

**2007 DRAFTING REQUEST**

**Assembly Amendment (AA-AB710)**

Received: 02/20/2008

Received By: phurley

Wanted: As time permits

Identical to LRB:

For: Jon Richards (608) 266-0650

By/Representing:

This file may be shown to any legislator: NO

Drafter: phurley

May Contact:

Addl. Drafters:

Subject: Criminal Law - abortion

Extra Copies:

Submit via email: YES

Requester's email: Rep.Richards@legis.wisconsin.gov

Carbon copy (CC:) to:

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**Pre Topic:**

No specific pre topic given

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**Topic:**

Exception for sexual assault

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**Instructions:**

Exempt sexual assault from 940.04

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**Drafting History:**

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/1	phurley 02/21/2008	bkraft 02/21/2008	rschluet 02/22/2008	_____	cduerst 02/22/2008	cduerst 02/22/2008	

FE Sent For:

<END>

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/1	phurley	/1 bjk 2/21					
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FE Sent For:

<END>

2007 - 2008 LEGISLATURE

2007 ASSEMBLY BILL 710 

[Link to Bill History](#)

**January 18, 2008 - Introduced by Representatives J. Ott, Staskunas, Albers, Ballweg, Bies, Davis, J. Fitzgerald, Friske, Gottlieb, Gunderson, Hahn, Hines, Honadel, Huebsch, Jeskewitz, Kaufert, Kerkman, Kestell, Kleefisch, Kramer, F. Lasee, LeMahieu, Lothian, Meyer, Montgomery, Moulton, Mursau, Murtha, Musser, Nass, Nerison, Newcomer, Nygren, A. Ott, Owens, Petersen, Petrowski, Pridemore, Rhoades, Roth, Stone, Strachota, Suder, Tauchen, Townsend, Van Roy, Vos, Vukmir, Wieckert, M. Williams, Wood, Ziegelbauer and Zipperer, cosponsored by Senators S. Fitzgerald, Breske, Cowles, Darling, Ellis, Grothman, Harsdorf, Kanavas, Kapanke, Kedzie, A. Lasee, Lazich, Leibham, Olsen, Roessler and Schultz. Referred to Committee on Judiciary and Ethics.**

Pg1Ln1 **An Act** to repeal 895.038 (1) (a); to consolidate, renumber and amend  
Pg1Ln2 895.038 (1) (intro.) and (b); to amend 895.038 (2) (a) (intro.), 895.038 (2) (a) 1.,  
Pg1Ln3 895.038 (2) (a) 2. and 895.038 (4); and to repeal and recreate 940.16 of the  
Pg1Ln4 statutes; relating to: partial-birth abortion and creating a penalty.

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**Analysis by the Legislative Reference Bureau**

Current law prohibits the performance of a partial-birth abortion and defines a partial-birth abortion as one during which a person partially delivers a living fetus, causes the death of the living fetus with the intent to kill the fetus, and then completes delivery of the fetus. A person who performs a partial-birth abortion is guilty of a Class A felony, and is subject to life imprisonment. Current law allows an exception if the partial-birth abortion is performed in order to save the life of the pregnant woman and no other option is available, and current law does not permit the prosecution of the woman upon whom a partial-birth abortion is performed. Current law also grants a civil cause of action to the father or, if the pregnant woman who received the partial-birth abortion was a minor, the maternal grandparent, of a fetus aborted by a partial-birth abortion if the father or grandparent did not consent to the partial-birth abortion procedure.

After the United States Supreme Court invalidated a Nebraska statute that prohibited "partial-birth abortion," in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the

Seventh Circuit Court of Appeals held that the current Wisconsin law prohibiting partial-birth abortion had the same constitutional flaws as the Nebraska statute and enjoined its enforcement. *Planned Parenthood of Wisconsin et al. v. Doyle, et al.*, 249 F.3d 603 (7th Cir. 2001).

In 2007, the United States Supreme Court upheld a federal ban on partial-birth abortion, finding that the federal ban did not unduly burden a woman's right to an abortion and that the federal statute set forth specific "landmarks" that clearly delineate when a partial-birth abortion is being performed. *Gonzales v. Carhart*, \_\_\_ U.S. \_\_\_ (2007).

This bill changes the current prohibition on the performance of a partial-birth abortion to define "partial-birth abortion" as an abortion during which a person vaginally delivers a living fetus until a certain proportion of the fetal body is outside of his or her mother's body and then kills the partially delivered fetus. This definition is the same as that under the federal ban, as upheld by *Gonzales*.

The bill grants a physician who is prosecuted for performing a partial-birth abortion the right to a hearing before the medical examining board to determine if the partial-birth abortion was necessary to save the life of the mother.

The bill also specifies that a civil cause of action is granted to the father of a fetus aborted by a partial-birth abortion is limited to cases in which the father was married to the mother at the time the abortion was performed.

Because this bill creates a new crime or revises a penalty for an existing crime, the Joint Review Committee on Criminal Penalties may be requested to prepare a report concerning the proposed penalty and the costs or savings that are likely to result if the bill is enacted.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

Pg2Ln1            **Section 1.** 895.038 (1) (intro.) and (b) of the statutes are consolidated,  
Pg2Ln2            renumbered 895.038 (1) and amended to read:

Pg2Ln3            895.038 (1) In this section: ~~(b) "Partial birth,~~ "partial birth abortion" has the  
Pg2Ln4            meaning given in s. 940.16 (1) (a).

Pg2Ln5            **Section 2.** 895.038 (1) (a) of the statutes is repealed.

Pg2Ln6            **Section 3.** 895.038 (2) (a) (intro.) of the statutes is amended to read:

Pg2Ln7            895.038 (2) (a) (intro.) Except as provided in par. (b), any of the following  
Pg2Ln8            persons has a claim for appropriate relief against a person who performs a

Pg2Ln9 partial-birth abortion and thereby kills a fetus:

Pg2Ln10 **Section 4.** 895.038 (2) (a) 1. of the statutes is amended to read:

Pg3Ln1 895.038 (2) (a) 1. If the ~~person~~ mother on whom a partial-birth abortion was  
Pg3Ln2 performed ~~was a minor, the parent of the minor~~ has not attained the age of 18 years  
Pg3Ln3 at the time of the abortion, the maternal grandparents of the fetus.

Pg3Ln4 **Section 5.** 895.038 (2) (a) 2. of the statutes is amended to read:

Pg3Ln5 895.038 (2) (a) 2. The father, if married to the mother at the time she receives  
Pg3Ln6 the partial-birth abortion procedure, of the ~~child~~ fetus aborted by the partial-birth  
Pg3Ln7 abortion.

Pg3Ln8 **Section 6.** 895.038 (4) of the statutes is amended to read:

Pg3Ln9 895.038 (4) Subsection (2) applies even if the mother of the ~~child~~ fetus aborted  
Pg3Ln10 by the partial-birth abortion consented to the performance of the partial-birth  
Pg3Ln11 abortion.

Pg3Ln12 **Section 7.** 940.16 of the statutes is repealed and recreated to read:

Pg3Ln13 940.16 Partial-birth abortion. (1) In this section:

Pg3Ln14 (a) "Partial-birth abortion" means an abortion in which the person performing  
Pg3Ln15 the abortion does all of the following:

Pg3Ln16 1. Deliberately and intentionally vaginally delivers a living fetus until, in the  
Pg3Ln17 case of a head-first presentation, the entire fetal head is outside the body of the  
Pg3Ln18 mother, or, in the case of breech presentation, any part of the fetal trunk past the  
Pg3Ln19 navel is outside the body of the mother, for the purpose of performing an overt act that  
Pg3Ln20 the person knows will kill the partially delivered living fetus.

Pg3Ln21 2. Performs the overt act specified in subd. 1., other than completion of the  
Pg3Ln22 delivery, that kills the partially delivered living fetus.

Pg3Ln23 (b) "Physician" has the meaning given in s. 448.01 (5).

Pg3Ln24 (2) Except as provided in sub. (3), any physician or any other person who  
Pg3Ln25 intentionally performs a partial-birth abortion is guilty of a Class I felony.

Pg4Ln1 (3) Subsection (2) does not apply to a partial-birth abortion that is necessary  
Pg4Ln2 to save the life of a mother whose life is endangered by a physical disorder, physical  
Pg4Ln3 illness, or physical injury, including a life-endangering physical condition caused by

Pg4Ln4

or arising from the pregnancy itself.

Pg4Ln5

Pg4Ln6

Pg4Ln7

Pg4Ln8

Pg4Ln9

Pg4Ln10

Pg4Ln11

Pg4Ln12

Pg4Ln13

(4) A physician who is charged under sub. (2) may seek a hearing before the medical examining board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. The findings of the medical examining board on that issue shall be admissible on that issue at the defendant's trial. Upon the defendant's motion, the trial court shall delay the beginning of the defendant's trial for not more than 30 days to permit the hearing to take place.

**(End)**

Lbjk

ASSEMBLY AMENDMENT,  
TO 2007 ASSEMBLY BILL 710

bh ✓  
SA ✓  
X-ref ✓

2-21-07

D-note  
Insert

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At the locations indicated, amend the bill as follows:

1. Page 1, line 4: delete "partial-birth".

2. Page 3, line 11: after that line insert:

"SECTION 6m. 940.04 (5m) of the statutes is created to read:

940.04 (5m) This section does not apply to an abortion that is performed to terminate a pregnancy that is the result of a violation of s. 940.225, 944.06, 948.02, 948.025, 948.06, 948.085, or 948.09."

(END)

D-note

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRBa1337/1dn

PJH:.....

Lbjk

Date

Representative Richards: ✓

> Please review this draft carefully to ensure that it is consistent with your intent. Please note that this amendment may prompt a germaneness challenge, as the amendment required a ~~change~~ change to the "relating to" clause in the bill and the amendment does not affect the proposed legislation regarding partial-birth abortions directly. ✓

Further, as INSERT A

Peggy Hurley  
Legislative Attorney  
Phone: (608) 266-8906  
E-mail: [peggy.hurley@legis.wisconsin.gov](mailto:peggy.hurley@legis.wisconsin.gov)



**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRBa1205/1dn  
PJH:lmk:rs

February 19, 2008

Insert A

~~Representative Richards:~~

9  
As I discussed with your office, this amendment does not require either the woman or the physician to report a sexual assault to law enforcement or to make an affirmative statement prior to the abortion that the pregnancy is caused by a sexual assault or incest. Please let me know if you want this changed.

Peggy Hurley  
Legislative Attorney  
Phone: (608) 266-8906  
E-mail: [peggy.hurley@legis.wisconsin.gov](mailto:peggy.hurley@legis.wisconsin.gov)

end of insert

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRBa1337/1dn  
PJH:bjk:rs

February 22, 2008

Representative Richards:

Please review this draft carefully to ensure that it is consistent with your intent. Please note that this amendment may prompt a germaneness challenge, as the amendment required a change to the "relating to" clause in the bill and the amendment does not affect the proposed legislation regarding partial-birth abortions directly. I discussed with your office, this amendment does not require either the woman or the physician to report a sexual assault to law enforcement or to make an affirmative statement prior to the abortion that the pregnancy is caused by a sexual assault or incest. Please let me know if you want this changed.

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