedure for handling confidential forensic examination results and evidence collected.

- Finally, although VAWA 2005 now prohibits the practice, some communities have had a policy of first billing the victim's private insurance for reimbursement of the costs associated with a forensic examination. Of course, this practice poses a serious threat to the victim's confidentiality, which is an important reason why it is now prohibited. For victims who share insurance coverage with a spouse, parent(s), or other family members, it may be impossible to keep these people from finding out about the forensic examination (and therefore the sexual assault) – because the reimbursement will show up on the insurance statement or other records.

Clearly, law enforcement investigators, forensic examiners, and victim advocates need to understand these complicated issues, so they can explain to victims the consequences of their decisions – regarding whether or not to have a forensic examination and whether or not to report the crime to law enforcement. In particular, community professionals must be able to explain to victims the consequences of these decisions as they pertain to questions of payment for any costs of the forensic exam and the confidentiality of their exam findings. Victims may also need to be referred to either community-based or system-based advocacy organizations for assistance in applying for reimbursement through the crime victims compensation funds.

Because these issues are complex and determined in large part by state law, agency policies, community protocols, and local resources, they must be carefully addressed by each community as part of their Sexual Assault Response and Resource Team (SARRT) or other coordinated effort.

For More Information

This piece originally appeared as a “Promising Practices” article in the e-newsletter of **Sexual Assault Training & Investigations (SATI), Inc.** For more information on this organization or to sign up to receive this e-newsletter, please see: www.mysati.com.

Information on this and related topics is also available from **EVAW International**, including an **On-Line Training Institute (OLTI)** that offers training on the topic of criminal justice response to sexual assault. Participation in the OLTI is open to professionals, students, or others who provide verification of their employment, educational status, or evidence of legitimate interest. A registration fee is required. For more information, please see: www.evawintl.org.

An **International Conference on Sexual Assault, Domestic Violence, and Stalking** hosted by EVAW International will take place at the Westin Galleria Hotel in Houston, Texas, April 16-18, 2007. For more information or to register, see: www.evawintl.org.

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For more information on the Violence Against Women Act 2005 Reauthorization, please see the website for the **National Task Force to End Sexual and Domestic Violence Against Women** at: <http://www.vawa2005.org>.

References

National Protocol for Sexual Assault Medical Forensic Examination: Adults/Adolescents (2004, September). Published by the U.S. Department of Justice, Office on Violence Against Women (NCJ 206554). Available at: <http://www.usdoj.gov/ovw/publications.htm>

“*Rape and Sexual Assault Reporting Requirements for Competent Adult Victims*” (2005). Also see the interactive map created by the American Prosecutors Research Institute through the National Center for the Prosecution of Violence Against Women at [State Rape Reporting Requirements](http://www.ndaa.org/apri/programs/vawa/state Rape Reporting Requirements) or at <http://www.ndaa.org/apri/programs/vawa/state Rape Reportings Requirements.html>

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ⁱ Drawn from A. Vachss (2001). *Redefining Rape Response: When the Victim is Elderly or Has a Disability*, pp. 6-8, and 10. Quoted in the National Protocol (2004, p. 48)