



## **Untested and Backlogged Sexual Assault Kits:**

### **Resources for Coalitions**

By Andrea Piper-Wentland

Over the last several years, much attention has been given to the problem of untested and backlogged sexual assault kits (SAKs) nationwide. The handling of SAKs is one of the more complex issues facing coalitions right now. Opening up state- or territory-wide conversations about sexual assault evidence collection can lead to important new collaborations and coordination of efforts to end sexual violence.

A SAK, also commonly known as a rape kit, guides the collection of evidence from a sexual assault victim's body during a forensic medical exam. The exam involves collection of potential DNA evidence, physical external and internal examination, and extensive documentation of injuries. Completed kits contain potential physical evidence specimens (swabs, hair, clothing, etc.) that will be forwarded to a crime lab for analysis.

Completed SAKs are an important evidentiary tool that can yield critical evidence of a sexual assault. Delays to processing kits can impede justice for survivors of sexual assault and allow perpetrators of crime to remain unaccountable for their actions.

Hundreds of thousands of SAKs remain untested nationwide, because SAK testing has not been upheld as a priority, state/territory testing laws or protocols have not been developed, or that resources for testing SAKs are limited. For most states, a combination of these reasons is true. State and territorial coalitions are uniquely poised to represent survivors on a state- or territory-wide level and advocate for testing and related systemic change. It is also the work of coalitions to make sure that conversations with other key stakeholders stay victim-centered and emphasize the importance of trauma-informed policy and practices.

As coalitions participate in dialogues about SAKs, it is important for us to consider multiple facets of the issue. Addressing needs related to SAK evidence requires us to think deeply about how to best address protection of victim rights and confidentiality, offender accountability, community safety, and sexual violence prevention through an anti-oppression lens. Addressing backlogged and untested kits will require a review of the entire sexual assault response system—healthcare, criminal legal, and advocacy--and review of laws pertaining to collection and storage of evidence.

### **Anti-Oppression Framing**

It is important to discuss how individual incidents of sexual violence and untested kits fit into the overall culture of violence and silence about sexual violence. Each case of sexual assault is different, but paying attention to how the system responds to sexual assault in general can tell us a lot. Untested and backlogged kits can be seen as an outcome of our society's devaluation of sexual assault victims, particularly those from marginalized communities. Untested kits are both problematic in themselves and a manifestation of systemic problems in investigating and prosecuting cases of sexual assault. Far too many sexual assault survivors have bravely come forward and participated in an invasive exam, only to have their SAK languish on shelves and justice remain elusive.

Historical experiences with systems have prevented many sexual assault victims of color from feeling safe coming forward to report assaults and to collect physical evidence. And when they do, all too often their kits are not processed and the investigation or prosecution is not completed. All across the country, investigators are finding a disproportionate amount of untested and backlogged kits represent survivors of color. Detroit found that 81% of untested kits<sup>1</sup> in their possession belonged to black women. The ramifications for access to justice for all survivors, particularly people of color cannot be ignored. To make sure that we are aware of and are addressing the specific implications on communities of color,

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<sup>1</sup> <https://mic.com/articles/128138/how-these-detroit-women-took-on-a-rape-kit-testing-backlog#.L2DINNkA8>

it's important to examine where untested kits are coming from. What do the numbers say: Does the data represent the demographics of the jurisdiction? Is there a higher concentration of SAKs from individuals of color? As your coalition considers how to address untested kits and backlog, continually question how policies and protocols--such as DNA upon arrest laws or victim notification--will affect communities of color and other marginalized communities.

### **Backlogged vs. Untested Tests**

An important distinction to make when discussing SAKs is the difference between untested kits and backlogs, as these terms have been conflated by policy makers and the general public. This distinction helps us discover the root of the problem specific to our state or territory in crafting the appropriate solution.

A backlog refers to SAKs that have been delivered to a lab and are in queue to be tested. A SAK in the queue for testing does not translate to immediate or timely testing. Many labs are severely understaffed which can result in long wait times for kits to be processed. Testing is typically not done in the order in which a SAK is received. Policies for prioritizing what kits will be tested first impact the overall timeline of an individual kit being tested. Many states or jurisdictions do not know how many backlogged kits they have, but it is possible to find out.

Untested SAKs are in storage in police stations, evidence holding facilities, or hospitals. Many of these kits are booked into evidence by law enforcement, but never submitted to the crime lab for analysis because law enforcement determined that the case did not merit forwarding. Other SAKs may reside at hospitals because they were collected as anonymous kits and the state/territory lacks a policy on how to address storage and maintenance of these specific types of SAKs or because the survivor hasn't authorized release.

Given the different holders of untested kits, it can be difficult to find out how many untested kits in a state or territory exist. There are currently no uniform methods for tracking how many kits are distributed, completed, and submitted for analysis, nor widespread or commonly used methods for comparing the number of kits distributed and the number submitted for analysis.

**At a glance:**

<b>Backlog</b>	<b>Untested</b>
Delivered to the lab and are in queue to be tested  Many jurisdictions do not know how many backlogged kits they have, but it is possible to find out.	Kits are in storage  Not submitted to the crime lab for analysis  It is difficult to find out how many untested kits there are, if possible at all.

Cities such as Detroit and Houston are leading efforts to create uniform handling of untested kits and can be looked to as models. Many state coalitions are working to change policy as well. In 2015, Washington State passed legislation mandating that SAKs (excluding anonymous kits) be forwarded to the crime lab within 30 days. In 2016, legislation to create a tracking system that only victims can access to see the location and status of their kit was passed. The database will also provide the state data on the timeliness of SAK testing and numbers of kits by county submitted for testing. This is the first statewide tracking system to date and will be operational in 2017.

There are many actions coalitions can take in helping their state or territory develop a victim-centered and justice-oriented approach to managing evidence collection kits. As each coalition is responding to unique dynamics in their community, they will need to create unique solutions to the challenges and questions in auditing, testing, victim notification, prosecution, and policy development. The following questions can help you create the solution that is right for your state/territory.

## **Audit**

An audit can help inform your state/territory about the volume of untested tested kits and the backlog in your state.

- Do you know how many untested kits/backlogged kits exist in your state?
  - Can you get an audit? Requesting an audit and garnering support from the law enforcement community to voluntarily participate can be helpful. Having these numbers helps each part of the respective system improve services and supports jurisdictions/states/territories in figuring what types and the amount of resources needed to clear backlogs, get untested kits to the lab, and enhance the response and notifications system.
  - Who will conduct the audit? What other stakeholders should be at the table? Be thoughtful about what data you are requesting in the audit. Are you looking at untested kits, including anonymous kits? Clarity in your questions and ensuring proper stakeholders are involved is imperative.
  - How much will an audit cost? Who would be the appropriate funder for an audit? Many cities and some states have conducted audits with no additional resources. In these instances, law enforcement and hospitals have voluntarily counted kits. Obtaining funding may allow a dedicated person to coordinate the inquiry.
  - Will this funding come out of the funding that rape crisis centers are allocated? The submission of forensic material for analysis is a responsibility of the criminal justice system, so the criminal justice system should incur associated costs. Victim service agencies should not be penalized nor should funds be diverted for counts and testing. It is important to help policy makers and funders understand the distinction between community-funded victim services and system accountability.
- An audit can be an ideal opportunity to work to debunk myths and share information about DNA with programs, community, and stakeholders. Coalitions can do this by creating materials and resources that address the

realities of DNA: its utility and limitations. This not only helps to educate the public, but it also establishes the coalition as a critical voice on DNA and evidence collection.

- The audit process is also be a good time to encourage multi-disciplinary collaborations and examine state- or territory-wide processes and conditions under which evidence is collected, stored, processed, and analyzed. Many states have begun to form taskforces to examine these important issues.
  - If your state or territory advocates for an audit, remember to take into consideration media coverage. With coverage, there may be an increase in survivors contacting programs to learn more about the status of their kits and seeking support. There may be an increase in reports to law enforcement as well. It will be important to think about how the coalition, local programs, and systems professionals will best prepare. If needed can additional funds be made available to local programs, law enforcement, and prosecution?
- An additional consideration is accountability. Survivors deserve an apology and explanation for why kits haven't been tested. Having common language, talking points and strategic communications across disciplines (advocacy, law enforcement, medical and prosecutorial) to achieve this is important. Coalitions can help by shape communications and contribute expertise in victim-centered messages and a trauma-informed framework.

## **Testing**

There are opportunities to utilize private labs to help with expediting SAK testing. States and territories will need to consider the volume of kits, resources available and discuss the option of whether using a private lab is feasible and if it would help to clear backlogs or move forward SAK testing.

- Do you only use public labs, or do you contract out to private labs? Private labs can process material expeditiously and be cost effective, but CODIS information still will need entered by a CODIS approved entity.

Determining a process for testing and entry of backlog and untested kits will be necessary.

- In what order should you prioritizing SAK testing?
  - The ones that are reaching the statute of limitations?
  - The ones that police and investigators believe are most likely to get convictions?
  - The ones where the perpetrator was deemed a “violent predator?”
- How will anonymous kits be handled? Will survivors have an option to decline testing, after evidence collection?

### **Victim Notification**

Victim notification is an important element of SAK testing and victim advocates have a critical role in the notification process. States and territories will want to explore structures for trauma-informed notification and consider resource needs.

- Is there a process so victims can access information on the status of their kit and who has control of it (LE, hospital or laboratory)? Is it online and anonymous?
- Have the strictest protections been established to maintain victim privacy?
- What do we mean by victim notification?
- If victim notification occurs:
  - Does the victim have an option to opt out or into notification?
  - Who is involved in making notification? Police, system advocates, community advocates, others?
  - How would initial contact with victim be made—phone, letter, in person?
  - What information would be given to victims at initial contact?
  - Do you notify only if the case gets a match? Do you notify if it didn't get a match?
    - Before kit tested or after? Only if suspect identified?
  - What kind of training does the notifying team receive? Notification can be a re-triggering event; it can also provide much desired

information for survivors. The reactions of victims vary and responses should be trauma-informed.

- What if you get a match, but the perpetrator is deceased or in prison?

### **Investigation and Prosecution**

As states and territories discuss remedies and advancement for processing SAKs it is also essential to discuss needs related to investigation and prosecution. If resources are put into testing kits but there is not a matching investment in investigation and prosecution, it simply moves the issue to another part of the system.

- Is there a process for the victim advocate to be involved in the investigation and prosecution of the case? Ultimately, the goal of the police and prosecutors' goal is conviction, but a community advocate's role is separate from a criminal justice outcome and is rooted in supporting the victim with what the victim has determined is best for them.
- Is there a process for deciding whether you try cases with multiple victims but the same perpetrator? Do your confidentiality statutes allow you to notify victims that their perpetrator victimized others, and who those others are?
- What training would benefit prosecutors and how will it be provided?
- Are additional prosecutors needed to prosecute the rise in caseload?
- What training and tools may be helpful to enhance *voir dire* practices that address the "CSI effect" (the influence of TV shows like CSI or Law and Order on the public's beliefs) with potential jurors and community at large?

## **Funding**

There are competitive federal grants available to assist states and territories in processing untested and backlog SAKs. Additionally, state, local, private donations, and other funding may be available to address SAK needs.

- Has your state or territory reviewed available funding? What level of funding is needed? Are there funds available for, or can they be made available for:
  - Collecting and testing the kits?
  - An audit of untested/backlogged kits?
  - Investigation and prosecution of cases? If kits are tested, do local law enforcement and prosecutors have the resources and staff time to fully investigate and prosecute?
  - Sexual assault services? Notification can bring up trauma and complex advocacy needs. Are funds allocated for services to these victims? Or will the sexual assault programs be even more overwhelmed with clients?
  - Forming a workgroup of state/territorial stakeholders to discuss issues related to SAK collection, testing, investigation, prosecution, and notification?

## **Conclusion**

SAK processing, DNA collection laws, evidence storage laws and guidelines, victim notification, medical forensic exam availability, and law enforcement, prosecutor, and advocacy response systems are all enmeshed when examining the issue backlog and untested kits. Becoming familiar with the current laws and practices in addition to fostering a multi-disciplinary review will lend to greatest success in comprehensively advancing SAK reform. The coalition is a key voice in these conversations and can be instrumental in convening workgroups, guiding audit processes, and championing change.

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## Resource Sharing and Research

Many jurisdictions have begun discussion and are taking action to resolve backlogs and address untested kits. There have been several funded initiatives and resources to draw upon for guidance and lessons learned. It is important to remember scale. Most work to date has been focused in one city or jurisdiction, so extrapolating that to statewide responses will look different. The following resources can help you explore the issues and options in your state/territory.

The National Institute of Justice (NIJ) issued a report on findings from Dr. Rebecca Campbell's research in Detroit. The [Detroit Sexual Assault Kit Action Research Project Final Report](#) documents the Detroit Sexual Assault Action-Research Project, in which a multidisciplinary team, funded by NIJ, looked at the issue of a large number of sexual assault kits (SAKs) that had not been sent to a crime lab for DNA-testing. It also offers practitioner-friendly resources, including how to create victim-notification protocols. NIJ also has a resource page on [Untested Evidence in Sexual Assault Cases](#).

The [Houston Sexual Assault Kit Research](#) Team is a multidisciplinary team, supported by NIJ that came together to research and respond to the issue of untested sexual assault kits in Houston. These reports make recommendations on topics related to victim notification and improving judicial and law enforcement responses to sexual assault victims.

The NSVRC has a [special online collection on eliminating](#) the backlog that provides information to help victim service professional engage in a multi-disciplinary dialogue about the issues and challenges involved with addressing the backlog of untested rape kits. It also includes information basic information for victims of sexual assault about the forensic examination process.

The [Sexual Violence Justice Institute](#) of the Minnesota Coalition Against Sexual Assault published *Unsubmitted Kits and Backlogs: Language, Approaches, and Protocols*, a three-part Issue Brief intended to support STOP Administrators as they address sexual assault evidence collection kit (SAK) issues in their state.