H-1175.2

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**HOUSE BILL 1775**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**State of Washington 65th Legislature 2017 Regular Session**

**By** Representatives Van Werven, Shea, McCabe, Hargrove, Short, Koster, Buys, McCaslin, Volz, Kraft, Barkis, Rodne, MacEwen, Klippert, McDonald, Young, Pike, Holy, and Muri

AN ACT Relating to enacting the Washington pain capable unborn child protection act; amending RCW 9.02.170, 9.02.100, 9.02.110, and 9.02.900; adding new sections to chapter 9.02 RCW; creating new sections; and prescribing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec.**  The legislature finds that:

(1) Pain receptors are present throughout the unborn child's entire body and nerves link these receptors to the brain's thalamus and subcortical plate by no later than twenty weeks;

(2) By eight weeks after fertilization, the unborn child reacts to touch. After twenty weeks, the unborn child reacts to stimuli that would be recognized as painful if applied to an adult human, for example, by recoiling;

(3) In the unborn child, application of such painful stimuli is associated with significant increases in stress hormones known as the stress response;

(4) Subjection to such painful stimuli is associated with long-term harmful neurodevelopmental effects, such as altered pain sensitivity and, possibly, emotional, behavioral, and learning disabilities later in life;

(5) For the purposes of surgery on unborn children, fetal anesthesia is routinely administered and is associated with a decrease in stress hormones compared to their levels when painful stimuli are applied without such anesthesia;

(6) The position, asserted by some medical experts, that the unborn child is incapable of experiencing pain until a point later in pregnancy than twenty weeks after fertilization predominately rests on the assumption that the ability to experience pain depends on the cerebral cortex and requires nerve connections between the thalamus and the cortex. However, recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain;

(7) Substantial evidence indicates that children born missing the bulk of the cerebral cortex, those with hydranencephaly, nevertheless experience pain;

(8) In adults, stimulation or ablation of the cerebral cortex does not alter pain perception, while stimulation or ablation of the thalamus does;

(9) Substantial evidence indicates that structures used for pain processing in early development differ from those of adults, using different neural elements available at specific times during development, such as the subcortical plate, to fulfill the role of pain processing;

(10) The position, asserted by some medical experts, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain is inconsistent with the documented reaction of unborn children to painful stimuli and with the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery;

(11) Consequently, there is substantial medical evidence that an unborn child is capable of experiencing pain by twenty weeks after fertilization;

(12) It is the purpose of this state to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain;

(13) Washington's compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are capable of feeling pain is intended to be separate from and independent of Washington's compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other;

(14) Mindful of *Leavitt v. Jane L.*, 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion, the United States supreme court noted that an explicit statement of legislative intent specifically made applicable to a particular statute is of greater weight than a general savings or severability clause, it is the intent of the state that if any one or more provisions, sections, subsections, sentences, clauses, phrases, or words of the act or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of the act shall remain effective notwithstanding such unconstitutionality. Moreover, this state declares that it would have enacted this act, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provisions, sections, subsections, sentences, clauses, phrases, or words, or any of their applications, were to be declared unconstitutional.

**Sec.**  RCW 9.02.170 and 1992 c 1 s 8 are each amended to read as follows:

For purposes of this chapter:

(1) "Viability" means the point in the pregnancy when, in the judgment of the physician on the particular facts of the case before such physician, there is a reasonable likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures.

(2) "Abortion" means any medical treatment intended to induce the termination of a pregnancy except for the purpose of producing a live birth.

(3) "Pregnancy" means the reproductive process beginning with the implantation of an embryo.

(4) "Physician" means a physician licensed to practice under chapter 18.57 or 18.71 RCW in the state of Washington.

(5) "Health care provider" means a physician or a person acting under the general direction of a physician.

(6) "State" means the state of Washington and counties, cities, towns, municipal corporations, and quasi-municipal corporations in the state of Washington.

(7) "Private medical facility" means any medical facility that is not owned or operated by the state.

(8) "Attempt to perform or induce an abortion" means an act, or an omission of a statutorily required act, that, under the circumstances, as the actor believes them to be.

(9) "Fertilization" means the fusion of a human spermatozoon with a human ovum.

(10) "Fetal anomaly" means that, in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that, with or without the provision of life-preserving treatment, would be incompatible with sustaining life after birth.

(11) "Medical emergency" means a condition that, in reasonable medical judgment, so complicates the medical condition of the pregnant woman that it necessitates the immediate abortion of her pregnancy without first determining postfertilization age to avert her death or for which the delay necessary to determine postfertilization age will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No condition must be considered a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(12) "Postfertilization" means the age of the unborn child as calculated from fertilization.

(13) "Probable postfertilization age of the unborn child" means what, in reasonable judgment, will with reasonable probability be the postfertilization age of the unborn child at the time the abortion is planned to be performed or induced.

(14) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.

(15) "Unborn child" or "fetus" means an individual organism of the species homo sapiens from fertilization until live birth.

NEW SECTION. **Sec.**  A new section is added to chapter 9.02 RCW to read as follows:

Except in the case of a medical emergency or fetal anomaly, no abortion must be performed or induced or be attempted to be performed or induced unless the physician performing or inducing it has first made a determination of the probable postfertilization age of the unborn child or relied upon such a determination made by another physician. In making such a determination, the physician shall make such inquiries of the woman and perform or cause to be performed such medical examinations and tests as a reasonably prudent physician, knowledgeable about the case and the medical conditions involved, would consider necessary to perform in making an accurate diagnosis with respect to postfertilization age.

NEW SECTION. **Sec.**  A new section is added to chapter 9.02 RCW to read as follows:

(1) No person shall perform or induce or attempt to perform or induce an abortion upon a woman when it has been determined, by the physician performing or inducing or attempting to perform or induce the abortion or by another physician upon whose determination that physician relies, that the probable postfertilization age of the woman's unborn child is at the point of viability or beyond, except in the case of fetal anomaly or, in reasonable medical judgment, she has a condition which so complicates her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions. No such greater risk must be considered to exist if it is based on a claim or diagnosis that the woman will engage in conduct, which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

(2) When an abortion upon a woman whose unborn child has been determined to have a probable postfertilization age that is at the point of viability or beyond is not prohibited by subsection (1) of this section, the physician shall terminate the pregnancy in the manner which, in reasonable medical judgment, provides the best opportunity for the unborn child to survive, unless, in reasonable medical judgment, termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods. No such greater risk must be considered to exist if it is based on a claim or diagnosis that the woman will engage in conduct, which she intends to result in her death or in substantial and irreversible physical impairment of a major bodily function.

NEW SECTION. **Sec.**  A new section is added to chapter 9.02 RCW to read as follows:

(1) Any hospital or health care facility in which an abortion is performed must report to the department of health the following information:

(a) Postfertilization age:

(i) If a determination of probable postfertilization age was made, whether ultrasound was employed in making the determination, and the week of probable postfertilization age determined; or

(ii) If a determination of probable postfertilization age was not made, the basis of the determination that a medical emergency existed;

(b) Method of abortion, of which the following was employed:

(i) Medication abortion such as, but not limited to, mifepristone and misoprostol or methotrexate and misoprostol;

(ii) Manual vacuum aspiration;

(iii) Electrical vacuum aspiration;

(iv) Dilation and evacuation;

(v) Combined induction abortion and dilation and evacuation;

(vi) Induction abortion with prostaglandins;

(vii) Induction abortion with intraamniotic instillation such as, but not limited to, saline or urea;

(viii) Induction abortion; and

(ix) Intact dilation and extraction, also known as partial-birth;

(c) Whether an intrafetal injection was used in an attempt to induce fetal demise such as, but not limited to, intrafetal potassium chloride or digoxin;

(d) Age of the patient;

(e) If the probable postfertilization age was determined to be at the point of viability or later, whether the reason for the abortion was a medical emergency or fetal anomaly and, if the reason was a medical emergency, the basis of the determination that the pregnant woman had a condition which so complicated her medical condition as to necessitate the abortion of her pregnancy to avert her death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions;

(f) If the probable postfertilization age was determined to be at the point of viability or later, whether or not the method of abortion used was one that, in reasonable medical judgment, provided the best opportunity for the unborn child to survive and, if such a method was not used, the basis of the determination that termination of the pregnancy in that manner would pose a greater risk either of the death of the pregnant woman or of the substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions, of the woman than would other available methods; and

(g) Other demographic information that the department of health determines is necessary.

(2) Reports required by subsection (1) of this section shall not contain the name or the address of the patient whose pregnancy was terminated, nor shall the report contain any other information identifying the patient, except that each report shall contain a unique medical record identifying number, to enable matching the report to the patient's medical records. The reports must be maintained in strict confidence by the department, must not be available for public inspection, and must not be made available except:

(a) To the attorney general or solicitor with appropriate jurisdiction pursuant to a criminal investigation;

(b) To the attorney general or solicitor pursuant to a civil investigation of the grounds for an action under section 7 of this act; or

(c) Pursuant to court order in an action under section 7 of this act.

(3) By June 30th of each year, the department of health shall issue a public report providing statistics for the previous calendar year compiled from all of the reports covering that year submitted in accordance with this section for each of the items listed in subsection (1) of this section. Each report also shall provide the statistics for all previous calendar years during which this section was in effect, adjusted to reflect any additional information from late or corrected reports. The department of health shall take care to assure that none of the information included in the public reports could reasonably lead to the identification of any pregnant woman upon whom an abortion was performed, induced, or attempted.

(4) Any facility that fails to submit a report by the end of thirty days following the due date must be subject to a late fee of one thousand dollars for each additional thirty-day period or portion of a thirty-day period the report is overdue. Any facility required to report in accordance with this section that has not submitted a report, or has submitted only an incomplete report, more than six months following the due date, may, in an action brought by the department of health, be directed by a court of competent jurisdiction to submit a complete report within a period stated by court order or be subject to civil contempt. Intentional or reckless falsification of any report required under this section is a gross misdemeanor punishable by not more than three hundred sixty-four days in prison.

(5) Within ninety days of the effective date of this section, the department of health shall adopt forms and rules to assist in compliance with this section. Subsection (1) of this section shall take effect so as to require reports regarding all abortions performed or induced on and after the first day of the first calendar month following the effective date of such rules.

NEW SECTION. **Sec.**  A new section is added to chapter 9.02 RCW to read as follows:

Any physician who intentionally or knowingly fails to conform to any requirement in sections 3 and 4 of this act is guilty of a class C felony and, upon conviction, must be fined not less than two thousand dollars nor more than ten thousand dollars or imprisoned for not more than five years, or both. No part of the minimum fine may be suspended. For conviction of a third or subsequent offense, the sentence must be imprisonment for not less than sixty days nor more than three years, no part of which may be suspended.

NEW SECTION. **Sec.**  A new section is added to chapter 9.02 RCW to read as follows:

(1) Sections 3 and 4 of this act may not be construed to repeal, by implication or otherwise, RCW 9.02.120 or any other applicable provision of state law regulating or restricting abortion. An abortion that complies with sections 3 and 4 of this act but violates the provisions of RCW 9.02.120 or any other applicable provision of state law must be considered unlawful as provided in such provision. An abortion that complies with the provisions of RCW 9.02.120 or any other applicable provision of state law regulating or restricting abortion but violates section 3 or 4 of this act must be considered unlawful.

(2)(a) If some or all of the provisions of this act are temporarily or permanently restrained or enjoined by judicial order, all other provisions of state law regulating or restricting abortion must be enforced as though such restrained or enjoined provisions had not been adopted.

(b) Subsection (2)(a) of this section does not apply if a temporary or permanent restraining order of injunction is stayed or dissolved, or otherwise ceases to have effect, in which case those provisions shall have full force and effect.

**Sec.**  RCW 9.02.100 and 1992 c 1 s 1 are each amended to read as follows:

The sovereign people hereby declare that every individual possesses a fundamental right of privacy with respect to personal reproductive decisions.

Accordingly, it is the public policy of the state of Washington that:

(1) Every individual has the fundamental right to choose or refuse birth control;

(2) Every woman has the fundamental right to choose or refuse to have an abortion, except as specifically limited by RCW 9.02.100 through 9.02.170 ((~~and~~)), 9.02.900 ((~~through~~)), 9.02.902, and sections 3 and 4 of this act;

(3) Except as specifically permitted by RCW 9.02.100 through 9.02.170 ((~~and~~)), 9.02.900 ((~~through~~)), 9.02.902, and sections 3 and 4 of this act, the state shall not deny or interfere with a woman's fundamental right to choose or refuse to have an abortion; and

(4) The state shall not discriminate against the exercise of these rights in the regulation or provision of benefits, facilities, services, or information.

**Sec.**  RCW 9.02.110 and 1992 c 1 s 2 are each amended to read as follows:

The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health, as provided in sections 3 and 4 of this act.

A physician may terminate and a health care provider may assist a physician in terminating a pregnancy as permitted by this section.

**Sec.**  RCW 9.02.900 and 1992 c 1 s 10 are each amended to read as follows:

RCW 9.02.100 through 9.02.170 ((~~and~~)), 9.02.900 ((~~through~~)), 9.02.902, and sections 3 and 4 of this act shall not be construed to define the state's interest in the fetus for any purpose other than the specific provisions of RCW 9.02.100 through 9.02.170 ((~~and~~)), 9.02.900 ((~~through~~)), 9.02.902, and sections 3 and 4 of this act.

NEW SECTION. **Sec.**  This act may be known and cited as the Washington pain capable unborn child protection act.

**--- END ---**