



FACT SHEET ***Q & A***

May 2003

An Act Relative to a Woman's Right to Know: Informed Consent on Abortion

What is the Women's Right to Know Act?

The Women's Right to Know Act is an informed consent bill filed in the Massachusetts state legislature. It would ensure that every woman considering abortion receives complete information and sufficient reflection time beforehand, thus reducing the possibility of harm arising from inadequately informed choices. Women deserve no less.

Who filed the bill and what is its bill number?

Identical versions were filed in both the House and the Senate for 2003-04. The House bill, H. 2644, is sponsored by the following 14 Representatives: Teahan, Garry, Poirier, Parente, Binienda, Carron, Connolly, DeMacedo, Fagan, Fallon, Frost, Goguen, Golden, Hill, Miceli, Ruane, Scaccia, Timilty, Tobin, Travis, Verga, and Walsh.

The Senate bill, S. 1069, is sponsored by the following Senators: Knapik, Hedlund, and Tarr.

How would the Women's Right to Know Act work?

The bill requires the Department of Public Health (DPH) to make available a pamphlet, web page and telephone message describing a woman's rights under the Massachusetts Patients Rights Act, detailing the risks of abortion, listing agencies providing abortion alternatives and prenatal care, and supplying scientifically accurate descriptions of fetal development. Abortion providers would have to let women know beforehand that such materials are available and give these materials to those who request them. Abortion facilities would have to allow women 24 hours to reflect before going through with the abortion. These requirements would not apply in medical emergencies.

Do other states have these requirements and are they consistent with *Roe v. Wade*?

Yes. As of May 2003, thirty states have informed consent laws with reflection requirements. The United States Supreme Court upheld these types of protection for women in 1992 after finding that states have an important interest in "reduce[ing] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882 (1992). As four of the Justices of the Supreme Court put it, "the ostensible objective of *Roe v. Wade* is not maximizing the number of abortions, but maximizing choice." *Id.* at 968-69 (Rehnquist, White, Scalia, Thomas, JJ.). Three other Justices noted that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." *Id.* at 882 (O'Connor, Kennedy, Souter, JJ.).

Isn't there an informed consent law already on the Massachusetts books?

Yes, but it is not being enforced in its entirety. In 1979, the legislature enacted comprehensive abortion regulations that required informed consent, including information about the unborn child, and a 24 hour reflection period. The Planned Parenthood League of Massachusetts promptly challenged the law in the federal courts.

A federal trial judge in Boston initially upheld the law in 1980, finding that women were not being given truthful information by abortion providers. A year later, an appellate court reversed this ruling after concluding that such laws at that time (in 1981) would likely be struck down by the U.S. Supreme Court.

As mentioned already, in 1992 the U.S. Supreme Court upheld the right of states to enact these types of requirements. The courts now continue to recognize their constitutionality. Nevertheless, the Attorney General's Office has decided not to enforce the law on the books in Massachusetts. The Office thus refuses to ask the federal courts to remove their now clearly erroneous judgment against the statute.

See the full and complex story of this litigation and the role of the Attorney General's Office in an MCC Briefing Paper "Abortion Consent in Massachusetts: Women Are Being Denied Their Right to Know" (May 2001) (available online at www.macathconf.org).

If the AG's Office is not enforcing the current law, why would a new law make any difference?

The only way to implement the public policy as expressed in the current law in light of the AG's refusal to ask for the removal of the outdated court judgment is to pass a new law that is not subject to the outdated judgment. The history behind the AG's refusal and the reasons why the Woman's Right to Know Bill is necessary are discussed in depth in the MCC Briefing Paper at 7-9.

Why single out abortion? Does the state mandate information before any other transaction and require waiting periods in other contexts?

Abortion is not singled out. Other laws in the Commonwealth establish **waiting periods** for:

- 1) **marriage** (M.G.L. chap. 207, § 19 (3 days));
- 2) **agreeing to another's adoption of one's newborn child** (M.G.L. chap. 210, § 2 (4 days after birth));
- 3) **breast implant surgeries** (M.G.L. chap. 111, § 70E (10 days));
- 4) **and the finalization of certain purchases** from door to door sales and the like (M.G.L. chap. 93, § 48 (personal goods or services, 3 days)), from credit agencies (M.G.L. chap. 93, § 68C (credit services, 3 days)), and from health clubs (M.G.L. chap. 93, § 81 (memberships, 3 days)).

Substantive **informed consent requirements** also apply to:

- 1) **Breast implants.** M.G.L. chap. 111, § 70E requires the Department of Public Health (DPH) to develop a "standardized written summary" describing "in layman's language" the "side effects, warnings, and cautions for a breast implantation operation". DPH must distribute the summary to all facilities performing breast implants, and physicians shall "inform the patient of the disadvantages and risks associated with breast implantation", provide the written summary, and

obtain the patient's written acknowledgement that the information was received before consent was given.

- 2) **Breast cancer treatments.** M.G.L. chap. 111, § 70E requires physicians to provide “a patient suffering from any form of breast cancer” with “complete information to all alternative treatments which are medically viable”.
- 3) **Adoption proceedings.** M.G.L. chap. 10, § 2 requires that the consent form relinquishing parental rights at birth for adoption purposes must state that signing the form will waive any right to be notified of future legal proceedings involving the child and that the surrender of parental rights is final and irrevocable.
- 4) **Maternity care.** M.G.L. chap. 111, § 70E requires maternity patients to receive at the time of pre-admission “complete information” regarding various rates in the facility relating to caesarian sections, deliveries, epidurals, etc.
- 5) **Genetic testing.** M.G.L. chap. 111, § 70G requires those providing genetic testing to inform the patient about the test's purpose, the reliability of positive or negative test results, levels of certainty, the availability and importance of genetic counseling, suggested genetic counselors or medical geneticists to consult, general description of each disease or condition tested for, and those to whom the results may be disclosed.
- 6) **Door to door sales and the like.** M.G.L. chap. 93, § 48 requires sellers of goods or services in certain cases to inform buyers orally and in writing of their right to cancel the agreement within 3 days and other related rights.
- 7) **Credit services.** M.G.L. chap. 93, §§ 68C, 68D requires credit services organizations to inform customers in writing of their rights to review their files at no charge, to dispute credit reports, and to cancel service agreements within 3 business days.
- 8) **Health club memberships.** M.G.L. chap. 93, §§ 81-82 requires health clubs to include in the written contract for memberships and “posted clearly and conspicuously on the health club premises” information about the customer's right to cancel for any reason within 3 days of the purchase or for health reasons.
- 9) **Consumer leases of personal property under \$25,000.** M.G.L. chap. 93, § 91 requires rental outlets to provide a detailed “written statement of information” prior to a customer's consent to the lease “setting out accurately and in a clear and conspicuous manner” ten separate categories of information, including descriptions of all express warranties, guarantees, and cancellation policies.
- 10) **Phone services.** M.G.L. chap. 93, § 111 requires phone companies providing local calling services to prepare and distribute an “information booklet” approved by the Department of Telecommunications and Energy describing all of the “consumer rights” and options available under the law for phone customers.
- 11) **New car purchases.** M.G.L. chap. 90, § 7N1/2(7), the “Lemon Law”, requires car dealers to affix “clear and conspicuous” listing of all the rights and options available by law to customers, and include same with the operator manual, as drafted by the Director of Consumer Affairs and Business Regulations, in the event problems with the new car's operation are discovered after the sale.

- 12) **Tanning services.** M.G.L. chap. 111, § 209 requires tanning parlors to provide customers with a standardized written notice, as set out in the statute, describing the risks of ultraviolet radiation, that customers must acknowledge they received and understood in a signed written statement before beginning the tanning process.

The Women's Right to Know Act stands in the same tradition as these and all other forms of *consumer rights legislation*. Shouldn't women faced with the obviously more momentous, life-changing, and irreversible decision of whether to abort her child have at least as much access to information as customers of tanning salons? Don't they deserve time to reflect in the same manner given to buyers of cars and health club memberships?

What about the claim by the Civil Liberties Union of Massachusetts (CLUM) that the Woman's Right to Know Bill is invalid under the state constitution because it is not neutral?

In its testimony before the Judiciary Committee in 2001, the CLUM argued that requiring informed consent regarding the developing fetus would violate the Massachusetts Constitution as construed by the Supreme Judicial Court because it requires the provision of information about one particular choice, and therefore is not neutral. Yet, in the *Moe v. Secretary of Administration & Finance* decision cited by CLUM, the SJC acknowledged that when considering the constitutionality of abortion legislation, the courts must take into account "practical realities". 382 Mass. 629 (1981). Practically, abortion providers do not volunteer a factual description of the developing fetus to women considering abortion, information which for many women would be material to their choice for or against an abortion. See MCC Briefing Paper at 3 (citing fact findings by Judge A. David Mazzone in *Planned Parenthood League of Mass. v. Bellotti*, 499 F. Supp. 215 (D. Mass. 1980)).

As with the informed consent statute dealing with breast cancer treatments, for example, the Woman's Right to Know Bill is designed to balance the informed consent process by ensuring the delivery of material information not otherwise provided, making the process *more* neutral.

How many women considering abortion could we expect will find the information about the developing fetus to be material to their decision such that they would opt to continue the pregnancy instead?

A prominent Massachusetts abortion practitioner, Dr. Philip Stubblefield, has testified that if women considering abortion were provided with fetal development information as required under the current law, he believed that 1 to 3 % of these women would choose childbirth instead. MCC Briefing Paper at 3. In Pennsylvania, one year after a law nearly identical to the Woman's Right to Know Bill was enacted, abortions decreased by 13% and the rate has continued in successive years to decline. Pa. Dept. of Public Health, Vital Statistics for Abortion. Thus anywhere from 1% to 13% of women could be expected in any given year to decide for childbirth instead of abortion as a result of a fully informed choice. In 2000, the latest year for which statistics are available, 27,180 abortions were performed in the Commonwealth. DPH Letter to Mass. Citizens for Life (2002). In light of the above, anywhere from 271 to 3533 women would have decided differently that year.

Is it true that women are not informed about who the abortionist is until right before the abortion?

Pamela Nourse, spokesperson for Planned Parenthood League of Massachusetts, told the Judiciary Committee in 2001 that her organization opposed any requirement that women be given information about the doctor beforehand, citing security concerns. In response to questioning from the Committee, she confirmed that Planned Parenthood does not give women the name of the abortion doctor until they

are on the table. They meet the doctor just before the abortion is performed. As a result, women lack any opportunity to assess the doctor's professional qualifications and are subjected to surgery at the hands of complete strangers. Nourse revealed this stunning information after earlier telling the Committee that she opposed judicial consent proceedings for minors because, in her opinion, minors should not have to go before strangers to get an abortion approval. Any interest on the part of doctors to hide their identities based on a generalized fear of being known as an abortionist should not override the right of women to be fully informed. If abortion is a decision "between a woman and her doctor", then doesn't it make sense that the woman should know who her doctor is? Women have that right under the Massachusetts Patients Rights Act. M.G.L. ch. 111, §70E(a). In most cases, instead, abortions are performed on patients having no "patient-doctor" relationship whatsoever.

Why should the state require abortion providers to supply information about the developing fetus when people in society disagree about whether abortion involves the taking of human life?

Leading abortion rights advocates no longer deny that abortion involves killing. Consider the following quotes:

"I think we have deluded ourselves into believing that people don't know that abortion is killing"—Faye Wattleton, former President of Planned Parenthood USA, Ms. Magazine, May/June 1997, at 67;

"Sometimes a woman has to decide to kill her baby. That is what abortion is"—Judith Arcana, pro-choice author and educator, Chicago Weekly Reader, Feb. 17, 1995;

"I agree that the way in which the arguments for legal abortion have been made include this inability to publicly deal with the fact that abortion takes a life"—Frances Kissling, Catholics for a Free Choice, Ms. Magazine, May/June 1997, at 67;

"[T]he pro-life slogan, 'abortion stops a beating heart,' is incontrovertibly true"—Naomi Wolf, pro-choice author, New Republic Magazine, Oct. 16, 1995, at 29;

"We have reached a point in this particular technology where there is no possibility of denial of an act of destruction by the operator. It is before one's eyes"—Dr. Warren Hern, Director of Boulder (Colo.) Abortion Clinic, Remarks at a meeting of the Association of Planned Parenthood Physicians, San Diego, Oct. 26, 1978;

"I have angry feelings at myself for feeling good about grasping the calvaria (head), for feeling good about doing a technically good procedure which destroys a fetus, kills a baby"—A New Mexico abortionist quoted in Diane M. Gianelli, *Abortion Providers Share Inner Conflicts*, Am. Med. News, July 12, 1993, at 36.

Moreover, the laws or court decisions of at least twenty nine states expressly recognize as a matter of public policy that the life of a new human being begins at conception/fertilization, marking a growing, if not widely known, legal consensus on this question, a development occurring despite the abortion rulings of the U.S. Supreme Court. Daniel Avila, *The Present Standing of the Human Embryo in U.S. Law*, 1 The Nat'l Catholic Bioethics Quarterly 203, 213 & n.55 (Spring 2001) (listing states and quoting from laws or court decisions). Massachusetts is included. See Mass. Gen. Laws ch. 112, §12K, which defines "unborn child" as "the individual human life in existence and developing from fertilization until birth".

Thus, those who believe that abortion does not kill or that human life does not begin before birth are out of step with the abortion rights advocates themselves. They also ignore the conclusions of lawmakers in the majority of the states—not to mention the biology and medical textbooks concluding as a scientific

matter that life exists from fertilization. The State has a compelling interest in making sure that the abortion decision is based on accurate information about the status of the embryo or fetus.

Isn't the Woman's Right to Know Bill just another attempt to restrict abortion?

The bill is pro-information, period. Dr. Eric J. Keroack, a Massachusetts obstetrician who sees many women considering abortion in his work with A Woman's Concern, a crisis pregnancy center, informed the Judiciary Committee in 2001 that that ultrasounds of the fetus are performed routinely at abortion facilities. Testimony of Dr. Keroack to the Judiciary Committee (May 17, 2001). Yet the screens are turned away from the women, denying them the opportunity to see the fetus and to verify on their own that they are even pregnant. As one pro-choice advocate has written, fully informing women in this way "would help them better understand the full ramifications of their decisions." Shari Danielson, Prenatal Snapshot of Twins Changes My Abortion Views, Virginia-Pilot, May 13, 2001.

Withholding such information from women reinforces their sense of denial and increases the likelihood of depression and other psychological trauma when, "[m]onths or years after an abortion [these] women come upon correct scientific information about prenatal development in the first trimester in a class, a textbook, a magazine or a television program." Testimony of Dr. E. Joanne Angelo to the Judiciary Committee (May 17, 2001).

The Woman's Right to Know Bill is pro-woman, pro-information, and pro-common sense. Women deserve no less!

For more information contact:

**Massachusetts Catholic Conference, West End Place, Suite 5,
150 Staniford Street, Boston, MA 02114-2511; (p) 617-367-6060; (f) 617-367-2767;
email: staff@macathconf.org; website: www.macathconf.org.**