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FISCAL IMPACT REPORT

SPONSOR Block **LAST UPDATED** 02/13/2023
ORIGINAL DATE 02/07/2023
BILL
SHORT TITLE Crime of Providing Abortions **NUMBER** House Bill 258
ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

| | FY23 | FY24 | FY25 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--|------|-----------------------------------|-----------------------------------|-----------------------------------|------------------------------|------------------|
| | | Indeterminate, but substantial | Indeterminate, but substantial | Indeterminate, but substantial | Recurring | General Fund |

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent version of this legislation and include incarceration costs as indicated below.

Conflicts with 2021 Senate Bill 10, 2023 House Bill 7

Sources of Information

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Law Offices of the Public Defender (LOPD)
Administrative Office of the District Attorneys (AODA)
Office of the Attorney General (NMAG)
New Mexico Sentencing Commission (NMSC)
New Mexico Corrections Department (NMCD)
Department of Health (DOH)
Department of Public Safety (DPS)

SUMMARY

Synopsis of House Bill 258

House Bill 258 would again make performing an abortion a criminal offense in certain instances; the procedure had been criminalized in Section 30-5 NMSA 1978, which was enacted in 1969 and repealed in 2021.

Section 1 of the bill would criminalize an abortion if the provider performed an abortion despite a fetal heartbeat being present. This offense would be considered a third-degree felony; the offending abortion provider would be deemed to have breached his/her duty to the patient and would be subject to the patient's lawsuit.

Section 2 amends Section 31-18-15 NMSA 1978, which gives sentencing authority. It adds a third-degree felony penalty of five years for the offense prohibited in Section 1.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

There is no appropriation in House Bill 258.

The fiscal impact of HB258 on the LOPD depends on the number of prosecutions brought under the section and whether the resulting defendants – presumably doctors – would qualify for indigent representation. LOPD can also be appointed to represent witnesses whose testimony could be incriminating. Accordingly, LOPD could also end up representing recently pregnant women during the course of prosecuting an abortion provider, for the reasons outlined below.

NMCD indicates an additional cost to that agency if increased incarceration were a result and NMSC points out the cost of a day in a public or private correctional facility in New Mexico is \$150.30. NMCD also points out that “It is difficult to determine what the effect of passing HB258 would be on the state’s prison population, but it would likely lead to more people being incarcerated by the Corrections Department.”

The table below indicates the additional cost to the state of each new conviction under this bill, though no one has come up with an estimate of the number of persons who might be charged and convicted under the provisions of the bill.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*
(dollars in thousands)

| | FY25 | FY26 | FY27 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|---------------|-----------------|-----------------|-----------------|-------------------|---------------------------|---------------|
| Costs to NMCD | At least \$26.6 | At least \$53.2 | At least \$69.8 | At least \$149.5 | Recurring | General Fund |

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

SIGNIFICANT ISSUES

DPS points out “HB258 is part of an effort nationwide to restrict abortions after the Supreme Court overturned *Roe v. Wade*.”

According to DOH, “Data indicate an association between unsafe abortions and restrictive abortion laws. The median rate of unsafe abortions in the 82 countries with the most restrictive abortion laws is 23/1000 women compared to 2/1000 in nations that allow abortions. Unsafe abortions are one of the leading causes of maternal mortality annually, accounting for approximately 68 thousand or 13 percent of all maternal mortality deaths worldwide (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2709326/>, retrieved on 1/27/2023). Repealing restrictive abortion laws can reduce the risk of unsafe abortions and therefore reduce the risk of maternal mortality.”

“In 2020, New Mexico ranked 19th for the rate of abortion out of 50 states and territories measured and had a total of 4,111 reported abortions

(<https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm>, retrieved on 1/27/2023). The rate of abortion in New Mexico [number of abortions per thousand women between 15 and 44 years of age] decreased by 10.1 percent from 13 percent in 2011 to 11.7 percent in 2020. During this time, there were no new abortion restrictions enacted [in New Mexico] (<https://www.guttmacher.org/gpr/2019/09/us-abortion-rate-continues-drop-once-again-state-abortion-restrictions-are-not-main>, retrieved on 1/27/2023). Abortions in New Mexico represent 0.5 percent of all abortions in the United States (<https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-new-mexico>, retrieved on 2/13/2023).”

CONFLICT

Conflicts with 2021 Senate Bill 10, which decriminalized abortion. Previous statute had defined abortion as a criminal act. Conflicts in part with 2023 House Bill 7, which would prohibit discrimination against persons based on their reproductive care choices.

TECHNICAL ISSUES

DPS points out the following concerns:

This bill neither defines what is meant by “abortion” nor what is meant by “health care provider” nor “detectable heartbeat.” This lack of definitions places law enforcement in an extremely difficult position if they were to attempt to enforce this statute. [Many of the agencies responding to this bill point out the difficulty of defining “detectable heartbeat – detectable by what means?]

For example, it is not obvious one way or another whether the removal of an ectopic pregnancy counts as an “abortion” for the purposes of this bill. The Nebraska version of this bill for example explicitly excludes ectopic or tubal pregnancies from the scope of their fetal heartbeat bill. This bill, however, fails to provide any clarity on this issue.

It will be up to law enforcement to determine if they believe that a doctor who saves a woman’s life by dealing with an ectopic pregnancy can be charged under this statute.

Similarly, this bill fails to define “health care provider.” It can be assumed that the drafter intended to cover doctor’s and probably nurses with this bill. The way the bill is written it is unclear if every individual healthcare provider is required to see if there is a detectable heartbeat and discuss with the pregnant woman the results.

This bill also probably inadvertently creates a situation where if a pregnant person seeks an abortion from an unlicensed non-health care provider that the individual performing the abortion will not be guilty of violating this statute.

There is also debate within the medical community about what “standard medical practice” would be employed to find a “detectable heartbeat.” Without additional clarification as what these terms mean an arresting officer will be left to make a determination if “standard medical practice” was followed and if the use of different medical equipment could have detected a heartbeat.

Lastly because there is no provision for a necessary intervention to save the life of the mother, there will be a category of cases in which defense of another can be raised by the physician. This will once again place law enforcement in the untenable position of having to second guess doctors in determining if charges should be file.

This statute needs to be cleaned up to add clarity to exactly what conduct is criminal and who it applies to. Otherwise, law enforcement is inevitably going to be sued every time they attempt to enforce this statute for civil rights violations. While it is true that the courts might eventually sort out the statute by creating their own definitions, it is equally likely that they would simply strike the statute down as too vague to be enforceable.

LOPD and AODA, in detailing many concerns about this bill, also allude to lack of definitions in the bill. In addition, those agencies' concerns include

- Possible conflict with the state and/or federal constitutions (although AODA agrees with possible conflict with the state constitution, but does not agree that the bill might conflict with the federal constitution, following the *Dobbs* case of 2022.)
- Entanglement of women with the judicial system.
- Violations of HB258 appear to carry a term of imprisonment but *not* a potential fine, which is extremely unusual.

NMAG also believes that provisions in this bill might violate aspects of the rights to privacy and to gender equality in the state constitution, citing case law from other states to support this position.

OTHER SUBSTANTIVE ISSUES

According to DOH, “Providing opportunities to obtain most or moderately-effective contraception to women of reproductive age who need it is a strong catalyst for decreasing abortions (<https://www.guttmacher.org/gpr/2019/09/us-abortion-rate-continues-drop-once-again-state-abortion-restrictions-are-not-main>, retrieved on 1/30/2020). In 2015, more than 3.8 million women received contraceptive services through the federal Title X program with almost 900 thousand unintended pregnancies averted and almost 300 thousand abortions prevented. Without the federally-funded Title X services, unintended pregnancy and abortion in women of reproductive age would have been 31 percent higher (<https://www.guttmacher.org/report/publicly-funded-contraceptive-services-us-clinics-2015>, retrieved on 1/30/2020).”

ALTERNATIVES

AODA points out that “It may be best for House Bill 258 to set a definite number of weeks beyond which a health care provider would be on notice that performing an abortion is a third-degree felony subject to five years imprisonment.”

LAC/al/ne/rl