

GOVERNOR'S PROGRAM BILL

2007

MEMORANDUM

AN ACT to amend the public health law, in relation to enacting the Reproductive Health and Privacy Protection Act and in relation to the revision of existing provisions regarding abortions; to amend the education law, in relation to unauthorized abortions; to amend the penal law, the criminal procedure law, the county law and the judiciary law, in relation to abortion; to repeal certain provisions of the education law relating to the sale of contraceptives; and to repeal certain provisions of the penal law relating to abortion

**Purpose of Bill:**

This bill updates New York's abortion laws and establishes a fundamental, statutory right to privacy in making personal reproductive decisions.

**Summary of Provisions:**

Sections 1 and 2 of the bill create a new Article 12 of the Public Health Law, to be known as the "Reproductive Health and Privacy Protection Act," which establishes in statute affirmative reproductive rights.

Section 3 of the bill amends Public Health Law § 4164 regarding certain restrictions placed on abortions performed after a fetus is considered viable in the judgment of a physician.

Section 4 of the bill adds a new subdivision 16-a to Education Law § 6530 to make the performance of an unauthorized abortion a basis for a finding of professional misconduct.

Section 5 of the bill repeals Education Law § 6811(8), which pertains to the sale, distribution, advertisement and display of contraceptives.

Sections 6 and 8 of the bill repeal the five abortion-related crimes contained in the Penal Law, amend the title of Penal Law Article 125 to delete the reference to abortion,

and delete the definitions of “abortion act” and “justifiable abortion act” from Penal Law § 125.05.

Section 7 of the bill amends the definition of “homicide” to delete the reference to an unborn child.

Sections 9 and 10 of the bill amend the first and second degree manslaughter statutes to delete the sections relating to causing a death of a woman during the performance of an abortion.

Section 11 of the bill amends Penal Law § 10.00(10) to provide that a termination of pregnancy without consent or authority constitutes a serious physical injury to the pregnant woman.

Sections 12, 13, and 14 of the bill make conforming changes by removing references to the crime of abortion in the Criminal Procedure Law, the County Law, and the Judiciary Law.

Section 15 sets forth the effective date of the bill.

**Existing Law:**

Under Public Health Law § 4164(1), abortions performed after the twelfth week of pregnancy may be performed only in a “hospital” and only on an in-patient basis. The subdivision further provides that abortions performed after the twentieth week of pregnancy must be attended by a second physician who is to take charge of and provide immediate medical care for any live birth that results from such abortion.

Education Law § 6811(8) prohibits the sale or distribution of contraceptives to minors under the age of sixteen, requires that sales of contraceptives to person who are sixteen or over may be authorized only by a licensed pharmacist, and prohibits the advertisement or display of contraceptives.

Article 125 of the Penal Law defines the crimes of first-degree abortion and first-degree self abortion as homicides. All abortions and self abortions are defined as criminal, unless they are justifiable. By definition, a “justifiable abortion act” is one that is performed with the woman’s consent: (1) under a reasonable belief that it is necessary to save the woman’s life; or (2) when a woman is no more than twenty-four weeks pregnant. In either case the justification only applies if such abortions are performed by a physician or, in the case of a self-abortion, are conducted on the advice of a physician. The crimes of manslaughter in the first and second degrees both include sections that impose criminal liability when a woman dies during the performance of an abortion that is not justifiable.

Penal Law § 10.00(10) defines “serious physical injury” for purposes of numerous penal statutes.

## Statement in Support

In 1970, New York legalized abortions in some circumstances, thereby recognizing that a woman has a fundamental right to make medical decisions about the course of a pregnancy. Three years later, the Supreme Court issued its landmark decision in Roe v. Wade, 410 U.S. 113 (1973), holding that this fundamental right is protected by the federal constitution.

During the over 30 years since Roe v. Wade was decided, there have been numerous federal court decisions clarifying the scope of the right to abortion, but unfortunately New York's laws have never been updated. Moreover, it is clear that some provisions of New York law are unconstitutional.

This bill updates and modernizes New York's abortion statutes to address the constitutional flaws in our statutes, and to recognize a woman's fundamental right to make medical decisions relating to contraception and pregnancy. These changes are similar to amendments made in other states over the past decade – including California, Connecticut, Hawaii, Maine, Maryland, Nevada and Washington – which have decriminalized unauthorized abortions and have enshrined a woman's fundamental right to make reproductive health decisions in statute, or recognized such a fundamental right in their state constitutions.

### 1. Correcting Constitutional Flaws in New York Law

First, Roe v. Wade and subsequent cases all adopt viability as an important standard in determining the scope of the right to an abortion. New York law, in contrast, seeks to regulate abortion by reference to the number of weeks of pregnancy. In addition, New York's law fails to contain any provision for an abortion after fetal viability that is necessary to protect the pregnant woman's health, as is required by Roe.

The existing Penal Law crimes of abortion and self-abortion are unconstitutional in both of these respects: (1) they would criminalize an abortion performed after 24 weeks of pregnancy, even if the fetus is non-viable; and (2) they would criminalize a post-viability abortion that was necessary to protect a woman's health. This bill corrects these constitutional defects by repealing these statutes.

There is a similar constitutional flaw in Public Health Law § 4164, which requires that abortions after the twelfth week of pregnancy be performed in a hospital on in-patient status. The United States Supreme Court has invalidated as unconstitutional similar provisions in other state's statutes. See City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft, 462 U.S. 476 (1983).

A requirement that a second physician be in attendance at an abortion performed after the twentieth week of pregnancy, for purposes of caring for any live birth that may result, has been upheld only as long as an exception is made for medical emergencies in which delay caused by waiting for a second physician's arrival could endanger the woman's life or health. Planned Parenthood Association of Kansas City v. Ashcroft, 462 U.S. 476 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (finding the second physician requirement to be unconstitutional because it did not include an exception for emergencies). The current version of Public Health Law § 4164 contains no such emergency exception.

Accordingly, as revised by the bill, Public Health Law § 4164 would: (1) permit abortions to be performed after viability in appropriate Article 28 facilities, which include general hospitals and clinics, without requiring in-patient status; (2) adopt the viability standard in determining when a second physician must be present during an abortion; and (3) provide an exception to the second physician requirement when delay in securing the second physician's attendance would endanger the woman's life or health.

Finally, this bill repeals Education Law § 6811(8) because the provision was expressly found to be unconstitutional, as applied to non-prescription contraceptives, by the Supreme Court in Carey v. Population Services International, 431 U.S. 678 (1977).

## 2. Recognizing the Right to Make Personal Reproductive Decisions

In addition to correcting these constitutional flaws, this bill affirmatively recognizes that New Yorkers have fundamental rights to privacy with respect to certain personal reproductive decisions.

Contrary to popular belief, New York law does not contain any statement affirmatively recognizing a woman's right to choose the course of her pregnancy. Instead, the statutory contours of legal abortion are found only in negative form – the Penal Law sets forth the circumstances in which abortions are illegal, and only from those provisions can one discern the circumstances in which abortions are permitted.

This bill therefore contains an affirmative statement of reproductive rights, to make clear that in New York all individuals have the right to use or refuse contraceptives and that all women have the right to carry a pregnancy to term, or to terminate a pregnancy.

In particular, the bill adds a new Article 12 to the Public Health Law – entitled “Reproductive Health and Privacy Protection” – which affirms that a pregnant woman has a right to abortion before a fetus is viable or if an abortion is necessary to preserve the woman's life or health, and permits qualified, licensed health care practitioners to perform abortions under those circumstances. The determination of whether a fetus is viable is generally left to a physician, who is to utilize his or her good faith medical judgment in accordance with generally accepted medical standards applied to the facts of

the case to decide if there is a reasonable likelihood of the fetus's sustained survival outside the uterus without application of extraordinary medical measures.

The new Article 12 also prohibits the State from interfering with the fundamental rights to use or refuse contraception, or to choose an abortion before viability, or after viability if the pregnant woman's life or health is at stake, except by narrowly tailored law, regulation or policy, or by statutes and regulations of general applicability. Statutes and regulations of general applicability would pertain to matters such as professional licensing, regulation of medical facilities, or the requirement that certain contraceptives be obtained only by prescription.

Additionally, the bill would prohibit the State from discriminating against the exercise of reproductive rights in the provision of benefits, facilities, services, or information. This is intended to ensure continued public funding of abortion services.

While this bill would decriminalize unauthorized abortions performed with the woman's consent, there will still be appropriate sanctions in place for the performance of such abortions. First, if a physician performs an unauthorized abortion – one after fetal viability for which he or she has not made a good faith medical judgment that the abortion is necessary to protect the life or health of the pregnant woman – the physician can be found guilty of professional misconduct and could face penalties, including suspension, limitation, revocation, or annulment of the physician's license. Because practitioners are unlikely to risk the loss of a professional license, these non-criminal sanctions should be sufficient to deter them from performing unauthorized abortions.

Second, under current law that is unchanged by this bill, if unlicensed persons perform or hold themselves out as being able to perform abortions, they may be prosecuted for the unauthorized practice of a profession, a class E felony under Education Law § 6512.

Third, although this bill would repeal two sections of the manslaughter statutes that impose criminal liability for anyone who causes the death of a woman while performing an unjustifiable abortion, it would still allow prosecutors to charge someone for such a death if it resulted from criminal negligence or recklessness, or the death occurred under circumstances evincing a depraved indifference to human life. See, e.g., People v. Benjamin, 270 A.D.2d 428 (2d Dep't 2000) (upholding depraved indifference murder conviction based on defendant doctor's conduct after he inflicted a fatal wound during an abortion procedure). The abortion-specific provisions of the manslaughter statute were used to prosecute abortionists who used unsafe methods prior to the legalization of abortion, but they have rarely (if ever) been charged since abortions became legal. Indeed, as illustrated by the Benjamin case, if a woman were to die as a result of criminally negligent or reckless conduct by an abortion provider, the provider could be criminally prosecuted, just like any other health care provider who caused injury to a patient as a result of such conduct.

Finally, this bill properly recognizes the seriousness of the injury to a woman when someone causes her to suffer an unconsented miscarriage (for example, by assaulting her). This type of injury does not fit squarely within the existing definition of serious physical injury, and it is possible that such an injury would be deemed merely to be a "physical injury." But causing a miscarriage should not be equated with the more minor injuries or substantial pain that typically qualifies as "physical injury." Instead, it is of similar seriousness to the types of impairments that qualify as "serious physical injury" under the law. By amending this definition, the degree of criminal liability imposed on a defendant would be appropriately assessed for causing this type of serious injury to the pregnant woman.

**Budget Implications:**

This bill is anticipated to have no fiscal implications.

**Effective Date:**

This bill would become effective immediately.