

**ITEM 3**  
**TEST CLAIM**  
**PROPOSED DECISION**

Penal Code Section 680 as Amended by  
Statutes 2019, Chapter 588 (SB 22)  
*Sexual Assault Evidence Kits: Testing*  
20-TC-01

City of San Diego, Claimant

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**EXECUTIVE SUMMARY**

**Overview**

This Test Claim filed by the City of San Diego (claimant) alleges reimbursable state-mandated activities and costs arising from Penal Code section 680, amended by Statutes 2019, chapter 588 (SB 22), effective January 1, 2020. Penal Code section 680, known as the Sexual Assault Victims’ DNA Bill of Rights, makes mandatory the previously encouraged processes and related time frames for DNA testing of sexual assault forensic evidence.

As described herein, staff finds that the test claim statute imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 on county and city law enforcement agencies.

**Procedural History**

The claimant filed the Test Claim on December 31, 2020.<sup>1</sup> The Department of Finance (Finance) filed comments on the Test Claim on March 29, 2021.<sup>2</sup> The claimant filed late rebuttal comments on May 7, 2021.<sup>3</sup> Commission staff issued the Draft Proposed Decision on May 20, 2021.<sup>4</sup> No comments were filed on the Draft Proposed Decision.

**Commission Responsibilities**

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. “Test claim” means the first claim filed with the Commission alleging that a particular statute or

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<sup>1</sup> Exhibit A, Test Claim, filed December 31, 2020, page 1.

<sup>2</sup> Exhibit B, Finance’s Comments on the Test Claim, filed March 29, 2021, page 1.

<sup>3</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, page 1.

<sup>4</sup> Exhibit D, Draft Proposed Decision, issued May 20, 2021.

executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>5</sup>

### Claims

The following chart provides a brief summary of the claims and issues raised and staff’s recommendation.

<b>Issue</b>	<b>Description</b>	<b>Staff Recommendation</b>
Was the Test Claim timely filed pursuant to Government Code section 17551 and California Code of Regulations, title 2, section 1183.1?	Government Code section 17551(c) states: “test claims shall be filed not later than 12 months following the effective date of a statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Section 1183.1(c) of the Commission’s regulations defines 12 months as 365 days. <sup>6</sup>  Government Code section 17557(e) requires a test claim to be submitted by June 30 following a fiscal year in order to establish reimbursement eligibility for that fiscal year.	<i>Timely filed with a potential period of reimbursement beginning January 1, 2020</i> – The test claim statute became effective on January 1, 2020 and the Test Claim was filed December 31, 2020. Accordingly, the Test Claim was timely filed.  Because the Test Claim was filed on December 31, 2020, the potential period of reimbursement would begin July 1, 2019. However, because the test claim statute has a later effective date, the period of reimbursement begins on the statute’s effective date of January 1, 2020.
Does Penal Code section 680, as amended by Statutes 2019, chapter 588, impose a reimbursable state-mandated program?	Prior to the 2019 test claim statute, Penal Code section 680 encouraged, but did not require, law enforcement agencies in whose jurisdiction specified sex offenses occurred to either submit sexual assault forensic evidence to a crime	<i>Approve</i> – the test claim statute requires city and county law enforcement agencies to perform the following mandated activities:  1. A law enforcement agency in whose jurisdiction a sex

<sup>5</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

<sup>6</sup> California Code of Regulations, title 2, section 1183.1(c).

Issue	Description	Staff Recommendation
	<p>lab or ensure that a rapid turnaround DNA program is in place.</p> <p>Law enforcement agencies, through their crime labs, were then encouraged, but not required, to either process the evidence for DNA or transmit it to another crime lab for processing, and to upload any qualifying DNA profiles into the Combined DNA Index System (CODIS). Penal Code section 680 specified the time limits within which each of these activities was recommended to be completed.</p> <p>Penal Code section 680, as amended by Statutes 2019, chapter 588, now requires law enforcement agencies to perform these activities within specified time limits.</p>	<p>offense specified in Penal Code sections 261, 261.5, 262, 286, 287, or 289 or former section 288a occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:</p> <ul style="list-style-type: none"> <li>• Submit sexual assault forensic evidence to the crime lab within 20 days after booking into evidence; <i>or</i></li> <li>• Ensure that a rapid turnaround DNA program is in place (with a written agreement between the law enforcement agency, the crime lab, and the medical facility pursuant to Penal Code section 680(c)(5)) to submit sexual assault forensic evidence directly from the medical facility examining the victim to the crime lab within five days.</li> </ul> <p>2. For any sexual assault forensic evidence received by the crime lab on or after January 1, 2016, the law enforcement's crime lab shall do one of the following:</p> <ul style="list-style-type: none"> <li>• Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS</li> </ul>

Issue	Description	Staff Recommendation
		<p>as soon as practically possible, but no later than 120 days after initial receipt; <i>or</i></p> <ul style="list-style-type: none"> <li>• Transmit sexual assault forensic evidence to another crime lab for DNA processing as soon as practically possible, but no later than 30 days after initial receipt. The transmitting crime lab shall upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA and no later than 120 days after the transmitting crime lab initially receives the evidence.</li> </ul> <p>All other activities and costs alleged in the Test Claim are not mandated by the plain language of the test claim statute, but may be proposed and supported by evidence in the record by the claimant for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5, <i>with the exception</i> of conducting follow-up investigations on evidence tested pursuant to the test claim statute, which is not a reimbursable activity.</p>

## **Staff Analysis**

### **A. The Test Claim Was Timely Filed.**

Government Code section 17551(c) requires that a test claim be filed “not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Section 1183.1(c) of the Commission’s regulations defines 12 months as 365 days.<sup>7</sup> Government Code section 17557(e) requires a test claim to be submitted by June 30 following a fiscal year in order to establish reimbursement eligibility for that fiscal year.

The test claim statute became effective on January 1, 2020.<sup>8</sup> The Test Claim was filed on December 31, 2020, exactly 365 days after the test claim statute’s effective date. Accordingly, the Test Claim was timely filed.

Because the Test Claim was filed on December 31, 2020, under Government Code 17557, the potential period of reimbursement would begin on July 1, 2019. However, because the Test Claim statute has a later effective date, the period of reimbursement begins on the statute’s effective date, January 1, 2020.

### **B. Penal Code Section 680(c)(1) and (2), as Amended by Statutes 2019, Chapter 588, Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

As described below, the Commission finds that Penal Code section 680(c)(1) and (2), as amended by the test claim statute (Stats. 2019, ch. 588), imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

#### **1. Penal Code Section 680(c)(1) and (2), as Amended by the Test Claim Statute, Imposes a State-Mandated Program on County and City Law Enforcement Agencies.**

- a. Penal Code section 680(c)(1) and (2) imposes new requirements on law enforcement agencies to submit all sexual assault forensic evidence received on or after January 1, 2016 to a law enforcement crime lab for processing and uploading qualifying DNA into CODIS.

The plain language of Penal Code section 680(c)(1), as amended by Statutes 2019, chapter 588, requires law enforcement agencies, in whose jurisdiction a specified sex offense occurs, to either submit all sexual assault forensic evidence received on or after January 1, 2016 to the crime lab, or ensure that a rapid turnaround DNA agreement is in place so that forensic evidence collected from the victim of a sexual assault is submitted directly from the medical facility where the victim is examined to the crime lab. The plain language of Penal Code section 680(c)(2), as amended by Statutes 2019, chapter 588, requires crime labs to either conduct DNA testing of all sexual assault forensic evidence received on or after January 1, 2016 or transmit the evidence to another crime lab for processing, and to upload qualifying DNA profiles into CODIS, all within

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<sup>7</sup> California Code of Regulations, title 2, section 1183.1(c).

<sup>8</sup> Statutes 2019, chapter 588.

specified time limits. Prior to the test claim statute, these activities and the corresponding deadlines were encouraged, but not required.

The plain language of Penal Code section 680(c)(1) requires that that law enforcement agencies in whose jurisdiction specified sex offenses occurred submit the sexual assault forensic evidence to a crime lab. However, under subdivision (c)(2), “the crime lab” is required to process the sexual assault forensic evidence received from the law enforcement agency or medical facility (under the rapid turnaround DNA agreement) or transmit the evidence to another crime lab, and to upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence. Because it is not clear from the plain language of subdivision (c)(2) whether the overall duty to process the evidence and upload any qualifying DNA profiles to CODIS is ultimately the responsibility of “the crime lab” or the law enforcement agency, further interpretation is required.

Neither Penal Code section 680 as originally enacted nor its legislative history mention “crime lab.” However, the legislative history of Penal Code section 680, when read in context with other sections in the Penal Code, evidences an intent that the duties created by the Sexual Assault Victims’ DNA Bill of Rights, including those in Penal Code section 680(c)(2), be imposed on law enforcement agencies only. Under the California Department of Justice’s (DOJ’s) interpretation of the test claim statute, the requirements are imposed on law enforcement agencies and *public* crime labs.<sup>9</sup> This is consistent with Penal Code section 297, which specifies that only accredited state and local law enforcement crime labs are authorized to conduct DNA analysis on forensic evidence.<sup>10</sup> While the law authorizes these public crime labs to contract with qualifying private labs to process evidence, the public crime labs have a duty to ensure DNA profiles are properly processed and comply with FBI standards for DNA.<sup>11</sup>

Under the rules of statutory construction, it is presumed the Legislature has existing laws in mind when it enacts new statutes.<sup>12</sup> Thus, when the Legislature used the phrase “crime lab” in Penal Code section 680, and required the crime lab to process the sexual assault forensic evidence received from the law enforcement agency or medical facility or transmit the evidence to another crime lab, and to upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence, it was imposing the duty on the state and local law enforcement agencies.

This interpretation is consistent with the legislative history of the test claim statute. According to the Assembly Committee on Appropriations analysis, the purpose of Penal Code section 680 as originally enacted was to “give rape victims the ability to follow their own cases *so that they can urge law enforcement to test the evidence* and determine if the suspect can be located.”<sup>13</sup> In

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<sup>9</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 1.

<sup>10</sup> Penal Code section 297(a), last amended by Statutes 2006, chapter 170.

<sup>11</sup> Penal Code section 297(b), last amended by Statutes 2006, chapter 170.

<sup>12</sup> *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625; *Arthur Anderson v. Superior Court* (1998) 67 Cal.App.4th 1481, 1499.

<sup>13</sup> Exhibit E, Assembly Committee on Appropriations, Analysis of AB 898 (2003-2004 Reg. Sess.), as introduced February 20, 2003, page 2, emphasis added.

passing the Sexual Assault Victims' DNA Bill of Rights, the Legislature found and declared that “[l]aw enforcement agencies have an obligation to victims of sexual assaults *in the proper handling, retention, and timely DNA testing* of rape kit evidence or other crime scene evidence and to be responsive to victims concerning the developments of forensic testing and the investigation of their cases.”<sup>14</sup>

Importantly, in describing the legal remedies available to sexual assault victims for a violation of Penal Code section 680, the statute since its enactment has referred only to a law enforcement agency’s duty to provide notice when failing to timely analyze DNA evidence or intending to destroy or dispose of sexual assault forensic evidence from an unsolved sexual assault case.<sup>15</sup>

The sole civil or criminal remedy available to a sexual assault victim *for a law enforcement agency's failure to fulfill its responsibilities* under this section is standing to file a writ of mandamus to require compliance with subdivision (e) or (f).<sup>16</sup>

By contrast, there is no separate remedy available to a sexual assault victim for a crime lab’s failure to comply with the requirements of Penal Code section 680.

Taken as a whole, the duties imposed by Penal Code section 680(c)(1) and (2) are ultimately a law enforcement responsibility.

b. The test claim statute does not require law enforcement agencies to conduct follow-up investigations.

The claimant also seeks reimbursement for the cost of employing one police sergeant and two police detectives to conduct follow-up investigations on the previously untested and outsourced sexual assault evidence kits (SAEKs).<sup>17</sup> These costs form the bulk of the claimant’s total estimated costs for the 2020-2021 fiscal year.<sup>18</sup> The claimant states that law enforcement officers are required to take any number of actions after receiving new evidence related to any criminal investigation, and therefore, conducting follow-up investigations on any new evidence resulting from the mandated DNA testing is necessary.<sup>19</sup>

Conducting investigations on new evidence resulting from the mandated testing requirement is not required by the plain language of the test claim statute. Investigation for future criminal charges and prosecution is within local district attorney and law enforcement existing duties and

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<sup>14</sup> Penal Code section 680(b)(4), as added by Statutes 2003, chapter 537, emphasis added.

<sup>15</sup> Penal Code section 680(e), (f).

<sup>16</sup> Penal Code section 680(k), emphasis added. This provision was originally contained in subdivision (j) and referenced subdivision (d) and (e), which were changed to (e) and (f) following renumbering. Statutes 2003, chapter 537.

<sup>17</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 13-14; Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, pages 1-2.

<sup>18</sup> Exhibit A, Test Claim, filed December 31, 2020, page 23.

<sup>19</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 13-15.

prosecutorial discretion, and is therefore not state-mandated.<sup>20</sup> Accordingly, conducting follow-up investigations is not required by the test claim statute and is, therefore, not eligible for reimbursement.

- c. The test claim statute imposes a state-mandated program on counties and cities, but does not impose a state-mandated program on K-12 school districts or community college districts.

The plain language of the test claim statute imposes requirements on law enforcement agencies in whose jurisdiction specified sex offenses occur. On its face, this would include county and city law enforcement agencies, as well as the law enforcement agencies of K-12 school districts and community college districts, as authorized by Education Code sections 38000 and 72330.<sup>21</sup> California counties and cities “have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction.”<sup>22</sup> However, because K-12 school districts and community college districts are permitted but not required by state law to have police departments and employ peace officers, they are not legally compelled to comply with the activities required by Penal Code section 680(c)(1) and (2).<sup>23</sup> Moreover, there is no evidence in the record that K-12 school districts or community college districts are practically compelled to have police departments.

Accordingly, staff finds that the test claim statute imposes a state-mandated program on counties and cities, but does not impose a state-mandated program on K-12 school districts and community college districts.

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<sup>20</sup> Government Code sections 26500, 26501; *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543 (Although codified by statute, the principle of prosecutorial discretion is rooted in the separation of powers and due process clauses of the California Constitution, and is basic to the state’s criminal justice system); *People v. Eubanks* (1996) 14 Cal.4th 580, 589 (prosecutorial discretion extends from the investigation and gathering of evidence relating to criminal offenses, through the crucial decisions of whom to charge and what charges to bring).

<sup>21</sup> Education Code sections 38000 and 72330, authorize school districts and community college districts, respectively, to establish school police departments and employ peace officers.

<sup>22</sup> *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367. Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that “It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force . . . .” Government Code section 36501 further provides that “[t]he government of a general law city is vested in: . . . (d) A chief of police.”

<sup>23</sup> *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

**2. Penal Code Section 680(c)(1) and (2), as Amended by the Test Claim Statute, Imposes a New Program or Higher Level of Service.**

For the test claim statute to be subject to subvention pursuant to article XIII B, section 6 of the California Constitution, the statute must impose a new program or higher level of service. A new program or higher level of service is defined as a program that carries out the governmental function of providing services to the public, or, in implementing a state policy, imposes unique requirements on local government that do not apply generally to all residents and entities in the state.<sup>24</sup>

The state-mandated activities are newly imposed on county and city law enforcement agencies and are unique to government. Providing police services and protection to the public is a core governmental function.<sup>25</sup> Moreover, the mandated activities relating to the testing of sexual assault forensic evidence provide a peculiarly governmental service to the public. Thus, staff finds that the test claim statute imposes a new program or higher level of service.

**3. Penal Code Section 680(c)(1) and (2), as Amended by the Test Claim Statute, Results in Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.**

Government Code section 17514 defines “costs mandated by the state” as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds \$1,000. In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim.

The claimant alleges that it has incurred increased costs of \$116,139 to comply with the mandated new program or higher level of service in fiscal year 2019-2020.<sup>26</sup> The claimant supports these assertions with documentary evidence.<sup>27</sup> The record contains sufficient evidence that the claimant’s costs to comply with the mandated new program or higher level of service for fiscal year 2019-2020 exceed \$1,000.

Additionally, no law or facts in the record support a finding that the exceptions specified in Government Code section 17556 apply to this claim. There are, however, several state and federal grant programs and other funding sources that can be used by a claimant to pay for the mandated activities in this program and for other criminal justice programs, which will be identified in the Parameters and Guidelines as potential offsetting revenues if the Commission approves this Test Claim.

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<sup>24</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57.

<sup>25</sup> *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 (Police protection is one “of the most essential and basic functions of local government.”); *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

<sup>26</sup> Exhibit A, Test Claim, filed December 31, 2020, page 16.

<sup>27</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 21-24, 56-110.

## **Conclusion**

Based on the forgoing analysis, staff recommends the Commission partially approve this Test Claim and find that Penal Code section 680(c), as amended by Statutes 2019, chapter 588, imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, and requires city and county law enforcement agencies to perform the following mandated activities, beginning January 1, 2020:

1. A law enforcement agency in whose jurisdiction a sex offense specified in Penal Code sections 261, 261.5, 262, 286, 287, or 289 or former section 288a occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:
  - a. Submit sexual assault forensic evidence to the crime lab within 20 days after booked into evidence; *or*
  - b. Ensure that a rapid turnaround DNA program is in place (with a written agreement between the law enforcement agency, the crime lab, and the medical facility pursuant to Penal Code section 680(c)(5)) to submit sexual assault forensic evidence directly from the medical facility examining the victim to the crime lab within five days. (Penal Code 680(c)(1), Stats. 2019, ch. 588.)
2. For any sexual assault forensic evidence received on or after January 1, 2016, the law enforcement's crime lab shall do one of the following:
  - a. Process sexual assault forensic evidence, creating DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initial receipt; *or*
  - b. Transmit sexual assault forensic evidence to another crime lab for DNA processing as soon as practically possible, but no later than 30 days after initial receipt. The transmitting crime lab shall upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA and no later than 120 days after the transmitting crime lab initially receives the evidence. (Penal Code 680(c)(2), Stats. 2019, ch. 588.)

Staff finds that all other activities and costs alleged in the Test Claim are not mandated by the plain language of the test claim statute, but may be proposed and supported by evidence in the record by the claimant for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5, *with the exception* of conducting follow-up investigations on evidence tested pursuant to the test claim statute, which staff finds is not a reimbursable activity.

## **Staff Recommendation**

Staff recommends that the Commission adopt the Proposed Decision to partially approve the Test Claim and authorize staff to make any technical, non-substantive changes following the hearing.

BEFORE THE  
 COMMISSION ON STATE MANDATES  
 STATE OF CALIFORNIA

IN RE TEST CLAIM  Penal Code Section 680 as Amended by Statutes 2019, Chapter 588 (SB 22)  Filed on December 31, 2020  City of San Diego, Claimant	Case No.: 20-TC-01  <i>Sexual Assault Evidence Kits: Testing</i>  DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7.  <i>(Adopted July 23, 2021)</i>
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**DECISION**

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on July 23, 2021. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission’s determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/partially approve/deny] the Test Claim by a vote of [vote will be included in the adopted Decision], as follows:

<b>Member</b>	<b>Vote</b>
Lee Adams, County Supervisor	
Keely Bosler, Director of the Department of Finance, Chairperson	
Jeannie Lee, Representative of the Director of the Office of Planning and Research	
Sarah Olsen, Public Member	
Spencer Walker, Representative of the State Treasurer	
Jacqueline Wong-Hernandez, Representative of the State Controller, Vice Chairperson	

## **Summary of the Findings**

This Test Claim filed by the City of San Diego (claimant) alleges that reimbursement is required for state-mandated activities arising from Statutes 2019, chapter 588 (SB 22), which amended Penal Code section 680 to require law enforcement agencies to perform specified activities relating to DNA testing of sexual assault forensic evidence within specified time periods.

The Commission finds that effective January 1, 2020, Penal Code section 680(c)(1) and (2) (Stats. 2019, ch. 588) imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution on county and city law enforcement agencies, in whose jurisdiction specified sex offenses have occurred for the following activities:

1. A law enforcement agency in whose jurisdiction a sex offense specified in Penal Code sections 261, 261.5, 262, 286, 287, or 289 or former section 288a occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:
  - a. Submit sexual assault forensic evidence to the crime lab within 20 days after booked into evidence; *or*
  - b. Ensure that a rapid turnaround DNA program is in place (with a written agreement between the law enforcement agency, the crime lab, and the medical facility pursuant to Penal Code section 680(c)(5)) to submit sexual assault forensic evidence directly from the medical facility examining the victim to the crime lab within five days. (Penal Code 680(c)(1), Stats. 2019, ch. 588.)
2. For any sexual assault forensic evidence received on or after January 1, 2016, the law enforcement's crime lab shall do one of the following:
  - a. Process sexual assault forensic evidence, creating DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initial receipt; *or*
  - b. Transmit sexual assault forensic evidence to another crime lab for DNA processing as soon as practically possible, but no later than 30 days after initial receipt. The transmitting crime lab shall upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA and no later than 120 days after the transmitting crime lab initially receives the evidence.<sup>28</sup> (Penal Code 680(c)(2), Stats. 2019, ch. 588.)

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<sup>28</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 3. The courts will give weight and appropriate deference to the interpretation of a statute by the agency charged with its implementation. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

The Commission finds that all other activities and costs alleged in the Test Claim are not mandated by the plain language of the test claim statute, but may be proposed and supported by evidence in the record by the claimant for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5, *with the exception* of follow-up investigation, which the Commission finds is not a reimbursable activity.

Accordingly, the Commission partially approves this Test Claim.

## COMMISSION FINDINGS

### I. Chronology

01/01/2020 Effective date of Statutes 2019, chapter 588, amending Penal Code section 680.

12/31/2020 The claimant, City of San Diego, filed the Test Claim.<sup>29</sup>

03/29/2021 The Department of Finance (Finance) filed comments on the Test Claim.<sup>30</sup>

05/07/2021 The claimant filed late rebuttal comments.<sup>31</sup>

05/20/2021 Commission staff issued the Draft Proposed Decision.<sup>32</sup>

### II. Background

This Test Claim alleges reimbursable state-mandated activities and costs arising from Penal Code section 680, as amended by Statutes 2019, chapter 588 (SB 22), effective January 1, 2020. Penal Code section 680, known as the Sexual Assault Victims' DNA Bill of Rights, was amended by the test claim statute to make mandatory the previously encouraged processes and related time frames for DNA testing of sexual assault forensic evidence received by a law enforcement agency on or after January 1, 2016.

#### A. Prior Law

Penal Code section 680 was added in 2003.<sup>33</sup> In passing the law, the Legislature found and declared as follows:

Law enforcement agencies have an obligation to victims of sexual assaults in the proper handling, retention and timely DNA testing of rape kit evidence or other crime scene evidence and to be responsive to victims concerning the developments of forensic testing and the investigation of their cases.<sup>34</sup>

The statute as originally enacted authorized law enforcement agencies investigating specified sex offenses to inform victims whether or not a DNA profile was obtained from testing sexual

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<sup>29</sup> Exhibit A, Test Claim, filed December 31, 2020.

<sup>30</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021.

<sup>31</sup> Exhibit C, Claimant's Late Rebuttal Comments, filed May 7, 2021.

<sup>32</sup> Exhibit D, Draft Proposed Decision, issued May 20, 2021.

<sup>33</sup> Statutes 2003, chapter 537 (AB 898).

<sup>34</sup> Statutes 2003, chapter 537.

assault forensic evidence from the victim's case, whether that information was entered into the Department of Justice's (DOJ's) data bank of case evidence, and whether there was a match between the DNA profile developed from the victim's case evidence and the DOJ Convicted Offender DNA Data Base.<sup>35</sup> The statute also required law enforcement agencies to notify victims in writing when electing not to perform DNA testing on sexual assault forensic evidence or when intending to destroy or dispose of the evidence prior to the expiration of the statute of limitations, as specified.<sup>36</sup> The statute encouraged law enforcement agencies investigating specified sex offenses to timely perform DNA testing of sexual assault forensic evidence in order to comply with the statute of limitations for filing a criminal complaint.

A law enforcement agency assigned to investigate a sexual assault offense specified in Section 261, 261.5, 262, 286, 288a, or 289 should perform DNA testing of rape kit evidence or other crime scene evidence in a timely manner in order to assure the longest possible statute of limitations, pursuant to subparagraphs (A) and (B) of paragraph (1) of subdivision (i) of Section 803.<sup>37</sup>

In 2014, Statutes 2014, chapter 874 amended Penal Code section 680 by changing the recommendation that law enforcement agencies perform DNA testing "in a timely manner" to instead recommend specific procedures and time limits for law enforcement agencies and crime labs to submit and process sexual assault forensic evidence received on or after January 1, 2016.<sup>38</sup>

In order to ensure that sexual assault forensic evidence is analyzed within the two-year timeframe required by subparagraphs (A) and (B) of paragraph (1) of subdivision (g) of Section 803 and to ensure the longest possible statute of limitations for sex offenses, including sex offenses designated pursuant to those subparagraphs, the following should occur:

(A) A law enforcement agency in whose jurisdiction a sex offense specified in Section 261, 261.5, 262, 286, 288a, or 289 occurred, *should* do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:

(i) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence.

(ii) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim.

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<sup>35</sup> Statutes 2003, chapter 537.

<sup>36</sup> Statutes 2003, chapter 537.

<sup>37</sup> Penal Code section 680(b)(6), as added by Statutes 2003, chapter 537.

<sup>38</sup> Statutes 2014, chapter 874 (AB 1517).

(B) The crime lab *should* do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016.

(i) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initially receiving the evidence.

(ii) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially receiving the evidence, for processing of the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab should upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA.<sup>39</sup>

The inclusion of specific time frames is based on a statutory exception to the 10-year statute of limitations for certain sex crimes that allows charges to be filed within one year of the date when a suspect is conclusively identified by DNA testing, so long as DNA evidence is analyzed within two years of the crime.<sup>40</sup> Statutes 2014, chapter 874 also revised the notice requirements to require law enforcement agencies to notify victims when an agency does not analyze DNA evidence, regardless of whether the perpetrator's identity is in issue, and to do so within six months of applicable limitations periods.<sup>41</sup>

The statute was further amended by Statutes 2017, chapter 692, which changed the recommendation that law enforcement agencies, upon a victim's request, should inform the victim of the status of DNA testing in their case, to require agencies to do so.<sup>42</sup> The bill also prohibited law enforcement agencies from destroying sexual assault forensic evidence from unsolved sexual assault cases before at least 20 years, or, if the victim was under 18 at the time of the assault, before the victim turns 40.<sup>43</sup>

### **B. Test Claim Statute**

The test claim statute, Statutes 2019, chapter 588 (SB 22) became effective on January 1, 2020, amending Penal Code section 680(c)(1) and (c)(2)<sup>44</sup> to now require law enforcement agencies, in whose jurisdictions specified sex offenses occur, to submit sexual assault forensic evidence received on or after January 1, 2016 to a crime lab (either themselves or through a rapid

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<sup>39</sup> Penal Code section 680, as amended by Statutes 2014, chapter 874, section 1, emphasis added.

<sup>40</sup> See Penal Code section 803(g)(1).

<sup>41</sup> Statutes 2014, chapter 874, section 1.

<sup>42</sup> Statutes 2017, chapter 692, section 3.

<sup>43</sup> Statutes 2017, chapter 692, section 3.

<sup>44</sup> Because Statutes 2019, chapter 588 renumbered select subdivisions of Penal Code section 680, it also amended Penal Code sections 680.3 and 13823.14 to update references contained therein to the renumbered subdivisions. There has been no test claim filing on these sections.

turnaround DNA program), with submission occurring within specified time limits, and for the crime lab to process sexual assault forensic evidence received on or after January 1, 2016 for DNA or to transmit the evidence to another crime lab for processing, and to upload qualifying DNA profiles into CODIS (“the Combined DNA Index System,” the FBI’s program and software used to store and search DNA profiles) no later than 120 days after initially receiving the evidence.

Accordingly, Penal Code section 680(c) was amended to change “should” to “shall” as follows:

(c) In order to ensure that sexual assault forensic evidence is analyzed within the two-year timeframe required by subparagraphs (A) and (B) of paragraph (1) of subdivision (g) of Section 803 and to ensure the longest possible statute of limitations for sex offenses, including sex offenses designated pursuant to those subparagraphs, the following ~~should~~ shall occur:

(1) A law enforcement agency in whose jurisdiction a sex offense specified in Section 261, 261.5, 262, 286, 287, or 289 or former Section 288a occurred ~~should~~ shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:

(A) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence.

(B) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim.

(2) The crime lab ~~should~~ shall do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016.

(A) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initially receiving the evidence.

(B) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially receiving the evidence, for processing of the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab shall upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA.

Both the Test Claim and the legislative analyses for the bill that enacted it repeatedly reference “sexual assault evidence kits” (SAEKs) or “rape kits.”<sup>45</sup> Following a sexual assault, a victim

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<sup>45</sup> Exhibit A, Test Claim, filed December 31, 2020, page 7; Exhibit E, Senate Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), December 3, 2018, pages 1-6; Exhibit E, Assembly Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), as amended May 17, 2019, pages 2-8.

may elect to undergo a medical examination to collect forensic evidence.<sup>46</sup> The examination, which may take four to six hours, is conducted by specially-trained medical personnel, who prepare a sexual assault forensic medical evidence kit.<sup>47</sup> As of 2019, a standardized sexual assault forensic medical evidence kit containing a minimum number of basic components is to be used throughout the state.<sup>48</sup> A standard kit includes multiple body swabs that may contain the perpetrator's DNA, and other potential evidence, such as underwear, hair, and fingernail scrapings, and reference buccal swabs collected from the victim's cheek.<sup>49</sup> The kit may be stored at a medical facility or sent to the law enforcement agency with jurisdiction over the sexual assault.<sup>50</sup>

Many crime labs, including those operated by the DOJ's Bureau of Forensic Services, have established rapid turnaround DNA programs, which expedite processing of evidence samples from SAEKs.<sup>51</sup> Penal Code section 680(c)(5) defines "rapid turnaround DNA program" as follows:

For purposes of this section, a "rapid turnaround DNA program" is a program for the training of sexual assault team personnel in the selection of representative samples of forensic evidence from the victim to be the best evidence, based on the medical evaluation and patient history, the collection and preservation of that evidence, and the transfer of the evidence directly from the medical facility to the crime lab, which is adopted pursuant to a written agreement between the law enforcement agency, the crime lab, and the medical facility where the sexual assault team is based.<sup>52</sup>

Where a rapid turnaround DNA program is in place, the medical facility sends selected samples, from the sexual assault evidence kit, including "the swabs most likely to contain the perpetrator's DNA and sends these, along with a reference buccal swab from the survivor/victim, directly to the crime laboratory," and the rest of the kit is sent to the law enforcement agency.<sup>53</sup> Under

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<sup>46</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4.

<sup>47</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4.

<sup>48</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4; Penal Code section 13823.14.

<sup>49</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4.

<sup>50</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4.

<sup>51</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4.

<sup>52</sup> Penal Code section 680(c)(5).

<sup>53</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, page 4.

Penal Code section 680(c)(3), it is not required that a crime lab receive or test all forensic evidence items obtained in a sexual assault forensic medical evidence examination and is considered to be in compliance when DNA testing is conducted on representative samples of the evidence. Therefore, where a rapid turnaround program is in place, it is a discretionary investigatory decision of the law enforcement agency (LEA) whether to separately test the remaining samples in the kit.<sup>54</sup>

### **1. Department of Justice’s Interpretation of the Test Claim Statute.**

According to DOJ, the test claim statute “establishes new mandatory requirements for the submission and testing of sexual assault forensic evidence by law enforcement agencies and public crime labs,” and applies to all sexual assault forensic evidence received by a law enforcement agency on or after January 1, 2016.<sup>55</sup>

Regardless of the date of the alleged offense, if an LEA [law enforcement agency] receives sexual assault forensic evidence on or after January 1, 2016, and none of the case evidence has ever been submitted to a crime lab for analysis, SB 22 requires the LEA to submit sexual assault evidence from the case to a crime lab within 20 days of booking the evidence. The crime lab is required to process the evidence and upload a qualifying DNA profile to CODIS within 120 days of receipt of the evidence by the crime lab.<sup>56</sup>

The submission and testing requirements are not limited to SAEKs; they include crime scene evidence as well.

While parts of SB 22 specifically mention “rape kit” evidence, the law more broadly addresses the timely analysis of “sexual assault forensic evidence.” The intent of the law is to ensure, in sexual assault cases, that a probative DNA sample is processed and uploaded to the Combined DNA Index System (CODIS) in a timely manner. Thus, if a sexual assault kit is not collected in a case, representative and probative samples of any other types of sexual assault evidence (e.g., the victim’s clothing, bedding from the assault scene, etc.) must be sent to the crime lab for timely processing to meet the sample processing and DNA profile upload requirements of SB 22.<sup>57</sup>

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<sup>54</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), pages 4-5.

<sup>55</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), pages 1-2.

<sup>56</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 2.

<sup>57</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), pages 1-2.

Under amended Penal Code section 680(c)(1), once a law enforcement agency has booked sexual assault forensic evidence, it has 20 days to submit the evidence to the crime lab.<sup>58</sup> Even when a case has been solved, if none of the sexual assault forensic evidence was ever tested, it must now be submitted to a crime lab for testing.<sup>59</sup> Similarly, the submission, testing, and uploading requirements equally apply to cases where the victim chooses to remain anonymous or not to participate in the investigation.

The Violence Against Women Act (VAWA) affords sexual assault victims the right to obtain a medical examination and to have forensic evidence collected without being required to immediately, or ever, report the sexual assault to law enforcement. However, VAWA evidence that an LEA has booked into evidence or that has been submitted to a crime lab is not exempt from the processing mandates set by SB 22. Even if a victim has chosen to remain anonymous and/or does not wish to cooperate with an investigation, sexual assault forensic evidence from their case that is received by an LEA or crime lab on or after January 1, 2016, must be tested and any qualifying DNA profiles uploaded to CODIS.<sup>60</sup>

Under amended Penal Code section 680(c)(2), the crime lab has 120 days to process sexual assault forensic evidence and upload any qualifying DNA profiles to CODIS or 30 days to transmit the evidence to another crime lab.<sup>61</sup> The 120-day time limit applies regardless of whether the evidence is transferred to another lab.

The first lab's 120-day deadline applies even if the evidence is transferred to a second lab. The first lab has 30 days to transmit the evidence to a second lab, and must upload a qualifying DNA profile to CODIS within 30 days after test results are obtained. (Pen. Code, § 680, subd. (c)(2)(B).) Therefore, if the first lab takes 30 days to transmit the evidence to a second lab, the second lab should take no longer than 60 days to process the evidence in order to ensure that the first lab has 30 days to upload a qualifying probative DNA profile into CODIS.<sup>62</sup>

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<sup>58</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 2.

<sup>59</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 4.

<sup>60</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 5.

<sup>61</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 3.

<sup>62</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 3.

According to DOJ, “[c]rime labs are considered to be in compliance with the testing mandate when they have processed representative samples of sexual assault evidence ‘in an effort to detect the foreign DNA of the perpetrator.’ (Pen. Code, § 680, subd. (c)(3).)”<sup>63</sup>

In 2020, DOJ prepared a report summarizing a one-time audit of untested SAEKs in the possession of California law enforcement agencies, crime laboratories, medical facilities and others, as required by Penal Code section 680.4 (Stats. 2018, ch. 950). The report provides the following overview of sexual assault evidence testing:

The purpose of conducting laboratory testing of sexual assault evidence is to establish whether there is evidence that the alleged sexual contact occurred, which may be accomplished by screening for the expected biological materials, and to identify the individual(s) who contributed those biological materials, which may be accomplished through DNA testing if a suitable DNA profile is developed from the evidence and a match to a suspect is found.

Qualifying evidence DNA profiles developed from SAE kits can be searched against the DNA profiles of evidence from other cases, convicted offenders, and arrestees by uploading the profiles to CODIS. CODIS is the Federal Bureau of Investigation’s program and software used to store and search DNA profiles in its Local DNA Index System (LDIS), State DNA Index System (SDIS), and National DNA Index System (NDIS) databases. The three main criminal indices in CODIS are the Forensic Index, which contains perpetrator DNA profiles developed from forensic evidence, the Convicted Offender Index, and the Arrestee Index. DNA profiles may be uploaded as far as the LDIS, the SDIS, and the NDIS, provided they meet the criteria for each level and index.

Once uploaded, the DNA profiles in the three criminal indices are regularly searched against each other to identify potential matches. To link forensic evidence to a known convicted offender or arrestee, the Forensic Index is searched against the Convicted Offender Index and the Arrestee Index. The Forensic Index is also searched against itself to link evidence from different crimes to the same perpetrator (referred to as case-to-case hits).<sup>64</sup>

## **2. Legislative History of the Test Claim Statute.**

According to the author of the test claim statute, a number of law enforcement agencies did not follow the prior law guidance on submitting and processing sexual assault forensic evidence.

As amended by Chapter 874, Statutes of 2014, California law states that law enforcement agencies “should” transfer rape kit evidence to the appropriate forensic laboratory within 20 days and that laboratories “should” process such evidence as soon as possible, but no later than 120 days, following receipt. Due

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<sup>63</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), pages 5-6.

<sup>64</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Evidence Kits, 2020 Report to the Legislature, pages 4-5.

to the current language of the law, this guidance is not currently being followed by a number of law enforcement agencies in the state.

Findings from public records requests filed by the Joyful Heart Foundation demonstrate significant variation in how law enforcement agencies have interpreted and implemented this legislative guidance. Only two jurisdictions of eight surveyed in 2017 reported full compliance with the intent of the law.

Across California, sexual assault survivors are not receiving equal access to justice. Depending on the jurisdiction in which the crime occurred, the timeframe for submission and analysis of their rape kits may vary widely, slowing the criminal justice process.<sup>65</sup>

Therefore, the purpose of these amendments was to require law enforcement agencies and crime labs to adhere to the submission and DNA testing procedures and timelines already enumerated in Penal Code section 680, but which were, prior to the test claim statute, only encouraged.<sup>66</sup>

By amending the language of Penal Code Section 680 from “should” to “shall,” Senate Bill 22 will require all law enforcement agencies and crime labs across the state to follow federal best practices and the intent of existing law. With this change, victims reporting sexual assault across California will have equal access to the swift submission and analysis of forensic evidence associated with their cases. Rape kits must be submitted within 20 days and tested no later than 120 days after receipt, preventing the development of rape kit backlogs in evidence rooms or laboratories throughout California.<sup>67</sup>

The Assembly Committee on Public Safety analysis acknowledges that while “this bill will not undo the backlog of untested kits – estimated to be more than ten thousand by the sponsor of the bill ... – it should prevent additional backlog provided that law enforcement agencies and crime labs have the resource[s] to keep up with the influx of new kit[s].”<sup>68</sup>

The Assembly Committee on Appropriations analysis states that the bill was anticipated to result in reimbursable state-mandated costs as follows:

**FISCAL EFFECT:**

1) Costs (GF/DNA Identification Fund) of approximately \$854,000 annually for the Department of Justice (DOJ) for personnel, operating expenses and equipment.

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<sup>65</sup> Exhibit E, Senate Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), December 3, 2018, pages 4-5.

<sup>66</sup> Statutes 2019, chapter 537, section 1.

<sup>67</sup> Exhibit E, Senate Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), December 3, 2018, page 5.

<sup>68</sup> Exhibit E, Assembly Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), as amended May 17, 2019, page 6.

2) Possible state reimbursable costs (local funds/GF) in the hundreds of thousands of dollars annually for local law enforcement agencies. The Los Angeles County Sheriff's Department anticipates additional personnel costs of about \$450,000 to process the evidence within the timeframe required. Local costs to comply with this bill would be subject to reimbursement by the state to the extent the Commission on State Mandates determines this bill imposes a reimbursable state-mandated local program.<sup>69</sup>

### **III. Positions of the Parties**

#### **A. City of San Diego**

The claimant alleges that the test claim statute imposes a reimbursable state-mandated program under article XIII B, section 6 and Government Code section 17514 for local law enforcement agencies. While the claimant alleges that Penal Code section 680(c)(1) mandates new activities, it asserts that the costs stemming from those new activities are de minimis and are therefore not being pursued in this Test Claim.<sup>70</sup> The claimant alleges costs incurred to comply with the new requirements under Penal Code section 680(c)(2); namely, to test and process all SAEKs received by its crime lab after January 1, 2016.<sup>71</sup>

The claimant states that it incurred increased mandated costs of \$116,138.95 in actual costs in fiscal year 2019-2020 and estimated costs of \$2,335,305.74 in the 2020-2021 fiscal year to implement the mandate.<sup>72</sup> Additionally the claimant estimates statewide annual costs of \$8,000,000<sup>73</sup>

The Test Claim is supported by a declaration from Jeffrey Jordon, Captain of the City of San Diego Police Department, stating that the claimant incurred \$116,138.95 in actual costs in fiscal year 2019-2020 and estimating claimant's costs at \$2,335,305.74 in total costs for the 2020-2021 fiscal year to implement the mandate.<sup>74</sup> The claimant has also included invoices,<sup>75</sup> a contract between the claimant and the contracted private crime lab,<sup>76</sup> a hiring memorandum pertaining to new criminalist positions,<sup>77</sup> and an itemized spreadsheet of consumable costs to support its alleged mandated costs.<sup>78</sup> The claimant notes that its sexual assault evidence kit outsourcing

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<sup>69</sup> Exhibit E, Assembly Committee on Appropriations, Analysis of SB 22 (2019-2020 Reg. Sess.), as amended May 17, 2019, page 1.

<sup>70</sup> Exhibit A, Test Claim, filed December 31, 2020, page 9.

<sup>71</sup> Exhibit A, Test Claim, filed December 31, 2020, page 7.

<sup>72</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 16-17, and 83-105.

<sup>73</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>74</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 22-23.

<sup>75</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 83-105.

<sup>76</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 56-82.

<sup>77</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 106-108.

<sup>78</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 109-110.

costs beginning July 1, 2020 were paid with state Citizen Option for Public Safety (COPS) grant funds and are therefore not included in the claim.<sup>79</sup> The claimant's estimate of statewide costs for the program amount to \$8,000,000 annually.<sup>80</sup>

While some local law enforcement agencies already submitted and tested all sexual assault forensic evidence kits under the "encouraged" guidelines in preexisting Penal Code section 680, others, including the claimant, did not.<sup>81</sup> Therefore, the claimant argues, the new activities and costs imposed by the test claim statute will vary by agency and depend on an agency's existing staffing, available equipment, investigative practices, as well as the volume of sexual assaults investigated.<sup>82</sup>

Prior to the passage of the test claim statute, the claimant states that it tested some, but not all, of the sexual assault forensic evidence kits in its possession, which led to a "substantial amount" of kits not being tested.<sup>83</sup> The claimant alleges that Penal Code section 680(c)(2)(A) requires local law enforcement agencies to perform the following activities as soon as practically possible, but no later than 120 days after initially receiving the evidence:

- Process sexual assault forensic evidence;
- Create DNA profiles when able; and
- Upload qualifying DNA profiles into CODIS.<sup>84</sup>

The claimant asserts that in order to perform these activities, it was required to: employ a Program Manager to oversee the processing of additional sexual assault evidence kit tests within the police department's own lab; hire additional criminalists to process more tests; create and upload DNA profiles within mandated time limits; and budget for more materials to test the increased number of SAEKs in its lab.<sup>85</sup>

The claimant alleges that under Penal Code section 680(c)(2)(B), it outsourced testing of SAEKs to a contract lab in order to process the kits within the 120-day timeline mandated by Penal Code section 680(c)(2)(A).<sup>86</sup> The claimant alleges that it had to first determine the number of untested SAEKs in its possession received by its crime lab on or after January 1, 2016, but does not specify any costs for this activity.<sup>87</sup> The claimant asserts that working with a contract lab creates

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<sup>79</sup> Exhibit A, Test Claim, filed December 31, 2020, page 23.

<sup>80</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>81</sup> Exhibit A, Test Claim, filed December 31, 2020, page 9.

<sup>82</sup> Exhibit A, Test Claim, filed December 31, 2020, page 9.

<sup>83</sup> Exhibit A, Test Claim, filed December 31, 2020, page 9.

<sup>84</sup> Exhibit A, Test Claim, filed December 31, 2020, page 7.

<sup>85</sup> Exhibit A, Test Claim, filed December 31, 2020, page 7.

<sup>86</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 7-8.

<sup>87</sup> Exhibit A, Test Claim, filed December 31, 2020, page 10.

additional external outsourcing costs and new internal costs.<sup>88</sup> Internal costs are alleged to include processing of the evidence by the local agency’s criminalists for DNA profiles after the evidence is returned from the contract lab and investigative review of the tested evidence to determine if it impacts any ongoing or completed criminal investigation.<sup>89</sup>

Total actual costs alleged by the claimant to perform these activities for the 2019-2020 fiscal year are \$116,138.95, broken down by the claimant as follows:<sup>90</sup>

Activity	Date(s) Performed	Description	Cost
1) SAEK Outsourcing	1/01/2020-6/30/2020	Contract Lab Analysis	\$ 52,670.00
2) Lab/Police Personnel	1/01/2020-6/30/2020	Follow-Up Outsourcing	\$ 985.75
3) Program Manager	1/01/2020-6/30/2020	SAEK Evidence Management	\$ 62,483.20
Total			\$116,138.95

Total estimated costs alleged by the claimant to perform these activities for the 2020-2021 fiscal year are \$2,335,305.74, broken down by the claimant as follows:<sup>91</sup>

Activity	Date(s) Performed	Description	Cost
1) SAEK Outsourcing	7/01/2020-6/30/2021	Contract Lab Analysis	\$ 214,855.00
2) Lab Personnel	7/01/2020-6/30/2021	Outsourcing	\$ 56,752.14
3) Program Manager	7/01/2020-6/30/2021	SEAK Evidence Management	\$ 124,996.40
4) New Lab Hires	7/01/2020-6/30/2021	Need for increased work	\$ 876,678.40
5) Police Personnel	7/01/2020-6/30/2021	Follow-Up Evidence Results	\$1,206,108.80
6) Consumables	7/01/2020-6/30/2021	Increased # SAEKs	\$ 70,800.00
Total			\$2,550,160.74

The claimant asserts that local agencies will be required to perform some, if not all, of the new activities alleged by the claimant, categorized as follows:

- Testing outsourced sexual assault evidence kits;
- Conducting internal administrative reviews of sexual assault evidence kits after receiving results from the outsourced lab;
- Purchasing additional materials to test sexual assault evidence kits (“consumables”);
- Additional lab personnel duties; and

<sup>88</sup> Exhibit A, Test Claim, filed December 31, 2020, page 8.

<sup>89</sup> Exhibit A, Test Claim, filed December 31, 2020, page 8.

<sup>90</sup> Exhibit A, Test Claim, filed December 31, 2020, page 16.

<sup>91</sup> Exhibit A, Test Claim, filed December 31, 2020, page 17.

- Additional sworn police officer duties.<sup>92</sup>

The claimant references the legislative history of the test claim statute to support its position that additional lab personnel are needed to perform the mandated activities.<sup>93</sup> The claimant states that DOJ, at the state level, anticipates receiving approximately 121 additional SAEKs annually as a result of the test claim statute and estimates it will need 3.0 new criminalists and 1.0 criminalist supervisors to complete the increased workload.<sup>94</sup> The claimant estimates that the City of San Diego will need to test an average of 118 additional SAEKs annually in its own crime lab to comply with the test claim statute.<sup>95</sup>

According to the claimant, the test claim statute's legislative history also notes that the Los Angeles County Sheriff's Department anticipates hiring additional lab personnel to process the evidence in the time limits imposed by the test claim statute and increased costs of \$450,000 annually.<sup>96</sup> The claimant also contacted other law enforcement agencies and their labs throughout the state in order to estimate the increased costs that local agencies will incur to implement the mandate.<sup>97</sup> The claimant determined that costs will be unique to each agency, and will depend on how the agency previously handled SAEKs and whether they largely tested all kits prior to the mandate.<sup>98</sup> The San Jose Police Department estimates new costs at \$100,000, whereas the San Diego County Sheriff's Department estimates costs in excess of \$300,000.<sup>99</sup> Notably, unlike the claimant, neither of these agencies accounted for the cost of sworn investigators conducting follow-up investigations and making additional disclosures to prosecutors, which the claimant alleges are mandated activities.<sup>100</sup> Estimated costs for individual LEAs throughout the state range from \$100,000 to over \$2 million and may increase if additional staffing is needed or decrease if grant funding is made available.<sup>101</sup> The claimant's statewide cost estimate to implement the mandate is \$8 million.<sup>102</sup>

The claimant, in its late rebuttal comments, disputes Finance's assertion that investigation costs are beyond the scope of the test claim.<sup>103</sup> The claimant argues that if it were not for the test

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<sup>92</sup> Exhibit A, Test Claim, filed December 31, 2020, page 17.

<sup>93</sup> Exhibit A, Test Claim, filed December 31, 2020, page 8.

<sup>94</sup> Exhibit A, Test Claim, filed December 31, 2020, page 8.

<sup>95</sup> Exhibit A, Test Claim, filed December 31, 2020, page 12.

<sup>96</sup> Exhibit A, Test Claim, filed December 31, 2020, page 8.

<sup>97</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>98</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>99</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>100</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>101</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>102</sup> Exhibit A, Test Claim, filed December 31, 2020, page 18.

<sup>103</sup> Exhibit C, Claimant's Late Rebuttal Comments, filed May 7, 2021, page 1.

claim statute, the claimant’s Sex Crimes Cold Case team would not exist.<sup>104</sup> Because the mandatory testing of all SAEKs resulted in new evidence, the claimant was forced to assign law enforcement personnel to solely investigate the impact of that new evidence on criminal investigations, instead of performing investigative duties in other essential areas, such as narcotics, robbery, or child abuse.<sup>105</sup> The claimant argues that regardless of the precise language of the test claim statute, the Legislature clearly intended that evidence obtained from testing *all* SAEKs would require law enforcement to investigate.<sup>106</sup>

The claimant also disputes Finance’s opposition to reimbursement for the personnel costs associated with the Program Manager position (Police Investigative Service Officer).<sup>107</sup> As a result of the processing duties under the test claim statute, the claimant, through the Police Investigative Service Officer position, must now either prepare hundreds of new SAEKs for testing, or handle, track, and package the kits for outsourcing, duties that were not required prior to the test claim statute.<sup>108</sup> But for these new requirements, the Police Investigative Service Officer could perform other duties.<sup>109</sup>

The claimant did not file comments on the Draft Proposed Decision.

### **B. Department of Finance**

Finance contends that some of the activities the claimant alleges are reimbursable are not required by the test claim statute.<sup>110</sup> Finance groups the costs allegedly incurred by the claimant into three categories: outsourcing of sexual assault evidence kit testing, personnel, and lab consumables.<sup>111</sup>

Finance does not dispute the claimant’s assertion that outsourcing the testing of backlogged SAEKs and purchasing additional testing materials are mandated reimbursable activities under the test claim statute.<sup>112</sup> Rather, Finance’s challenge is limited to select personnel costs relating

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<sup>104</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, pages 1-2.

<sup>105</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, page 2.

<sup>106</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, page 2.

<sup>107</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, page 2.

<sup>108</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, page 2.

<sup>109</sup> Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, page 2.

<sup>110</sup> Exhibit B, Finance’s Comments on the Test Claim, filed March 29, 2021, page 3.

<sup>111</sup> Exhibit B, Finance’s Comments on the Test Claim, filed March 29, 2021, page 2.

<sup>112</sup> Exhibit B, Finance’s Comments on the Test Claim, filed March 29, 2021, pages 2-3. Notably, both the claimant and the Department of Finance use “outsourcing” and “transmitting” interchangeably when referring to the option under section 680(c)(2)(B) for the crime lab to transmit sexual assault forensic evidence to a different crime lab for DNA processing in lieu of processing the evidence itself.

to staffing increases and new workload activities that the claimant alleges are required to comply with the test claim statute.<sup>113</sup>

Finance does not dispute the claimant's assertion that the following new duties, as fulfilled by the DNA Technical Manager, are required by the test claim statute: overseeing the technical aspects of the outsourcing contract, including receiving and analyzing data and reviewing case work and reports from the contracted private lab; and verifying and preparing any DNA profiles identified by the contracted private lab.<sup>114</sup> Finance also does not dispute the claimant's allegation that because it will be required to test approximately 118 new SAEKs annually in its own lab beginning January 1, 2020, four new criminalist positions are necessary.<sup>115</sup>

However, Finance challenges the claimant's alleged need to create the Police Investigative Service Officer position, with costs of \$62,483 in fiscal year 2019-2020 and \$124,996 in 2020-2021.<sup>116</sup> Finance argues that contrary to the claimant's assertion, the test claim statute neither requires such a position nor the referenced administrative duties of tracking, processing, and managing the SAEKs within the claimant's crime lab.<sup>117</sup>

Finance also contests the assertion that the creation of the Police Department's Sex Crimes Cold Case Team, with costs of \$1,206,109 in fiscal year 2020-2021, is mandated by the test claim statute.<sup>118</sup> The Sex Crimes Cold Case Team is comprised of one sergeant and two detectives tasked with performing follow-up investigative work on new evidence from previously untested SAEKs.<sup>119</sup> Finance argues that the claimant's assertion that follow-up investigations are required under Penal Code section 680(c)(2)(B) is incorrect.<sup>120</sup> Penal Code section 680(c)(2)(A) and (c)(2)(B), which form the basis for the test claim, pertain to the requirements for processing sexual assault forensic evidence.<sup>121</sup> Neither subdivision specifies that investigative work related to newly uncovered sexual assault evidence resulting from that processing is also required.<sup>122</sup> Furthermore, Finance maintains, because the police officers were already performing investigative work, modification of those duties to focus on sex crime cold cases is not a new or higher level of service and is beyond the scope of the test claim statute.<sup>123</sup>

Finance did not file comments on the Draft Proposed Decision.

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<sup>113</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 2.

<sup>114</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 2.

<sup>115</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 2.

<sup>116</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 2.

<sup>117</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 2.

<sup>118</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 3.

<sup>119</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 3.

<sup>120</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 3.

<sup>121</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 3.

<sup>122</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 3.

<sup>123</sup> Exhibit B, Finance's Comments on the Test Claim, filed March 29, 2021, page 3.

#### IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service...

The purpose of article XIII B, section 6 is to “preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are ‘ill equipped’ to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose.”<sup>124</sup> Thus, the subvention requirement of section 6 is “directed to state-mandated increases in the services provided by [local government] ...”<sup>125</sup>

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or “mandates” local agencies or school districts to perform an activity.<sup>126</sup>
2. The mandated activity constitutes a “program” that either:
  - a. Carries out the governmental function of providing a service to the public; or
  - b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.<sup>127</sup>
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.<sup>128</sup>
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.<sup>129</sup>

The Commission is vested with the exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California

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<sup>124</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

<sup>125</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56.

<sup>126</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874.

<sup>127</sup> *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

<sup>128</sup> *San Diego Unified School Dist.* (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal3d 830, 835.

<sup>129</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

Constitution.<sup>130</sup> The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.<sup>131</sup> In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an “equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities.”<sup>132</sup>

**A. The Test Claim Was Timely Filed.**

Government Code section 17551(c) requires that a test claim be filed “not later than 12 months after the effective date of the statute or executive order, or within 12 months of incurring increased costs as a result of a statute or executive order, whichever is later.” Section 1183.1(c) of the Commission’s regulations defines 12 months as 365 days.<sup>133</sup> Government Code section 17557(e) requires a test claim to be submitted by June 30 following a fiscal year in order to establish reimbursement eligibility for that fiscal year.

The test claim statute became effective on January 1, 2020.<sup>134</sup> The claimant filed the Test Claim on December 31, 2020, exactly 365 days after the test claim statute’s effective date. The Test Claim was therefore timely filed.

Because the Test Claim was filed on December 31, 2020, under Government Code 17557, the potential period of reimbursement would begin on July 1, 2019. However, because the Test Claim statute has a later effective date, the period of reimbursement begins on the statute’s effective date, January 1, 2020.

**B. Penal Code Section 680(c)(1) and (2), as Amended by Statutes 2019, Chapter 588, Imposes a Reimbursable State-Mandated Program Within the Meaning of Article XIII B, Section 6 of the California Constitution.**

As described below, the Commission finds that Penal Code section 680(c)(1) and (2), as amended by the test claim statute (Stats. 2019, ch. 588), imposes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

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<sup>130</sup> *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

<sup>131</sup> *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

<sup>132</sup> *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1280 (citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817).

<sup>133</sup> California Code of Regulations, title 2, section 1183.1(c).

<sup>134</sup> Statutes 2019, chapter 588.

**1. Penal Code Section 680(c)(1) and (2), as Amended by the Test Claim Statute, Imposes a State-Mandated Program on County and City Law Enforcement Agencies.**

- a. Penal Code section 680(c)(1) and (2) impose new requirements on law enforcement agencies to submit all sexual assault forensic evidence received on or after January 1, 2016 to a crime lab for processing and uploading qualifying DNA into CODIS.

The plain language of Penal Code section 680(c)(1), as amended by Statutes 2019, chapter 588, now requires law enforcement agencies in whose jurisdiction a specified sex offense occurs to either submit all sexual assault forensic evidence received on or after January 1, 2016 to the crime lab, or ensure that a rapid turnaround DNA agreement is in place so that forensic evidence collected from the victim of a sexual assault is submitted directly from the medical facility where the victim is examined to the crime lab. The plain language of Penal Code section 680(c)(2), as amended by Statutes 2019, chapter 588, now requires crime labs to either conduct DNA testing of all sexual assault forensic evidence received on or after January 1, 2016, or transmit the evidence to another crime lab for processing, and to upload qualifying DNA profiles into CODIS, all within specified time limits. Prior to the test claim statute, these activities and the corresponding deadlines were encouraged, but not required. The test claim statute amended Penal Code section 680(c)(1) and (c)(2) to change the “should” to “shall” as follows:

(c) In order to ensure that sexual assault forensic evidence is analyzed within the two-year timeframe required by subparagraphs (A) and (B) of paragraph (1) of subdivision (g) of Section 803 and to ensure the longest possible statute of limitations for sex offenses, including sex offenses designated pursuant to those subparagraphs, the following ~~should~~ shall occur:

(1) A law enforcement agency in whose jurisdiction a sex offense specified in Section 261, 261.5, 262, 286, 287, or 289 or former Section 288a occurred ~~should~~ shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:

(A) Submit sexual assault forensic evidence to the crime lab within 20 days after it is booked into evidence.

(B) Ensure that a rapid turnaround DNA program is in place to submit forensic evidence collected from the victim of a sexual assault directly from the medical facility where the victim is examined to the crime lab within five days after the evidence is obtained from the victim.

(2) The crime lab ~~should~~ shall do one of the following for any sexual assault forensic evidence received by the crime lab on or after January 1, 2016.

(A) Process sexual assault forensic evidence, create DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initially receiving the evidence.

(B) Transmit the sexual assault forensic evidence to another crime lab as soon as practically possible, but no later than 30 days after initially

receiving the evidence, for processing of the evidence for the presence of DNA. If a DNA profile is created, the transmitting crime lab shall upload the profile into CODIS as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA.

The legislative history makes clear that that the purpose of these amendments was to require DNA testing on all sexual assault forensic evidence kits (SAEKs) within existing time frames because a number of law enforcement agencies throughout the state were not adhering to the recommended time limits for processing sexual assault forensic evidence collected after an alleged assault, leading to a growing concern over a backlog of untested SAEKs.<sup>135</sup>

Thus, the following activities imposed by Penal Code section 680(c)(1) and (2) are newly required by the state:

1. A law enforcement agency in whose jurisdiction a sex offense specified in Penal Code sections 261, 261.5, 262, 286, 287, or 289 or former section 288a occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:
  - a. Submit sexual assault forensic evidence to the crime lab within 20 days after booked into evidence; *or*
  - b. Ensure that a rapid turnaround DNA program is in place (with a written agreement between the law enforcement agency, the crime lab, and the medical facility pursuant to Penal Code section 680(c)(5)) to submit sexual assault forensic evidence directly from the medical facility examining the victim to the crime lab within five days. (Penal Code 680(c)(1), Stats. 2019, ch. 588.)
2. For any sexual assault forensic evidence received by the crime lab on or after January 1, 2016, the crime lab shall do one of the following:
  - a. Process sexual assault forensic evidence, creating DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initial receipt; *or*
  - b. Transmit sexual assault forensic evidence to another crime lab for DNA processing as soon as practically possible, but no later than 30 days after initial receipt. The transmitting crime lab shall upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA and no later than 120 days after the transmitting crime lab initially receives the evidence.<sup>136</sup> (Penal Code 680(c)(2), Stats. 2019, ch. 588.)

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<sup>135</sup> Exhibit E, Senate Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), December 3, 2018, page 5.

<sup>136</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 3. The courts will give weight and appropriate deference to the interpretation of a statute by the agency charged

It is clear from the plain language of Penal Code section 680(c)(1) that law enforcement agencies in whose jurisdiction specified sex offenses occurred are required to submit the sexual assault forensic evidence to a crime lab. However, under subdivision (c)(2), “the crime lab” is required to process the sexual assault forensic evidence received from the law enforcement agency or medical facility (under the rapid turnaround DNA agreement) or transmit the evidence to another crime lab, and to upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence. As indicated below, there are public crime labs run by the state and local agencies, and private labs that contract with law enforcement to process and test forensic evidence. It is not clear from the plain language of the statute whether the overall duty to process and test the evidence and upload any qualifying DNA profiles to CODIS is ultimately the responsibility of “the crime lab” or the law enforcement agency. Thus, further interpretation is required.

While neither the original statute nor the enacting bill analyses mention crime labs, the legislative history of Penal Code section 680, read within the context of other Penal Code statutes, evidences an intent that the duties created by the Sexual Assault Victims’ DNA Bill of Rights, including those in subdivision (c)(2), be imposed on law enforcement agencies only.

DOJ has interpreted the test claim statute’s requirements as being imposed on law enforcement agencies and *public* crime labs.<sup>137</sup> This is consistent with Penal Code section 297(a), which provides in pertinent part:

[O]nly the following laboratories are authorized to analyze crime scene samples and other forensic identification samples of known and unknown origin and to upload and compare those profiles against state and national DNA and forensic identification databanks and databases in order to establish identity and origin of samples for forensic identification purposes pursuant to this chapter:

- (1) The DNA laboratories of the Department of Justice that meet state and federal requirements, including the Federal Bureau of Investigation (FBI) Quality Assurance Standards, and that are accredited by an organization approved by the National DNA Index System (NDIS) Procedures Board.
- (2) Public law enforcement crime laboratories designated by the Department of Justice that meet state and federal requirements, including the FBI Quality Assurance Standards, and that are accredited by an organization approved by the NDIS Procedures Board.
- (3) Only the laboratories of the Department of Justice that meet the requirements of paragraph (1) of subdivision (a) are authorized to upload DNA profiles from arrestees and other qualifying offender samples collected pursuant to this section, Section 296, and Section 296.2.

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with its implementation. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.)

<sup>137</sup> Exhibit E, California Department of Justice, Sexual Assault Kits and Evidence FAQs, <https://oag.ca.gov/bfs/prop69/faqs-sake> (accessed on February 26, 2021), page 1.

Section 297(b) authorizes state and local law enforcement public crime labs to contract with private forensic laboratories to process evidence, as long as the private labs meet state and federal requirements, including the FBI Quality Assurance Standards, and are accredited by an organization approved by the NDIS Procedures Board. However, the state or local public crime lab is required by section 297(b) to “conduct the quality assessment and review required by the FBI Quality Assurance Standards” prior to uploading DNA profiles generated by a private lab.<sup>138</sup> Thus, under this statute, state and local law enforcement public crime labs have the duty to ensure that the DNA profiles are properly processed and comply with FBI standards for DNA.

Under the rules of statutory construction, it is presumed the Legislature has existing laws in mind when it enacts new statutes.<sup>139</sup> Thus, when the Legislature used the phrase “crime lab” in Penal Code section 680, and required the crime lab to process the sexual assault forensic evidence received from the law enforcement agency or medical facility or transmit the evidence to another crime lab, and to upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence, it was imposing the duty on the state and local law enforcement agencies.

This interpretation is also consistent with the legislative history of Penal Code section 680. According to the Assembly Committee on Appropriations analysis, the purpose of Penal Code section 680, as originally enacted, was to “give rape victims the ability to follow their own cases *so that they can urge law enforcement to test the evidence* and determine if the suspect can be located. This right is similar to other victim's rights, such as the right to be notified of court dates, parole dates, and the disposition of cases.”<sup>140</sup> As discussed above, in passing the Sexual Assault Victims’ DNA Bill of Rights, the Legislature found and declared that “[*l*]aw enforcement agencies have an obligation to victims of sexual assaults *in the proper handling, retention, and timely DNA testing* of rape kit evidence or other crime scene evidence and to be responsive to victims concerning the developments of forensic testing and the investigation of their cases.”<sup>141</sup>

Notably, Penal Code section 680 as originally enacted encouraged law enforcement agencies *only*, not crime labs, to perform DNA testing of sexual assault forensic evidence.

(b)(6) A law enforcement agency assigned to investigate a sexual assault offense specified in Section 261, 261.5, 262, 286, 288a, or 289 *should perform DNA testing of rape kit evidence or other crime scene evidence* in a timely manner in order to assure the longest possible statute of limitations, pursuant to subparagraphs (A) and (B) of paragraph (1) of subdivision (i) of Section 803.<sup>142</sup>

The original language of subdivision (d) also refers to analysis of DNA evidence as the law enforcement agency’s responsibility.

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<sup>138</sup> Penal Code section 297, last amended by Statutes 2006, chapter 170.

<sup>139</sup> *Keeler v. Superior Court* (1970) 2 Cal.3d 619, 625; *Arthur Anderson v. Superior Court* (1998) 67 Cal.App.4th 1481, 1499.

<sup>140</sup> Exhibit E, Assembly Committee on Appropriations, Analysis of AB 898 (2003-2004 Reg. Sess.), as introduced February 20, 2003, page 2, emphasis added.

<sup>141</sup> Penal Code section 680(b)(4), as added by Statutes 2003, chapter 537, emphasis added.

<sup>142</sup> Penal Code section 680(b)(6), as added by Statutes 2003, chapter 537, emphasis added.

(d) *If the law enforcement agency elects not to analyze DNA evidence within the time limits established by subparagraphs (A) and (B) of paragraph (1) of subdivision (i) of Section 803, a victim of a sexual assault offense specified in Section 261, 261.5, 262, 286, 288a, or 289, where the identity of the perpetrator is in issue, shall be informed, either orally or in writing, of that fact by the law enforcement agency.*<sup>143</sup>

Importantly, in describing the legal remedies available to sexual assault victims for a violation of Penal Code section 680, the statute since its enactment has referred only to a law enforcement agency's duty to provide notice when failing to timely analyze DNA evidence or intending to destroy or dispose of sexual assault forensic evidence from an unsolved sexual assault case.<sup>144</sup>

The sole civil or criminal remedy available to a sexual assault victim *for a law enforcement agency's failure to fulfill its responsibilities* under this section is standing to file a writ of mandamus to require compliance with subdivision (e) or (f).<sup>145</sup>

By contrast, there is no separate remedy available to a sexual assault victim for a crime lab's failure to comply with the requirements of Penal Code section 680.

The term "crime lab" was added to Penal Code section 680 by Statutes 2014, chapter 874 (AB 1517) which amended the section by bifurcating law enforcement's responsibility to timely "analyze DNA evidence" into specific tasks to be separately performed by "a law enforcement agency" and "the crime lab."<sup>146</sup> While the bill analyses for AB 1517 do not directly discuss why Penal Code section 680 was changed in this manner, they do indicate that DOJ played a significant role in testing and analyzing sexual assault forensic evidence statewide. According to the Senate Appropriations Committee analysis of AB 1517, costs to comply with the DNA testing guidelines would be incurred by crime labs at both the state and local level, with DOJ handling crime lab functions for 46 counties (representing 25% of the state population), the Los Angeles Crime Lab processing 30 percent of cases statewide, and the remaining counties accounting for 45 percent of cases.<sup>147</sup>

California's public crime lab system is comprised of state, county, and city level entities.<sup>148</sup> DOJ, through its Bureau of Forensic Services, serves 46 of the state's 58 counties through its

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<sup>143</sup> Statutes 2003, chapter 537, emphasis added.

<sup>144</sup> Penal Code section 680(e), (f).

<sup>145</sup> Penal Code section 680(k), emphasis added. This provision was originally contained in subdivision (j) and referenced subdivisions (d) and (e), which were changed to (e) and (f) following renumbering. Statutes 2003, chapter 537.

<sup>146</sup> Statutes 2014, chapter 874, emphasis added.

<sup>147</sup> Exhibit E, Senate Appropriations Committee, Analysis of AB 1517 (2013-2014 Reg. Sess.), as amended May 23, 2014, page 1.

<sup>148</sup> Exhibit E, Excerpts from California Department of Justice, 2003 California Task Force on Forensic Services Force Report, August 2003, page 4.

regional and specialized crime labs.<sup>149</sup> Rural and inland areas of the state tend to be served by state-run labs, whereas more populous urban regions are generally served by county-run labs, or a combination of county- and city-run labs.<sup>150</sup> Notably, “[e]ach jurisdiction is served by only one primary forensic laboratory for any given type of testing.”<sup>151</sup>

According to DOJ, DNA analysis is performed at 18 public crime labs,<sup>152</sup> seven of which are state-run labs,<sup>153</sup> with the remaining 11 consisting of county- and city-run labs.<sup>154</sup> DNA analysis may also be outsourced to accredited private labs in California or other states.<sup>155</sup>

While private labs are used by California law enforcement agencies in a significant portion of DNA cases,<sup>156</sup> there is no indication in either the language or legislative history of Penal Code section 680, or in other provisions of the Penal Code, that the Legislature intended to impose the responsibility to conduct DNA processing on private crime labs. The statute since its enactment has referred to law enforcement’s obligation to victims of sexual assaults in the proper handling, retention and timely DNA testing of rape kit evidence or other crime scene evidence.<sup>157</sup>

Taken as a whole, the duties imposed by Penal Code section 680(c)(1) and (2) are ultimately a law enforcement responsibility. This conclusion is further supported by the general rule that California counties and cities “have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction.”<sup>158</sup>

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<sup>149</sup> Exhibit E, California Department of Justice, Bureau of Forensic Services Brochure, September 2019, page 1.

<sup>150</sup> Exhibit E, Excerpts from California Department of Justice, 2003 California Task Force on Forensic Services Force Report, August 2003, pages 4-5.

<sup>151</sup> Exhibit E, Excerpts from California Department of Justice, 2003 California Task Force on Forensic Services Force Report, August 2003, page 2.

<sup>152</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Kits, 2020 Report to the Legislature, page 3.

<sup>153</sup> Exhibit E, California Department of Justice, Bureau of Forensic Services Brochure, September 2019, page 2.

<sup>154</sup> Exhibit E, Excerpts from California Department of Justice, 2003 California Task Force on Forensic Services Force Report, August 2003, pages 6-9.

<sup>155</sup> Exhibit E, California Department of Justice, Statewide Audit of Untested Sexual Assault Forensic Kits, 2020 Report to the Legislature, page 3.

<sup>156</sup> Exhibit E, Excerpts from California Department of Justice, 2003 California Task Force on Forensic Services Force Report, August 2003, page 3.

<sup>157</sup> Penal Code section 680, Statutes 2003, chapter 537.

<sup>158</sup> *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367. Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that “It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the

- b. The test claim statute does not require law enforcement agencies to conduct follow-up investigations.

The claimant also seeks reimbursement for the cost of employing one police sergeant and two police detectives to conduct follow-up investigations on the previously untested and outsourced SAEKs.<sup>159</sup> These costs form the bulk of the claimant’s total estimated costs for the 2020-2021 fiscal year.<sup>160</sup> The claimant states that law enforcement officers are required to take any number of actions after receiving new evidence related to any criminal investigation, and therefore, conducting follow-up investigations on any new evidence resulting from the mandated DNA testing is necessary.<sup>161</sup>

Conducting investigations on new evidence resulting from the mandated testing requirement is not required by the plain language of the test claim statute. Investigation for future criminal charges and prosecution is within local district attorney and law enforcement existing duties and prosecutorial discretion, and is therefore not state mandated.<sup>162</sup> Furthermore, any duties law enforcement agency personnel may have upon discovering new evidence impacting prior or ongoing criminal proceedings exist independently and outside the scope of the test claim statute. The Commission finds that conducting follow-up investigations is not required by the test claim statute and is, therefore, not eligible for reimbursement.

- c. The test claim statute imposes a state-mandated program on counties and cities, but does not impose a state-mandated program on K-12 school districts or community college districts.

The plain language of the test claim statute imposes requirements on law enforcement agencies in whose jurisdiction specified sex offenses occur. On its face, this would appear to include county and city law enforcement agencies, as well as the law enforcement agencies of K-12 school districts and community college districts, as authorized by Education Code sections 38000 and 72330.<sup>163</sup> As indicated above, California counties and cities “have as an ordinary,

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State for: (1) the constitution, regulation, and government of the city police force . . . .” Government Code section 36501 further provides that “[t]he government of a general law city is vested in: . . . (d) A chief of police.”

<sup>159</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 13-14; Exhibit C, Claimant’s Late Rebuttal Comments, filed May 7, 2021, pages 1-2.

<sup>160</sup> Exhibit A, Test Claim, filed December 31, 2020, page 23.

<sup>161</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 13-15.

<sup>162</sup> Government Code sections 26500, 26501; *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543 (Although codified by statute, the principle of prosecutorial discretion is rooted in the separation of powers and due process clauses of the California Constitution, and is basic to the state’s criminal justice system); *People v. Eubanks* (1996) 14 Cal.4th 580, 589 (prosecutorial discretion extends from the investigation and gathering of evidence relating to criminal offenses, through the crucial decisions of whom to charge and what charges to bring).

<sup>163</sup> Education Code sections 38000 and 72330, authorize school districts and community college districts, respectively, to establish school police departments and employ peace officers.

principal, and mandatory duty the provision of policing services within their territorial jurisdiction.”<sup>164</sup> However, because K-12 school districts and community college districts are permitted but not required by state law to have police departments and employ peace officers, they are not legally compelled to comply with the activities required by Penal Code section 680(c)(1) and (2).

The courts have made clear that activities required by state law, but triggered by a local discretionary decision (that is, action undertaken without any legal compulsion from the state or threat of penalty for nonparticipation) do not result in a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.<sup>165</sup> In *Department of Finance v. Commission on State Mandates (POBRA)*, the court addressed legislation that provided procedural protections to peace officers employed by counties, cities, and school districts when a peace officer employee is subject to an interrogation by the employer, is facing punitive action, or receives an adverse comment in his or her personnel file. The court specifically held that “school districts . . . that are permitted by statute [i.e., Education Code sections 38000 and 72330], but not required, to employ peace officers who supplement the general law enforcement units of cities and counties” are not eligible to claim reimbursement under article XIII B, section 6 for the new activities required by the state because school districts and community college districts are not legally or practically compelled by state law to comply.<sup>166</sup> The court reasoned that unlike cities and counties,<sup>167</sup> school districts and community college districts do not have the provision of police protection as an essential and basic function, and instead make a

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<sup>164</sup> *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367. Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that “It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force . . . .” Government Code section 36501 further provides that “[t]he government of a general law city is vested in: . . . (d) A chief of police.”

<sup>165</sup> *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 742; *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1363.

<sup>166</sup> *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357-1367.

<sup>167</sup> Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that “It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force . . . .” Government Code section 36501 further provides that “[t]he government of a general law city is vested in: . . . (d) A chief of police.”

discretionary decision to form a police department and employ peace officers pursuant to statutory authority:

The Commission notes that *Carmel Valley Fire Protection Dist. v. State* characterizes police protection as one of “the most essential and basic functions of local government.” [Citation omitted.] However, that characterization is in the context of cities, counties, and districts that have as an ordinary, principal, and mandatory duty the provision of policing services within their territorial jurisdiction. A fire protection district perform must hire firefighters to supply that protection.

Thus, as to cities, counties, and such districts, new statutory duties that increase the costs of such services are prima facie reimbursable. This is true, notwithstanding a potential argument that such a local government’s discretionary decision is voluntary in part, as to the number of personnel it hires. (See *San Diego Unified School Dist., supra*, 33 Cal.4th at p. 888. . . .) A school district, for example, has an analogous basic and mandatory duty to educate students. In the course of carrying out that duty, some “discretionary” expulsions will necessarily occur. [Citation to *San Diego Unified School Dist.* omitted.] Accordingly, *San Diego Unified School Dist.* suggests additional costs of “discretionary” expulsions should not be considered voluntary. Where, as a practical matter, it is inevitable that certain actions will occur in the administration of a mandatory program, costs attendant to those actions cannot fairly and reasonably be characterized as voluntary under the rationale of *City of Merced*. [Citation to *San Diego Unified School Dist.* omitted.]

However, the districts in issue are authorized, but not required, to provide their own peace officers and do not have provision of police protection as an essential and basic function. It is not essential unless there is a showing that, as a practical matter, exercising the authority to hire peace officers is the only reasonable means to carry out their core mandatory functions.<sup>168</sup>

As discussed above, the duties under Penal Code section 680(c)(1) and (2) are imposed on law enforcement agencies, including the law enforcement agencies of K-12 school districts and community college districts in whose jurisdiction specified sex offenses occur. As recognized by the court in *POBRA*, however, K-12 school districts and community college districts are authorized, but not required, to have police departments and employ peace officers. Police protection is not a basic or essential function of K-12 school districts and community college districts. Thus, since K-12 school districts and community college districts are not legally compelled to have police departments, the legal duty to comply with the activities required by Penal Code section 680(c)(1) and (2) is imposed as a result of their own discretionary decisions to have police departments and employ peace officers and is not mandated by the State. Moreover, there is no evidence in the record that K-12 school districts or community college districts are practically compelled to have police departments.

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<sup>168</sup> *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1367-1368.

Accordingly, the Commission finds that the test claim statute imposes a state-mandated program on counties and cities, but does not impose a state-mandated program on K-12 school districts and community college districts. K-12 school districts and community college districts are therefore not eligible to claim reimbursement for this program.

**2. Penal Code section 680(c)(1) and (2), as Amended by the Test Claim Statute, Imposes a New Program or Higher Level of Service.**

For the test claim statute to be subject to subvention pursuant to article XIII B, section 6 of the California Constitution, the statute must impose a new program or higher level of service. A new program or higher level of service is defined as a program that carries out the governmental function of providing services to the public, or, in implementing a state policy, imposes unique requirements on local government that do not apply generally to all residents and entities in the state.

Looking at the language of section 6 then, it seems clear that by itself the term “higher level of service” is meaningless. It must be read in conjunction with the predecessor phrase “new program” to give it meaning. Thus read, it is apparent that the subvention requirement for increased or higher level of service is directed to state mandated increases in the services provided by local agencies in existing “programs.” But the term “program” itself is not defined in article XIII B. What programs then did the electorate have in mind when section 6 was adopted? We conclude that the drafters and the electorate had in mind the commonly understood meanings of the term – *programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state.*<sup>169</sup>

The court further held that “the intent underlying section 6 was to require reimbursement to local agencies for the costs involved in carrying out functions *peculiar to government*, not for expenses incurred by local agencies as an incidental impact of laws that apply generally to all state residents and entities.”<sup>170</sup>

As indicated above, the state-mandated activities are newly imposed on county and city law enforcement agencies and are unique to government. Providing police services and protection to the public is a core governmental function.<sup>171</sup> Moreover, the mandated activities relating to the testing sexual assault forensic evidence provide a peculiarly governmental service to the public. In passing the Sexual Assault Victims’ DNA Bill of Rights, the Legislature found and declared that “[t]imely DNA analysis of rape kit evidence is a core public safety issue affecting men, women, and children in the State of California. It is the intent of the Legislature, in order to further public safety, to encourage DNA analysis of rape kit evidence within the time limits

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<sup>169</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56, emphasis added.

<sup>170</sup> *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56-57, emphasis added.

<sup>171</sup> *Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 537 (Police protection is one “of the most essential and basic functions of local government.”); *City of Sacramento v. State of California* (1990) 50 Cal.3d 51.

imposed by subparagraphs (A) and (B) of paragraph (1) of subdivision (i) of Section 803.”<sup>172</sup> Furthermore, the test claim statute aims to “to ensure that survivors of rape have equal access to justice by promptly testing all rape kits collected after an assault.”<sup>173</sup>

**3. Penal Code Section 680(c)(1) and (2), as Amended by the Test Claim Statute, Results in Increased Costs Mandated by the State Within the Meaning of Article XIII B, Section 6 of the California Constitution and Government Code Section 17514.**

In order to be reimbursable, the mandated activities must also result in increased costs mandated by the state. Article XIII B, section 6 of the California Constitution and Government Code section 17561(a) require reimbursement for all costs mandated by the state. Government Code section 17514 defines “costs mandated by the state” as any increased costs that a local agency or school district incurs as a result of any statute or executive order that mandates a new program or higher level of service. Government Code section 17564(a) further requires that no claim shall be made nor shall any payment be made unless the claim exceeds \$1,000. In addition, a finding of costs mandated by the state means that none of the exceptions in Government Code section 17556 apply to deny the claim.

The claimant alleges that it has incurred increased costs of \$116,139 to comply with the mandated new program or higher level of service in fiscal year 2019-2020 as follows:<sup>174</sup>

Activity	Date(s) Performed	Description	Cost
1) SAEK Outsourcing	1/01/2020-6/30/2020	Contract Lab Analysis	\$ 52,670.00
2) Lab/Police Personnel	1/01/2020-6/30/2020	Follow-Up Outsourcing	\$ 985.75
3) Program Manager	1/01/2020-6/30/2020	SAEK Evidence Management	\$ 62,483.20
Total			\$116,138.95

The claimant supports these assertions with invoices,<sup>175</sup> a contract between the claimant and the outsourced crime lab,<sup>176</sup> a hiring memorandum pertaining to the criminalist positions,<sup>177</sup> an itemized spreadsheet of consumable costs,<sup>178</sup> and a declaration from Jeffrey Jordon, Captain of

<sup>172</sup> Penal Code section 680(b)(5), as added by Statutes 2003, chapter 537. “Subdivision (i) of Section 803” was later changed to “subdivision (g) of Section 803” to reflect renumbering of that law. See Penal Code section 680(b)(6), as amended by Statutes 2014, chapter 874.

<sup>173</sup> Exhibit E, Assembly Committee on Public Safety, Analysis of SB 22 (2019-2020 Reg. Sess.), as amended May 17, 2019, page 3.

<sup>174</sup> Exhibit A, Test Claim, filed December 31, 2020, page 16.

<sup>175</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 83-105.

<sup>176</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 56-82.

<sup>177</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 106-108.

<sup>178</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 109-110. The claimant defines “consumables” as “materials needed to test the sexual assault evidence kits,” not the materials that make up the kits themselves. Exhibit A, Test Claim, filed December 31, 2020, page 7.

the City of San Diego Policy Department.<sup>179</sup> While the claimant alleges that Penal Code section 680(c)(1) mandates new activities, the claimant asserts that costs stemming from those new activities are de minimis and therefore has not identified them.<sup>180</sup>

The record contains sufficient evidence that the claimant's costs to comply with the mandated new program or higher level of service for fiscal year 2019-2020 exceed \$1,000.

Additionally, none of the exceptions specified in Government Code section 17556 apply to this claim. No State funds have been specifically appropriated to fund this program. In fact, the initial draft of the test claim statute included a direct appropriation of \$2 million from the General Fund to DOJ to assist local law enforcement agencies with complying with the new testing requirements, but that language was eventually removed.<sup>181</sup> There are, however, several state and federal grant programs and other funding sources that may be used by a claimant to pay for the mandated activities in this program and for other criminal justice programs. These include, but are not limited to:

- Citizens Option for Public Safety Grant (COPS) (state)
- DNA Capacity Enhancement and Backlog Reduction Program (federal)
- DNA Identification Fund (state)
- Sexual Assault Evidence Submission Grant Program (state)

There is nothing in the law, however, that requires the above-described funding sources to be mandatory offsets and there is no evidence that they are sufficient to fully fund the costs of the program. Therefore, the Commission finds that there are costs mandated by the state. The identified funding sources, above, will be identified as potential offsetting revenues in the Parameters and Guidelines.

## **V. Conclusion**

Based on the foregoing analysis, the Commission partially approves this Test Claim and finds that Penal Code section 680(c), as amended by Statutes 2019, chapter 588, imposes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution and Government Code section 17514, and requires city and county law enforcement agencies to perform the following mandated activities beginning January 1, 2020:

1. A law enforcement agency in whose jurisdiction a sex offense specified in Penal Code sections 261, 261.5, 262, 286, 287, or 289 or former section 288a occurred shall do one of the following for any sexual assault forensic evidence received by the law enforcement agency on or after January 1, 2016:

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Under Penal Code section 13823.14(d), “[e]very local and state agency shall remain responsible for its own costs in purchasing a standardized sexual assault forensic medical evidence kit.”

<sup>179</sup> Exhibit A, Test Claim, filed December 31, 2020, pages 21-24.

<sup>180</sup> Exhibit A, Test Claim, filed December 31, 2020, page 9.

<sup>181</sup> Exhibit A, Test Claim, filed December 31, 2020, page 42.

- a. Submit sexual assault forensic evidence to the crime lab within 20 days after booked into evidence; *or*
  - b. Ensure that a rapid turnaround DNA program is in place (with a written agreement between the law enforcement agency, the crime lab, and the medical facility pursuant to Penal Code section 680(c)(5)) to submit sexual assault forensic evidence directly from the medical facility examining the victim to the crime lab within five days. (Penal Code 680(c)(1), Stats. 2019, ch. 588.)
2. For any sexual assault forensic evidence received on or after January 1, 2016, the law enforcement's crime lab shall do one of the following:
- a. Process sexual assault forensic evidence, creating DNA profiles when able, and upload qualifying DNA profiles into CODIS as soon as practically possible, but no later than 120 days after initial receipt; *or*
  - b. Transmit sexual assault forensic evidence to another crime lab for DNA processing as soon as practically possible, but no later than 30 days after initial receipt. The transmitting crime lab shall upload into CODIS any qualifying DNA profiles from sexual assault forensic evidence as soon as practically possible, but no longer than 30 days after being notified about the presence of DNA and no later than 120 days after the transmitting crime lab initially receives the evidence. (Penal Code 680(c)(2), Stats. 2019, ch. 588.)

All other activities and costs alleged in the Test Claim are not mandated by the plain language of the test claim statute, but may be proposed and supported by evidence in the record by the claimant for inclusion in the Parameters and Guidelines pursuant to Government Code section 17557(a), and California Code of Regulations, title 2, sections 1183.7(d) and 1187.5, *with the exception* of conducting follow-up investigations on evidence tested pursuant to the test claim statute, which the Commission finds is not a reimbursable activity.