

# SENATE BILL REPORT

## ESHB 1469

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As of March 14, 2023

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

**Committee Activity:** Law & Justice: 3/16/23.

### Brief Summary of Bill

- Defines protected health care services in Washington to include reproductive health care services and gender-affirming treatment.
- Restricts the ability of a court to issue, and for law enforcement to enforce, subpoenas, warrants, criminal process, extradition, and other court orders for civil or criminal liability 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.
- 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.
- Authorizes the attorney general to bring an action to enjoin any person from violating the act and to recover costs.

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*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.*

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## SENATE COMMITTEE ON LAW & JUSTICE

**Staff:** Joe McKittrick (786-7287)

**Background:** In 2022, the United States Supreme Court issued a decision in *Dobbs v. Jackson Women's Health Organization*, finding the United States Constitution does not confer a right to abortion. The court held that individual states may regulate any aspect of abortion 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 subpoena is a document issued by a court that requires a person to appear at a specified place and time to provide testimony, or requires a person to produce documents or other items. A court in another state has no power to issue a subpoena in Washington unless a Washington court issues a valid subpoena on its behalf.

Under the Uniform Depositions and Discovery Act, a litigant in a foreign action may present a subpoena issued in the trial state to the clerk of the court in the Washington county in which discovery is sought. The clerk of the court must then issue a subpoena for service upon the person to be deposed or from whom discovery materials are sought. In issuing the subpoena, the Washington court acts in accordance with its own procedures. 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 a grand jury investigation has commenced, or there is a criminal prosecution pending in such court, and 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 the witness is material, compelling the witness's attendance will not cause undue hardship, and the laws of the other state will protect the witness from arrest and service of civil and criminal process.

Private Communications and Information. The Privacy Act restricts the interception or recording of private electronic communications or conversations. 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. Courts may order the interception of communications without the consent of any party 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, and the court may authorize installation if:

- 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 imminent.

If requested pursuant to a lawful court order, providers of wire and electronic communication services must provide law enforcement with all information, facilities, and technical assistance necessary to complete 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. 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.

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 to keep the person's actual address confidential. An address can be designated for persons, and any family member residing with such person who:

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

A person may apply on their own or on behalf of a minor or incapacitated person who meets the criteria. A court order for disclosure of protected information relating to a participant in the program 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 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-affirmation 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 the provision or receipt of protected health care services 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 protected health care services. The court may issue the subpoena if it is related to a claim that would exist under Washington law and is brought by a person seeking damages for 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 underlying action is related to the provision or receipt of protected health care services. A valid summons for a witness in Washington must include an attestation, made under penalty of perjury, stating that such prosecution or grand jury investigation does not seek documents, information, or testimony related to the provision or receipt of protected health care services.

Private Communications. Any ex parte order for the interception of private communications or conversations seeking information 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 pen registers, trap

and trace devices, or cell site simulator devices related to the provision or receipt of protected health care 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 a 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 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 such an 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. The person bringing the charge or complaint has an affirmative duty to disclose if the crime is related to criminal liability based on the provision or receipt of protected health care services.

False Attestation. Any false attestation submitted 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 investigation, 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. A state court, judicial officer, court employee or clerk, or public employee or official may not apply any law contrary to the state's public policy to protect the provision and insurance coverage of protected health care services regardless of the location of the person receiving the services. 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 liability related to the provision or receipt of protected health care services.

Limits on Washington Businesses. Washington businesses that provide electronic

communications 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 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 the attestation in determining whether the civil or criminal legal process relates to protected health care services.

Interference with Protected Health Care Services. A claim for interference with protected health care services is established. The 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 with 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. The claim does not apply to a judgement entered in another state 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 Washington.

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 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 to demonstrate the objective baselessness of the underlying action.

An underlying action is brought for improper purposes if:

- a purpose of the underlying action is to deter acts or omissions in Washington 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 the court finds for a party in an action asserting a claim of 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 defending the underlying action;
- cost 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 service provider, employee, or affiliate, and family members residing with the person, who attest 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 judgements necessary to enjoin such person from violating this chapter. For any action in which the attorney general prevails, the attorney general may recover the cost of the action, including reasonable attorneys' fees.

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 not available under Washington law or the law of another state that is substantially similar to Washington law.

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

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

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