

HOUSE BILL REPORT

ESHB 1469

As Passed Legislature

Title: An act relating to protecting access to reproductive health care services and gender-affirming treatment in Washington state.

Brief Description: Concerning access to reproductive health care services and gender-affirming treatment in Washington state.

Sponsors: House Committee on Civil Rights & Judiciary (originally sponsored by Representatives Hansen, Thai, Chopp, Fitzgibbon, Simmons, Berry, Slatter, Santos, Ryu, Street, Gregerson, Goodman, Peterson, Tharinger, Ramel, Macri, Ormsby, Reeves, Senn, Doglio, Riccelli, Alvarado, Bateman, Morgan, Callan, Bergquist and Pollet).

Brief History:

Committee Activity:

Civil Rights & Judiciary: 1/24/23, 1/27/23 [DPS].

Floor Activity:

Passed House: 2/28/23, 59-38.

Passed Senate: 4/10/23, 29-20.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Defines protected health care services in Washington to include reproductive health care services and gender-affirming treatment.
- Restricts the ability for a court to issue, and law enforcement to enforce, subpoenas, warrants, criminal process, extradition, and other court orders for civil or criminal liability that is based on the provision or receipt of protected health care services.
- Restricts Washington businesses from complying with records requests or subpoenas for information related to the provision or receipt of protected health care services.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not part of the legislation nor does it constitute a statement of legislative intent.

- Creates a cause of action for interference with protected health care services when certain civil or criminal actions are filed against an aggrieved party or a subpoena is issued to a person in Washington.
- Allows any protected health care services provider or employee to apply to the Secretary of State's Address Confidentiality Program.
- Authorizes the Attorney General to bring an action to enjoin any person from violating the act and to recover costs for such action.

HOUSE COMMITTEE ON CIVIL RIGHTS & JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 6 members: Representatives Hansen, Chair; Farivar, Vice Chair; Entenman, Goodman, Peterson and Walen.

Minority Report: Do not pass. Signed by 3 members: Representatives Walsh, Ranking Minority Member; Graham, Assistant Ranking Minority Member; Rude.

Minority Report: Without recommendation. Signed by 1 member: Representative Cheney.

Staff: Matt Sterling (786-7289).

Background:

Abortion and Reproductive Health Care Services.

In 2022 the United States Supreme Court issued a decision in *Dobbs v. Jackson Women's Health Organization*, finding that the United States Constitution does not confer a right to abortion. The court held that individual states can regulate any aspect of abortion that is not otherwise protected by federal law. Regulations must rationally relate to a legitimate state interest. Some states prohibit or limit access to abortion, while other states maintain legalized access to abortion.

Washington law prohibits the interference with a pregnant person's right to choose to have an abortion prior to viability or to protect the person's life or health. Certain types of health care providers are authorized to terminate a pregnancy in these circumstances.

Foreign Subpoenas.

A court in another state has no power to compel discovery in Washington and may only do so with a valid subpoena issued from a Washington court. A subpoena is a document issued by a court that requires a person to be somewhere at a certain time, provide testimony, or produce documents or items. For a litigant in a foreign action to obtain a subpoena for discovery that is enforceable in Washington, the jurisdiction of the Washington court must

be invoked.

Under the Uniform Interstate Depositions and Discovery Act a litigant in a foreign action may present a subpoena issued in the trial state to the clerk of court in the Washington county in which discovery is sought. The clerk of the Washington court must then issue a Washington subpoena for service upon the person to be deposed or from whom discovery materials are sought. The Washington subpoena must contain all the relevant terms of the subpoena from the trial state and the contact information for all counsel of record or unrepresented parties. In issuing the subpoena, the Washington court acts in accordance with its own procedure. All applications to the court for a protective order or to enforce, quash, or modify a subpoena issued through the above procedure must comply with Washington court rules and applicable statutes.

Compelling Witnesses.

Any person may be compelled to attend as a witness before any court of record, judge, commissioner, or referee, in any civil action or proceeding in this state. Under the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, if a judge in another state certifies that a grand jury investigation has commenced or that there is a criminal prosecution pending in such court, and that a person in this state is a material witness, a judge of a court in the county in which the person is located is required to make an order directing the witness to appear for the hearing.

The judge will issue a summons for the witness if at a hearing the judge determines that:

- the witness is material and necessary;
- it will not cause undue hardship to the witness to be compelled to attend and testify; and
- the laws of the other state will protect the witness from arrest and the service of civil and criminal process.

Private Communications and Information.

The Privacy Act restricts the interception or recording of private electronic communications or conversations. "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photo-optical system, but does not include any wire or oral communication; any communication made through a tone-only paging device; or any communication from a tracking device.

As a general rule, it is unlawful for any person to intercept or record a private communication or conversation without first obtaining the consent of all persons participating in the communication or conversation. There are limited exceptions to this general rule that allow the communication or conversation to be intercepted and recorded when only one party consents. The Privacy Act allows a court to order interceptions of communications without the consent of any party to the communication only in cases involving danger to national security, human life, or imminent arson or riot.

A law enforcement officer may apply to the superior court for a court order authorizing the installation and use of a pen register, a trap and trace device, or cell site simulator. The court must authorize the installation and use of the device if the court finds:

- that the information likely to be gained is relevant to an ongoing criminal investigation; and
- there is probable cause to believe that the device will lead to evidence of a crime, contraband, weapons, or that a crime reasonably appears about to be committed.

The court order must specify the identity of the person registered to the affected line, the identity of the subject of the criminal investigation, the number and physical location of the affected line, and a statement of the offense to which the information likely to be obtained relates. The existence of the pen register, trap and trace device, or cell site simulator may not be disclosed by any person except by court order.

If requested by the law enforcement officer and directed by the court, providers of wire or electronic communication services and other appropriate persons must provide the law enforcement officer authorized to install a pen register or trap and trace device with all information, facilities, and technical assistance necessary to complete the installation. A person who provides assistance must be reasonably compensated for the person's services and is immune from civil or criminal liability for any information, facilities, or assistance provided in good faith reliance on a court order authorizing the installation.

Extradition.

Under the Uniform Criminal Extradition Act, the Governor is authorized to issue a warrant for the arrest of any person who is charged with committing a crime in another state and has fled from justice and is found in this state. A demand for the extradition of the person from the Governor of that foreign state must precede the warrant. In certain circumstances, the Governor may exercise discretion as to whether to issue the warrant and have the fugitive arrested and delivered to the executive authority of the demanding state.

Under the Uniform Criminal Extradition Act, a law enforcement agency is required to deliver a person in custody to the accredited agent or agents of a demanding state without the Governor's warrant when:

- the person is alleged to have broken the terms of his or her probation, parole, bail, or any other release of the demanding state; and
- the law enforcement agency has received from the demanding state:
 - an authenticated copy of a prior waiver of extradition signed by the person as a term of the individual's probation, parole, bail, or any other release of the demanding state; and
 - photographs or fingerprints or other evidence properly identifying the person as the person who signed the waiver.

Address Confidentiality Program.

The Address Confidentiality Program allows a person meeting certain criteria to apply to the Secretary of State for a separate address to be designated to serve as the person's public address in order to keep his or her actual address confidential. An address can be designated for persons, and any family member residing with such person, who:

- have a good reason to believe that they are a victim of domestic violence, sexual assault, trafficking, or stalking, and are in fear for their safety;
- are a target for threats or harassment because of their involvement in the criminal justice system;
- are any election official or criminal justice participant who is a target for threats or harassment from cyber harassment; or
- are an election official who is a target for threats or harassment from felony harassment.

A person may apply on their own behalf or on behalf of a minor or incapacitated person who meets the criteria. A court order for disclosure of Address Confidentiality Program participant information may only be issued upon a finding of probable cause that release is necessary for a criminal investigation or to prevent immediate risk to a minor.

Summary of Engrossed Substitute Bill:

Definitions.

"Reproductive health care services" means all services, care or products of a medical, surgical, psychiatric, therapeutic, mental health, behavioral health, diagnostic, preventative, rehabilitative, supportive, counseling, referral, prescribing, or dispensing nature relating to the human reproductive system, including, but not limited to, all services, care, and products related to pregnancy, assisted reproduction, contraception, miscarriage management, or the termination of a pregnancy, including self-managed termination.

"Gender-affirming treatment" means health services or products that support and affirm an individual's gender identity, including social, psychological, behavioral, and medical or surgical interventions. Gender-affirming care services include, but are not limited to, evaluation and treatments for gender dysphoria, gender-affirming hormone therapy, and gender-affirming surgical procedures.

"Protected health care services" means gender-affirming treatment and reproductive health care services that are lawful in Washington.

Foreign Subpoenas.

Any request for the issuance of a subpoena under the Uniform Interstate Depositions and Discovery Act must include an attestation, made under penalty of perjury, stating whether the subpoena seeks documents, information, or testimony related to the provision or receipt of protected health care services. The clerk of the court is prohibited from issuing a subpoena under the act if the party is seeking information, documents, or testimony related to protected health care services that are legal in Washington and must present the subpoena

to the court for action.

After reviewing the subpoena, the court may not issue the subpoena and must quash any existing subpoena issued by the court if the subpoena is related to such protected health care services. The court may issue a subpoena if the subpoena is related to a claim that would exist under Washington law and that is brought by a person seeking damages or loss of consortium, or seeking the enforcement of a contractual relationship.

Compelling Witnesses.

The summons of a witness in Washington to testify in a prosecution or grand jury investigation in another state is prohibited if the prosecution or investigation is based on the provision or receipt of protected health care services. A valid summons for a witness in Washington to testify in another state related to a criminal prosecution or grand jury investigation must include an attestation, made under penalty of perjury, stating that such prosecution or investigation does not seek documents, information, or testimony related to the provision or receipt of protected health care services.

Private Communications and Information.

Any ex parte order for the interception of any private communication or conversation that is seeking communications or conversations that are related to a criminal investigation for the provision or receipt of protected health care services must attest that such information is sought. Courts are prohibited from issuing such an order if this type of information is sought.

Courts are prohibited from issuing orders for the installation and use of a pen register, trap and trace device, or cell site simulator device related to the provision or receipt of protected health services. All applications for the installation of such devices must include an attestation, made under penalty of perjury, stating whether the application seeks information related to the provision or receipt of protected health care services.

Extradition.

No person may be extradited to another state if the demand for extradition states the person is charged with a crime in the demanding state related to the provision or receipt of protected health care services in Washington or any third state. An extradition demand claiming a person committed a crime in another state must include an attestation made under penalty of perjury stating whether the charge of the crime in the other state is related to the provision or receipt of protected health care services. No warrant may be issued, and no arrest may be effectuated, that is related to an extradition demand claiming criminal liability related to the provision or receipt of protected health care services.

Criminal Proceedings.

No criminal warrant, subpoena, or order seeking records may be issued if such criminal process is related to the provision or receipt of protected health care services. A Washington recipient of a criminal warrant, subpoena, or order issued by or in another state

does not need to comply if the process is related to criminal liability based on the provision or receipt of protected health care services. There is an affirmative duty on any person making a charge or complaint before a judge or magistrate with the commission of a crime in another state to disclose if the crime is related to criminal liability that relates to protected health care services.

False Attestations.

Any false attestation submitted in connection with interstate depositions and discovery, foreign witnesses, extradition proceedings, the interception of private communications, or criminal orders is subject to a \$10,000 penalty per violation and subjects the attester to the jurisdiction of the courts of Washington for any suit, penalty, or damages arising out of the false attestation. For the statutory penalty to be applicable to a request for a foreign subpoena or testimony in a foreign criminal prosecution or grand jury, the court must find that the false attestation was intentionally submitted and did seek information related to protected health care services.

Limits on Public Officers and Employees.

It is the public policy of Washington to protect the provision and insurance coverage of protected health care services regardless of the location of the person receiving the services. A state court, judicial officer, court employee or clerk, or public employee or official may not apply to a case or controversy heard in state court any law that is contrary to this state's public policy as described in this section. Employees of state courts and public employees or officials may not issue or effectuate a subpoena, warrant, court order, arrest, or other civil or criminal legal process related to proceedings in another state in connection with the provision or receipt of protected health care services.

State or local agencies or departments are prohibited from cooperating with or providing information to any individual, agency, or department from another state, or to the extent permitted by federal law, to a federal law enforcement agency, for the purpose of enforcing another state's law that asserts criminal or civil liability related to the provision or receipt of protected health services.

Limits on Washington Businesses.

Washington businesses that provide electronic communication services are prohibited from knowingly providing records, information, facilities, or assistance in response to a civil or criminal process that relates to an investigation into, or the enforcement of, another state's laws asserting criminal or civil liability for the provision or receipt of protected health care services.

Washington businesses that provide these services are also prohibited from complying with any subpoena, warrant, or civil or criminal process unless it is accompanied by an attestation stating that the civil or criminal process does not seek documents, information, or testimony relating to an investigation into, or the enforcement of, another state's law asserting criminal or civil liability for the provision or receipt of protected health care

services. Such businesses may rely on the representations made in an attestation in determining whether the civil or criminal legal process relates to the provision or receipt of protected health care services.

Interference with Protected Health Care Services.

A claim for interference with protected health care services is established. A claim arises when a civil or criminal action is commenced against a party in any court in the United States where liability is based on the party's provision, receipt, or assistance of protected health care services or when any person in Washington receives a subpoena from any court in the United States where the information sought concerns such protected health care services. A claim does not apply to a judgment entered in another state that is based on an action for which a similar claim would exist under the laws of Washington or where no part of the acts that formed the basis for liability occurred in this state.

A person with a claim for interference with protected health care services may maintain the claim if the civil or criminal action is objectively baseless and brought for an improper purpose. An underlying action is objectively baseless under this section if:

- the court in the underlying action lacked jurisdiction over the aggrieved party;
- the underlying action impedes the right to travel; or
- other factors exist that the court determines demonstrate the objective baselessness of the underlying action.

An underlying action is brought for an improper purpose under this section if:

- a purpose of the underlying action is to deter acts or omissions in Washington that are permitted under the laws of Washington; or
- other factors exist that the court determines demonstrate the underlying action was brought for an improper purpose.

If a court finds for a party in an action asserting a claim for interference with protected health care services authorized by this section, the party may recover damages from any party that brought the underlying action. Recoverable damages include:

- actual damages including, but not limited to, costs and reasonable attorneys' fees spent in defending the underlying action;
- costs and reasonable attorneys' fees incurred in bringing an action under this section as may be allowed by the court; and
- statutory damages up to \$10,000 if the underlying action is found to be frivolous.

Address Confidentiality.

Any protected health care services provider, employee, or affiliate, and any family members residing with the person, who attests that they are the target of threats or harassment may apply to the Secretary of State's Address Confidentiality Program.

Miscellaneous.

The Attorney General may bring an action to enjoin any person from violating any

provision of this chapter and the superior court may grant any orders or judgments necessary to enjoin such persons from violating this chapter. For any action in which the Attorney General prevails, the Attorney General may recover the costs of the action, including a reasonable attorney's fee.

The Attorney General's Office must maintain a list of any laws of another state that impose criminal liability for the provision or receipt of protected health care services and make the list available to the Washington State Patrol.

A person in Washington that receives a subpoena from any court may move to modify or quash the subpoena if the information sought concerns protected health care services and liability in the underlying action is based on a cause of action or criminal liability that is not available under Washington law or the law of another state that is substantially similar to Washington law.

The act is not to be construed to undermine the application of the Full Faith and Credit Clause of the United States Constitution.

The bill contains a severability clause.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony:

(In support) After the United States Supreme Court's draft of *Dobbs* leaked, advocates quickly started looking at all ways that other states' laws restricting abortion could be used in Washington against Washington persons. States like Texas had already been creative and aggressive in enacting ways to impose civil liability on persons who assist abortions through Senate Bill 8, and it could be foreseen that further efforts to criminalize abortion would shortly be underway. If other states wish to be creative and aggressive in restricting abortion rights, Washington can be creative and aggressive in fighting back and that is what this bill does. All civil and criminal mechanisms used to enforce the laws of other states in Washington are made unavailable to actors trying to enforce restrictions on gender-affirming care or abortion care that is legal in Washington. Other states are free to make their public policy choices as to what is legal or illegal in their states, but Washington is free to not let our laws or judicial processes be used to enforce those laws in this state. The Supreme Court overturned decades of precedent by taking away the constitutional right to abortion and as a result one in three women have lost access to abortion. The Supreme Court decision created chaos as to what people can and cannot do with their bodies. An Idaho court just upheld a law that included a bounty provision for family members to seek

actions against a provider. Patients and providers are living in fear of being criminally prosecuted. The law is crystal clear that abortion and gender-affirming care in Washington remains legal, but overzealous prosecutors and lawmakers in other states are trying to criminalize these legal actions in Washington. The unimpeded access to abortion services is essential for harm reduction in cases like domestic violence. By prohibiting courts from issuing subpoenas for health care information, it ensures that this private health information remains private. Without that assurance, people might be reluctant to seek care which will lead to poor health outcomes. There are increased suicide rates in states where abortion is not legal and people travel to Washington every week for this life-saving care. Washington is a leader and safety net for patients and we need to protect providers and patients from hostile attacks of other states. These laws that target providers have created a lot of uncertainty and fear, but providers are dedicated to providing services that are legal in Washington and this bill will provide protection and certainty for these providers. This legislation is vitally important to providers who have been overwhelmed the last few years. If the burdens are too great, the state will lose providers and the consequences will be dire. This bill is designed to limit cooperation with other states that seek to criminalize these services. Providers are very appreciative of the provision providing for employee address confidentiality to protect against threats and violence against health care providers. This bill stands in support of gender-affirming care. There are concerns about the over criminalization of the black, transgender community which has been made worse by the recent anti-transgender legislation being introduced across the country. Forty-seven percent of black transgender people across the country have experienced incarceration due to a network of laws and over policing. This bill will work to protect the community from further criminalization and incarceration. There are 14 states that now ban abortion and estimates are that about half will probably do so within the next year. This bill protects Washington providers and people that travel to Washington for health care services from the threat that other states pose through government officials or private individuals attempting to investigate, sue, or prosecute people in Washington for lawful health care services. So far, seven states have enacted laws that are comparable to this bill.

(Opposed) Please do not put law enforcement officers in the middle of the abortion fight. When another state issues a judicial warrant, law enforcement honors that under the extradition clause of the United States Constitution. In all these cases, that person is brought before a Washington court for a hearing. The bill creates unnecessary burdens and liabilities for officers based on other states' laws. An officer making an arrest will not necessarily know what the warrant is for and could not comply with the bill.

Persons Testifying: (In support) Representative Drew Hansen, prime sponsor; Erin Berry and Ashley Wilson, Planned Parenthood; Jaelynn Scott, Lavender Rights Project; David Cohen; Katina Rue, Washington State Medical Association; Sarah Prager, American College of Obstetricians and Gynecologists; Suzanne Poppema; Danni Askini, Gender Justice League; Carey Morris, Washington State Coalition Against Domestic Violence; Hillary Whitmore; Alizeh Bhojani, Legal Voice; and Mary Lynne Courtney, League of Women Voters of Washington.

(Opposed) James McMahan, Washington Association of Sheriffs and Police Chiefs.

Persons Signed In To Testify But Not Testifying: None.