

Submission to the Senate Community Affairs Legislation Committee

From:

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Therapeutic Goods Amendment (Repeal of Ministerial responsibility for approval of RU486) Bill 2005

I wish to support the proposed amendment. It is my view that the amendment is justified, not by tendentious arguments concerning the morality of abortion, but by considerations of public policy. There are two related grounds for supporting this amendment. The first concerns the appropriate relationship between legislatures in a federal system. The second concerns the justification of executive discretion in a system of government characterized by the Rule of Law.

While there may be significant moral grounds for allowing freedom of reproductive choice, these are not relevant to the current amendment. In fact, such debate properly belongs in the various State parliaments, where the Crimes Acts regulate the legal right to termination of pregnancy and limits to such access. This is the first basis for my objections to the special category of restricted goods in the Act. Assuming that we are committed to the sovereignty of State parliaments, it is essential that the jurisdictional competency of state legislatures is respected. In any system such as ours, even one with a written constitution, it is impossible for the boundaries between powers to be perfectly delineated. The operation of a Westminster system depends upon conventions that allow participants to agree on the appropriate limits of conflict between the various spheres of authority. The ministerial discretion allowed by the legislation in this case appears to me to violate what ought to be regarded as the proper conventional boundary between State and Commonwealth jurisdictions. The competence of State parliaments to decide upon the rights of women to secure terminations of pregnancies is overridden by Commonwealth powers to restrict the means to secure a termination. It would seem that the principal reason for the Minister's discretion is to override the judgment of a legislature with which he or she might disagree. Any case where an alternative legislative means is used to allow the Commonwealth to handicap or disable the decision of a State legislature in regards to a moral issue undermines the competency of that legislature, and so places the entire federal structure at risk.

The supposition that this particular ministerial discretion involves the overriding of moral judgments is strengthened by the observation that the Minister is unlikely to possess a better technical knowledge than the TGA.

My argument here is not intended to invalidate the general principle that Commonwealth legislation should override state laws. However this principle should be restricted to direct incompatibility where both levels of government possess authority in the same domain. The principle ought not to extend to allowing the

Commonwealth to invalidate or otherwise interfere with matters entrusted to the States simply because the legislators disagree over the proper course of public policy.

This first objection is appropriate only if we assume a shared commitment to robust federalism, and the protection of diverse moral sentiment it presupposes. Even if there is a difference over the relative weight to give to the protection of moral values and individual freedom of conscience, the arguments above provide the basis for further considerations which I believe support the amendment regardless of the substantive moral views of Senators.

Ministerial discretion is an essential part of the operation of the Westminster system. However the justification of this power is a delicate balancing act. The Rule of Law requires that the operation of the law should confer benefits and burdens equitably, if not equally. To the extent that persons will be differently effected by the law it is essential that we have recourse to shared reasons that justify the distribution of these benefits and burdens according to commonly accepted and appropriate criteria. The justification for executive discretion is that the law can be a crude instrument, and needs occasional adjustment in application to ensure that extreme or unexpected effects do not create injustice. The definition of “injustice” in this area turns out to be that the operation of a law impacts differentially on people, either to their harm or benefit, for reasons other than those generally thought proper. It is essential that the exercise of discretion should be based on the application of the agreed public reasons. This is the definition of accountability, to explain decisions to demonstrate that they do in fact accord with these shared reasons.

It is my very strong opinion that this particular discretionary power violates the normal justification for such powers. As I argued earlier, in this instance the Minister’s discretion seems to be intended to counter judgments of State legislators with whom Commonwealth legislators and the Minister disagree. This is worrisome in itself, but the real impact of the discretion lies in the method chosen. Since the Commonwealth has no direct power to override the States’ Crimes Acts, the method chosen is not to nullify the right to terminate, but to restrict the means by which women can seek to exercise the right. The effect of this is to create barriers to exercising a legal right (opportunity costs), which might seem unfair in itself. The real problem is that the restriction impacts differentially. If it is true that the general availability of abortifacants would enable women in rural and remote communities to access terminations more readily than they do now, then the denial of these drugs means that some women are being denied a choice that is legally available to women in the city.

Therefore, rather than ensure that the operation of the law is “fair” (where fair means everyone accesses opportunities equally) the exercise of this particular discretion serves to make the law unfair, by creating barriers to accessing a right (or opportunity) that prevent some but not all women securing a termination of pregnancy when they want one.

Regardless of the rights and wrongs of the current State laws in regards to abortion, it is illegitimate for the Commonwealth to interfere with the exercise of rights granted by state legislation, especially when this discretion creates opportunity costs that fall differentially on some women because of social or geographic isolation.