SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 1690

SPONSOR: Health, Aging and Long-Term Care Committee and Senator Cowin

SUBJECT: Pregnancies/Termination

DATE: March 12, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harkey	Wilson	HC	Favorable/CS
2.			JU	
3.			GO	
4.			RC	
5.				
6.				

I. Summary:

The committee substitute creates the "Women's Health and Safety Act." The bill requires a physician or a facility medical director to report terminations of pregnancies by filing a report monthly on a form developed by the Agency for Health Care Administration (AHCA). The bill clarifies that the reports must be filed with AHCA within 30 days following the preceding month, and states that the licensee shall be subject to disciplinary action by the licensing authority upon successive failures to file the report.

The reporting form must contain information for the categories reported in the Centers for Disease Control and Prevention Surveillance Summary on Abortion. Currently, Florida law requires a monthly report containing the number of procedures performed, the reason for same, and the period of gestation at the time such procedures were performed.

The bill states that the rules developed by AHCA for clinics that perform only first trimester abortions shall be comparable to the rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of abortions during the first trimester. For clinics that perform abortions after the first trimester, the rules shall be comparable to the rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of abortions after the first trimester.

The bill specifies that the rules developed by AHCA relating to abortions performed in abortion clinics must be in accordance with current statutes that stipulate prohibited acts relating to abortions. The bill provides that the rules must not impose an "unconstitutional" burden on the woman's freedom to decide whether to have an abortion, instead of the current prohibition of a "legally significant" burden. Finally, the bill requires abortion clinics to develop policies to protect the health, care, and treatment of patients.

This bill amends ss. 390.0112 and 390.012, F.S.

II. Present Situation:

Reporting Termination of Pregnancies in Florida

Chapter 390, F.S., governs termination of pregnancies. The Department of Health (DOH), Office of Vital Statistics, collects all statistical data and analysis on termination of pregnancies. Section 390.0112(1), F.S., requires the report to be filed with AHCA; however, it is the practice of the agencies (DOH & AHCA) to direct the medical directors and physicians to file the report with DOH. Chapter 59A-9.034, F.A.C., requires that an abortion clinic must submit a cumulative report each month to the Office of Vital Statistics. AHCA licenses and inspects abortion clinics, but all reporting from physicians or medical directors regarding termination of pregnancies is sent directly to DOH, Office of Vital Statistics, where the data is entered and reports are prepared. The Office of Vital Statistics reported to the Agency for Health Care Administration in 1998 that a total of 82,335 abortions were reported.

Reports are confidential and will not be revealed except under the order of a court. Statutorily, such reports include the following information:

- Number of procedures performed;
- Reason for pregnancy termination (personal choice, physical condition, mental condition, abnormal fetus, or other reason) which must be specified; and
- Period of gestation at the time such procedure was performed.

The form used by the Department of Health also includes the following data fields:

Facility name;
Facility address (Street Address);
City of facility;
County;
Zip Code;
Telephone number and area code;
Director, physician or authorized representative;
Title;
Signature; and
Date Signed

If the termination of pregnancy was not performed in a medical facility (physician's office), the physician performing the procedure is also responsible for reporting such information to DOH. A $200 fine is assessed against any person who willfully fails to file the monthly report.

Regulation of Abortion Clinics

AHCA and DOH have promulgated detailed rules regulating the licensure of and setting clinical standards for surgical facilities, including physicians' offices (Chapter 64B8-9.009, F.A.C.) and ambulatory surgical centers (Chapter 59A-5, F.A.C.). AHCA has also promulgated rules regulating abortion clinics (Chapter 59A-9, F.A.C.).

Under s. 390.012(1), F.S., AHCA's rulemaking authority for abortion clinics is limited to the promulgation of rules that are "comparable to rules which apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of first trimester abortions." According to the Department of Health and AHCA, since this statute was originally passed, abortions performed after the first trimester have become more commonplace. AHCA's authority to protect patient health is limited by the statutory rule authority language, which sets the clinical standard for such rules at a level lower than that necessary to benefit patients receiving abortions after the first trimester of pregnancy. The rule governing abortion clinics is less clinically significant than the rules governing office surgery and ambulatory surgical centers.

Currently, there is no requirement in law or rule that abortion clinics develop any policy, in contrast to the rules on office surgery and ambulatory surgical clinics.

Collecting data on abortion, nationally – The Centers for Disease Control and Prevention(CDC) Surveillance Summary on Abortion

In 1969, the CDC began to document the number and characteristics of women obtaining legal induced abortions, to monitor unintended pregnancy, and to assist efforts to identify and reduce preventable causes of morbidity and mortality associated with abortions. For each year since 1969, CDC has compiled abortion data by state where the abortion occurred. The data are received from 52 reporting areas in the United States: 50 states, the District of Columbia, and New York City. According to the CDC, the number and characteristics of women who obtain abortions in the United States should continue to be monitored so that trends in induced abortion can be assessed and efforts to prevent unintended pregnancy can be evaluated.

In its December 2000 report entitled, "Abortion Surveillance – United States, 1997", the CDC indicated that the availability of information about characteristics of women who obtained an abortion in 1997 varied by state. Most reporting areas (44 states, the District of Columbia, and New York City) collected and reported adequate abortion data (i.e., data with <15% unknown values and categorized in accordance with the study variables) by age of the woman, whereas only 26 states, the District of Columbia, and New York City collected and reported adequate abortion data by Hispanic ethnicity. Therefore, the findings of the CDC report only reflect characteristics among women from reporting areas that submitted adequate data.

The CDC indicated in its report the following categories of information about women who obtained legal abortions in the United States:

Reported number of legal abortions
Residence (in-state or out-of-state)
Age (Three categories: age 19 and younger; ages 20-24; and age 25 and older)
Race (White, Black, Other)
Hispanic origin (Hispanic, Non-Hispanic)
Marital status (Married, Unmarried)
Number of previous live births
Type of procedure
Weeks of gestation

The results of the report were based on known values in data from all areas reporting a given characteristic with no more that 15 percent unknowns. The number of areas reporting a given characteristic varied. For 1997, the number of areas included for residence was 45; age, 46; race 39; ethnicity, 28; marital status, 38; number of live births, 39; type of procedure, 43; and weeks of gestation, 42.

Data on abortions performed in Florida was not included in the report for the following categories: reported abortions by age group, reported abortions by weeks of gestation, reported abortions obtained by adolescents, reported abortions by type of procedure, reported abortions by race, reported abortions by Hispanic ethnicity, reported abortions by marital status, and reported abortions by number of previous live births.

According to the CDC:

> Most reported legal abortions are performed before 8 weeks of gestation, and more than three fourths are done before 13 weeks. Approximately 4 percent of abortions are performed at 16–20 weeks of gestation, and 1 percent at >21 weeks. Approximately 99 percent of legal abortions are performed by curettage (which is consistent with the fact that 94 percent of abortions are performed in the first trimester or early second trimester of pregnancy), and <1 percent are performed by intrauterine saline or prostaglandin instillation. ("Legal Induced Abortion", Center for Reproductive Health, National Center for Chronic Disease Prevention and Health Promotion)

Prohibited Acts

Under s. 797.03, F.S., it is unlawful for any person to perform or assist in performing an abortion except in an emergency care situation, other than in a licensed abortion clinic, licensed hospital, or physician's office. It is unlawful for anyone to operate an abortion clinic without a license or to perform a third trimester abortion in any setting other than a hospital. A violation of these provisions is a second degree misdemeanor punishable under ss. 775.082 or 775.083, F.S.

III. Effect of Proposed Changes:

The committee substitute creates the "Women's Health and Safety Act." The bill requires the director of any medical facility in which a pregnancy is terminated to submit a report monthly to the Agency for Health Care Administration. AHCA is required to develop a reporting form that contains information regarding each category reported in the Centers for Disease Control and Prevention Surveillance Summary on Abortion. The bill clarifies that the reports must be filed with the agency within 30 days following the preceding month. Presently, if these reports are not timely received, the licensee will be subject to a $200 fine for willful failure to file, for each violation. Additionally, the bill states that upon successive failure to file, the licensee shall be subject to disciplinary action by the licensing authority.

As it relates to the power of AHCA to regulate abortion clinics, the bill distinguishes between clinics that perform only first trimester abortions and those that perform second trimester abortions. The bill states that for clinics that perform first trimester abortions only, the rules developed by the agency should be comparable to rules that apply to all surgical procedures

requiring approximately the same degree of skill and care as the performance of first trimester abortions. The bill states that rules for clinics that perform second trimester abortions shall be comparable to rules that apply to all surgical procedures requiring approximately the same degree of skill and care as the performance of abortions after the first trimester.

The bill states that AHCA rules shall be in accordance with s. 797.03, F.S., which describes prohibited acts relating to abortion and provides penalties. The bill provides that the rules must not impose an "unconstitutional" burden on the woman's freedom to decide whether to terminate her pregnancy, instead of the current prohibition of a "legally significant" burden. An "unconstitutional" burden, as it pertains to the fundamental liberty interest in terminating one's pregnancy, has been defined by the U.S. Supreme Court in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 878 (1992) as an "undue burden." The Court further defines undue burden as a "state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Casey at 878.

The bill requires all abortion clinics that perform termination of pregnancies to develop, promulgate, and enforce policies to protect the health, care, and treatment of patients, including rules relating to informed consent and postoperative care of patients suffering complications.

The bill will take effect July 1, 2002.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Art. VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Art. III, s. 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Right of Privacy under the Federal Constitution

The United States Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) sets forth the limits that the 14th Amendment Due Process Clause of the United States Constitution imposes on the states' ability to interfere with abortion procedures. 505 U.S. at 874. In *Casey*, the Court held

that a state has legitimate interests in protecting the life of the fetus, however, the Court held that the following two principles are paramount:

1. A woman has a right to an abortion before viability and to obtain it without undue interference from the state. *Id*. at 846.
2. Subsequent to viability, the state in promoting its interest in the potentiality of human life may ... proscribe abortion, except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother. *Id*. at 879, quoting *Roe v. Wade*, 410 U.S. at 164-165.

Under *Casey*, state legislation that does not comply with these two principles may raise constitutional concerns.

Right of Privacy under the Florida Constitution

The Florida Supreme Court has held that the express right of privacy in section 23 of article I of the Florida Constitution provides broader protection than that afforded by the U.S. Constitution. See *Winfield v. Division of Pari-Mutual Wagering*, 477 So.2d 544 (Fla. 1985). Therefore, any state regulation of a fundamental right is subject to the higher standard of review, i.e., strict scrutiny. The Florida Supreme Court has held that the right of privacy is "clearly implicated in a woman's decision of whether or not to continue her pregnancy." *In re T.W.*, 551 So.2d 1186, 1192 (1989) (statute for parental consent for a minor's abortion declared unconstitutional). Therefore, any regulation regarding termination of pregnancy must be analyzed against whether the state has a compelling state interest and whether the state has satisfied its burden to justify its regulatory goal through the use of the least intrusive means. *Id*., citing to *Winfield*, 447 So.2d at 547.

Constitutional Implications

The bill may possibly implicate a woman's right of privacy, if the regulations and policies required are construed by the courts to constitute an undue burden on the woman's right to choose to have an abortion before viability. However, according to the Court in *Casey*, "not all burdens on the right to decide whether to terminate a pregnancy will be undue." *Casey* at 876. The Court recognized the following requirements as constitutional: informed consent; 24-hour waiting period; parental consent; and record keeping. Also, "regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden." *Id*. at 878.

Section 1 of the bill deals with reporting requirements for abortions. In *Planned Parenthood v. Danfort*h, 428 U.S. 52, 80, (1976), the Supreme Court held that "record keeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." However, the Court held that record-keeping requirements may not be "utilized in such a way as to accomplish, through the sheer burden of record keeping detail, what we have held to be an otherwise unconstitutional restriction." *Danforth* at 81. The Court in *Casey* noted that the effect of slightly increasing the cost of abortion is not

an undue burden, but stated that "at some point, increased cost could become a substantial obstacle." *Casey* at 901.

Section 2 of the bill, in directing the Agency for Health Care Administration to regulate the treatment of persons in abortion clinics and the safe operation of such clinics, requires the resulting rules to provide for the following:

- A distinction between abortion clinics that provide only first trimester abortions and those that perform second trimester abortions, and enforcement of a comparable standard of care as that for all surgical procedures requiring approximately the same degree of skill and care as abortions performed during the particular trimester;
- Compliance with s. 797.03, F.S.; and
- Requirement that abortion clinics develop, promulgate, and enforce policies to protect the health, care, and treatment of patients, including policies relating to obtaining the informed consent of the patient and to postoperative care of patients suffering complications from an abortion.

Informed consent requirements are already provided for in statute in s. 390.0111(3), F.S. No current requirement for postoperative care exists. In *Florida Women's Medical Clinic v. Smith*, 536 F. Supp. 1048, 1059 (1982), major provisions of Florida's abortion law in chapter 390, F.S. (1980), were declared unconstitutional. The court ordered a permanent injunction against enforcement of a statutory requirement that agency rules provide for the "availability of aftercare services." *Id*. The same court rejected reconsideration of the injunction in 1990. See *Florida Women's Medical Clinic v. Smith*, 746 F. Supp. 89 (1990). Therefore, the postoperative care requirement of the bill could possibly be subject to challenge for violation of the injunction.

Furthermore, the injunction provided that the agency could not enforce rules pertaining to: the establishment of minimum standards for the care and treatment of clients of an abortion clinic; the availability of emergency medical services to be administered by a hospital; the transportation of patients requiring emergency care from an abortion clinic to a licensed hospital; the cleanliness of an abortion clinic; or license suspension or revocation, or criminal penalties for failure to dispose of fetal remains and tissue. The injunction may therefore affect the agency's ability to develop and enforce rules that apply comparable standards as that of surgical procedures requiring approximately the same degree of skill and care to abortion procedures.

The bill does retain the current statutory requirement found in s. 390.012(1), F.S., that the rules be reasonably related to the preservation of maternal health, and that they not be an unconstitutional burden on choice. This will require the agency to consider the current federal and state case law on what type of regulations do or do not violate the right to privacy.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There will be some increased costs for physicians and facilities to report additional information in the monthly report. There may also be additional costs to comply with new rules relating to standards for comparable surgical procedures.

C. Government Sector Impact:

AHCA does not anticipate that implementing this bill will result in a cost to the agency. AHCA must revise rules. The reporting rule should be amended to incorporate the new reporting form required by the bill. The clinic licensing rule should be amended to delineate rules applicable to clinics that perform abortions after the first trimester in contrast to those applicable to clinics that perform abortions in the first trimester. The clinic licensing rule should be amended to specify the types of policies clinics must develop, promulgate, and enforce to comply with the statute.

The Department of Health estimates the following costs to implement the reporting requirements of this bill:

Recurring Expenses	
Form Design and Printing	$4,000
Monthly contract data entry	$1,000
Total Recurring Costs	**$5,000**

VI. Technical Deficiencies:

None.

VII. Related Issues:

For clinics that perform both first and second trimester abortions, it is unclear whether the second trimester standard would apply to all abortions performed at those clinics, or whether the standard would change depending on the particular trimester. Rules for clinics that perform abortions after the first trimester may have to be comparable to surgical procedures comparable to third trimester abortions which may only be performed in a hospital.

VIII. Amendments:

None.